CONSTITUTIONAL ISSUES OF EUROPEAN ADVERTISING SELF-REGULATION

OUTSOURCING CHILLING EFFECT?

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s/Gábor Benke

ABSTRACT

Although there has been developed scholarship in the field of freedom of commercial expression, constitutional problems with the European advertising self-regulation has not been explored yet. The main reason is that this institution has worked successfully, and has taken up both regulatory and adjudication functions from the state very efficiently. It has been my experience as a practicing attorney in the electronic media that European advertising self-regulation, has in the past decades become gradually a state within the state, with its own national and international organizations, rules and adjudication forums. It was also my impression that advertising self-regulation is not merely a product by the advertisers and advertising service providers, but electronic media has a major role in it, and has been acting as a very efficient private censor of commercial content.

My dissertation discusses constitutional issues of advertising self-regulation at national and international level in Europe. I examine two national jurisdictions and look at two cross border cases. Wherever it was practically possible I focused on advertising via linear broadcast media services (i.e. services with pre-scheduled program flow, where the viewer has no control over the stream of program items), as this is the media which is most exposed to the economic pressure by advertisers, pluralism related problems occur mostly in linear programming and despite the steady development of online advertising, still linear broadcasting is the most powerful media. My hypothesis was that advertising self-regulation may restrict freedom of commercial speech in excess of the constitutionally acceptable standards and it impacts pluralism of linear broadcast media. In order to verify this hypothesis I examine the status, stakeholders, codes and adjudication practice of advertising self-regulatory authorities in Germany and in the United Kingdom. In addition, I analyze the cross-border complaints system under the auspices of the European Advertising Standards Alliance ("EASA") Finally, I discuss the case of ad hoc industry lobby against the full prohibition of tobacco advertising at EU level, as I argue that this lobby activity, by successfully delaying the prohibition of tobacco advertising in Europe with more than a decade, had a *de facto* regulatory effect.

My research shows that (1) advertising self-regulation focuses on a paternalistic goal of consumer satisfaction besides consumer protection; (2) the principal regulatory contribution of advertising self-regulation to the above aim is introducing a broad term of "offensive speech" which encompasses indecent, immoral, unethical speech and thereby tends to restrict speech in a way that is broader than the standards for legislative restrictions; (3) the outstanding efficiency of advertising self-regulation stems from the involvement of the media as a regulatory target, inducing this platform to act as a private censor of commercial content.

My dissertation first provides a general framework for self-regulation of commercial expression (Chapter 1) by relying on relevant literature and comparative assessment of the case law of the European Court of Human Rights and that of the U.S. Supreme Court. This is followed by the discussion of two national jurisdictions (Chapter 2), the UK, where strong, independent advertising self-regulatory system exists and Germany, where advertising self-

regulation exists within the boundaries of a strong legislative framework. Chapter 3 discusses cross border case studies; the cross-border complaints system organized under the EASA and the so called counteractive lobby against the European tobacco advertising prohibition.

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INTRODUCTION

> It's the same old story
> Everywhere I go,
> I get slandered,
> Libeled,
> I hear words I never heard in the Bible,
> And I'm one step ahead of the shoe shine,
> Two steps away from the country line,
> Just trying to keep my customers satisfied,
> Satisfied.
> (Paul Simon & Art Garfunkel)

The European advertising self-regulation is a success story. It is well organized both at national and cross border level. It is efficient and has taken up both regulatory and adjudication functions from the state. The principal reason for this success is the mutual dependence between the media and advertising businesses. The media carry advertising to the public and live on advertising income, and they compete on both the advertising market (i.e. compete for advertisers) and at the viewer market (i.e. compete for viewers). Advertising self-regulation is in fact a joint product by the media, advertising service providers and advertisers. It is highly efficient because the participants represent several layers of voluntary censorship over commercial content. My dissertation explores whether there is a price paid for this regulatory success and if yes, who pays the bill.

I argue in my dissertation that besides the usual advantages attributable to self-regulation (efficiency, cost savings and expertise), advertising self-regulation renders a premium service for both its members and the state, which is a voluntary restriction of "offensive speech" (in its broad meaning as used in the advertising self-regulatory codes, encompassing indecent, unethical, immoral, etc. speech). I argue in this dissertation that

- the principal regulatory contribution of advertising self-regulation is the regulation of "offensive speech";

- in terms of drafting, self-regulatory restriction of commercial speech on the basis of the "offense" argument is broader than the general standards of legislative restriction on commercial speech;
- this gives a mandate to self-regulatory organizations to restrict speech at a level of certain discretion;
- the principal goal of such speech restriction is to keep the audience satisfied rather than costumer protection;
- this, to some extent affects pluralism of media content;
- self-regulatory restrictions of speech may bring up legitimacy questions;
- availability of constitutional protection against potentially illegitimate self-regulatory measures varies discretionally both at national jurisdictions and at international level, and such protection is independent of the regulatory effect of the given self-regulatory measure or institution.

In order to explore the above issues, I look at two cases at national level and two cases at international level. At national level, first I examine the case of the United Kingdom, which is the flagship of strong standalone advertising self-regulation. The other case I discuss is that of Germany, where advertising self-regulation has long traditions, but it is strongly dependent of the state.

At international level I present two examples. First, I examine the case of the European Advertising Standards Alliance, a *par excellence* case of international self-regulatory organization, which has a brilliant reputation, having been created to fill the regulatory niche of European level harmonization of advertising regulation. The second example I examine was the regulatory effect of the successful lobbying efforts by the tobacco, advertising and media industry against the proposed introduction of the general prohibition of tobacco advertising in Europe. This topic admittedly leads slightly further from formalistic self-regulatory organizations and the issue of offensive speech, but raises the same questions in a different context: legitimacy of private measures having regulatory effect, and legal protection against such measures.

The structure of the dissertation

The dissertation has three Parts. In the first Part I discuss the issues of advertising self-regulation in general. The second and third Parts of my dissertation consist of case studies supporting my arguments presented in the general part. The second Part discusses two national jurisdictions, and the third Part analyses two unique cross-border cases.

Part I. consists of five Sections.

In the first Section *("The media and advertising; General issues with advertising self-regulation")* I discuss the unique nature of advertising regulation, being intertwined with media regulation, and the dual nature of the media and its role in the success of advertising self-regulation.

In the second Section *("Self-regulation; Definition and the principal Issues")* I discuss the questions of definition and terminology, then summarize the ups and downs of self-regulation, describe the principal issues for constitutional analysis and finally summarize the most important constitutional theories for providing constitutional protection against private infringement of fundamental rights.

In the third Section *("Freedom of speech v. regulation of commercial expression in the United States and Europe")* I discuss the general benchmarks of commercial speech regulation. First, I discuss the United States, the commercial speech doctrine of which has exerted major influence on the European system but remained different at the same time, and thereafter I discuss the jurisdiction of the European Court of Human Rights, which directly affects domestic legislation of almost all the European countries.

In the fourth Section *("Soft issues": Offensive, indecent, tasteless speech and advertising self-regulation")* I argue that advertising self-regulation restricts speech based on the offense

argument not only to protect consumers but also to satisfy them. These rather paternalistic restrictions are principally commercially driven, and mostly enforced through vaguely drafted self-regulatory codes which allow wide discretion in censoring commercial communication which allows consumer complaints on a rather wide basis. In most of these cases this censoring is not a self-censorship by the advertisers themselves, but a private censorship by the media, which are directly responsible for content and scheduling of advertising spots and are threatened by self-regulatory sanctions and sometimes by state power too.

In the fifth Section *("Pluralism of broadcast media and advertising self-regulation")* I argue that similarly to freedom of speech in general, media pluralism often represents an issue or a regulatory goal rather than a naturally given status quo, as it is always at the junction of conflicting interests of business or politics. The basic issue stems from the tension between the major effect and limited capacity of electronic media. The two principal interests conflicting with pluralistic content are the danger of commercially driven pressure by advertisers and politically driven pressure by the state.

Part 2 is the country specific part in which I deal with two countries.

In the Section regarding the United Kingdom it is shown that the most important censorial effect over broadcast advertising is the allocation of legal liability for program content to the broadcasters. The case of the UK shows that unlike the case of editorial content, where the speaker is the media itself, in the case of commercial communication the speaker (i.e. the advertiser) cannot convey its message without the media. In fact, the broadcast media, being the ultimately responsible party for the content, acts as a private censor over the content of commercial messages. This censorship is embodied in two filtering layers. The first filter is pre-clearance by Clearcast, a private joint venture held by the six leading broadcasters in the UK, with indirect monitoring power stemming from the broadcast licenses by OFCOM, and

the second filter is the complaint handling by the ASA Broadcast, which has a legal stature of a regulatory authority based on case law by English courts, despite being a private organization. Both of these self-regulatory authorities operate on the basis of the BCAP Broadcast Advertising Code, which is the product of a private regulatory organization (the Broadcast Committee of Advertising Practices).

The UK country Section also shows that the BCAP Code applies a broad and flexible definition of harm and offense, by force of which the standards of adjudication blur and this broadness gives more space for speech restriction "to increase the audience's confidence in advertising". Despite all these concerns, legitimacy of the UK advertising self-regulation is impeccable. Regulation and adjudication are based on express mandate by OFCOM, whose powers to regulate broadcast media, including the right to delegate code setting and adjudication in broadcast advertising stems from an Act of Parliament (the Communications Act 2003).

In the Section regarding Germany I argue that commercial speech in that country is restricted using the "decency" argument. This works on two levels; under the unfair competition law and based on self-regulatory codes. On the basis of the unfair competition legislation, speech against "contempt of humanity" ("Menschenverachtung") may constitute unfair commercial practice under the German Unfair Competition Act. Here the self-regulatory element is in the enforcement process, where the German Wettbewerbszentrale ("Competition Centre") collects consumer and viewer complaints and channels them to state courts as a class action. Under the regulatory codes of the Werberat[1], commercial speech may be restricted as "indecent" speech. The Germany-related Section also shows that self-regulatory organizations are involved both in indecency based and in unfair competition based speech

[1] The Werberat is the only advertising self-regulatory body at federal level in Germany, having its own codes of conduct (it actually has several codes, as shown below). The Werberat represents the advertisers, the media, agencies and professionals, therefore it is directly interested in the efficient operation of the advertising industry.

restrictions, opening the possibility of taking legal measures directly against advertisers on behalf of the audience. I argue that these legal measures inadvertently or purposefully increase the circle of speech restrictions. I argue that the goal of this extensive censorship is as much the support of efficiency of commercial speech (an economic motive) as consumer protection.

The Part regarding the cross-border case studies includes two unique phenomena. I discuss the cross-border complaint system under the auspices of the European Advertising Standards Alliance ("EASA") and analyze the story of international private lobby efforts against the EU Directives regarding the prohibition of tobacco advertising.

In the Section regarding the EASA I claim that international level self-regulation supplements the economically driven national self-regulatory efforts focusing on the consumer satisfaction. Although this international self-regulation has a relatively small case load, it extends the application of national codes to complaints from abroad, which, taking into account the broad definition of "offense" in national codes implies additional restrictions of commercial speech on the basis of viewer complaints. It is shown that the cross-border complaint system, set up under the auspices of EASA, has been in fact developed into a direct co-operation among EASA members, and it is not a standalone operation of a multinational self-regulatory organization.

In the Section regarding the international lobby efforts against the prohibition of tobacco advertising I argue that the tobacco related successful counteractive lobbying had regulatory effect, as it directly affected rights and obligations of the relevant stakeholders, who themselves had no power and/or possibility to avert such effects. Although it admittedly an imaginative scenario to consider ad hoc lobbying a regulation, the efficient international lobby raises questions of legitimacy involved in the EU level legislative process which both

economically and professionally seemed to be exposed to the tobacco, advertising and media industry in connection with the legislative process of the tobacco advertising directives.

One important note on terminology used: In the daily practice the advertising industry uses the term "self-regulation" to designate any kinds of advertising regulation where there is a trace of private involvement. Therefore I will follow this approach throughout the dissertation, except that I use the term "co-regulation" when the context expressly requires to differentiate between self- and co-regulation. Sometimes I use the term "private regulation" to emphasize that the given matter involves both self- and co-regulation.

Self-regulatory organizations will always be referred as such, as I believe that co-regulatory arrangements do not change the legal and organizational nature of the SRO, therefore using a term "co-regulator" would be inappropriate.

PART I. THE MEDIA AND ADVERTISING; GENERAL ISSUES WITH ADVERTISING SELF-REGULATION

A. The media and advertising; Advertising regulation, media regulation

1. PLATFORMS

In connection with the country reports concerning the UK and Germany I deal with regulation of linear broadcast media services, as this platform brings unique regulatory issues and as the statistics show, despite the steady development of online advertising, it is still the most powerful media and triggers most of the complaints.

2. WHY IS LINEAR TELEVISION BROADCASTING IS ESPECIALLY SENSITIVE OF ADVERTISING REGULATION?

The classic reasons supporting broadcast regulation (which are "the use of public resources by private broadcasters", "scarcity of frequencies", "television intruding into homes" and "broadcasting being a new form of media") are set out in the classic passage by Professor Barendt "Why regulate broadcasting?" [2]. Barendt already at the time of writing this passage (1993) expressed his doubts about these arguments. Today, in the digital era, these arguments have become even weaker. Linear audiovisual media services are available online (although these are typically retransmission services). These online services raise the same regulatory issues as the terrestrial, cable or satellite platforms, but their monitoring and control is technically not viable. The ultimate reason for the stricter regulation of broadcasters with primary transmission on the terrestrial, cable or satellite platforms seems to be the de facto ability of governments of the day to exert technical control over these operations. I expect that the regulation of such broadcasters will not disappear until such control remains possible.

[2] Eric Barendt, *Broadcasting Law; A Comparative Study* (Oxford: Oxford University Press, 1993). p 3-10

Besides being the most powerful media[3], there are three other aspects that make television broadcasting sensitive of regulation.

The first aspect is the pre-scheduled, linear nature of television broadcasting. In linear services viewers (unlike in non-linear services, e.g. video on demand) cannot control content within a given programme flow. All a viewer can do is switch to other channels. Viewers, however, are in general loyal to their channels. Audience research demonstrates significant television viewing consistency and channel loyalty of viewers in mass media television[4]. This demonstrates that viewers are not inclined to switch easily, and they are more exposed to the content stream of a given channel. Commercial channels recognize this tendency and attempt to address their entire program flow to one or two particular target audience groups (family, male, female, young urban, children, etc.).

The second aspect is that linear television broadcasters are typically financed by advertising, as opposed to non-linear services, which are mostly selling content in form of pay per view or subscription. Therefore, advertising regulation mostly concerns linear broadcast services.

The third aspect is indirectly related to commercially driven financing, namely, that programming of linear broadcast channels, which are typically financed by advertising rely mostly on valuable editorial content, while non linear content typically consists of feature films. News, information programs, sports, game shows are typical of linear general entertainment television[5] and this valuable content is exposed most to the influence by advertisers. This exposure has several sources, the two most important sources being, first,

[3] According to OFCOM's statistics, in 2011 the average TV viewer spent 242 minutes per day watching television. http://media.ofcom.org.uk/facts/ (Last visited May 19, 2013)

[4] See for example Hans-Bernd Brosius, Mallory Wober, and Gabriel Weimann, "The Loyalty of Television Viewing: How Consistent Is TV Viewing Behavior?," *Journal of Broadcasting & Electronic Media* 36, no. 3 (1988). p 5
"(...) there was a large consistency effect when it came to watching certain channels. Those who watched BBC1,BBC2,ITV, or Channel 4 did so in a very predictable way. on the level of channels, television viewing was consistent to a large degree."

[5] See for example Part 4 (Programming and Production) of Howard J. Blumenthal and Oliver R. Goodenough, *This Business of Television* (New York: Billboard Books, 1991).

direct influence by advertisers or agencies through requirements of general program genres in order to reach the desired target audience, and second, influencing program scheduling to accommodate placement of advertising spots. I argue in this dissertation that advertising self-regulation, in which the broadcast media is also a participant, is also a means of influencing content (this time the advertising content), the principal purpose of which is to increase the viewing shares by the desired target audience group, including viewing of commercials.[6]

3. SPLIT OF CONTENT; THE DUAL NATURE OF AUDIOVISUAL MEDIA SERVICES

Advertising is typically carried by the media in association with editorial content. The unique feature of media is in its dual nature: *"audiovisual media services are as much culture as they are economic services"*[7]. Media companies (TV, Internet and printed press alike) as service providers serve both audience and advertisers and simultaneously compete on these two distinct markets, with two distinct sets of contents giving space to third party advertisers for commercial communications and editorial contents of their own. Regulation of these two distinct contents is different and commercial messages are clearly subject to a more detailed legislation.[8]

Although these markets are separate, they are not unrelated. Media companies compete on the advertising market with audience shares. Simply put, the audience is being sold on the advertising market. In media "advertising space as a normal private good is tied with the

[6] This is expressed for example in Section 13 of the joint dissent to the Animal Defenders v. UK judgment of the ECtHR:
"The hope that Animal Defenders International will be able to make their views known thanks to "programming" disregards the reality that broadcasting, and television in particular, is driven by commercial advertising. Programming is a matter of editorial choice and is subject to the need to maximize viewership. Even in the context of public broadcasting, with all its obligations of fairness, there is a strong tendency to avoid divisive or offensive topics."

[7] See the fifth "Whereas clause" of the AVMS Directive (Directive 2010/13/EU)

[8] See CR Munro, "The Value of Commercial Speech," *The Cambridge Law Journal* 62, no. 1 (2003): 0–18, http://journals.cambridge.org/abstract_S0008197303006263. p 6

public good content, in order to finance it"[9]. Truly, economic aspects are decisive in analyzing media markets, but the dual nature makes an added imprint on legal analysis. "(I)nextricably intertwined with the economic aspects of media markets, there exist important non-economic goals, such as freedom of speech and pluralism, that give reasons for a media-specific regulatory framework in addition to general competition law."[10] No analysis of advertising regulation is possible without considering this economic and regulatory dualism.

4. REGULATION OF ADVERTISING IN GENERAL. THE SHARE OF SELF-REGULATION IN THE REGULATORY JOB

Advertising regulation addresses "hard issues" where the violation causes either pecuniary or personal harm or "soft issues where the violation offends people without causing actual harm. I argue that hard issues are regulated by legislation, and the job of regulating soft issues has been typically picked up by advertising self regulation.

Although the actual form of legislation varies (in some countries – e.g. Hungary - there is a comprehensive advertising law , elsewhere – e.g. Germany, UK – general unfair competition law and broadcasting law are the principal source of advertising regulation), in any event advertising regulation traditionally addresses two issues; market protection (regulated by unfair competition legislation) and consumer protection (regulated by broadcasting law, consumer protection and specific advertising regulation, if any). Unfair competition is regulated by public legislation and most part of it is harmonized at EU level by the Misleading Advertising Directive and the Unfair Commercial Practices Directive. Unfair competition regulation addresses issues where the infringement of law results in pecuniary damages, lost profit (misleading quality or quantity statements, unfair pricing or discount,

[9] Budzinski, Oliver and Wacker, Katharina, The Prohibition of the Proposed Springer-Prosiebensat.1-Merger: How Much Economics in German Merger Control? (March 28, 2007). Available at SSRN: http://ssrn.com/abstract=976861 or http://dx.doi.org/10.2139/ssrn.976861p 9

[10] Ibid p 9

availability of goods or services, counterfeit products, etc.). Consumer protection regulation focuses on preventing personal harm directly caused to consumers.

5. OUTSOURCING CHILLING EFFECT

Besides the personal harm argument, "offence" is the other regulatory basis of restricting commercial speech in the name of consumer protection. The ICC Code, the BCAP Code, the German Werberat Code are brought below as illustration. Offensive speech is hard to regulate. Its boundaries are unclear and depend on the ever changing morals, ethics and customs prevailing in the society at a particular time. Moreover, this speech restriction is a constitutionally suspect area. Regulation of speech regarding these "soft issues" may result in restriction of speech violating the right to freedom of speech. States do not regulate this area, it seems moreover, that they do not prevent self-regulation here. Therefore self-regulation addresses the "soft issues" of "packaging" (i.e. form and language) of commercial messages. The regulatory subject in the codes of ethics usually appears as "harmful", "offensive", "indecent", "immoral", etc. speech.

This job has been taken up by advertising self-regulation. There are three tasks in this respect: a) regulating content, b) monitoring and operating a consumer / viewer complaints regime and c) adjudication / dispute resolution. I show below the various solutions evolved with respect to these tasks in the jurisdictions I examined.

6. REGULATORY TECHNIQUE REGARDING ADVERTISING; ADVERTISING REGULATION EQUALS MEDIA REGULATION; THE COMMERCIAL MESSAGE IS IN THE FOCUS

Advertising regulation, including self-regulation, is typically addressed to the media and not to the advertisers, which creates a private censorship over commercial content by the media. This is one of the reasons why an efficient regulation of advertising is easier. In the case of advertising, the speaker (i.e. the advertiser) uses two intermediaries to convey his message; it

uses the advertising agency to create the artistic form and content and it uses the media to convey the message. Advertising regulations target these intermediaries and not the speaker directly. This is reflected, for example, in the British BCAP Code, stating among the principles of compliance, that

> "All compliance matters (copy clearance, content, scheduling and the like) are the ultimate responsibility of each broadcaster."

Another example is the Misleading Advertising Directive, which defines commercial advertising to mean conveying commercial messages to potential customers[11] instead of creating, ordering, financing, etc. of such messages.

Therefore, in the case of advertising, the speaker (i.e. the advertiser) is controlled by the media, before any regulatory authority involvement in the enforcement process.
As a consequence, the principal advertising related services (strategic advice and creating the message itself), which mostly make a living for the advertising industry, are not directly covered by the advertising regulation. Instead, (although, for example in the EU level legislation it is not expressly stated) , it is the media which is principally held responsible for the compliance with the advertising regulation.

A good example for the media being the principal target of advertising regulation is the Tobacco Advertising Directive, which (instead of prohibiting the creation of tobacco related advertising messages) prohibits tobacco advertising "(a) in the press and other printed publications; (b) in radio broadcasting; (c) in information society services; and (d) through tobacco related sponsorship, including the free distribution of tobacco products."[12]

[11] 'advertising' means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations; (Art 2.(a) of the "Misleading Advertising Directive 2006/114/EC," 2006)
[12] Art 1.1 of the *Tobacco Advertising Directive 2003/33/EC*, vol. 34, 2003. Television is not mentioned, because it is separately regulated by the Audiovisual Media Services Directive, which expressly prohibits tobacco advertising and sponsorship.

All the media enterprises can do is back up this liability by contract with the agencies and make precautionary measures to prevent violation of law. Advertising self-regulation is part of these precautionary measures. Media enterprises are members of advertising self-regulatory organizations. It can be argued therefore that the lack of direct regulation was an important reason inducing the intensive self-regulation by the advertising and media industry in Europe.

7. THE REASONS AND EFFECT OF SELF-REGULATION; WHY IS IT THE ADVERTISING INDUSTRY WHERE SELF-REGULATION IS THE STRONGEST?

The strong self-regulation by the advertising industry is generally explained with the usual reasons: self-regulation is cheap, efficient, flexible, professional, fast, etc. These arguments mostly reflect the interests of the public regulator and do not answer the main question, namely, why is it the advertising and media industry and not, let's say, the engineers, the auditors or doctors, where self-regulation is so outstanding? Advertising self-regulation is fuelled by the specific features of the industry: its high visibility, (since its principal aim is to reach the widest possible audience), and its exposure to the media which carries the commercial messages.

7.1 The reasons for self-regulation on the side of the professions

Advocates, accountants,[13] auditors, doctors, engineers, advertising agents and many other "highly visible and identifiable" professions have created strong self-regulatory regimes to demonstrate that their "house is in order" and to improve professional behavior.[14] This is not a

[13] I cannot help recalling here the famous Dutch preliminary ruling case (C-309/99, Doc. nr. 61999J0309) before the ECJ regarding Mr. Wouters, et al. and (the late) Arthur Andersen. In that case the ECJ upheld the prohibition by the bar association of joint advocate/accountant bureaus which had shaken the business lawyer community in Europe. The ECJ in its judgment also stated that a professional body having delegated power to adopt universally binding rules "may be treated as comparable to a public authority where the activity which it carries on constitutes a task in the public interest forming part of the essential functions of the State". (See Sections 53-58 of the ECJ Judgment).

[14] See Eric Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2005). p 392; See also Jean J. Boddewyn, "Advertising Self-Regulation : True Purpose and Limits," *Journal of Advertising* 18, no. 2 (1989): 19–27.; T.W. Reader, "Is Self-Regulation the Best Option for the Advertising Industry in the European Union--An Argument for the Harmonization of Advertising Laws Through the Continued," *U. Pa. J. Int'l Bus. L.* 16, no.

mere formality or demonstration for public relations. Self-regulation represents real value for these professions for which a real price is paid. Guy Parker, Chief Executive of the UK's Advertising Standards Authority, Europe's strongest advertising self-regulatory organization, has said recently that the European advertising industry spends to the tune of EUR 25 million annually on self-regulation.[15] Although this amount looks high in absolute terms, it is in fact modest when compared with the total European advertising spend of approximately USD 109 billion in 2012.[16]

Advertising self-regulation is arguably the strongest of all the above mentioned highly visible professions, for three reasons. First, visibility of advertising is the biggest, as its prime purpose is to be visible. Second, advertisements rely on print or electronic media. "This unique situation of depending on an intermediary provides a check on advertising practices, since these media apply their own self-disciplinary standards."[17] Third, public regulation of advertising content hits the media and not the advertising industry. State law therefore applies to the advertising industry indirectly, which would necessarily put the media - an outsider in terms of advertising content - in control regarding the essence of advertising.

7.2 The regulatory capture and democratic legitimacy

As shown in connection with the EASA (Section A. of Part III) and the Tobacco Lobby (Section B. of Part III) , besides procedural legitimacy directly or indirectly deriving from democratically elected bodies, regulators must be open to interest representation institutions (lobbies, experts) in order to maintain their substantive legitimacy. Self-regulatory organizations are necessarily more exposed to the influence by their own members than a

181 (1995).p 11-12; see also Tarlach McGonagle, "Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea," *Iris Plus* 33, no. 2002 (2003). p 6

[15] www.advertisingwecare.org A conference held on March 28, 2012 organized by the European Advertising Standards Alliance

[16] See for example http://www.emarketer.com/Article/Regional-Economic-Woes-Drag-Down-Worldwide-Total-Media-Ad-Spend-Growth/1009974, the figures are shown under the heading "Western Europe" which appears to be the EU members and Switzerland (Last visited July 20, 2013)

[17] Jean J. Boddewyn, "Advertising Self-Regulation : True Purpose and Limits." p 22

state organ whose mandate is more widely based.[18] This regulatory capture is illustrated in my dissertation by the self-regulation of "offensive speech". The purpose of the regulatory speech restriction is to maintain the trust and satisfaction of viewers and consumers in advertising. This business driven goal influences both the drafting and adjudication of commercial speech restrictions.

7.3 Examples for the generally drafted speech restrictions allowing discretion by the self-regulatory authority

The core of the European self-regulatory codes is the ICC sample Code[19], whereby "marketing communication should not contain statements which offend standards of decency currently prevailing in the country and culture concerned".[20] This approach is more or less reflected at national level. Under the BCAP Code of the UK, the general principle is that "advertisements must not be harmful or offensive", and that "advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards".[21] Under the German Werberat Code "commercial communications must comply with the generally accepted basic values of society and the prevailing standards of decency and morality"[22]. These generally drafted self-regulatory codes restrict content in two ways. First, they open the doors of the self-regulatory adjudication for a wide circle of viewer / consumer complaints, therefore in theory "anything may go". Second, the generally defined "offensive, harmful, indecent, etc. speech category provides the self-regulatory organization a discretional controlling position over commercial content.

[18] See e.g. Anthony Ogus, "Rethinking Self-Regulation," *Oxford Journal of Legal Studies* 15, no. 1 (1995): 97–108. p 98

[19] ICC, "Consolidated ICC Code on Advertising and Marketing Communication Practice" (2011).

[20] There are two points to mention here. First, it can be argued that national codes are mere copy/pastes of the ICC Code, i.e. restriction of indecent speech is a mere formality and second that the ICC reflects worldwide tendencies and does not express the business interests of the advertising industry. These arguments may be refuted by fact that the mandate of the ICC is to represent the business interests, and that the national paractice of self-regulatory complaints and adjudications show the dominance of offensive speech related cases.

[21] See Section 4.2 of the BCAP Code at http://www.cap.org.uk/Advertising-Codes/~/media/Files/CAP/Codes%20BCAP%20pdf/BCAP%20Code%200712.ashx (Last visited July 11, 2013)

[22] See at http://www.werberat.de/grundregeln (Last visited July 11, 2013)

8. MONITORING – THE CONSUMER COMPLAINT MECHANISM

Monitoring is a core function of advertising self-regulation that is operated through the consumer complaint mechanism. National laws normally do not give direct standing for consumers against misleading, offensive, indecent, generally harmful or prohibited advertising. Therefore, unless a particular consumer proves his or her personal interest in challenging a particular advert (e.g. by proving damages), the consumer complaint mechanism is the only regulatory instrument that connects the advertiser and media with the consumer. In Germany, for example the consumer complaints are channeled to courts by a general mandate to organizations representing larger circle of stakeholders for a quasi class action. That is the legal basis of the Wettbewerbszentrale that has been operating since 1912 as a consumer complaint forum. Consumer complaints, of course represent high pressure on commercial speech. Once the self-regulatory organization takes the challenge seriously, thousands of baseless complaints must be handled.

In the case of the ASA (UK), for example, in the year of 2012 two thirds of the 30 thousand complaints were closed without further investigation.[23] This ratio was 48% in Belgium[24], approx. 70% in the Czech Republic[25] and approx. 40% in Ireland[26].

The consumer complaint mechanism, coupled with wide publicity of complaints and decisions operates as an audience poll for the various advertising campaigns. The mere publications of decisions and statistics itself have a major effect of voluntary compliance; as mentioned above, the ratio of voluntary compliance is 96% in the case of the Werberat, the

[23] See the Annual report of the Advertising Standards Authority at http://asa.org.uk/About-ASA/~/media/Files/ASA/Annual%20reports/ASA_CAP%20Annual%20Report%20Online.ashx (Last visited July 12, 2013)

[24] See the Annual report of the "JEP", the Belgian self-regulatory organization at http://www.jep.be/media/Rapport%20Annuel%202012%20FR.pdf (Last visited July 12, 2013)

[25] See the Annual report of "RPR", the Czech self-regualtory organization at http://www.rpr.cz/cz/kauzy.php?rok=2012 (Last visited July 12, 2013)

[26] See the Annual report of "ASAI", the Irish self-regulatory organization at http://www.asai.ie/documents/ASAI%2032nd%20Annual%20Report%202012-2013.pdf (Last visited July 12, 2013)

German advertising self-regulatory organization. This national "public audience poll" is supplemented with an international audience poll through the EASA cross-border complaint system, where complaints from foreign countries where the given advertising is accessible are channeled back to the self-regulatory organization of the home country. As a consequence the advertising (including its decency and offensive nature, which is highly dependent of the prevailing taste and traditions of the given country) is tested outside the home country as well.

B. Self-regulation: Definition and the Principal Issues

Self-regulation is neither new, nor has been invented by the advertising industry.[27] As mentioned above, it is applied by many highly visible professions to raise trust of consumers by demonstrating that their house is in order. Self-regulation, however, is not a mere formality of demonstration for public relations. It has other advantages for both the public- and the self-regulator. Below, first I discuss the questions of definition and terminology, then summarize the ups and downs of self-regulation, describe the principal issues for constitutional analysis and finally summarize the most important theories for providing constitutional protection against private infringement of fundamental rights.

It often happens that terminology generally used in the literature and in practice to designate a particular phenomenon does not precisely reflect its meaning. This is the case with the advertising self-regulation. It appears that the term is generally used for private involvement in advertising regulation, without regard to the details of the underlying concepts. I will attempt to discuss the concepts first and then clarify the terminology I use in the dissertation.

1. MEANING OF SELF-REGULATION

I discuss constitutionality of advertising regulation where there is and least a partial overlap in the regulator and the regulated party. The terms generally used in the literature to designate sources of regulation are "command and control regulation" which stands for public legislation[28], "self-regulation" for the case when the state refrains from interfering in the regulation[29], "co-regulation", or "regulated self-regulation" principally when the state

[27] Colin Scott, "Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU," *European Law Journal* 15, no. 2 (March 2009): 160–173, http://doi.wiley.com/10.1111/j.1468-0386.2008.00456.x. p 165

[28] Ian Ayres and Braithwaite, *Responsive Regulation* (Oxford University Press, 1992).

[29] See e.g. Wolfgang Schulz and Thorsten Held, "Regulated Self-Regulation as a Form of Modern Government" (Hans-Bredow-Institut für Medienforschung an der Universitat Hamburg, n.d.).

delegates part of its regulatory functions to a self-regulatory authority[30]. Finally, the term "private regulation" is also used in the literature to cover all types of regulatory efforts where private parties are involved[31].

Private involvement in the regulatory arena varies widely and therefore many argue[32] that due to this great variety depending on the regulatory area or depending on the angle of a particular scientific discipline, no satisfactory definition can be given for self-regulation.

Black[33] proposes a very flexible analysis of self-regulation, breaking up the term into pieces, taking into account the meaning of the "self", the "regulation" and the method of state involvement. She suggests that we speak about self-regulation, when "the self" means a collective and not an individual. "Self-regulation describes a situation of a group of persons or bodies, acting together, performing a regulatory function in respect of themselves or others who accept their regulatory authority".[34] The definition of "regulation" ranges between command and control regulation to the pure market regulation. As to "state involvement", Black names four types of self-regulations, mandated, sanctioned, coerced, and voluntary, depending on the degree and method of state involvement in self-regulation.

Taking an empirical approach of the examples of the UK and Germany one can recognize clear distinction between advertising self-and co-regulation. In both of these countries the law (the Communications Act of the UK and the Unfair Competition Act of Germany) includes express authorizations for the delegation to a self-regulatory organization of regulatory and

[30] See e.g. Ibid. (Schulz and Held); See also Linda Senden, "Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?," *Electronic Journal of Comparative Law* 9, no. January (2005): 1–27.
[31] See e.g. Fabrizio Cafaggi, "Private Regulation in European Private Law" (2009).
[32] See e.g. Price-Verhulst: Self-regulation and the Internet p 3; Neil Gunningham and Joseph Rees, "Industry Self-Regulation: An Institutional Perspective," *Law and Policy* 19, no. 4 (October 1997): 363–414, http://www.blackwell-synergy.com/links/doi/10.1111%2F1467-9930.t01-1-00033. Cary Coglianese, "Meta-Regulation and Self-Regulation," *Social Science Research* no. 12 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2002755.
[33] Julia Black, "Constitutionalising Self-Regulation," *The Modern Law Review* 59, no. 1 (1996): 24–55. p 26
[34] Ibid. (Black) p 27

adjudication power (UK) and power to start class actions on behalf of consumers (Germany). The act of delegation was implemented in a contract in the UK and by force of law in Germany. Both of these cases can be considered co-regulation (it is actually named so in the UK contract between OFCOM and the ASA[35] by the given contract. The government authorities and public legislation are in both cases available as 'legal backstops'.

The term "legal backstop" refers to statutory power behind self-regulation. In the generally used terminology both state law and government authorities are called legal backstops. An example in the UK is the Business Protection from Misleading Marketing Regulations 2008, serving as statutory legal backstop behind the self- and co-regulatory codes, as and the Office of Fair Trading as enforcement authority, being an organizational legal backstop.

The key act that makes the difference between self – and co-regulation is the delegation of power. This defines both the allocation of jobs between the public and private regulator and serves as a legal basis for the powers of the self-regulatory authority.

It should be noted here that the underlying arguments for the distinction between self- and co-regulation in the two countries are different. In English law, co-regulation is used to regulate advertising using the media services of licensed broadcasters, as these are subject to administrative control by OFCOM anyway, based on the Communications Act 2003. Media other than licensed broadcasters are purely self-regulated without regulatory involvement by the state. It is clearly visible that the watershed in the English law is the free press (self-regulation) v. regulated licensed broadcasters (co-regulation). There is no such distinction in Germany.

[35] "Memorandum of Understanding Between OFCOM and the ASA (Broadcast) Limited and theBroadcasting Committeee of Advertising Practice Limited," 2004, http://www.asa.org.uk/About-ASA/About-regulation/~/media/Files/ASA/Misc/Ofcom Memorandum of Understanding.ashx (Last visited March 2, 2013).

2. TERMINOLOGY USED IN THE DISSERTATION

The advertising industry uses the term self-regulation to designate any kinds of advertising regulation where there is a trace of private involvement. Therefore I will follow this approach throughout the dissertation, except that I use the term "co-regulation" when the context expressly requires differentiating between self- and co-regulation. Sometimes I use the term "private regulation" to emphasize that the given matter involves both self- and co-regulation. Self-regulatory organizations will always be referred as such, as I believe that co-regulatory arrangements do not change the legal and organizational nature of the SRO, therefore using a term "co-regulator" would be inappropriate.

3. THE OPEN METHOD OF CO-ORDINATION AND SELF-REGULATION

OMC is a collection of informal intergovernmental processes by the EU Member States at the European Council level (such as collective recommendations, review, monitoring and benchmarking) developed over time.[36] EU Member States use the OMC to harmonize cross border actions in regulatory areas not reserved for Union legislation. OMC, therefore, relates to matters that are beyond EU legislation and therefore it is arguably a private governance scheme in the context of EU level public regulation. Besides high level political participation by Member States, OMC involves private actors too, fostering co-operative practices and networking. Therefore the OMC is sometimes considered as a form of co-regulation at EU Member State level [37], however it has no direct regulatory effect, therefore I do not discuss it here.

[36] Susana Borrás and Kerstin Jacobsson, "The Open Method of Co-ordination and New Governance Patterns in the EU," *Journal of European Public Policy* 11, no. 2 (April 1, 2004): 185–208, http://www.tandfonline.com/doi/abs/10.1080/1350176042000194395.

[37] Linda Senden, "Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?". Linda Senden, "The OMC and Its Patch in the European Regulatory and Constitutional Landscape," *EUI Working Papers* (2010).

4. UPS AND DOWNS OF SELF-REGULATION, AND THE REGULATORY CHOICE

4.1 Upsides

The most frequently quoted advantages of self-regulation are its speed, efficiency, flexibility, up-to-date expertise, and that it saves costs for the government.[38] From economic point of view, self-regulation is used to fix market failures in case "private law instruments are inadequate or too costly" and that private "regulation is a better (cheaper) method of solving the problem, than conventional public regulation".[39] It is also argued that self-regulation may be used instead of governmental regulation to avoid constitutional issues.[40] (Although the positive nature of this last feature is arguable.)

4.2 Downsides

The principal criticisms of self-regulation are "corporatism", i.e. that out of regulatory bias, self-regulatory organizations represent the interests of their members instead of reflecting general public interests[41]; accountability and transparency problems, i.e. the problems with control over the self-regulators, and that information on self-regulatory acts and the operation of the self-regulatory organization is not or not sufficiently available for those who are affected by them; finally, legitimacy problems, i.e., that self- regulation affects a circle of persons, who have not necessarily subjected themselves to it and that the self-regulatory authority does not have democratic delegation of regulatory power.

4.3 The regulatory choice

By measuring ups and downs, public regulators decide whether a particular area shall be subject to command and control regulation, would be left for self-regulation or it would be

[38] See e.g. Peter Cane, "Self Regulation and Judicial Review," *Civil Justice Quarterly* 6 (1987): 324–347.
[39] Ogus, "Rethinking Self-Regulation." p 97
[40] Angela Campbell, "Self-Regulation and the Media," *Federal Communications Law Journal* (n.d.): 711–771. p 717
[41] Ogus, "Rethinking Self-Regulation." p 98

regulated in a manner that is in between the two ends of that scale. The decreasing effectiveness of public regulation gives stronger position for self-regulators, as states must increasingly rely on them to reach their regulatory goals. "In this context it is said that the "sovereign state" is already changing to a "corporate bargaining state".[42]

5 THE MAIN CONSTITUTIONALLY RELEVANT ELEMENTS OF ADVERTISING SELF-REGULATION

From point of view of constitutional analysis, there are three important elements in self-regulation. These are the regulatory bias (self-censorship), public-private divide (the question of horizontal effect) and accountability.

5.1 Regulatory bias and self-censorship

In the advertising industry the main driver of self regulation is declared to be consumer protection. Advertising self-regulatory codes from the UK and Germany declare as follows:

> "The overarching principles of this Code are that advertisements should not mislead or cause serious or widespread offence or harm, especially to children or the vulnerable." (BCAP Code of the UK)
>
> "The goal of the German Advertising Council as an self-regulatory organization is to preserve and strengthen consumer confidence in commercial communications." (Code of the German Werberat)

As mentioned in above, Media, serves not only consumers. The unique feature of commercial media, where provision of advertising services is essential for financing the business, is in its dual nature, competing both on the advertising and audience markets.

As Tambini points out, self-regulation "increasingly regulate not only the voluntarily delegated content of their funding members, but the speech (...) of the broader population of users. Speech could be suppressed without the protections that the legal system grants, had the limitation originated in the authorities. Were the activities of industry bodies to take over

[42] Schulz and Held, "Regulated Self-Regulation as a Form of Modern Government." p 6

these public functions, it is argued, such self-regulation would in fact constitute a direct threat to speech rights as it instates a so-called 'privatised censorship'."[43]

5.2 Accountability of self-regulatory organizations; private and judicial review

Accountability means control over the SRO. There are two forums for such control. The first is internal control by the members or contracting parties, who have expressly submitted themselves to the private jurisdiction of the given SRO. The second is public control. The reasons for the private internal control are to ensure that the SRO keeps its boundaries both from points of view of operation and rule making. There are many forms of internal control from setting up supervisory bodies, annual or more frequent reports, possibility for independent review of the SRO decisions, etc. The reasons for public accountability of self-regulatory organizations are principally to protect third party rights affected by the SRO rule-making or adjudication mechanism. The issue here is the protection against violation by the self-regulator of generally applicable legislation, and in case of delegated power, the abuse with such delegation. The public / private divide mentioned below comes up regarding the question of compliance with general law. Namely, whether private actions remain within the boundaries of contract law, an area based on equality of the parties involved and therefore permits wide discretion in the content of such relationship; or alternatively, recognizes the inequality between the self-regulator and the regulated members or third parties affected by self-regulation, and provides statutory remedies against the self-regulatory decisions in the form of judicial or administrative review, despite that the self-regulator is a private party.

5.3 The public - private divide

The challenge in the constitutional analysis of self-regulation is that it is in the junction of public and private law. The regulatory element suggests public law analysis and the fact that

[43] Damian Tambini, Danilo Leonardi, and Chris Marsden, *The Privatisation of Censorship : Self Regulation and Freedom of Expression Book Section*, 2011. p

the regulator is a non-state actor represents the private law element. Public law analysis puts the emphasis on protection of fundamental rights, while the starting point of private law is the flexibility and discretion of the parties[44] where general constitutional aspects are exceptional. Restrictions of free speech rights do not raise constitutional problems to the extent they are based on and remains within the boundaries of the express consent (i.e. may be considered as a contractual or corporate relationship) by the regulated persons. I am dealing with self-regulation that is applicable beyond the circle of express consents and affects third parties too. In that context (e.g. the advertising self-regulatory system of the UK, which is generally applicable and not voluntary), self-regulation warrants constitutional analysis. In such cases, the main issue is whether protection of fundamental rights are available against self-regulatory acts, which affect third parties' rights without their consent.

The dissertation discusses two national approaches to advertising self-regulation: in the UK, the self-regulatory authority has been delegated regulatory and adjudication powers under a contractual arrangement, and is considered a government body for the purposes of judicial review; no such express delegation was made Germany, where the self-regulatory organization is acting under a general statutory authorization, which widely extends the right of complaint to state authorities in matters of unfair competition.

This latter solution is generally termed constitutionalizing self-regulation[45] or horizontal effect doctrine.

6 THE HORIZONTAL EFFECT DOCTRINE; STATE ACTION, DRITTWIRKUNG AND THE ECTHR JURISDICTION

There are several theoretical grounds for providing protection for private parties against private intervention of rights, of which the English solution is undoubtedly the simplest. There

[44] Ibid. (Tambini) p 412
[45] Black, "Constitutionalising Self-Regulation."

the Administrative Court considers that the national advertising SRO pursues public functions therefore judicial review by the Administrative Court is available against its decisions.[46] I will discuss that arrangement and the case law in the UK Chapter. Below I summarize three systems where fundamental rights are somehow provided protection against private action. According to the U.S. state action doctrine and the jurisdiction of the European Court of Human Rights, horizontal application of constitutional rights assumes that the infringement is however remotely, but ultimately attributed to the state. The German "Drittwirkung" theory derives horizontal effect from the Basic Law and does not require state action for horizontal application.

6.1 The first trace of recognizing horizontal effect of constitutional rights; the state action doctrine

From the mid-twentieth century the U.S. Supreme Court has begun extending constitutional review to nominally private actions, provided that the state is somehow involved therein. The typical areas where constitutional review applies under the state action doctrine are free speech (first amendment), due process and equal protection (both under the fourteenth amendment) related cases. Unlike the constitutional scrutiny of actions by the state, where the Court approach is protective of constitutional rights, horizontal relations always require fine-tuned balancing between rights of the parties involved. Therefore the constitutional rights which are highly protected against state actions, such as the right to due process or free speech often remain defenseless when balanced against private interests. It is no wonder therefore that the magic term "state action" is often tested as this would turn rights related cases upside down.[47] As a result, the Supreme Court has faced and discussed state action (and inaction)

[46] R. v Advertising Standards Authority Ltd Ex p. Direct Line Financial Services Ltd; Queen's Bench Division; 08 August 1997

[47] See for example Flagg Brothers v. Brooks (436 U.S. 149 (1978) (as referred to in **Stone**) in which the Supreme Court said that no constitutional protection is available against private enforcement of a private lien which was created by a state legislation.

cases fairly often and has actually applied constitutional scrutiny on private actions due to state involvement in a great variety of cases[48] for example actions by private parties performing state functions[49], enforcement of private acts by courts[50], enforcement by courts in litigation between private parties[51] and licensing[52].

One could assume from the case law that the state action doctrine is quite spacious and the scope and definition of "state involvement" in private action is vague.[53] Powe v. Miles[54], however, suggests that the focus of state action doctrine is not merely about the fact if there is state involvement in a private action, but the court assesses constitutionality of the state action itself. In other words, there is no chance for the desired constitutional scrutiny if the government is involved in the given private action but such state action remained constitutionally neutral. Judge Friendly of the U.S. Court of Appeals for the Second Circuit, in Powe v. Miles stated that the "essential point" is

> "that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private, must be the subject of the complaint."

[48] See Chapter IX of Stone et al., *Constitutional Law*, Third (Aspen Law & Business, 1996). The Constitution, Baselines, and the Problem of Private Power pp 1583-1648

[49] Marsh v. Alabama 326 U.S. 501 (1946) "(T)he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

[50] Shelley v. Kraemer 334 U.S. 1 (1948) "(S)o long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the (Fourteenth) Amendment have not been violated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."

[51] New York Times v. Sullivan 376 U.S. 254 (1964) "It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form , whether such power has in fact been exercised."

[52] Public Utilities Commission v. Pollak 334 U.S. 451 (1952) "…the action of Capital Transit in operating the radio service, together with the action of the Commission in permitting such operation, amounts to sufficient Federal Government action to make the First and the Fifth Amendments applicable thereto."

[53] Shelley, on its face, even suggests introducing a new class of „natural obligation", whereby unconstitutional private actions are not enforceable.

[54] 407 Fed 2d 73

6.2 Broadcast media and the state action doctrine

Typical justifications of regulating and licensing broadcast media[55] include that airwaves are public resource, frequencies are scarce and must be centrally allocated, and broadcast media has high influence (intrusion into homes[56]). Unlike the internet and the press, broadcast media is a heavily regulated area and the operation is typically subject to a license. Therefore one could argue that the government, once it is actually dictating the rules of the game, should be held responsible for any eventual unconstitutionality, even if the problem is of horizontal nature. However, under the case law, while licensing triggers the state action doctrine[57] mere regulation does not, even if it includes explicit authorization for actions in private relations[58]. This appears to weaken the chances of horizontal application of constitutional rights to broadcast advertising self-regulation.

6.3 The German direct and indirect third party effect ("unmittelbare und mittelbare Drittwirkung")

6.3.1 Drittwirkung

The German concept of "Drittwirkung", (literary "effect on third persons") means effect of someone's basic rights on third persons other than the state[59]. According to the doctrine of Drittwirkung, fundamental rights are protected not only against state power but also against "third party" individuals and private entities. It is effected by direct or indirect application of rules of the Basic Law of the Federal Republic of Germany ("Grundgesetz für die Bundesrepublik Deutschland") in private contexts. Comparing with the state's passive role in the U.S., the government in the Federal Republic of Germany historically has taken a more active economic role in the society, which determines a more active constitutional role in

[55] See Barendt, *Broadcasting Law; A Comparative Study*. p 56
[56] See FCC v. Pacifica Foundation 438 U.S. 726 (1978)
[57] Public Utilities Commission v. Pollak 334 U.S. 451 (1952)
[58] See Flagg Brothers v. Brooks 436 U.S. 149 (1978)
[59] Lüth 7 BVerfGE 198 (1958) B II

protecting and furthering rights, irrespective of who is threatening their infringement.[60] This is reflected in the Basic Law, which provides that the legislative, executive and judiciary are bound by the basic rights which are directly enforceable.[61] Therefore the starting point in Germany is that constitutional scrutiny of private actions is not conditional upon any formal trace or real presence of state action and the central question is the manner and scope of enforcing fundamental rights in private relations. [62]

The two basic notions regarding enforcement of basic rights in private relations are the direct third party effect ("unmittelbare Drittwirkung") and the indirect third party effect ("mittelbare Drittwirkung").

6.3.2 Direct Drittwirkung

Under the direct third party effect fundamental rights set forth in the Basic Law are directly enforceable in private relations. The direct effect doctrine was introduced after WWII in matters of employment law by the President of the Federal Labor Court of Germany who was dissatisfied with the rigid and unfair rules of the Labor Code inherited from an authoritarian regime.[63] He therefore complemented prevailing problematic labor law provisions with constitutional principles. Accordingly the Federal Labor Court regarded the employee as being essentially in the same position of dependency and legal inferiority as an individual vis-á-vis the state.[64]

[60] See András Sajó, *Limiting Government* (Budapest: Central European University Press, 1999). p 274
[61] Art 1 (3), Grundgesetz für die Bundesrepublik Deutschland ("Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.")
[62] On the basis of Art 1(3) (direct applicability – "unmittelbar geltendes Recht") one could even argue that the Basic Law itself orders direct applicability of basic rights by courts directly in all disputes.
[63] See Dorsen et al., *Comparative Constitutionalism; Cases and Materials* (Thomson West, 2003). p 896 The direct effect doctrine was applied by Hans Carl Nipperdey, the first President of the Federal Labor Court ("Bundesarbeitsgericht")
[64] **Ulrich Preuß:** The German Drittwirkung Doctrine and its Socio-Political Background in András Sajó, Renána Uitz, and (Eds.), *The Constitution in Private Relations* (Utrecht: Eleven International Publishing, 2005).

6.3.2 Indirect Drittwirkung – Lüth

The notion of "indirect third party effect" ("mittelbare Drittwirkung") was first applied in the leading case of Lüth[65]. In Lüth the German Constitutional Court upheld free speech right of Herr Lüth vis-á-vis another individual, Herr Harlan. The Lüth case was specific for being a constitutional dispute between two "Herren" without state being involved. The Court said, that there is no need to resort to the Drittwirkung doctrine (as at that time it meant "direct Drittwirkung only") and introduced the indirect Drittwirkung through general clauses and general laws of private law. Instead of applying the direct Drittwirkung, the Court recognized that there is an interaction between public and private law. Public law rules shall be applied to private relations if they breach into (the domain of) private law through general clauses of private law.[66] The Court in Lüth stated, however, that the case of freedom of speech is different. Article 5 (2) of the Basic Law specifically mentions, that

> "this right (to freedom of speech) finds its limits within the framework of general laws" and courts "must interpret these laws so as to preserve the significance of the basic right; in a free democracy this process (of interpretation) must assume the fundamentality of freedom of speech in all spheres, particularly in public life."[67]

Judges therefore in free speech related disputes under both public and private law shall "weigh the values to be protected against each other (…) on the basis of the facts of each individual case". Under the German indirect Drittwirkung doctrine, self-regulation may easily fall under constitutional scrutiny, no matter if fundamental rights restrictions therein are attributable to the state or not.

[65] 7 BVerfGE 198 (1958)
[66] "Deshalb sind mit Recht die Generalklauseln als die "Einbruchstellen" der Grundrechte in das bürgerliche Recht bezeichnet worden (Dürig in Neumann-Nipperdey- Scheuner, Die Grundrechte, Band II S. 525)." See also Dorsen et al., *Comparative Constitutionalism; Cases and Materials*. p. 884
[67] Quoted in Ibid. (Dorsen) p 885

6.4 The jurisdiction of the European Court of Human Rights ("ECtHR") regarding private restrictions of speech

6.4.1 Vertical effect

The European Convention of Human Rights was drafted to protect individuals against violation of human rights by states. It is an instrument of public international law, which is binding upon its member states. According to Article 1 it is the obligation of "The High Contracting Parties" to secure human rights and fundamental freedoms, consequently no parties other than states may be the defendants before the ECtHR.68 In connection with the freedom of expression that is relevant to advertising regulation, this is reflected in Article 10-1 of the ECHR which provides that the right to "freedom of expression... shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority...". This implies that the ECHR does not protect against private interference.

6.4.2 Horizontal application.

The ECtHR, however, in some cases extends the application of free speech protection against measures where the state is not or not directly involved, and has drawn certain cases of self-regulatory speech restrictions under the ECHR. These cases may have two grounds:

First, that self-regulatory measures may qualify as measures "prescribed by law" as long as they are accessible and foreseeable and has some basis in domestic law (delegation or control).[69]

[68] See a more detailed analysis in Clapham pp 89-133,

[69] "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 any individual – 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." Hertel v. Switzerland, App Nr. 25181/94, § 35

Second, that states may be held responsible for private actions in a way, similarly to the state action doctrine of the U.S. Starting from 1979[70] the ECtHR has in a few cases extended fundamental rights protection to infringements which did not directly derive from a state action, but were somehow attributed to the state. As discussed in the commercial speech related Section above, this protection is typical in regulation of professional advertising by professional bar associations.

Here is a list of situations[71] where states have been brought before the ECtHR for private abuse of human rights:

- When the state is held responsible for a private violation, due to its failure to legislate or take other preventive action. These cases are based on the notion (the doctrine of positive obligations) that constitutions and the ECHR not only protect human rights against states but also oblige them to actively enhance prevalence of human rights. (The leading case is Appleby and Others v. the United Kingdom[72])
- Where the ECtHR considers that a private body is an organ of the state. (E.g. Casado Coca v. Spain[73])
- Where the state is held responsible based on a national court decision brought in a private litigation (Pla and Puncernau v. Andorra[74]).
- Where the state is held responsible due to a national court decision based on self-regulation. (Barthold[75], Casado Coca).

[70] Although the doctrine of positive obligations only one of the manifestations of the private actions triggering a case before the ECtHR, the first trace is from 1979, regards the doctrine of positive obligations, referred to by **Xenos** p 22. "The application of positive obligations in the Court's jurisprudence begins with the judgments in the cases of Marcks and Airey in 1979."
Clapham (p89) refers to § 23 of the judgment in case of X and Y v. The Netherlands (1985), where the ECtHR stated that the rights in the Convention create obligations for States which involve "the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves".
[71] Clapham pp 91-92. Clapham's list contains seven items. The list here does not include item 1 (application is inadmissible as the applicants themselves have to respect the Convention), item 5 because it includes specific individual obligations which are not for the ECtHR to adjudge, item 6 (overlaps with 2 from point of view of private regulation) and item 7 (outdated). Cherednychenko (Chapter 4) mentions items 1 and 2 of the list above as sources of state responsibility for private abuse.
[72] Application no 44306/98
[73] Casado Coca v. Spain Application number 15450/89.
[74] Application number 69498/01
[75] Application number: 8734/1979

This approach extended the control over private-regulators and opened the door for speakers to submit complaints to the ECtHR against states on the basis of actions by private parties.

C. Freedom of speech v. regulation of commercial expression in the United States and Europe

> "...the individual consumer's interest in receiving price information may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[76]

I argue in this dissertation that self-regulation of commercial speech in broadcast media has stricter standards than legislation, its principal driver is commercial success, and consumer protection is incidental to it and the main goal of advertising self-regulation is to contribute to the optimalization of viewing, by not offending the audience with messages that is away from mainstream content. Ultimately this affects the content and scheduling of non-commercial content as well and has an impact on the media pluralism.

In Section B. above I discussed the availability of constitutional scrutiny with respect to self-regulatory restrictions of fundamental rights. In this Chapter I discuss the general benchmarks of commercial speech regulation, i.e. where is the limit of speech restrictions. Two jurisdictions are analyzed. First, I discuss constitutional protection of commercial speech in the United States, the commercial speech doctrine of which has exerted major influence on the European system, but at the same time the difference between the two systems remained significant. Second, I discuss the jurisdiction of the European Court of Human Rights, which directly affects domestic legislation of almost all the European countries.

1. DEFINITION OF COMMERCIAL SPEECH; PAYMENT, MOTIVATION AND CONTENT

As shown below, commercial speech is considered speech of lower value and triggers less scrutiny in the U.S. Supreme Court jurisdiction, and the ECtHR tends to apply higher margin of appreciation. Therefore it is decisive whether a particular speech qualifies as commercial or not. There are three aspects which should be discussed here; first, whether the publication was for payment or free, second, the motivation of speech and third the content of speech.

[76] Virginia 763

As to payment, one can conclude that motivation and content of speech matters, and it is insignificant whether the communication is paid for or not. See for example the classic case of New York Times v. Sullivan[77] in the U.S. where a paid advertising was protected by the Supreme Court or the same here in Europe in the case of VgT v. Switzerland[78].

As to motivation v. content, the ECtHR prefers content to motivation, while in the U.S. it is the opposite. The key indicator in this respect is "mixed speech", which means high value elements in speech having commercial motive.

Motivation v. content before the ECtHR. As seen below, the ECtHR protects commercially motivated speech having high value elements. The leading cases are Barthold v. Germany, where a propagandistic article about a veterinary surgeon was protected, Stambuk v. Germany, where the same happened with respect to a new operation technique of an ophthalmologist and Hertel v. Switzerland which is an unfair competition case involving an article claiming harmful effects of microwave ovens. These cases are common in that commercial motivation was not denied and discussed, however, high value elements in the communication saved them from restrictions.

Motivation v. content in the U.S. As also seen below, the Supreme Court considers motivation decisive over content. As a result, mixed speech qualifies in the same way as pure commercial speech, subject to the intermediate level of scrutiny pursuant to the Central Hudson test (see the details below). The exception might be the case when commercial expression is inextricably intertwined with fully protected non-commercial speech. The Supreme Court, however, is very heavy handed in granting the heightened protection based on the "inextricably intertwined" argument. In Bolger[79] the Supreme Court qualified pamphlets as commercial, not social, speech, even though information conveyed discussed the social issues

[77] 376 U.S. 254 (1964)
[78] Case of Verein gegen Tierfabriken v. Switzerland (Application no. 24699/94)
[79] Bolger v. Youngs Drug Products Corp.; 463 U.S. 60 (1983)

of human sexuality and venereal disease. In the case of Kasky v. Nike[80] the commercial motivation was considered decisive over content (see the details below).

2. THE COMMERCIAL SPEECH DOCTRINE IN THE U.S.

Constitutional protection of commercial speech is not self-explanatory. It was a long way for the U.S. Supreme Court to move from Valentine v. Chrestensen[81] of 1942, where the Supreme Court stated that "the Constitution imposes no restraint on government as respects purely commercial advertising"[82] to Virginia[83] of 1976, where it was stated that "the free flow of commercial information is indispensable."[84] Before Virginia, commercial speech was considered as unprotected low value speech in the same class with obscenity, libel, incitement and child pornography[85].

New York Times v. Sullivan[86] of 1964 is among the first moves from the denial of protection. Here the Court stated that from point of view of constitutional protection of speech, whether the message is a paid advertisement or not "is as immaterial as is the fact that newspapers and books are sold". The paid advertising in New York Times v. Sullivan was related to fundraising and did not have commercial motive.

In Bigelow v. Virginia[87] of 1975, the advertising had a clear commercial motive, of offering abortion treatments; however, it also contained factual material of clear public interest: "Abortions are now legal in New York. There are no residency requirements."[88] The Court declared this message protected considering the importance of its non-commercial elements for the general public.

[80] Marc Kasky v. Nike, Inc. et al., 27 Cal. 4th 939 (2002)
[81] 316 U.S. 52 (1942)
[82] Ibid. 54
[83] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748 (1976)
[84] Ibid. 765
[85] Joanna Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe* (Hamburg: Verlag Dr. Kovac, 2008). p 30
[86] 376 U.S. 254 (1964)
[87] 421 U.S. 809 (1975)
[88] Ibid. (Bigelow) 822

2.1 First Amendment protection of pure commercial advertising

The first case was Virginia Pharmacy where the importance of pure commercial speech for public interest was recognized. Here the Supreme Court discussed First Amendment protection of pure commercial speech. As Judge Blackmun put it in the Virginia case, which was a challenge of a Virginia statute prohibiting drug price advertising by pharmacists:

> "...Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. (...) The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment."

2.1.1 Virginia

Consumers challenged the validity of a Virginia statute prohibiting advertising the prices of prescription drugs, on the basis that the First Amendment entitles them to receive such information. It was revealed in the lawsuit that information on prescription drug prices may be of value, as in Virginia they strikingly vary from outlet to outlet even within the same locality. The Supreme Court held that commercial speech is not outside the First Amendment protection. It established that the individual consumer's interest in receiving price information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate".[89] The Supreme Court went on saying that advertising also serves the interests of the public:

> "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."[90]

The Supreme Court also made it clear in Virginia that restriction of commercial speech remains permissible, subject to the same standards of constitutional scrutiny as those applied

[89] Ibid 763 (Virginia)
[90] Ibid. 765 (Virginia)

for time, place and manner restrictions[91], and restrictions on false or misleading commercial speech are also permissible.[92] The Court also said that "commercial speech may be more durable than other kinds, since advertising is driven by commercial profits, and therefore there is little likelihood of its being chilled by proper regulation and forgone entirely".[93]

2.1.2 Further developments; the Central Hudson test

In Virginia the Court stated that the prohibition of commercial speech could not be justified on the basis of the state's interest in maintaining the professionalism of its licensed pharmacists. This test was further refined in subsequent case law.

In Bates[94] the Supreme Court examined commercial speech by lawyers, applied the Virginia test, and held that a prohibition to advertise prices of certain routine services by lawyers violates their First Amendment rights. The Court said (referring to New York Times v. Sullivan) that speech is protected even if it is in the form of a paid advertisement, and that if commercial speech is to be distinguished, it 'must be distinguished by its content.'[95]

As to the specific issue, the Court stated that

> "Advertising legal services is not inherently misleading. Only routine services lend themselves to advertising, and for such services fixed rates can be meaningfully established (...). Though advertising does not provide a complete foundation on which to select an attorney, it would be peculiar to deny the consumer at least some of the

[91] Ibid. 770-771 (Virginia)
[92] Ibid, 771 (Virginia)
[93] Ibid. 772 (Virginia)The three arguments in favor of constitutionality of regulation of commercial speech are set out in Section 9 of Kasky v. Nike :
"There are three reasons for the distinction between commercial and noncommercial speech in general and, more particularly, for withholding U.S. Const., 1st Amend., protection from commercial speech that is false or actually or inherently misleading. First, the truth of commercial speech may be more easily verifiable by its disseminator than news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that it provides and presumably knows more about than anyone else. Second, commercial speech is hardier than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation. Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is linked inextricably to those transactions.
[94] Bates v. State Bar of Arizona, 433 U.S. 350 (1977)
[95] Ibid. (Bates) 363

> relevant information needed for an informed decision on the ground that the information was not complete."[96]

2.1.3 Central Hudson

In 1980, four years after Virginia, the Supreme Court in the Central Hudson case[97] improved the commercial speech test, to be a four prong test.

Facts. Central Hudson **("CH")** is an electric and gas supplier[98] which challenged constitutionality of a regulation of the New York Public Service Commission which completely banned promotional advertising by the utility on the ground that it is contrary to the energy conservation requirements. CH claimed that the ban infringes its First Amendment right.

Holding and dicta. Stating that the "Constitution (...) accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"[99] the Supreme Court stated that

> "For commercial speech to come within that provision (the First Amendment, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[100]

Applying the four prong test, the Court held that advertising in the given case comes under the First Amendment protection (despite the fact that CH was in monopoly). It accepted that the governmental interest, i.e. involved energy conservation is substantial. The Court found, however, that the advertising prohibition is excessive as the prohibition suppresses speech that in no way impairs the State interest in energy conservation, and it was not demonstrated that

[96] Ibid. (Bates) 351
[97] Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York; 447 U.S. 557
[98] http://www.centralhudson.com/index.html (Last visited May 4, 2013)
[99] Ibid. 563
[100] Ibid. 566

the energy conservation cannot be protected by more limited regulation of commercial expression.[101]

2.1.4 Analysis

The Court in Central Hudson confirmed that only advertising of lawful activity in a correct (not misleading) way may come under the First Amendment protection. It "laid down an intermediate standard of scrutiny reminiscent of the standard applied to content neutral time, place and manner regulations of speech"[102].

The Court in the dicta of Virginia, referred to the possibility of general time, place and manner restrictions of commercial speech. In Hudson, however, the intermediate standard of scrutiny, which generally applies to time, place and manner restrictions, was applied to a content based regulation of commercial speech.[103] This demonstrates more than anything else that commercial speech is considered to be a distinct category of lower value speech.

2.2 First Amendment Protection of Mixed Speech

Mixed speech involves both commercial and non-commercial elements, and the issue is whether the non-commercial elements involved increases the speech value – and consequently the level of constitutional protection. It does not – says the Supreme Court -, unless the commercial and non-commercial elements are inextricably intertwined.[104]

In Bolger[105] the Supreme Court qualified pamphlets as commercial, not social, speech, even though information within the mailing discussed social issues of human sexuality and venereal disease.

The Court stated, that

[101] Ibid. 570-571
[102] KM Sullivan and G Gunther, First Amendment Law (2nd edn, Foundation Press, New York 2003) 191, quoted in Ibid. (Krzeminska) p 38
[103] See e.g. Scott Wellikoff, "Mixed Speech: Inequities That Result from an Ambiguous Doctrine," *Saint John's Journal of Legal Commentary* 19, no. 159 (2004): 1–34.p 3
[104] See McCarthy on Trademarks and Unfair Competition § 31:141 (4th ed.) in Westlaw
[105] Bolger v. Youngs Drug Products Corp.; 463 U.S. 60 (1983)

> ”A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protections when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including reference to public issues.”

As a result, mixed speech qualifies in the same way as pure commercial speech, subject to the intermediate level of scrutiny pursuant to the Central Hudson test.

The exception might be the case when commercial expression is inextricably intertwined with fully protected non-commercial speech. The Supreme Court, however, is very heavy handed in granting the heightened protection based on the “inextricably intertwined” argument. The above mentioned old Bigelow case from 1975 is a positive example, where the Supreme Court recognized and appreciated non-commercial elements in commercial expression. There are not many more, however.

The case of Kasky v. Nike[106] is a premier example of speech of commercial and non-commercial character. Between October, 1996 and December, 1997 a series of articles were published in various newspapers criticizing the work conditions and wages of Nike’s factories in China, Vietnam and Indonesia.[107] Nike rejected the allegations in a number of publications, advertisements and

> “bought full-page advertisements in leading newspapers to publicize a report that GoodWorks International, LLC, had prepared under a contract with Nike. The report was based on an investigation by former United States Ambassador Andrew Young, and it found no evidence of illegal or unsafe working conditions at Nike factories in China, Vietnam, and Indonesia. Kasky and other individuals brought a lawsuit against Nike claiming that the report and the various responses were false and misleading.[108]

Nike claimed First Amendment protection, arguing that it contributed to a political debate. The key question in the court proceeding was whether the communications of Nike were of a commercial or non-commercial character.

As to the nature of speech, the California Supreme Court stated that

[106] Marc Kasky v. Nike, Inc. et al., 27 Cal. 4th 939 (2002)
[107] See Ibid. (Kasky) at 942
[108] Ibid (Kasky) at 948

> "statements may properly be categorized as commercial notwithstanding the fact that they contain discussions of important public issues, and advertising that links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech."[109]

Therefore the court held that

> "when a corporation, to maintain and in- crease its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception."

Kasky is specially interesting for comparison with similar cases of the ECtHR's jurisdiction (e.g. Barthold, Stambuk and Hertel), where non-commercial elements of commercial speech trigger stricter scrutiny by the ECtHR than applied by the Californian Court.[110]

2.3 Advertising on electronic broadcast media – unlimited private censorship?

Since Red Lion[111] of 1969 the electronic broadcast media may in theory be subject to stricter regulation than speech in general, with the notion, that broadcasting uses the scarce resource of radio frequencies, and "(b)ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium"[112]. The Court stated that "(t)here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."[113] This approach was further confirmed in FCC v. Pacifica[114] (1978), where the Supreme Court found permissible to regulate patently offensive words through broadcasting. The Court confirmed that "of all forms of communication, it is broadcasting that has received the most limited First

[109] Ibid. (Kasky) Sec. 10 of the Summary
[110] See for example MH Randall, "Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?," *Human Rights Law Review* 6, no. 1 (2006): 0–25, http://hrlr.oxfordjournals.org/content/6/1/53.short.
[111] Red Lion Broadcasting Co. v. F.C.C. 395 U.S. 367 (1969)
[112] Ibid. 390
[113] Ibid. 392
[114] F.C.C. v. Pacifica Foundation 438 U.S. 726 (1978)

Amendment protection" due to licensing and due to the "pervasive presence" of broadcast media in the lives of all Americans."[115]

In this background, commercial content as low value speech (Central Hudson) and electronic broadcasting as restricted media (Red Lion and Pacifica) serve as cumulated grounds for detailed regulation. Although the Supreme Court appears to apply the same Central Hudson test on broadcast advertising over radio and television as in other media (see the recent case law below) the Federal Communications Commission has major powers to restrict broadcasting freedom. As described in the Section regarding offensive, indecent or tasteless speech the FCC is authorized to regulate obscene or indecent programming. The par excellence example is the "Nipplegate" case[116] which induced enactment of the Broadcast Decency Enforcement Act of the U.S. (2005), which increased the maximum fine for indecency in radio and television ten times [117], to "$325,000 for each violation or each day of a continuing violation ..."[118]

Below I summarize two examples of recent case law of the U.S. Supreme Court regarding broadcast advertising, one for constitutional and another for unconstitutional restriction.

2.3.1 Constitutional restriction of broadcast advertising[119]

In Edge[120] the Supreme Court examined constitutionality of federal statutes prohibiting the broadcast of lottery advertising

[115] Ibid. 748-749
[116] see Section D. of Part I. below regarding offensive, indecent and tasteless speech
[117] See an article of the Washington Posthttp://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700287.html (Last visited June 26, 2013) The Washington Post article was referred to in the above entry of the Wikipedia.
[118] See the Broadcast Decency Act here: http://www.gpo.gov/fdsys/pkg/BILLS-109s193enr/pdf/BILLS-109s193enr.pdf (Last visited June 26, 2013)
[119] See 164 A.L.R. Fed. 1: Ann K. Wooster in ALR Federal, "Protection of Commercial Speech Under First Amendment—Supreme Court Cases," 2013. § 17(a)
[120] U.S. v. Edge Broadcasting Co., 509 U.S. 418 (1993)

> "by a broadcaster licensed to a state that did not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a state that supported lotteries"[121],

even if the given broadcaster is located in a nonlottery state but near the border of a lottery state. The Supreme Court held that

> "the federal statutes prohibiting the radio broadcast of lottery advertising by licensees located in nonlottery states directly advanced the governmental interest (see the third prong of Hudson) of balancing the interests of lottery and nonlottery states, for the purpose of determining whether the statutes violated the First Amendment, the Court concluded, even when the radio station located in a nonlottery state had signals that reached into a lottery state, and such prohibition was not more extensive than necessary to serve the governmental interest". [122]
>
> This argument reflects the fourth prong of Central Hudson.

2.3.2 Unconstitutional restriction of broadcast advertising[123]

In Greater New Orleans Broadcasting[124] the Court determined that the FCC's prohibition on broadcasting gambling advertising is unconstitutional, regarding that the broadcasters' radio stations are located in Louisiana, where such gambling was legal. The Court noted the contradiction between the general prohibition of broadcast advertising of gambling and that the "regulatory regime is so pierced by exemptions and inconsistencies", such as the permission of gambling by authorized Native American tribes or for charitable purposes. The Court, applying the Central Hudson test, found that the government, which permitted tribal casinos, presented "no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos"[125].

[121] Ibid. (Wooster) § 17 (a)
[122] Ibid.
[123] Ibid. (Wooster) § 17(b)
[124] Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173 (1999)
[125] Ibid. (Wooster) § 17 (b)

2.4 Summary

Similarly to other media, broadcast advertising regulation targets the broadcasters, and therefore these are the broadcasters and not the speakers, who bear the risk of regulatory restrictions. The chilling effect of any commercial advertising restriction is indirect. It induces self-censorship by the media, which affects the actual speaker (i.e. the advertiser of gambling, the abortion treatment). This represents an additional layer of self-regulation between legislation and the speaker. At the same time, as seen in connection with Red Lion and Pacifica, the general approach to broadcast regulation is that stricter restrictions may be permitted in broadcast advertising than in the case of general expression.

3. COMMERCIAL SPEECH AND THE EUROPEAN COURT OF HUMAN RIGHTS

Commercial speech cases before the European Court of Human Rights **("ECtHR" or "the Court")** have so far been commercial advertising related restrictions (e.g. Scientology, Casado Coca, Krone, Ponson), and mixed speech cases involving both commercial messages and speech of public interest (e.g. Hertel, Stambuk). It seems that although there is neither strict categorization of speech in the ECtHR jurisdiction, nor distinct test evolved, the commercial content of speech has a decisive impact on the outcome of the cases; the "necessity test" is applied less strictly and the ECtHR is more deferential in clear commercial speech cases[126], at the same time, full necessity test is applied to mixed speech and paid political advertising.

In terms of figures, "the biggest number of commercial speech cases decided by the Strasbourg institutions concern advertising"[127]. Taking a look at the statistics, one can see that in the period between 1959 and 2011, the ECtHR had 479 violation judgments involving

[126] See e.g. Randall, "Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?". p 4,

[127] Randall, MH. 2006. "Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?" Human Rights Law Review 6 (1): 0-25; p 4.

freedom of expression.[128] 45 of these (almost 10%) somehow involved "advertising" ("publicité").[129]

The law:

ARTICLE 10 of the European Convention on Human Rights **("ECHR" or "Convention")**

> Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart in- formation and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[130]

3.1 Article 10.1: All expressions, no exceptions

Art 10.1 of the ECHR expresses the general protection of expression. Here the question of speech protection is a "yes/no" one, without a qualifier. In other words, Article 10.1 covers and treats expressions that have commercial, artistic or political nature alike no matter of form, subject matter or content[131] and – except for abuse with Convention rights, which is expressly prohibited in Article 17 - "there appears to be no expression which is not protected at all by paragraph 1 of Article 10 because of its (sc. the expression's) content".[132] Even those

[128] ECHR, Overview on violation judgments 1959-2011 http://www.echr.coe.int/NR/rdonlyres/E58E405A-71CF-4863-91EE-779C34FD18B2/0/APERCU_19592011_EN.pdf (Last visited May 14, 2012)
[129] These 45 violation judgments are the result of a search, using the following search terms in the HUDOC database: „publicité" in „complete text" zone; language: French; importance level 1,2,3; Article: 10; Conclusion: „violation de l'Art. 10"
[130] Article 10 of the European Convention on Human Rights
[131] See for example the classic quote of § 49 of the Handyside case:
"Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."
[132] Shiner p 96 quoting Harris, O'Boyle and C. Warbrick, Law of the European Convention of Human Rights (London, Butterworths, 1995), 373

actions are covered which do not qualify speech but have the effect of merely imparting information[133]. Regulation of speech often targets the carriers of information rather than the speaker himself. Article 10 also protects against such regulatory restrictions[134]. Advertising restrictions, for example, almost always bind broadcasters and not the advertisers directly. Article 9 of the Audiovisual Media Services Directive[135] obliges member states to require media service providers (as opposed to advertisers, advertising agents or creative producers, etc.) to comply with restrictions on advertising content. As a result of this broad scope and due to the equal treatment of expressions under Article 10.1, in fact almost all cases (which are found admissible) fall to be decided under Article 10.2[136].

3.2 Interference by public authority

The other substantive limiter of Art 10.1 stems from the basic nature of the Convention. It protects protect individuals against violation of human rights by states, consequently no parties other than states may be the defendants before the ECtHR.[137]

This is reflected in Article 10.1 of the ECHR which provides that the right to *"freedom of expression... shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority..."*. This implies that the ECHR does not protect against private interference. However, similarly to the state action doctrine of the

[133] Here the relevant textbooks (e.g. SHINER) mention the case of Autronic vs Switzerland (Application No. 12726/87) as one of the few cases where the question of scope of Article 10 was analysed. The applicant, Autronic AG applied for a permission for using a so called point-to-point satellite signal to demonstrate the technical capability of the satellite dish produced by it. The Court said that Article 10 is applicable "not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information." (§ 47)
"(…)the reception of television programmes by means of a dish or other aerial comes within the right laid down in the first two sentences of Article 10 § 1 (art. 10-1), without it being necessary to ascertain the reason and purpose for which the right is to be exercised." (§ 47)
The Autronic case is referred to in SHINER p 96.

[134] See for example Société de Conception de Presse et d'Edition et Ponson v. France, Application Nr. 26935/05, where the liability for unlawful conduct was borne by the publisher of the magazine and not the producer of the tobacco product for which a fine was imposed.

[135] Directive 2010/13/EU

[136] See Shiner p 96

[137] See a more detailed analysis in Andrew Clapham, *Human Rights in the Private Sphere*, *Human Rights* (Clarendon Press, 1993), http://books.google.com/books?id=NO0HLeSnBbMC. p 89-133,

U.S., starting from 1979[138] the ECtHR started to extend fundamental rights protection to cases where the infringement was not directly caused by state action, but somehow attributed to the state. The self-regulation related Section of the dissertation includes the list of possible scenarios, where states have been brought before the ECtHR for private abuse of human rights. Commercial speech cases involves the situation, whereby the ECtHR considers that a private body (in the ECtHR examples a professional self-regulatory organization) is an organ of the state.

3.2.1 Positive obligation of the state vs. assumption of public status

In fact here the ECtHR has two alternative options. The first alternative that the ECtHR holds the state liable for a private action infringing free speech rights based on the doctrine of positive obligations of the state (i.e. that the state should have intervened by legislation or otherwise between the private parties to defend free speech rights). The second alternative concerns cases of private regulatory bodies (professional organizations) which pursue public functions. In these cases the private regulatory body is considered by the ECtHR an organ of the state. The question of the state's positive obligations don't come up In this latter interpretation, as the private organ is considered a state body and as a result, formally speaking, there is no private element on the interference side.

An example for the state positive obligation scenario is Vgt v Switzerland[139]), where the dispute was triggered by a private company which, based on Swiss state law prohibiting political advertising, refused the advertising request by the applicant. The Swiss government

[138] "The application of positive obligations in the Court's jurisprudence begins with the judgments in the cases of Marcks and Airey in 1979." See Dimitris Xenos, *The Positive Obligations of the State Under the European Convention of Human Rights* (London and New York: Routledge, 2012). p22
Clapham (p89) refers to § 23 of the judgment in case of X and Y v. The Netherlands (1985), where the ECtHR stated that the rights in the Convention create obligations for States which involve "the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves".
[139] Application number 24699/94

defended itself arguing that it does not control actions by private companies. The ECtHR wiped this argument away by dealing the trump of positive obligation of the state.

Under Article 1 of the Convention, each Contracting State "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention". (...) (I)n addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, "there may be positive obligations inherent" in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation."[140]

3.2.1 The "state court" argument

There are a number of commercial speech cases where professional self-regulatory organizations are considered state body, but it is only in Casado Coca v. Spain, where this matter explicitly discussed by the Court. In other cases the ECtHR simply gets around the problem by stating that state courts approved the speech restriction, and thereby the precondition of state interference was met. It is interesting that the ECtHR ends up with the same "state court" argument even in Casado Coca. Below I mention Barthold v. Germany, as an example for the "state court involvement" argument and Casado Coca.

In Barthold[141] *("violation" 1985)* the interference in the free speech rights of the applicant was by a private organization[142], using self-regulatory provisions. Although it would have been an obvious defense, the Government did not use this argument, nor did the Court recognize it ex officio. Instead, the Court based its jurisdiction with the argument that the judgment of the national appeal court in this private dispute constitutes interference by a public authority.

[140] Section 45 of VgT v. Switzerland
[141] Barthold v. Germany, Application number: 8734/1979
[142] A self-regulatory organization called "Pro Honore" was the first organ which adjudged the case and called Herr Barthold to refrain from similar actions in the future and to pay a penalty.

In CasadoCoca[143] *("no violation" 1994)*, answering the argument of the Spanish government that the problematic interference is merely an internal sanction by peers, the Court stated that bar associations are qualified as public law corporations, their purpose is to serve public interest and their decisions may be appealed before state courts[144]. However, the ECtHR, having been through the argumentation to re-qualify a private body into a public one, ended up with the Barthold argument:

> "....(Competent) courts and the Constitutional Court, all of which are State institutions, upheld the penalty (...). That being so, it is reasonable to hold that there was an interference by a "public authority" with Mr Casado Coca's freedom to impart information."[145]

3.3 Article 10.2 and the three prong test.

At statutory level, the European regulation differs from that of the U.S., where freedom of speech is perceived to be unconditional and unabridged ("Congress shall make no law abridging the freedom of speech, or of the press.") Under the Convention freedom of expression is not unconditional in Europe, and interference with such right is permitted by the Convention itself, if the given measure meets the requirements of Art 10.2, which consists of a three prong test. The first prong is that the restriction must be prescribed by law, i.e. non legal restrictions of speech by a state (e.g. ad hoc orders of a government authority) are *ab ovo* contrary to the Convention. The second prong is that the restriction must serve one or several of the legitimate aims, expressly listed in Article 10.2. The third prong is that the restriction is acceptable if it proves to be necessary in a democratic society.

3.3.1 The "prescribed by law" test

The "prescribed by law" test is especially relevant to self-regulation, as its source is admittedly not a legitimate legislative body of a state, and therefore it may not qualify as law

[143] Casado Coca v. Spain Application number 15450/89
[144] § 39 Casado Coca
[145] § 39 Casado Coca

under local jurisdiction (and consequently the given restriction qualifies as "prescribed by law") for the purposes of the Convention.

The ECtHR remains flexible, and does not enter into analysis of national legislation in judging whether a restricting measure qualifies as law or not. Instead, it uses the empirical features of accessibility and precision to a reasonable extent:

> "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 any individual – 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." [146]

As another approach, ECtHR accepts the position of local authorities, without particular analysis. In Casado Coca[147], for example the ECtHR accepted the position of the Spanish Supreme Court that regulations of local bar associations qualify law, and the measure contested in that case therefore qualified as "prescribed by law" and met the first prong.[148]

A note on the national application of the ECHR from the UK, where the Convention was transposed into national law, together with the entire body of the ECtHR case law.[149] The English Administrative Court is even more explicit in qualifying self-regulation to meet the "prescribed by law" requirement. English courts consider the Advertising Standards Authority **("the ASA")** a government body despite that it is a fully private organization. In the given case the plaintiff argued that the decision of the ASA is not prescribed by law therefore it infringes the Convention. The Court stated that

[146] Hertel v. Switzerland, App Nr. 25181/94, § 35

[147] Casado Coca v. Spain, App. Nr. 15450/89

[148] § 43 Ibid. (Casado)

[149] See Sections 1 and 2 of the Human Rights Act 1998

> ”The adjudications of the Advertising Standards Authority published pursuant to the British Codes of Advertising and Sales Promotion (10th edition 1999) were "prescribed by law" for the purposes of the European Convention on Human Rights 1950 Art.10(2). (...) Held, refusing the application, that the adjudications of the ASA published under the Codes were "prescribed by law" for the purposes of Art.10(2). The Control of Misleading Advertisements Regulations 1988 provided statutory recognition of accepted methods for handling complaints. It was therefore apparent that the Codes were recognized within subordinate legislation. They also satisfied the requirements of accessibility and precision set out in Barthold v Germany (A/90) (1985) 7 E.H.R.R. 383. Accordingly, whilst not having direct statutory effect, the Codes fell within the meaning of Art.10(2).”[150]

3.3.2 The “legitimate aim” test

The legitimate aim element in the leading commercial speech cases is always the “rights of others”. As mentioned above, these cases are either advertising restrictions, protecting competitors (Barthold, Hertel, markt intern), or advertising restrictions protecting consumers (Ponson, Krone,). With respect to broadcast media, the “rights of others” may be extended to the protection of pluralistic media, without the disproportionate influence by commercial advertising, which may be necessary due to the fact that in “reality (...) broadcasting, and television in particular, is driven by commercial advertising. Programming is a matter of editorial choice and is subject to the need to maximize viewership. Even in the context of public broadcasting, with all its obligations of fairness, there is a strong tendency to avoid divisive or offensive topics.”[151]

3.3.3. The “necessary in a democratic society” test - Ad hoc or strict standards?

[150] R. v Advertising Standards Authority Ltd Ex p. Matthias Rath BV
Queen's Bench Division (Administrative Court)
06 December 2000
[2001] E.M.L.R. 22; [2001] H.R.L.R. 22

[151] See Animal Defnders International v. UK (App. Nr. 48876/08), Joint Dissenting Opinion §§ 11 and 13

The outcome of most free speech cases depends on the test where the Court assesses if in the given circumstances the speech restriction was necessary in a democratic society. This is done by a proportionality analysis, whereby the Court "*determine(s) whether the actual "restrictions" and "penalties" complained of by the applicant were "necessary in a democratic society"*[152].

Although the proportionality analysis is not carved in stone and varies depending on the factual and legal circumstances, the elements used in §62 of the Sunday Times v. The United Kingdom case of 1979 appear to reflect a set of elements that are often referred to in subsequent Article 10 case law concerning commercial speech (hereinafter ***"the Sunday Times formula"***) [153]. Under the Sunday Times formula the Court tests

> "whether the "interference" complained of corresponded to a "pressing social need", whether it was "proportionate to the legitimate aim pursued", whether the reasons given by the national authorities to justify it are "relevant and sufficient under Article 10 (2)".

For the reasons explained above the Court could neither develop an abstract definition for the "pressing social need", "the proportionality test" and the "relevant and sufficient" requirement nor could it work out the relationship among these elements. Moreover, the elements of the Sunday Times formula are used (or not used) alternately, depending on the circumstances of the case in question[154]. Therefore, the elements of the necessity test and their interaction are

[152] Handyside §47

[153] These elements first appeared in Handyside §48-50. Sunday Times (1979) §62 or TV Vest (2008) §58 include more elaborate language. For a brief comparative analysis of Article 10 of the Convention as reflected in the the Sunday Times formula and the relevant Articles of the Canadian Charter of Rights and Freedoms and the First Amendment of the U.S. Constitution, see Roger A. Shiner, Freedom of Commercial Expression, (OUP, 2003). p 95-96

[154] The final verdict of the Sunday Times case (§67) is an eminent example where the Court was matching its arguments to the elements of the menu: "Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2) (art. 10-2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary."

interpreted rather widely.[155] In order to increase foreseeability for both government authorities and individuals, and to ease case analysis for themselves, the Strasbourg organs have developed a detailed vocabulary of further standards of review. For example, the Court – depending on the circumstances of the given case - use the formulas whereby "the necessity of interference must be *convincingly established"*[156] or national restrictions must be *"closely scrutinized"*[157] and the national authorities must base themselves *"on acceptable assessment of the relevant facts"*[158] . Similarly to the elements of the Sunday Times formula, these further formulas are not "standard" in that they are alternately used depending on the given circumstances of the case in question. An important example of a lax "further standard" applicable to commercial cases provides that here the national measures should be *"justifiable in principle and proportionate"*. This was the standard of review in the cases of *markt intern, Casado Coca* and *Jacubowski*[159] - all of which ended with a "no violation" judgment.

The most recently applied necessity test on commercial speech is that of Mouvement raëlien suisse v. Switzerland, where the Court stated that

> "As set forth in Article 10, this freedom is subject to exceptions, which (...) must, however, be construed strictly, and the need for any restrictions must be established convincingly (...)"[160]

In the proportionality test the Court examines the appropriateness between the "means and aims", i.e. it assesses whether in the given circumstances the gravity interference was

[155] According to Randall (p 4) "The ECtHR has attempted to strike a balance between national sovereignty and its supervisory func tion, by interpreting the requirement that the measure be 'necessary in a democratic society' as implying a 'pressing social need'. The latter is, as the Court puts it, neither synonymous with 'indispensable', 'absolutely necessary' or 'strictly necessary'; nor does it have the flexibility of terms such as 'useful', 'reasonable' or 'desirable'. Rather, the Court has to evaluate whether 'the measure is proportionate to the legitimate aim pursued' and whether the reasons given by national authorities to justify it are 'relevant and sufficient'." According to Arai (p 11) "The Convention bodies have developed two criteria for applying this standard ("necessary in a democratic society"): the reasons adduced by a respondent State for for justifying an interference must be both „relevant and sufficient", and most importantly, the „necessity implies the existence of a "pressing social need". This means that the interference must be proportionate to the legitimate aim pursued."

[156] See for example Barthold §58
[157] Casado Coca §51, Krone §31
[158] Stambuk §38
[159] See §33 of markt intern; §50 of Casado Coca; §26 of Jacubowski
[160] § 48 App Nr. 16354/06

proportional to the importance of the legitimate aim. For example, capping election campaign expenses at GBP 5[161] or the requirement to provide evidence of correctness of value judgments[162] was found to be a disproportionately heavy interference of speech rights.

3.4 Scope, level of scrutiny or both? - The margin of appreciation

> "The term margin of appreciation is used to indicate the measure of discretion allowed the Member States in the manner in which they implement the Convention's standards, taking into account their own particular national circumstances and conditions."[163]

The margin of appreciation is unavoidable, because of difference among national traditions, habits, morals, detailed local legal environment. Therefore, the Court cannot be expected to decide the same way in a similar factual basis but in different national contexts. As a result, a certain level of discretion is left for states to regulate:

> "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them."[164]

The margin of appreciation is obviously not an exception from the free speech right, but a recognition that national authorities may better judge the appropriate measures to comply with the Convention. It is impossible to define a strict test for the application of the margin of appreciation, though there are some guiding principles. The margin of appreciation of national authorities is higher in *"the complex and fluctuating area of unfair competition (...). The same applies to advertising."*[165] Although the margin of appreciation is mostly driven by the

[161] Bowman
[162] Lingens
[163] Arai (p2) and George Letsas argue that besides the margin of appreciation described by Arai, which Letsas calls „structural margin of appreciation" there is a so called „substantial margin of appreciation" which is embodied in the "accomodation clauses" of Articles 8-2, 9-2, 10-2 and 11-2. Under the substantial margin of appreciation "the Court has to decide whether a particular interference with a Convention freedom is justified", while under the structural margin of appreciation "the Court refrains explicitly from employing a substantive test of human rights review".
[164] Handyside § 48
[165] Casado Coca § 50

recognition of lower value of the given expression and indicates a certain level of deference, it seems that the Strasbourg organs use this doctrine for both the substantial assessment (*"overstepped its margin of appreciation"*[166]) and formalistic decisions *("the national court is better placed…").* As a result there is an overlap between this doctrine and the necessity test, which is reflected in the case analysis below.

3.5 Categorization and treatment of commercial adverts: the value of speech and margin of appreciation

The guiding principle of the ECtHR assessment method is that the necessity test is applied more or less strictly depending on the speech at issue[167], and the scope of margin of appreciation also differs depending on the category of speech. Commercial advertising in its clear manifestation is considered by the Starsbourg organs as lower value commercial expression. In the case of Casado Coca[168], for example, the Court stated that

"In some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions."[169]

In Demuth v. Switzerland, the Court expressly tied the higher level of margin of appreciation with commercial speech.

> "However, the authorities' margin of appreciation is essential in an area as fluctuating as that of commercial broadcasting (...) It follows that, where commercial speech is concerned, the standards of scrutiny may be less severe."[170]

This trend was recently broken in a case of commercial advertising (*Krone in 2003*), where the Court entered into a detailed proportionality analysis in a pure commercial advertising case.

[166] E.g. Krone §34
[167] See Randall p4,
[168] Casado Coca v. Spain App. nr. 15450/89
[169] Ibid. (Casado Coca) §51
[170] § 42 of Demuth v. Switzerland, 2002, App nr. 38743/97

Besides "*lower value*", *ephiteta ornans of commercial advertising* include *"complex and fluctuating area"* and sometimes *"lack of European consensus".* There are exceptions from the latter, though, for example, in *Ponson*[171], which concerns unlawful tobacco advertising in a printed periodical, the Court noted that there is both European and worldwide consensus to strictly regulate the advertising of tobacco products.[172] The cases however, rarely produce clear-cut examples and the Court is very careful with any categorization of expressions.

The key part of the necessity test is the proportionality analysis, whereby the Court assesses whether the interference with the protected right(s) is proportional to the legitimate aim. Although the literature and some dicta in the cases sometimes names this process as "balancing Convention rights with the rights of others"[173], there are **three** problems with this approach.

First, the "balancing approach" disregards the fact that protection of free speech right is the rule (Art. 10.1), and conflicting interests (legitimate aims) (Art 10.2) are at most considered as exceptions from the rule. Unequal weights cannot be balanced, therefore, the better approach is the proportionality analysis.

Second, the "balancing approach" presumes a situation having two contradicting interests, which is often not the case before the ECtHR, where conflict situations involve several conflicting rights of several persons.

For example, in Casado Coca, the court was supposed to consider

> "various interests involved, namely the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information

[171] Société de Conception de Presse et d'Edition and Ponson v. France Application Nr. 26935/05
[172] §§ 57 and 63 Ibid. (Ponson)
[173] See Bowman § 43 or Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe*. p 69

about legal assistance, and affording members of the Bar the possibility of advertising their practices"[174].

Third, balancing necessarily compares rights and interests, which does not reflect the real analytical process whereby the ECtHR assesses not only the severity of legitimate aims, but also that of the given measure compared with the free speech right in the given situation. In Krone[175], for example, proportionality of a measure was assessed by taking into account that "no penalty was imposed, (and that) (...) the measure at issue has quite far- reaching consequences as regards future advertising involving price comparison (...). The Court considers the injunction to be far too broad, impairing the very essence of price comparison. Moreover, its practical implementation – although not impossible – in general appears to be highly difficult for the applicant company."[176]

There is no generally applicable test for the proportionality analysis and instead the Court applies several standard formulas depending on the underlying background. Three of these indicative standards have been typical in commercial speech cases: the generally applicable *"Sunday Times formula"* is eased by the *"Barthold / markt intern formula"* allowing higher margin of appreciation and requiring the more lax "justifiable in principle and proportionate" standard. Although the Court has developed a tailor-made *"Casado Coca formula"* for commercial advertising, its use is apparently rather rhetoric than substantive.

3.6 Mixed speech

Unlike in the U.S., mixed speech, consisting of both commercial and non-commercial elements does not share the fate of pure commercial speech in the ECtHR jurisdiction. The leading case of *Hertel v. Switzerland*[177] deals with an article based on an evidently misleading research paper by Mr. Hertel (and co-authors) about the harmful effects of

[174] Casado Coca § 55
[175] Krone Verlag GmbH & Co. KG v. Austria (2003), App. nr. 39069/97
[176] Ibid. (Krone) §33
[177] App. Nr. 25181/94 (1998)

microwave ovens on health. At the complaint of a Swiss NGO, the Swiss Courts on the basis of the Swiss Unfair Competition Act prohibited Mr. Hertel from making his above statements. The case touched on several issues, inter alia, the question whether Mr. Hertel as an uninterested party would be subject to the Swiss Unfair Competition Act. As to the necessity test, the ECtHR held that the high margin of appreciation, which is generally applicable in commercial matters and especially unfair competition cases must be reduced when not purely commercial speech is at stake, but the speaker's participation in a debate affects general interest.[178]

In *Stambuk v. Germany* the Court decided on a case concerning an article by a doctor, which was interpreted by the German authorities as prohibited professional advertising. Dr. Stambuk was fined and he was seeking legal remedies for breach of his right to freedom of expression. The Court recognized the presence of advertising element, but, unlike in the case of lawyers (*Casado Coca*), it did not apply margin of appreciation, arguing that there is no diversity among the member states in connection with public communications by doctors[179]. This would suggest that states enjoy wide margin of appreciation in regulating professional advertising by doctors. However, the ECtHR also found the commercial element as secondary nature only and recognized and appreciated the role of the press in a democratic society[180]. Hence the valuable speech element was decisive here and triggered a detailed necessity analysis, whereby the Court found that the prohibition in the given case was not necessary in a democratic society.

[178] See § 47 Ibid (Hertel)
[179] Stambuk v. Germany App. Nr. 37928 / 97 §40
[180] Ibid. (Stambuk) § 42

3.7 Advertising on Broadcast media – an analogy to regulation of political broadcast advertising

3.7.1 The recognition of immediate and powerful effect of broadcasting.

Since paid political advertising on television and radio prohibited in several European countries, there is no European consensus, and this matter is a widely debated issue, the ECtHR has repeatedly dealt with the powerful position of the broadcast media in political advertising cases[181]. It seems that the general findings of the Court in the political broadcast advertising cases would be applicable for an eventual dispute with respect to restrictions on commercial broadcast advertising.

The Court's starting point is that

> "Article 10 protects not only the content and substance of information but also the means of dissemination since any restriction on the means necessarily interferes with the right to receive and impart information."[182]

In other words, a prohibition of commercial advertising on television would be considered as an interference with free speech rights of the media and the advertiser, even if alternative media remained available.

The second generally recognized premise is that "the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference"[183], and radio and television broadcasting has

> "immediate and powerful effect, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the

[181] A distinct stream of case law has emerged regarding advertising of political views (TV Vest (2009), religion (Murphy (2003) and subjects of general interest (Verein gegen Tierfabriken (2001). The Court consistently considered these advertisings as high value expression and distinguished from commercial speech. Unlike commercial advertising, regulation of political advertising is subject to the most careful scrutiny and a narrow margin of appreciation (§ 104, Animal Defenders).
[182] Murphy v. Ireland App. Nr. 44179/98, § 61
[183] Ibid. (Murphy) § 69

> home"[184], the audio-visual media have a more immediate and powerful effect than the print media[185]

and such factor would be important in the consideration of the proportionality of an interference[186].

3.7.2 Impartiality and financial pressure

In TV Vest, the Court also emphasized the importance to protect impartiality of television broadcasts[187] against financial pressure. This factor was even better spelled out in VgT, where the Court stated that

> "It is true that powerful financial groups (...) may (...) eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society. (...)This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely"[188].

Although the issue of financial influence on impartiality and pluralism was considered in connection with paid political advertising, the problem is similar to the potential influence of commercial advertising on program content and scheduling.

3.7.3 Margin of appreciation in broadcast media related cases

The Court's case law suggests that the more influential nature of the broadcast media influences the level of margin of appreciation. The case law, however, does not give a firm direction as to which way would the type of media influence the Court's decisions. In Murphy[189], for example, it seems that the powerful effect of broadcast media trigger higher

[184] Animal Defenders § 119
[185] §60 TV VEST AS & Rogaland Pensjonsparti v. Norway App. Nr. 21132/05
[186] See for example Murphy § 69
[187] Ibid. (TV Vest) § 70
[188] § 73 Verein gegen Tierfabriken v. Switzerland App. Nr. 24699/94
[189] See § 74 of Murphy: "The State was, in the Court's view, entitled to be particularly wary of the potential for offence in the broadcasting context, such media being accepted by this Court (see paragraph 69) and acknowledged by the applicant, as having a more immediate, invasive and powerful impact including, as the Government and the High Court noted, on the passive recipient."

margin of appreciation. In TV Vest[190] the Court implies that the "more immediate and powerful effect" broadcast media may serve as a justification of regulation. In Animal Defenders[191], and VgT[192] however, television as the medium of advertising triggers a narrower margin of appreciation.

4. SUMMARY

Cultural, language and historic diversity is reflected in the differences between the protection of commercial speech under the First Amendment and Article 10 of the ECHR. In this Section I have examined three aspects, the protection of pure commercial speech, the protection of mixed speech and the impact of the broadcast media as the most powerful medium on the legal treatment of commercial speech regulation.

4.1 Pure commercial speech.

As to pure commercial speech, the clear categorization and constitutionality test in the U.S. (Central Hudson) has no counterpart in the ECtHR jurisdiction. The ECtHR recognizes commercial speech and attaches a lower value to it; however, no overall standard has been developed to treat such expressions. In addition, it is the policy of the ECtHR to allow a certain, somewhat volatile level of margin of appreciation for the national authorities, as they are often considered better placed to judge the given issue. Still, it makes sense, even if for the sake of intellectual exercise, to compare the Central Hudson test with the Convention and the ECtHR case law:

See §
[190] § 76 of TV Vest
[191] See Animal Defenders §§ 102-104
[192] § 77 of Vgt: "(...) the Court observes that the applicant association, aiming at reaching the entire Swiss public, had no other means than the national television programmes of the Swiss Radio and Television Company at its disposal, since these programmes were the only ones broadcast throughout Switzerland."

Central Hudson test	ECHR test
advertising of unlawful activity and misleading advertising are not protected	advertising of unlawful activity is not protected (Ponson) Misleading commercial advertising is not protected (Scientology)
asserted governmental interest must be substantial	protection is limited to the legitimate aims, listed in Art 10.2 of the Convention
the regulation directly advances the governmental interest asserted	substanitive proportionality analysis (Sunday Times; Raelien Suisse, etc.)
the regulation is not more extensive than is necessary to serve that interest	means and aims proportionality analysis (Bowman, Krone, etc.)

4.2 Mixed speech

As to mixed speech, the U.S. courts apply the same treatment as pure commercial speech with a tiny difference, when commercial and non-commercial contents are inextricably intertwined (Bigelow). The ECtHR lends greater importance to non-commercial elements in commercial speech (Hertel, Stambuk). It appears that non commercial content is in fact a savior of speech in the European regime.

4.3 Radio and television broadcasting

As to radio and television broadcasting as a media carrying the messages, first of all, both the U.S. and European regulatory system principally targets the media and not the speakers. Therefore, speakers using broadcast media are indirectly regulated, and exposed to self-regulation by broadcast media. Chilling effect of broadcast media regulation therefore has bigger risk than in the case of a directly applicable speech restriction (e.g. the one in Virginia Pharmacy, where the pharmacists were directly prohibited to announce drug prices, or in Hertel, where the unfair competition act was directly applied to the speaker, even if the problematic allegations were in a newspaper article, written by a journalist and not by the speaker himself).

Broadcasting is also important for being the principal media for commercial advertising, and therefore the main target of advertising regulation.

Finally, as mentioned above, issues regarding pluralism more explicitly pop up in a pre-scheduled, linear programming than in a VOD type, viewer controlled media service.

Getting to the constitutional standards, it appears that in the U.S. stricter broadcast media regulation would in theory be allowed, using the scarcity of frequencies argument (Red Lion) and the pervasive presence argument (FCC v. Pacifica). In reality, however, the media does not have decisive effect on the legal treatment of commercial speech in the U.S. The ECtHR (although not adamantly) better appreciates the powerful effect argument (Animal Defenders), and in certain cases allows narrower margin of appreciation. There are exceptions, however, where it is exactly the importance of the broadcast media that leads to a higher margin of appreciation (Murphy).

4.4 Protection of commercial speech against advertising self-regulation

What follows from this for the protection of commercial speech against efforts of advertising self-regulation?

First, commercial broadcast advertising is subject to a very detailed content regulation in Europe both by legislation and self-regulation. The legislative measures are mostly harmonized at Union level (see the Audiovisual Media Services Directive), but as will be shown in the country chapters later on, the European advertising self-regulation is dominantly organized on a national basis (with the exception of EASA, which concerns cross border complaint handling only). This matches the nature of the ECtHR jurisdiction, which also considers national regulatory systems rather than cross border regulation.

Second, the European advertising self-regulatory regimes clearly focus on pure commercial speech and do not cover mixed or political advertising. Therefore it is expectable, that the

ECtHR will be deferential to the national authorities to handle any complaints against restricting commercial speech by advertising self-regulation.

D. "Soft issues": Offensive, indecent, tasteless speech and advertising self-regulation

1. SOFT ISSUES / HARD ISSUES

I argue in my dissertation that restrictions of commercial advertising content on the basis of "decency", "ethics", "offense" or "generally prevailing taste of the society" are wide concepts and allow plenty of room for the judge or self-regulatory decision maker for discretion. These rather paternalistic restrictions are principally commercially driven, and mostly enforced through vaguely drafted self-regulatory codes which allow wide discretion in censoring commercial communication which allows consumer complaints on a rather wide basis. As decency is one of the four main principles ("legal", "decent", "honest" and "truthful") of the European Advertising Standards Alliance and it is also a leading principle of the Consolidated ICC Code of Advertising & Marketing Communication Practice[193] which is the basis of most of the national self-regulatory codes in Europe[194], decency based restriction of commercial speech is a generally followed practice throughout Europe.Taking a quick look at the country chapters in the Blue Book[195] one sees that "decency" or „taste and decency" is declared as one of the leading principles of the advertising self-regulatory codes of all the EASA member states. Self-regulatory codes of Poland, Spain and the United Kingdom use the term "offense" instead of decency but it seems that the principle is the same, and only the terminology is different:

[193] Available at the ICC website http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/Advertising-and-Marketing-Communication-Practice-(Consolidated-ICC-Code)/ (Last visited June 24, 2013)
[194] European Advertising Standards Alliance, *Advertising Self-regulation in Europe and Beyond ("the Blue Book")*, 6th ed. (EASA, 2010). p 19
[195] Ibid.

Although decency is not mentioned in the Polish code, offensive advertising is a sensitive issue. Out of the 627 complaints in 2009, 250 were related to advertisements offending the audience.[196]

The Spanish Code does not mention decency, but according to Section 8 "advertising shall not include contents that cause offence against prevailing standards of good taste,social decorum, and good customs."[197]

The case of the United Kingdom is discussed in Section A of Part II. The BCAP Code provides that

> "Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards."

A great variety of complaints is adjudicated by the ASA under this clause. As discussed in the UK related Section, the BCAP Code mentions "offense" together with "harm" and self-regulatory adjudication process, seems to treat all the advertising restrictions in the same neutral mechanism. The ASA Council examines compliance only and there are no different levels of scrutiny depending on the potential or actual harm or offence threatened with or caused by the given commercial.

As explained above in connection with the role of media in the advertising self-regulation, in most of these cases this censoring is not a self-censorship by the advertisers themselves, but a private censorship by the media. This private censorship remains mostly invisible, as it does not involve any formal legal process, i.e. broadcasters simply refuse the advertising spot that does not comply with the standards or assumed standards of legislation of self-regulation. The formal content restriction through adjudication by the advertising self-regulatory organization

[196] Ibid. (Blue Book) p 130
[197] Code of Advertising Practice of the Asociación para la Autorregulación de la Comunicación Comercial (AUTOCONTROL) at http://www.autocontrol.es/pdfs/Code%20of%20Advertising%20Practice%20English%20Version.pdf (in English, Last visited June 26, 2013)

forms a separate filter in addition to the informal censorship by the media. Below, are a few examples of self-regulatory authority decisions regarding content that was found offensive, indecent or tasteless. These examples illustrate the wide variety of matters discussed by self-regulatory authorities, and that some of the cases would be borderline taking into account the ECtHR case law.

- In the Home Test Direct Case the Advertising Standards Authority of the UK ("the ASA") blocked a HPV test advertising with supporting (true) arguments which included that „Each day in the UK, around eight women are diagnosed with cervical cancer. Three of those will die." The ASA found the advert scaremongering, as it did not include several important pieces of information about the risks of cervical cancer.[198]

- The German Werberat blocked a TV commercial of a bank in which a reputable dressed man jumps from the bridge. It looks like suicide, apparently because of financial hardships - until finally it becomes clear that it is a bungee jumper. The advert was found indecent as it was playing with human despair.[199]

- A complainant called for prohibiting television advertisements regarding feminine hygiene in general. The Werberat has found no violation, as today people openly talk about sex, and menstruation problems are discussed in school education.[200]

- ÖRT, the Hungarian self-regulatory organization gave a negative copy advice on a billboard campaign of an NGO calling attention for the risks of AIDS-HIV. The ÖRT argued that the campaign "would result in propaganda in favor of homosexuality"[201].

- The operator of an Internet platform showed in his TV spot under the heading 'dive sites' three men in wheelchairs, partially missing arms and legs - apparently because of an earlier attack by sharks taken place. The Werberat instructed the advertiser to amend the spot, as "severe disabilities are exploited for advertising purposes".[202]

- A television broadcaster advertised its new animated series that deals with the Vatikan under the heading " laughter rather than hanging out" in full-page ads. The advert shows an empty cross, Christ sitting in the foreground in front of a TV set with his

[198] ASA Rulings at A12-203992, available at the ASA Website at: http://asa.org.uk/Rulings/Adjudications/2012/10/Home-Test-Direct-Pty-Ltd/SHP_ADJ_203992.aspx (Last visited July 25, 2013)
[199] See the Werberat website regarding selected decisions in the Nineties at http://www.werberat.de/die-90er (Last wisited July 25, 2013)
[200] Ibid. (Werberat decisions in the Nineties)
[201] Quote from Lambda's open letter for ÖRT http://www.hatter.hu/programjaink/lobbizas-itthon/egyeb/tiltakozas-az-onszabalyozo-reklam- testulet-etikai-bizottsaganak-a (in Hungarian, last visited February 19, 2013)
[202] See the Werberat website regarding selected decisions starting from year 2000 at http://www.werberat.de/die-nuller (Last visited July 25, 2013)

Crown of Thorns and remote control in his hands and laughs. The advertising was blocked by the German Werberat.[203]

- In its Sofa Factory ruling[204] the ASA blocked an advert which used an image of Guru Nanak, the founder of Sikhism and sacred Sikh verses calling the audience to buy sofas. The advertising was found offensive by the ASA.

- The "stallions and mares" advert by Paddy Power[205] triggered the largest number of cross-border complaints in EASA's records of recent years[206]. The ad featured women, some of whom were apparently transgender, during a horse race and invited the viewer to "spot the trans-women from the normal women" referring to them as "stallions and mares". The complainants found the ad to be offensive because it ridiculed transgender individuals and was prohibited by the Irish self-regulatory organization (ASAI). [207]

- TV ads for a TV programme of Channel Four Television of the UK titled "My Big Fat Gypsy Wedding"[208] were stopped the ASA Broadcast as some of the images together with the accompanying text were found offensive and irresponsible.

The above adverts represent the so called "soft issues" of advertising. Offending, indecent, tasteless, etc. speech, which is generally regulated as "Harm and Offence" in the BCAP Code of the UK, and as "indecency" and "unethical" in the German Werberat code concern rather the form of the commercial message than the hard facts concerning quality, price, availability, etc. of the product or service being advertised.[209] "Hard issues" are normally covered by the national unfair competition law dealing with economic issues and market distortion (based on the EU level Unfair Business-to-Consumer Commercial Practices Directive[210] or the Misleading Advertising Directive[211]) and consumer protection legislation, which focuses on preventing personal harm directly caused to consumers. As seen above, soft issues are of a

[203] Ibid. (Werberat website)
[204] The Sofa Factory Ltd. (A12-186954)
[205] See the spot at youtube: http://www.youtube.com/watch?v=1XZ5MOB3nww (Last visited July 2, 2013)
[206] EASA, "Cross Border Complaints Annual Report 2012," 2012, http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=2ajb5s45taeuaxjsubz1ucvr/2012_CBC_report_FINAL.pdf. p 7
[207] 2456/2463 - Paddy Power in EASA, "EASA Cross-Border Complaints Quarterly Report N ° 56 2012/02" 56, no. June (2012): 1–6.
[208] See the trailer here: http://www.youtube.com/watch?v=2HAUmII_hcg
[209] The idea of "soft" and "hard issues" is by Jean Boddewyn in Jean J Boddewyn, "Controlling Sex and Decency in Advertising Around the World," *Journal of Advertising* 20, no. 4 (1991): 25–35.
[210] Directive 2005/29/EC
[211] Misleading Advertising Directive 2006/114/EC,

wide variety, some of them are typically regulated by national legislation (protection of Human dignity), but most of the above soft issues are regulated by advertising self-regulation. This Section discusses this chicken-or-egg type of problem; are these cases issues for the advertising self-regulation, or vice versa, the advertising self-regulation made them issues?

For the purpose of the dissertation am calling the great variety of soft issues (offensive, indecent, obscene, unethical, hate speech, etc.) as **"offensive speech".**

2. RESTRICTIONS OF SPEECH RIGHT: HARM AND OFFENSE

Free speech (expression) is expressed in human rights documents as "right to free speech" instead of simply "free speech", which implies the notion (that I already mentioned with respect to pluralism) that free speech is in the junction of conflicting interests and it is rather a regulatory goal than declaration of a status quo. "Speech is important because we are socially situated and it makes little sense to say that Robinson Crusoe has a right to free speech."[212] Free speech theory has two main approaches. The first is the justification of the high value attributed to speech among the fundamental rights. In this respect the most important arguments are that speech is a means of getting closer to truth in the marketplace of ideas, participation in social and political decision-making and individual self-fulfillment.[213] The principle of harm and the principle of offence approaches freedom of speech from points of view of its limitation. Under the harm principle, by Mill,

> "(T)he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[214]

Harm, of course, is a broad concept and no clear definition is possible for a legislation restricting speech on this basis. Mill does not expressly define "harm" either. According to the

[212] David van Mill, "'Freedom of Speech'," *The Stanford Encyclopedia of Philosophy (Winter 2012 Edition)*, 2012, <http://plato.stanford.edu/archives/win2012/entries/freedom-speech/>. p 2
[213] For the summary of arguments regarding justifications of free speech see Chapter 1, András Sajó, *Freedom of Expression* (Warszawa: Institut Spraw Publicznych, 2004).
[214] See Section I.9 of J. S. Mill, On Liberty

literature Mill can be interpreted to imply that an action may be restricted or prohibited by regulation as harmful, if it directly and in the first instance invades the rights of a person[215]. As a result of this definition there is little space to restrict speech as it is hard to find cases when speech directly harms the rights of others. Due to the broad concept of harm, however, the particular pieces of legislation may define harm in various ways, allowing less or more space for speech. In the above examples misleading and unfair advertising qualifies as harmful speech.

The "offense principle" was introduced by Joel Feinberg[216]. He claims that restriction on speech solely on the basis that it causes harm is not sufficient, because there are very offensive expressions, which do not cause harm but still must also be restricted. Feinberg states though that offense is not as serious as harm, and therefore the penalty for offences should not be so severe.

Again, offensive nature of speech depends on several factors. According to Feinberg "...these include the extent, duration and social value of the speech, the ease with which it can be avoided, the motives of the speaker, the number of people offended, the intensity of the offense, and the general interest of the community at large."[217]

The institution of "offensive speech" involves both regulatory and constitutional uncertainties. The principal regulatory problem with the term "offense" is its uncertainty that opens the door for any arbitrary restrictions. Accepting the notion that speech may be restricted on the basis of offence would imply the opposite as well: only "non-offensive" or "peaceful" (or even "supportive") speech is permitted. In addition, whether speech qualifies as "offensive" or

[215]Section 2.1 David van Mill, "'Freedom of Speech'," The Stanford Encyclopedia of Philosophy (Winter 2012 Edition), 2012,
<http://plato.stanford.edu/archives/win2012/entries/freedom-speech/>. p
[216] Feinberg: The Moral Limits of the Criminal Law, Vol. 2. Offense to Others, Oxford: OUP referred to in Ibid.(van Mill)
[217] Ibid. (van Mill)

"peaceful" depends on the context, timing, the target, the number of people offended, etc. Therefore, with some exaggeration, speech is offensive if it is complained of. The advertising self-regulatory systems are built on consumer complaints, which is a good basis for the flourishing of speech restrictions using the offence argument. Human rights documents, constitutions, national legislation, therefore, do not authorize for speech restrictions on the ground of offence in general, but always specify the target, the mode, time, etc. or qualify the restriction with reference to general democratic values. In the context of commercial speech the "soft issues" qualify as offensive speech.

The other problem with the term "offensive" versus "harmful" speech is related to the constitutional protection of speech. As seen below, the First Amendment doctrine and the ECtHR case law under Article 10 do not match with the idea of harm and offence. The notion of "clear and present danger" or the various tests involving "compelling" or "substantial" interest in restricting speech under the First Amendment jurisprudence do not necessarily match with the harm / offence distinction. The same is true with Article 10 case law of the ECHR involving the various formulas of the necessity test involving the principles of "pressing social need" and "proportionality".

Below I attempt to show how is speech that fits into the category of "offensive speech" treated under the First Amendment and under Article 10 of the ECHR. Since offensive speech encompasses many forms and content, I limit the discussion to three categories, which represent most of the problems in advertising; hate speech, blasphemy and obscenity. A small glossary for the purposes of the discussions below:

Hate speech refers to "speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances where the communication is likely to provoke violence"[218].

Blasphemy refers to "the act of insulting or showing contempt or lack of reverence for God".[219]

Obscenity refers to sexually explicit material which may be proscribed, because it has harmful effects.[220]

3. OFFENSIVE SPEECH UNDER THE FIRST AMENDMENT AND ARTICLE 10 OF THE ECHR

The First Amendment doctrine in general

Under the First Amendment The U.S. First Amendment protection of "offensive speech" ranges from the generally high constitutional protection to tolerate full prohibition on broadcasting.

Hate speech, is protected under the First Amendment, as content-based regulation in public discourse is unconstitutional in the U.S.[221] The U.S. hate speech doctrine considers all ideas equal from point of view of government regulation.[222] In the leading case of R.A.V. v. City of St. Paul[223] the court stated that suppression of speech by singling out only certain words based on its viewpoint (in the given case hate speech – cross burning – was prohibited) is unconstitutional viewpoint discrimination.[224]

[218] Black's Law Dictionary. West Group, St. Paul, Minn. 1999 1407-1408 – referred to in Sajó, A szólásszabadság kézikönyve, p 35
[219] Merriam-Webster Dictionary http://www.merriam-webster.com/dictionary/blasphemy (Last visited July 23, 2013)
[220] Barendt, *Freedom of Speech*. p 352
[221] J. Weinstein: An Overview of American Free Speech Doctrine and its Application to Extreme Speech in Ivan Hare, James Weinstein, and Eds., *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009). p 81
[222] Ibid.
[223] 505 U.S. 377 (1992)
[224] Ibid. (Weinstein) p 85-86

Obscenity is outside the First Amendment protection as far as it falls under the category in the leading case of Miller v. California whereby obscenity means "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political, or scientific value"[225]. Barendt points out three ingredients here: First, that prurient interest in sex is "ill-defined" in the case law of the Supreme Court leaving this matter to the notion "I know it when I see it" by Justice Stewart[226]. The second and third points are that "the Supreme Court has consistently emphasized that the average person must find the material offensive under contemporary community standards for this limb of the obscenity definition to be satisfied."[227]

Blasphemy. Under the leading case of Cantwell v. Connecticut[228] blasphemy is adjudged under both the freedom of religion and freedom of speech elements of the First Amendment stating that "the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged".[229] Post points out that Cantwell should be interpreted as supporting a heterogeneous society where "diversity leads toward the constitutional requirement that the law tolerate "exaggeration", "vilification" and even "excesses and abuses".[230]

4. RESTRICTION OF "OFFENSIVE SPEECH" IN BROADCASTING IN THE U.S.

As mentioned in connection with commercial speech, since the Red Lion[231] case of 1969 the electronic broadcast media may be subject to stricter regulation than speech in general, with the notion, that broadcasting uses the scarce resource of radio frequencies, and "(b)ecause of

[225] 413 US 15, 24 (1973) referred to in Barendt, *Freedom of Speech*.p 364
[226] In Jacobellis v. Ohio 378 US 184, 197 (1964) – referred to in Ibid. (Barendt) p 365
[227] Ibid. (Barendt) p 366
[228] 310 US 296 (1940)
[229] Ibid. (Cantwell) at 307 – referred to in Robert C. Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment," *California Law Review* 76, no. 297 (1988). p 318
[230] Ibid. (Post) p. 319
[231] Red Lion Broadcasting Co. v. F.C.C. 395 U.S. 367 (1969)

the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium"[232].

An example of restriction of indecency in broadcasting is the "Nipplegate" case of 2004, where the FCC hit the CBS television channel with a record fine of USD 550,000[233] for flashing the bare breast of Janet Jackson234 for half a second, live in the Super Bowl XXXVIII Halftime Show watched by approx. 140 million viewers over the country. The Court later abolished the fine, but the incident had major effects on media regulation, on media business and even the personal career of Ms. Jackson.[235] The Nipplegate incident triggered the Broadcast Decency Enforcement Act of the U.S. (2005), which increased the maximum fine for indecency in radio and television ten times[236], to

> "$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $3,000,000 for any single act or failure to act."[237]

The FCC was authorized to regulate obscene, indecent and profane broadcasting content.[238] At the same time the Communications Act expressly states that the FCC shall have no

[232] Ibid. 390
[233] http://transition.fcc.gov/eb/News_Releases/DOC-252384A1.html (Last visited June 26, 2013)
[234] See at 2:29 http://www.youtube.com/watch?feature=endscreen&v=u3H_Sm66QB4&NR=1 (Last visited June 26, 2013)
[235] According to the Wikipedia, the Superbowl XXXVIII incident made 'Janet Jackson' the most searched term, event and image in Internet history. Jackson was later listed in the 2007 edition of Guinness World Records as "Most Searched in Internet History" and the "Most Searched for News Item". YouTube creator Jawed Karim said the inspiration for YouTube came from Janet Jackson's infamous Superbowl incident, when Janet's breast was accidentally exposed by Timberlake during the halftime show. Karim could not easily find that video clip online, which led to the creation of Youtube. See http://en.wikipedia.org/wiki/Super_Bowl_XXXVIII_halftime_show_controversy (last visited June 26, 2013)
[236] See an article of the Washington Posthttp://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700287.html (Last visited June 26, 2013) The Washington Post article was referred to in the above entry of the Wikipedia.
[237] See the Broadcast Decency Act here: http://www.gpo.gov/fdsys/pkg/BILLS-109s193enr/pdf/BILLS-109s193enr.pdf (Last visited June 26, 2013)
[238] Title 18 of the United States Code, Section 1464 referred to at the FCC website: http://www.fcc.gov/guides/obscenity-indecency-profanity-faq (last visited July 23, 2013)

censorship power over broadcast content[239]. Besides referring to the First Amendment, the FCC refers to this Section when refusing the prohibition of broadcasts suspect of hate speech.

Non-obscene, but sexually indecent material is protected by the First Amendment. Indecent material is defined as ”offensive to some but is not within the constitutional standards of unprotected obscenity”. Nudity portrayed in films or stills cannot be presumed obscene[240] nor can offensive language ordinarily be punished simply because it offends someone[241]. Government has a "compelling" interest in the protection of children from seeing or hearing indecent material, but total bans applicable to adults and children alike are constitutionally suspect.[242]

According to the FCC website[243]

> “profane material also is protected by the First Amendment, so its broadcast cannot be outlawed entirely. The Commission has defined such program matter to include language that is both “so grossly offensive to members of the public who actually hear it as to amount to a nuisance” and is sexual or excretory in nature or derived from such terms.”

Blasphemy is considered as part of profane material.[244]

5. THE ECHR AND OFFENSIVE SPEECH

According to the free speech related provisions of the ECHR[245] restriction of speech may only be permitted as an exception that is always subject to the general right to freedom of

[239] Section 326 of the Communications Act 1934
[47 U.S.C. 326]
[240] Erzroznik v. Jacksonville, 422 U.S. 205 (1975) – referred to in Findlaw U.S. Constitution Annotated
[241] Cohen v. California , 403 U.S. 15 (1971) - referred to in Findlaw U.S. Constitution Annotated
[242] See Sable Communications v. FCC, 492 U.S. 115 (1989)
> “FCC's "dial-a-porn" rules imposing a total ban on "indecent" speech are unconstitutional, given less restrictive alternatives--e.g., credit cards or user IDs--of preventing access by children). Pacifica Foundation is distinguishable, the Court reasoned, because that case did not involve a "total ban" on broadcast, and also because there is no "captive audience" for the "dial-it" medium, as there is for the broadcast medium.” See: http://constitution.findlaw.com/amendment1/annotation19.html#f59

[243] http://www.fcc.gov/guides/public-and-broadcasting-july-2008#OBSCENE
[244] See Section 14 of the Memorandum Opinion and Order in connection with complaints against broadcast licencees regarding their airing of the Golden Globe Awards program (File No. EB-03-IH-0110) at http://transition.fcc.gov/eb/Orders/2004/FCC-04-43A1.html (Last visited July 23, 2013)
[245] Article 10 of the European Convention on Human Rights of 1950

expression. The general approach of the ECtHR, therefore, that all speech are protected, even the one that offends, shocks and disturbs.[246] There are three areas of offensive speech, where the Court's position has been evolved into distinct lines of case law. These are hate speech, blasphemy and obscenity. These are cases where on the one hand human dignity, freedom of religion and morals are involved, which are legitimate competitors to free speech rights, on the other hand, these areas are volatile in time and varies significantly country by country. Therefore the margin of appreciation is significant.[247] In the case of Fuentes Bobo v. Spain[248], for example, the Court emphasized that "Article 10 of the Convention [did] not guarantee unrestricted freedom of expression, even in press reports on serious questions of general interest".

5.1 Hate speech

Hate speech is generally considered as expression targeting a particular group of people (as opposed to speech targeting an individual[249]), which is "more than insulting to members of the targeted group(s)"[250]. It is hard to give a more precise definition, as hate speech has several manifestations (racial and religious hate speech, holocaust denial and other negationism, etc.), both content and form may matter and in addition, the effect of speech depends on the history, traditions and habits that change from time to time and country by country. Therefore the ECtHR is generally inclined to accept the competence of national courts in evaluating historical circumstances in connection with hate speech related disputes.[251] There are several standards of assessment of speech which may fall under this category.

[246] ECHR, "HANDYSIDE V. THE UNITED KINGDOM (Application No. 5493/72)" (1976).
[247] See e.g. Section 37 of Murphy v. Ireland App. nr. 44179/98 (2003)
[248] App. nr. 39293/98 (2000) – referred to in "Freedom of Expression in Europe; Case-law Concerning Article 10 of the European Convention on Human Rights" (Council of Europe Publishing, n.d.).
[249] I am not dealing with personal defamation cases as these are not or very remotely relevant to mass media advertising.
[250] See e.g. § 35 of "Jersild V. Denmark 15890/89," 1994.
[251] See Sajó, *Freedom of Expression*. p 112

5.1.1 Protection of the press; the Jersild case.

The starting point (which is still neutral as to the content of speech) is that punishing the press for disseminating statements by others would be contrary to the "public watchdog function". The Court, however, added two qualifiers to this general statement, namely that the given statements should contribute to a discussion of matters of public interest and there should not be particularly strong reasons for such punishment.

5.1.2 "Public interest" and "Particularly strong reasons"; the merits of hate speech assessment by the ECtHR

Initially expression "more than insulting to members of the targeted group(s)" were not even considered as protected speech under Article 10 and refused by the Commission as inadmissible.[252] This approach has gradually changed to a level of protection that is comparable to the First Amendment protection of hate speech although does not reach its level. As mentioned above, the Court emphasized in Jersild that protection of speech that may qualify hate speech assumes contribution to a discussion of matters of public interest. Although there has been no cases of offensive commercial speech before the ECtHR, it obviously does not have such a quality, therefore the expected level of protection is lower, and the national margin of appreciation would be higher than the general standards mentioned below. I mention below standards of assessments regarding hate speech that may occur in commercial messages; racial, and sexual orientation based hate speech.

As discussed in connection with commercial speech above, the legal assessment by the ECtHR has a four prong test ("interference by public authority", "prescribed by law", "legitimate aim" and the "necessity test") and the merits of the decision is usually grounded

[252] Ibid. (Sajó) p 112

on the "necessity test", when the Court establishes whether the impugned restriction was necessary in a democratic society.

In the case of racial hate speech with political content the Court distinguishes between political speech having shocking and offensive language which is protected by Article 10 and that which forfeits its right to tolerance in a democratic society.[253] In Gündüz v Turkey[254] the key point was that the statements of Mr. Gündüz based on which he was convicted were contribution to a "topic was widely debated in the Turkish media and concerned a matter of general interest. The Court stated that this is a sphere in which restrictions on freedom of expression are to be strictly construed.[255]

Hate speech regarding sexual orientation concerns an advertising[256] that triggered the biggest number of cross-border complaints in the records of the European Advertising Standards Alliance in the recent years[257]. In Vejdeland v. Sweden[258] the Court approved the conviction of persons distributing leaflets against homosexuals. The key points for the Court in considering the necessity of the conviction were

- the seriously prejudical wording of the leaflets against homosexuality,
- that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour";[259] and
- that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them, and that the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.[260]

[253] § 36 Fáber v. Hungary (App. nr. 40721/08; 2012)
[254] App nr. 35071/97
[255] See § 43of Gündüz (Ibid.)
[256] 2456/2463 - Paddy Power in EASA, "EASA Cross-Border Complaints Quarterly Report N ° 56 2012/02."
[257] EASA, "Cross Border Complaints Annual Report 2012." p 7
[258] App. nr. 1813/07 (2012)
[259] § 55 Ibid. (Vejdeland)
[260] § 56 Ibid. (Vejdeland)

5.2 Obscene speech.

The Court is not more tolerant with respect to obscene speech. In the leading case of Müller and others v Switzerland, the Court did not find violation in confiscation of paintings and fining the artist for obscenity. The Court stated that "in the circumstances" (there had been completely unrestricted access to the exhibition, with no admission charge or age-limit) and "having regard to the margin of appreciation" that might exist as to how morally offensive the paintings were, the authorities which had taken the confiscation decision and imposed the fine had been entitled to consider such measures necessary for the protection of morals"[261].

5.3 Blasphemy

With respect to blasphemy, the Court, in the leading case of Otto-Preminger-Institut v. Austria[262], held that the confiscation of the film Das Liebeskonzil was not a violation of Article 10, as it was aimed at protecting the religious beliefs of citizens. The ECtHR also emphasized that the Austrian authorities have broad margin of appreciation in the given circumstances. [263] In the Wingrove[264] case the Court held that the British Board of Film Classification's refusal, on the ground of blasphemy, to grant a classification certificate to the video Visions of Ecstasy, was not a violation of Article 10. The case was decided on the basis of high margin of appreciation, as the Court said that the national authorities are in better position to judge a case like the one in question than the international judge.[265]

6. THE ECTHR AND OFFENSIVE COMMERCIAL SPEECH

The ECtHR case law does not include examples of commercial speech that was restricted for being offensive. The ECtHR commercial cases so far have been professional advertising (Barthold, Hertel, Casado Coca), misleading advertising (Scientology), unfair competition

[261] "Freedom of Expression in Europe; Case-law Concerning Article 10 of the European Convention on Human Rights." p 86
[262] App. nr. 13470/87 (1994)
[263] Ibid. (Freedom of Expression in Europe)
[264] App. nr. 17419/90 (1996)
[265] Ibid. (Freedom of Expression in Europe) p 105

(Krone, markt intern), consumer protection (Scientology, Ponson). These are cases where the restriction of commercial speech was based on general rules of unfair competition or specific speech restrictions (prohibition of professional advertising), i.e. the underlying reason for the restriction was the content of the commercial message (that would be called the "hard issues") and not the language or form used for packaging the message. The argument of advertising being offensive has so far popped up once in the ECtHR case law in the Mouvement Raelien Suisse v. Switzerland case[266]. Even there, the legal problem was with the ideas conveyed and not the content of the advertising itself. In any event Raelien was not commercial but some sort of weird political message claiming that mankind and its religions have been created by extraterrestrials.

Since advertising self-regulation is handling "soft issues", the lack of offensive commercial speech cases before the ECtHR may be an additional evidence of the efficiency of the European advertising self-regulation, which is based on voluntary compliance (or just the opposite; the lack of proper judicial defense against private regulation and adjudication).

7. AN ATTEMPT TO PUT THE PUZZLE TOGETHER; ASSESSMENT OF SELF-REGULATORY RESTRICTIONS IN THE LIGHT OF THE ECTHR STANDARDS

Since there has been no precedent, the expected outcome of an offensive commercial advertising case would only be guessed by matching the existing inventory of arguments. Let me take some of the self-regulatory decisions mentioned at the beginning of this Section and play with the idea of running them by the ECtHR. I summarize the result in a chart.

[266] ECtHR, "MOUVEMENT RAELIEN SUISSE V. SWITZERLAND 16354/06," 2011. App. nr. 16354/06

Facts	Self-regulatory decision	ECtHR decision
HPV test advertising with supporting (true) arguments which included that „Each day in the UK, around eight women are diagnosed with cervical cancer. Three of those will die."	Blocked - scaremongering	Protected: High value elements are mixed with commercial motive (Hertel, Stambuk, Barthold)
A French car manufacturer used in a spot different national anthems to describe competing car models.	No violation, as the national anthems were not used in a negative context.	Not admissible. Nations have no human rights
A complainant called for prohibiting television advertisements regarding feminine hygiene in general.	No violation, as today people openly talk about sex, and menstruation problems are discussed in school education	No violation. Speech that offend, shock and disturb are also protected. (Handyside)
Billboard campaign of an NGO calling attention for the risks of AIDS-HIV.	Blocked: the campaign "would result in propaganda in favor of homosexuality"	Blocking the advert would constitute a violation. High value speech (Handyside)
A television broadcaster advertised its new animated series that deals with the Vatikan under the heading " laughter rather than hanging out" in full-page ads. The advert shows an empty cross, Christ sitting in the foreground in front of a TV set with his Crown of Thorns and remote control in his hands and laughs.	Blocked: the advert offends religious feelings	Blocking would be no violation. There is high margin of appreciation in case of claims of blasphemy. (Wingrove, Otto-Preminger)

8. SUMMARY

This Section discussed offensive speech which is the "soft issue" of commercial advertising, namely dealing with the form and language carrying the commercial message. In this dissertation I use the term offensive speech expression that offends, indecent, obscene or tasteless. Offensive speech – as opposed to harmful speech, belong to "soft" issues of commercial communication. This is referred to by "decency" among the four main principles of "honest", decent", "truthful" and "legal" in the leading slogan of the European Advertising Standards Alliance. Although the issue appears to be is secondary to fairness and honesty, the breach of which may cause economic losses, the "overbreadth" drafting of conditions for restricting speech as offensive may result in excessive restriction of speech by advertising self-regulatory codes. One of the claims of my dissertation is that advertising self-regulation restricts speech based on the offense argument not only to protect consumers but also to satisfy them. These rather paternalistic restrictions are principally commercially driven. The examples illustrate the wide variety of matters discussed by self-regulatory authorities, and that some of the cases would be borderline taking into account the ECtHR case law. I also described the situation in the U.S. to reflect the differences in the approach between the European regime and over the Ocean. Although there is no ECtHR case-law in offensive commercial speech, it appears that some of the decisions of the advertising self-regulators would be in conflict with the ECtHR. It is, however, absolutely unlikely that any of the soft issue related commercial disputes end up in Strasbourg. The national and European cross border advertising self-regulatory system handles all soft issue related disputes within the family circle.

E. Pluralism of broadcast media and advertising self-regulation

1. INTRODUCTION

Similarly to freedom of speech, media pluralism often represents an issue or a regulatory goal than a naturally given status quo, as it is always in the junction of conflicting interests of culture, business and politics. The basic issue stems from the tension between the major effect and limited capacity of electronic media. It, on the one hand, greatly extends the public sphere for exchange of ideas[267], but on the other hand access to it is limited. Therefore programming content is always subject to editorial decisions and broadcasters inadvertently become de facto self-censors or private censors to content. The two principal interests conflicting with pluralistic content are the danger of commercially driven pressure by advertisers and political interest driven pressure by the state. I am discussing below the issues of pluralism related to commercially driven pressures.

Defining media pluralism. There are a number of definitions offered in papers, laws, policy documents, etc. [268] of which four elements should be underlined from point of view of my subject: availability of several independent and autonomous media with diversity of content both for speakers ("active access") and for the audience ("passive access"). Pluralism has

[267] Reference to Habermas by Beata Klimkiewitz, *Media Pluralism: European Regulatory Policies and the Case of Central Europe*, 2005, http://www.eui.eu/RSCAS/WP-Texts/05_19.pdf (Last visited June 22, 2013).

[268] See for example:

The Council of Europe's Committee of Experts on Media Concentrations and Pluralism defines media pluralism as "diversity of media supply, reflected, for example, in the existence of a plurality of independent and autonomous media and a diversity of media contents available to the public.'(referred to in Klimkiewitz's study Ibid.)

The Independent Study on Indicators for Media Pluralism in the Member States prepared in 2009 for the European Commission (http://ec.europa.eu/digital-agenda/en/independent-study-indicators-media-pluralism Last visited June 22, 2013) understands media pluralism to mean

> " the diversity of media supply, use and distribution, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests. Indicators look at both active and passive access to the media, of the various cultural, political and geographic groups in society."

Miklós Haraszti in his issue paper for the Council of Europe, defines media pluralism in general as follows: "the media are pluralistic if they are multi-centred and diverse enough to host an informed, uninhibited and inclusive discussion of matters of public interest at all times. " Miklós Haraszti, *Media Pluralism and Human Rights*, n.d., https://wcd.coe.int/ViewDoc.jsp?id=1881589 .(Last visited June 22, 2013)

four main aspects, namely the plurality of service providers, the diversity of content, access for diversity of speakers and access to diverse information by the audience.

The issues.

- Plurality of media service providers represents the variety of channels offered at the general audience market (external pluralism).
- Diversity of programming content refers to internal pluralism within a broadcaster, related to editorial decisions regarding the genre and scheduling of programming and the content within the particular program items.
- The key issue regarding media pluralism stems from the limited capacity of broadcasters coupled with major effect of the media. Due to the limited capacity (e.g. "scarcity of frequencies"), access for speakers and audience must be limited by the editorial decisions of broadcasters. The questions for the regulator are, whether such decisions should be left for the broadcaster entirely or not, and if not, where is the limit of broadcaster independence?

In this respect Jakubowitz writes about three regulatory models.

> "The advertising driven Pure Market model assumes the free operation of supply and demand which matches the media content to the composition of the given consumer market. The New Media Model is based on the view that new channels are created by new technologies. This abundance of thematic, narrow-case, specialized channels has been said to promote the birth of "personal media", allowing viewers to select content precisely attuned to their needs, tastes and interests. The Public-Policy Model is a mix of market model with public intervention to promote pluralism. It is based on the recognition not only of freedom of speech, but also of the need and the right of all social groups to communicate." [269]

2. FREEDOM OF SPEECH AND MEDIA PLURALISM

2.1 Pluralism is covered by Article 10 of the ECHR

As seen from the above short introduction, "pluralism of the media may (...) be considered as one aspect of freedom of expression". Article 10 of the European Convention on Human Rights is construed by the ECtHR to apply to media pluralism. Article 10.1 provides in its

[269] Karol Jakubowicz, "Legislative guarantees of a plurality of information sources" in Implementation of constitutional provisions regarding mass media in a pluralist society, Science and Technique of Democracy No. 13, 1994, pp. 81-86. Quoted in "Opinion of the Venice Commission on the 'Gasparri' and 'Frattini' Laws of Italy," 2005.

second sentence that (The right to freedom of expression) "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." In the recent (2012) case of Centro[270], the ECtHR confirmed that media pluralism is protected under the right to freedom of expression, moreover it emphasized that maintaining media pluralism requires both the state and the media to take positive measures.[271] The Court stated that media not only have the freedom to speak, but also have the task of imparting information, and the public also has the right to receive them (here the Court referred to the case of Handyside). The Court (referring to the case of Jersild) emphasized the importance of the role of audiovisual media in imparting information, and observed, that

> "to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. In addition, it is necessary to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programs are aimed."[272]

Finally the Court observed that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.[273] The positive obligation of the state to maintain media pluralism was confirmed in the Animal Defenders judgment (with reference to the Lentia judgment) stating that "(...) given the importance of what is at stake under Article 10, the State is the ultimate guarantor of pluralism"[274].

[270] ECtHR, "CASE OF CENTRO EUROPA 7 S.R.L. AND DI STEFANO V. ITALY App. No. 38433/09," 2012.
[271] See Ibid. (Centro) Sections 129-135
[272] See Ibid. (Centro) Section 130
[273] See Ibid. (Centro) Section 156
[274] See Section 101 of "Animal Defenders 48876/08" (2013).

2.2 The interests conflicting with pluralism – commercial broadcasters, audience and advertisers.

In reality, the media and advertisers and even majority of the audience (abundantly proven by audience research data) do not prefer pluralism-enhancing-regulation. It is widely considered as paternalistic, that increases competition at the general audience market (by enhancing external pluralism, with cross ownership, audience and economic market share, voting rights, etc. restrictions – see below), limits commercial revenue (by enhancing internal pluralism regarding scheduling and program content restrictions), increases operational costs (enhancing, again, internal pluralism, by requiring own news and public service content, which are among the most expensive program items in television broadcasting), and enhances less popular niche programming that does not meet the appetite of mass audience. As shown below in the country chapters, advertising self-regulation acts contrary to the pluralism related legislative efforts, by leveling out content, to avoid viewer harassment and increase viewer satisfaction. This is always in the context of linear mass media, because advertising self-regulation is audience complaint driven, which typically concerns linear mass media. In fact, linear commercial broadcasting can be considered the battlefield for pluralism related regulation and advertiser pressure. As mentioned above in connection with general issues of advertising self-regulation, this form of media is most exposed to advertiser pressure, as in linear services viewers (unlike in non-linear services, e.g. video on demand) cannot control content; linear broadcasters are typically financed by advertising, as opposed to non-linear services; and programming of linear broadcast channels, which are typically financed by advertising, rely mostly on valuable editorial content, while non linear content typically consists of feature films. News, information programs, sports, game shows are typical of

linear general entertainment television[275] and this valuable content is exposed most to the influence by advertisers.

2.3 Free speech, media pluralism and advertising self-regulation.

I show in this dissertation that advertising self-regulation restricts commercial speech in excess of the boundaries of the statutory restrictions (which are themselves abundant in the first place). I use the term "advertising self-regulation in a broad sense, comprising rule-making, enforcement, adjudication, lobbying, and economic pressure, in other words I consider all measures as self-regulation that have regulatory effect comparable to legislation. These self-regulatory restrictions may affect both content of commercial communication and editorial independence (as discussed in connection with the advertising self-regulation of the UK and Germany) and in a wider context it may also be interpreted to affect cross border legislation (as discussed in connection with the EU level prohibition of tobacco advertising and the case of EASA). All these cases ultimately boil down to regulation of commercial speech in one way or another. As the Venice Commission pointed out, "pluralism of the media may (...) be considered as one aspect of freedom of expression"[276]. The requirement of media pluralism is inextricably intertwined with protection of speech, therefore the above mentioned self-regulatory measures equally affect media pluralism, in fact, it is another aspect of the same issue, with a different focus. While in the case of speech protection the speaker is in the focus, pluralism cares about the audience's right to information; while the right to free speech protects against government intrusion, the requirement of pluralism creates positive obligation by the state to ensure "the free formation of opinions (and) (...) equality of

[275] See for example Part 4 (Programming and Production) of Blumenthal and Goodenough, *This Business of Television*.
[276] "Opinion of the Venice Commission on the 'Gasparri' and 'Frattini' Laws of Italy."

opportunity among all democratic groups and political parties"[277], by supporting the "multiplicity of outlets" and of "open access".

State intervention may be exerted in two levels.
At the level of the general market of audience (see the discussion below), the state may enhance diverse offer of channels (outlets), open access and support of independent public service television that is not exposed to commercial revenues and thereby the audience-share-driven pressure by the advertisers. This regulatory support of diversity in channels is to enhance "external pluralism". The principal tool of the state in enhancing external pluralism is licensing, general ownership or cross-ownership restrictions of commercial broadcasters and support of independent non-commercial public service channels. As to self-regulatory restrictions, external pluralism is affected indirectly by lobbying and market pressure to seek the preferred audience group. This latter phenomenon is the result of homogenous programming of general entertainment channels of the same market, in a particular time slot.

At the level of individual broadcasters the state may require specific editorial and program content items requirements ensuring diverse content of a particular broadcaster. This regulatory support of diversity of programming is to enhance "internal pluralism". The principal tool of the state in enhancing internal pluralism are program content requirements set in legislation or in the broadcast license and ownership and organizational restrictions.

2.4 Summary

In summary, the ECtHR attributes extremely high importance to audiovisual media, which, must not only be protected by merely restricting state intervention, but also must be supported with positive measures, not only by the state (positive obligations), but also by the media. (This was called by the German Constitutional Court a functional freedom that serves a

[277] See the Preamble of the *European Convention on Transfrontier Television*, 1989.

particular purpose, as opposed to personal freedoms that are ends in themselves."[278]). Below I briefly discuss where the place of advertising self-regulation in this regime is. Can it be expected to contribute to media pluralism, or just the opposite, as a result of positive obligations by the state and the task-based approach of the media's right to freedom of expression it has less room.

3 THE ISSUES, LEGISLATIVE AND SELF-REGULATORY ANSWERS

Self-regulation by the advertising industry may affect media pluralism basically in the three levels of pluralism related issues, namely the general offer of channels on the audience market, editorial decisions and program content.[279] These three issues and the legislative and self-regulatory answers will be analyzed below. National legislations reflect the two Council of Europe Recommendations containing proposed measures to promote media pluralism.[280]

3.1 The duality of advertising and audience markets

As mentioned in Section A. of Part I above, the unique feature of commercial media is in its dual nature. Media companies (TV, Internet and printed press alike) as service providers simultaneously serve both audience and advertisers and compete on these two separate but at the same time interrelated markets. In media "advertising space as a normal private good is tied with the public good content, in order to finance it"[281]. The issue with pluralism is to make sure that the programming content that is tied with business remains a "public good". These two markets are separately regulated and controlled. The advertising market is protected against corporate distortions by generally applicable antitrust legislation (abuse with dominant position, merger control, etc.) which is normally enforced by the national

[278] Ivan Hare, Weinstein, and Eds., *Extreme Speech and Democracy*. p 15-16
[279] See Klimkiewitz, *Media Pluralism: European Regulatory Policies and the Case of Central Europe*. p 2
[280] "Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism," 1999.and "Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member States on Media Pluralism and Diversity of Media Content," 2007.
[281] Budzinski, Oliver and Wacker, Katharina, The Prohibition of the Proposed Springer-Prosiebensat.1-Merger: How Much Economics in German Merger Control? (March 28, 2007). Available at SSRN: http://ssrn.com/abstract=976861 or http://dx.doi.org/10.2139/ssrn.976861p 9

competition authority. Market share based restrictions follow the method of EU level antitrust legislation, which prohibits creation of market dominance by corporate transactions, penalizes abuse with dominant position, but does not prohibit the mere existence of economic dominance. The market share based antitrust legislation can of course handle numbers (i.e. economic measurements of profit and loss, etc.) only and is unable to handle programming content related issues.[282] Therefore antitrust legislation naturally does not and cannot address pluralism related problems as abuse with dominant position, no matter how serious is that.

See for example the line of political advertising cases of VgT, TV Vest and Animal Defenders, all of which boil down to the question of economic power endangering pluralism of broadcast media. The disputes in all these cases were handled under media regulation aiming to enhance pluralism of content and antitrust based arguments were not raised.

However, antitrust based market regulation indirectly affects the audience share markets, therefore in some countries there is no separate legislation regarding pluralism as this matter is left for general antitrust legislation.[283]

3.2 The issue with external pluralism

Based on the definitions above, external pluralism exists when several channels are accessible both for speakers and the audience with diversity of content, including open access and support of independent public service television that is not exposed to commercial revenues and thereby the audience-share-driven pressure by the advertisers.

3.2.1 Commercial influence on external pluralism

[282] Ibid. (Recommendation CM/Rec(2007) Section 1.2
[283] See AP-MD / Council of Europe, *Media Diversity in Europe*, 2003, http://www.coe.int/t/dghl/standardsetting/media/doc/H-APMD(2003)001_en.pdf (Last visited June 22, 2013). (Media diversity in Europe) Sections 21 and 22

Commercial influence on external pluralism is exerted through the audience and advertising markets rather than actual measures having regulatory effect. There are no expressly identifiable advertising self-regulatory measures in connection with the audience market structure (external pluralism). The indirect impact of commercial pressure against pluralism at the audience market level includes

- the standardization of programming of general entertainment televisions (including, in some countries, the public service channels) to predominantly serve a few target audience groups (the most common being 18-49 urban) concerning the entire audience market;
- share and volume deals, whereby major channels and agencies define financial terms of advertising attached to the ratio of and amount of advertising spending with a particular channel[284];
- the commercialization of the public service television channels. This issue is aptly formulated by the Venice Commission:

> "Broadcasters that rely heavily on commercial funding and have thus entered into direct competition with the commercial sector have become highly susceptible to the demands of advertisers and sponsors and their programme strategies are guided by the needs of advertisers and audience share, rather than the requirements of their obligations.[285]

3.3 Legislative measures generally promoting pluralism at the audience market

Special audience market regulation is introduced in several European countries besides antitrust law to enhance serves pluralism and freedom of expression, because general antitrust legislation was considered insufficient.[286] Enforcement of audience market regulation is normally in the hands of the national media authorities. These measures include ownership restrictions, audience market based limitations and regulation of access. Examples of

[284] See for example IRIS 2007-10:9/14
Germany
ProSiebenSat.1 and RTL Accept Heavy Fines from the Federal Cartel Office
http://merlin.obs.coe.int/iris/2007/10/article14.en.html (Last visited June 23, 2013)
[285] Section 58 "Opinion of the Venice Commission on the 'Gasparri' and 'Frattini' Laws of Italy."
[286] AP-MD / Council of Europe, *Media Diversity in Europe*. p 9

ownership restrictions[287] are the limitation of simultaneous ownership in national and/or regional media service providers (France, UK, Hungary prevailing until 2010, Romania prevailing until 2010) and limitation of the maximum voting power that may be obtained by one person with respect to a particular broadcaster (France).[288] Examples of audience market related restrictions include maximum audience share thresholds in terms of number of viewers reached (France), audience share within the audience reached (Germany, Hungary), number of licenses awarded (France)[289], and prohibition or restriction of networking or syndication of programming by local stations into regional or national media[290] The most important examples of regulating access are the "must carry" and "must offer" rules.[291] Under the "must carry" obligation the transmission service provider is obliged by law to carry the signal of channels that are considered important by the legislator from points of view of pluralism (normally public service channels and nation-wide general entertainment channels).[292] Under the "must offer" obligation the content provider (the television channel) is obliged to offer its content to transmission service providers.[293] In terms of translating these tools into free speech protection under Article 10 of the ECHR, must carry obligations serve the interests of the broadcasters' right to impart information, while must offer obligations serve the right of the audience to receive information.

The independent public service broadcaster is the principal tool of ensuring media pluralism, as in an ideal situation it neither depends on the government nor on the market. In Europe the dual system of public and private broadcasting exists, whereby the pluralism of editorial

[287] See Section I. of the Appendix to the "Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism."
[288] See Ibid. p 12
[289] Ibid. (Appendix to R (99) 1)
[290] Ibid. (Appendix to R (99) 1) , Section 3.2 of "Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member States on Media Pluralism and Diversity of Media Content."
[291] See Section 3 of Ibid. (Recommendation CM/Rec (2007)
[292] Section III. of "Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism." (Appendix to R (99) 1)
[293] See Section 3.3 of the "Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member States on Media Pluralism and Diversity of Media Content."

content is an expectation from the public service broadcasters. The principal regulatory tasks of Council of Europe member states are summarized in the Council of Europe Recommendation on the independence of public service broadcasting.[294] The main guarantees of public service broadcasters are editorial and operational independence, funding and access (see "must carry" above).

The public financing of public service broadcasters were carved out from the rules of the EC Treaty by the Public Broadcasting Protocol to the Treaty of Amsterdam.[295] According to the Protocol financing by the states of the public service remit does not constitute prohibited state aid under the Treaty. However, since the early-Nineties, when commercial television started in Europe, there has been a tendency is to supplement state financing with commercial revenue, i.e. public service broadcasters have entered the advertising market in competition with commercial channels. The price paid was the commercialization of program content (see the quotation from the Venice Commission above in Section 3.2.1).

4. INTERNAL PLURALISM AND EDITORIAL INDEPENDENCE OF BROADCASTERS

Internal pluralism means diversity of programming within a particular broadcaster. This generally means presenting diverse content and programming flow to the audience and hosting diverse cultural and political opinions.[296]

[294] "Recommendation No. R (96) 10 of the Committee of Ministers to Member States on the Guarantee of the Independence of Public Service Broadcasting," 1996.

[295] Protocol to the Treaty of Amsterdam on the system of public broadcasting in the Member States (extract):

> "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."

[296] See "Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism."

There are two levels of internal pluralism, namely the general scheduling of programming flow and content of the particular program items. Pluralism in program flow principally means diverse genres of program items in the program schedule (which, of course, is applicable to general entertainment or public service channels only and cannot be an expectation with respect to thematic broadcasts). Pluralism within particular program items has again two aspects, the general political and cultural diversity of program content[297] and balanced coverage of information[298].

4.1 Commercial influence on internal pluralism

Commercial influence on internal pluralism may affect both the actual program flow and program contents. Commercial influence on programming has two basic aims; to extend the ratio of advertising in the program by using editorial content for commercial communication, and to increase viewership of the audience targeted by the advertising.

4.1.1Pressure by advertisers to use editorial content for commercial communication

Statutory limitation of advertising airtime is an important factor of the European market in connection with the commercial efforts to increase the ratio of advertising. Unlike in the U.S., advertising airtime of linear television broadcast services is capped at 12 minute per hour[299] in the EU. This statutory limitation makes inventory management of advertising airtime a key business for commercial television broadcasters, and triggers various techniques of advertising sales[300] and content related deals between advertisers (agencies) and broadcasters. These techniques include sponsoring of editorial content (or advertiser funded programs) in

[297] See Section 40 of the "Opinion of the Venice Commission on the 'Gasparri' and 'Frattini' Laws of Italy."
[298] This notion reflects the fairness doctrine of the U.S. which was based on the case of Red Lion v. FCC (395 U.S. 367, 1969) which was gradually abandoned by the FCC by the mid Eighties (See Sajó: Freedom of speech p 112)
As to the aplication of the fairness doctrine in Europe, see for example K.U. Leuven et al., "Indicators for Media Pluralism Towards a Risk-Based Approach" (2009).
[299] Article 23.1 of the AVMS Directive 2010/13/EU "The proportion of television advertising spots and tele-shopping spots within a given clock hour shall not exceed 20 %."
[300] Under the most generally applied sales techinque the price of advertising is calculated on the basis of the number of audience reachd ("cost per thousand").

return of the appearance of a commercial message or the promotion of products by placing them in editorial content (films, game shows, etc.) in return of a fee, payable to the broadcaster by the marketer or producer of the given product ("product placement"). Using editorial content for advertising raises two major issues. These are editorial independence of broadcasters and misleading of viewers as to the purpose of editorial content. Protection of editorial independence of broadcasters from advertisers and protection of the viewers from misleading and surreptitious advertising are a basic notions of media regulation.[301] Therefore this area is regulated by legislation, including the provision for statutory remedies (penalties, suspending license, etc.). In the UK, for example, this area is carved out from the BCAP Code and is expressly reserved for OFCOM[302], and the German self-regulatory codes do not even mention this matter. Therefore advertising self-regulation does not play a role in connection with supporting or preventing commercial efforts to use editorial content for conveying commercial messages.

4.1.2 Pressure by advertisers to increase the share of audience (and the audience share in a particular target group)

The real aim of advertising self-regulation is to ensure audience satisfaction in the general programming. As explained in the Section regarding "offensive speech", the principal tool to ensure audience satisfaction is the restriction of speech on the basis of the argument that it is offensive to the audience. As shown in the Sections regarding the UK and Germany, in this respect "offense" or "decency" is formulated vaguely in the self-regulatory codes which

[301] According to Article 1.1 (c) of the AVMS Directive
> "editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services".

Article 10.1 (a) of the same directive provides that content (of sponsored programmes) and,
> "in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider (...)"

[302] See Point c) of the Introductory Section of the BCAP Code

allows wide discretion for the self-regulatory authority in its adjudication. As a result the self-regualtory authority is free to restrict content of commercial communication at its discretion. Although self-regulatory authorities do not have enforcement power, they can rely on the media which acts as a private censor in enforcing self regulatory restrictions. Generally, this broad definition of offensive speech has chilling effect, operating without involving self-regulatory adjudications. However, it may also be formalistic, whereby private censorship of the media is requested by the self-regulatory authority.

Sanctions of the Werberat, for example, include that

> "if an advertiser fails to modify or discontinue an advertisement, Deutscher Werberat issues a reprimand and makes the case public: Mass media editorial departments are sent a release on the reprimand which is then reported and commented upon in the press. In parallel with a reprimand, the media are requested no longer to carry the advertisement in question. A public reprimand is rarely necessary: If a complaint is upheld, the advertiser generally complies with Deutscher Werberat's request to modify or discontinue the advertisement."[303]

In fact it may be argued that such private restriction of commercial content carries the risk of a quasi cartel, where the leading market players dictate content restrictions in order to keep the high audience ratings.

5. SUMMARY

In this Section I discussed the most important issues regarding media pluralism. It was shown that media pluralism is protected by Article 10 of the ECHR and that the ECtHR considers it so important that it established in its case law that the state has positive obligation to maintain media pluralism. It was also shown that regulation of commercial influence of actual program content is reserved for state legislation and the impact of advertising self-regulation on media pluralism is indirect, through the restriction of commercial speech using the argument of

[303] See "English Keyfacts; German Advertising Standards Council" at http://www.werberat.de/keyfacts (Last visited July 22, 2013)

"offensive speech". The media as a private censor plays an important role in the enforcement of such restrictions, either informally (chilling effect) or formally, as part of the sanctions applied by the self-regulatory authority.

PART II. ADVERTISING SELF-REGULATION IN THE UNITED KINGDOM AND IN GERMANY

A. Self- and co - regulation of Television Broadcast Advertising and its Legal Environment in the UK

1. SUMMARY OF FINDINGS

Shortly put, the UK self- and co-regulatory system is built on the balance between legal liability and economic power. The ultimate responsibility for program content is with the broadcasters, but the advertisers have decisive economic power.

Although online commercials steadily grow, television advertising still leads the list of advertisings most complained about and most of the complaints are submitted in connection with this platform. This is reflected, for example, in a recent study by ASA on harm and offence in UK advertising.[304] Below I will discuss free speech aspects of regulatory and factual background of offensive and harmful advertising in connection with television broadcast advertising in the UK.

Regulation of advertising spots and teleshopping is in private hands in the United Kingdom with a remote control kept by the independent regulatory authority (OFCOM). The most important censorial effect over broadcast advertising is the allocation of legal liability for program content to the broadcasters. Unlike the case of editorial content, where the speaker is the media itself, in the case of commercial communication the speaker (i.e. the advertiser) cannot convey his/its message without the media. In fact, broadcast media which is the

[304] IPSOS MORI and Advertising Standards Authority, *Public Perceptions of Harm and Offence in UK Advertising*, 2012, http://asa.org.uk/~/media/Files/ASA/Misc/ASAHarmOffenceReport.ashx.
"Television is the most common medium through which people come into contact with advertising, and the source of most of the memorable examples (both positive and negative) referred to by participants. Seven in ten adults (72%) in the quantitative research said they had come into contact with advertising through television in the last year. Indeed, when discussing adverts, participants in the qualitative research typically had to be prompted to think of examples beyond television." p 13 of the Report

ultimately responsible party for the content, act as a private censor over the content of commercial messages. This censorship is embodied in two filtering layers. The first filter is pre-clearance by Clearcast, a private joint venture held by the six leading broadcasters in the UK, with indirect monitoring power stemming from the broadcast licenses by OFCOM, which obliges licensed broadcasters to use Clearcast before airing an advert. The second filter is the complaint handling by the ASA Broadcast, which has a de facto stature of a regulatory authority, despite being a private organization. Both of these self-regulatory authorities operate on the basis of the BCAP Broadcast Advertising Code, which is the product of the Broadcast Committee of Advertising Practices.

One could argue that this broadcaster controlled system balances the economic power of advertisers, the latter being the clients who pay the fee. However, it should also be taken into account that in this self-regulatory system advertisers have major potential influence on the code drafting and complaint handling self-regulatory organizations. All the three players (Clearcast, ASA and BCAP) are ultimately controlled by the advertising and media industry. This control has a contractual limit with respect to ASA and BCAP. Their co-regulatory arrangement with OFCOM requires maintaining the independence of the ASA(B) / BCAP from the industry. There is no such arrangement with Clearcast. ASA (B), however is entitled to overrule the Clearcast decisions if a complaint is lodged against a particular advertising. The ASA, however is not an appeal organization, i.e. ex officio cannot take any measures against the Clearcast decisions.

In this Chapter I take a closer look at the Harm and Offense section of the BCAP Code and show that it opens wide possibilities for complaints based on both content-based and content neutral restrictions.

The above self-regulatory system operates within the general legal environment of public and civil law. English Courts allow judicial review of the ASA rulings which is an important legal guarantee against regulatory bias. In the judicial review, however, the Court checks the illegality, irrationality or procedural impropriety of the adjudications instead of looking into the merits of the decision. In addition, no administrative judicial review is available against the decisions of Clearcast.

Structure of the Chapter. This Chapter has two main parts. The first part explains the regulatory and theoretical background to advertising regulation and self-regulation in the United Kingdom. The second part analyzes the content of the self-regulatory code, and the related self-regulatory adjudications and judicial review.

2. THE REGULATION OF COMMERCIAL COMMUNICATION ON TELEVISION IN THE UNITED KINGDOM

Who is who? Regulation of commercial communications via television broadcasting in the UK is dominantly in private hands. Rule making is handled by the Broadcast Committee of Advertising Practice **("BCAP")**, and complaint handling by the Advertising Standards Authority Broadcast **("the ASA"** [305]**).** Both of these organizations are private corporate entities with no statutory powers on their own rights. BCAP and ASA(B) operate under delegated powers pursuant to a co-regulation arrangement with Office of Communications **("OFCOM")**. OFCOM serves as a legal backstop[306] in both drafting and implementation of

[305] The general reference to "the Advertising Standards Authority" means all the six entities operating under the organizational umbrella, handling tasks related to regulation, adjudication (complaint handling) and financing. This will be discussed in some more detail below.

[306] Here the term "legal backstop" refers to the "stand-by" role of the government authority behind self-regulation if the self-regulatory enforcement mechanism does not work. OFCOM is not the only legal backstop for advertising self-regulation, but it is specific for broadcast advertising. Besides OFCOM, the Office of Fair Trading is also an important legal backstop in unfair competition aspects of both broadcast and non-broadcast advertising. These backstops exist in the legal environment of the generally applicable public and private law, which is applied and enforced independently of the media specific public authorities and self- regulatory organizations.

the Code[307]. Besides this co-regulation measure, there is a private organization, **Clearcast,** which clears advertising before broadcasting. Although Clearcast is also a private entity, this pre-clearance is de facto binding in case of television advertising, in that licensed broadcasters are prohibited under their OFCOM license to air ads without Clearcast pre-clearance.

3. LEGISLATION, CASE LAW AND REGULATORY AUTHORITIES IN THE UK

3.1 Nationwide regulator and self-regulatory authority in three jurisdictions

"UK law" per se does not exist, as the UK consists of four countries of three different jurisdictions of English and Welsh law, Northern Ireland Law and Scots law. Although the national Parliament (Scotland) and Assembly (Northern Ireland) have the power to legislate, the Acts of the UK Parliament may cover the entire United Kingdom. OFCOM is a UK wide regulatory authority and the ASA is also a UK wide self-regulatory organization. They, therefore may in theory come into conflict due to the differences in local laws of the various nations within the United Kingdom.[308] Issues regarding television broadcast advertising are, however, regulated by legislation covering the entire UK, and so is the case of the delegation for ASA for co-regulation of broadcast advertising. Therefore, in this area there is no conflict between local legislation and nationwide implementation.

The advertising market in the UK does not reflect the boundaries of jurisdictions either. The relevant geographic market of broadcast media services depends on a number of local and national factors that are independent of any legislative barriers, such as the coverage of media local, regional or national) or the overlap of geographical coverage by the respective media.[309]

[307] See Section 10. c) (regulatory actions reserved for OFCOM) and Section 27 (enforcement related role of OFCOM) of the "Memorandum of Understanding Between OFCOM and the ASA (Broadcast) Limited and theBroadcasting Committeee of Advertising Practice Limited."
[308] For example the legislation regarding food labeling differ by nations.
[309] See for example Bird & Bird, "Market Definition in the Media Sector - Comparative Legal Analysis – Report by Bird & Bird for the European Commission , DG Competition" no. December (2002), http://ec.europa.eu/competition/sectors/media/documents/legal_analysis.pdf (Last visited February 28, 2013). The Communications Act 2003 also uses the term relevant market, but in the opposite sense, approaching from

3.2 Primary legislation (Acts of Parliament.

Acts of the UK Parliament have been recognized as the highest source of law[310] having a nation-wide effect in all the four members of the United Kingdom (England, Northern Ireland, Wales and Scotland).[311] Broadcasting is regulated by such an Act, having nation-wide effect.

3.3 Secondary legislation

Secondary legislation is statutory legislation, based on power delegated in a primary legislation. From the point of view of advertising regulation, the most important pieces of secondary legislation in the UK are the regulations implementing the UCP Directive and the Misleading Advertising Directive. [312]

3.4 Case law

In the common law systems case law typically governs private law. Advertising self-regulation is unique in that the ASA is considered by the English Administrative Court as a public authority, and therefore judicial review has been opened against its decisions. As to the relationship between statutes and case law, the doctrine of Parliamentary supremacy prevails and accordingly, Acts of Parliament can be challenged before court only exceptionally.[313]

the angle of the UK regulator: "relevant markets" means markets for any of the services, facilities, apparatus or directories in relation to which OFCOM have functions." (Section 3 (14))

[310] See e.g. Leyland p 26

[311] http://www.cilex.org.uk/about_cilex_lawyers/the_uk_legal_system.aspx

[312] The Business Protection from Misleading Marketing Regulations 2008 ("BPRs") and The Consumer Protection from Unfair Trading Regulations 2008 ("CPRs"). These two pieces of legislation cover unfair competition regulation in the UK. The UK Competition Act 1998 (which regulates restraints on competition, i.e. cartel, abuse and merger control) does not cover matters regarding advertising which falls under unfair competition legislation.

[313] Such legal challenge is possible by reference to legislative presumptions of compliance with the European Convention on Human Rights established by the Human Rights Act 1998 and with the UK's European Union obligations established by the European Communities Act 1972. Secondary legislation can be challenged in the courts on a wide variety of grounds, in common with other forms of Executive action. (See Greenberg in Westlaw UK Insight: "Legislation" Section)

3.5 Regulatory authorities (delegated power)

Involving regulatory authorities in governance raises several questions. The most important ones are delegation of power and accountability. As Tony Prosser writes, "Until the 80s regulation was little discussed,(...) public ownership, it was assumed, was the main way of making key industries reflect the public interest, and of curbing their monopoly powers, and this left little room for explicitly working out the principles underlying the exercise of public power and how this exercise could be made accountable."[314] Broadcast advertising regulation is subject to co-regulation, which is the result of two levels of delegation of powers. OFCOM is acting as independent media regulator for the entire UK, responsible to the UK Parliament under the transfer of functions based on the Communications Act (2003)[315] The ASA operates under an agreement with OFCOM[316]. The OFCOM agreement delegates both regulatory and adjudication powers to the BCAP (regulatory power) and ASA (Broadcast) (adjudication power).

4. STATUTORY FRAMEWORK FOR THE REGULATION OF BROADCAST ADVERTISING IN THE U.K.

Broadcast advertising regulation has three statutory levels; unfair competition, consumer protection and platform specific regulation (e.g. regulating broadcast media).

4.1 Unfair competition

The first and the broadest level is unfair competition related regulation which covers all forms of unfair commercial practices. Business-to-business advertisements are covered by the

[314] Tony Prosser, *Law and the Regulators* (Oxford: Clarendon Press, 1997). p 1
[315] Section 3(4) c) of the Communications Act (2003)
"OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances (...) the desirability of promoting and facilitating the development and use of effective forms of self-regulation(...)"
[316] See the Memorandum of Understanding dated May, 2004 between OFCOM and ASA. "Memorandum of Understanding Between OFCOM and the ASA (Broadcast) Limited and theBroadcasting Committeee of Advertising Practice Limited." The OFCOM – ASA delegation is based on a specific authorization by the Secretary of State for "contracting out", advertising regulatory functions (2004 No. 1975 - The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004. See http://www.legislation.gov.uk/uksi/2004/1975/made)

Business Protection from Misleading Marketing Regulations 2008 (the BPRs)[317], and business-to-consumers advertisements are covered by the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs)[318]

4.2 Consumer protection

The second level is the consumer protection legislation, which includes the Consumer Protection Act 1987 and specific legislation regarding sensitive products and services. There are more than three hundred pieces of legislation (such as Food Labelling, Gambling, Medicines, Fireworks, Financial services, etc.).

4.3 Media specific regulation

The third level is the media specific regulation. The Communications Act 2003 regulates electronic communications networks (which means electronic transmissions systems[319]), electronic communications services (i.e. services for signal transmission[320]), the provision of television and radio services; the use of the electro-magnetic spectrum (i.e. the allocation of radio frequencies used in terrestrial radio and television broadcasting) and confer functions on the Office of Communications.[321] The Communications Act authorizes OFCOM, to regulate content, scheduling and forms of commercial communications.[322] In this respect the Act defines the principal requirements only. With respect to advertising content these are the protection of minors[323], prohibition to incite crime or disorder[324], prohibition of political

[317] These are the implementation of the *Misleading Advertising Directive 2006/114/EC*. of the EU.
[318] The CPRs are implementing the Unfair Commercial Practices Directive 2005/29/EC
[319] Sec. 32 of the Communications Act 2003
[320] Ibid.
[321] See the Introduction of the Communications Act 2003
[322] The Broadcasting Acts 1990 and 1996 also relate to transmission and licensing of broadcast operations. Although their subject matter overlaps with the Communications Act 2003, this Act has amended, but not repealed them. The regulatory authorities under the Broadcasting Acts were terminated and their functions have been merged under OFCOM. See the regulatory archives here: http://www.ofcom.org.uk/regulator-archives/ (Last visited 2013. 05.25) The Broadcasting Acts do not concern broadcast advertising regulation, except some interpreting provisions by section 202 of the Broadcasting Act 1990 (paragraph 3 in Part 1 of Schedule 2).

[323] Sec. 319 (2) (a)
[324] Sec. 319 (2) (b)

advertising[325], prohibition of misleading, harmful, or offensive advertising[326], prohibition of unsuitable sponsorship[327]. The Act also requires that in the course of the content regulation, OFCOM considers the likely size and composition of the potential audience for radio and television programmes and the likely expectation of the audience as to the nature of the given programme.[328]

5. THE BCAP CODE AND ITS LEGAL STATUS

The BCAP Code has been enacted on the basis of a delegation of regulatory power by OFCOM to BCAP. It is generally applicable to all OFCOM licensed broadcasters. The BCAP Code is considered a co-regulatory measure due to the delegation of regulatory power and adjudication and also, that OFCOM stands behind ASA Broadcast as an enforcement authority[329]. The BCAP Code generally "applies to all broadcast advertisements (including teleshopping, content on self-promotional television channels, television text and interactive television advertisements)" in radio and television services licensed by Ofcom. As explained below, product placement and sponsorship are regulated by the OFCOM Broadcasting Code[330]. The BCAP Code is principally addressed to broadcasters and applicable by force of their broadcast license by OFCOM. This underlines the co-regulatory nature of the BCAP Code, as its application is not based on membership or express submission, but it applies indirectly through the OFCOM licences.

[325] Sec 319 (2) (g)
[326] Sec 319 (2) (h)
[327] Sec 319 (2) (j)
[328] Sec 319 (4) (b) and (c)
[329] Section 15 of Appendix 1 of the BCAP Code
[330] See Point c) of the Introductory Section of the BCAP Code

6. COMMERCIAL COMMUNICATION TECHNIQUES AND THE ALLOCATION OF REGULATORY TASKS IN THE UK

6.1 Spot sales, teleshopping and sponsorship

The three generally available commercial communication techniques used in linear television broadcasting are sale of advertising airtime (advertising spot sales), teleshopping, and sponsored programs (including product placement, and other forms of commercials within the television program).[331]

6.2 Co-regulation; OFCOM and the ASA (Broadcast)/BCAP

OFCOM has delegated the regulatory power to the BCAP with respect to content of advertising spots and teleshopping[332]. These two items qualify as stand-alone program items, as opposed to the various forms of sponsorship and product placement, where commercial communication is included in the editorial content of the program. OFCOM has retained the regulatory powers regarding these forms of commercial communications, as "sponsorship has strong links with programming and editorial issues"[333]. Consequently, advertising spot content is regulated by co-regulation in the BCAP Code. The various commercial communication techniques used within an editorial program item are regulated in OFCOM's Broadcasting Code[334]. Regulation of scheduling of television ads and teleshopping by licensed television broadcasters (both public service and commercial channels) are retained by OFCOM. This area is covered by "COSTA"[335]. Although there is an overlap between the COSTA and the BCAP Code, the latter regulates scheduling of advertising in radio and placement of television text and interactive advertisement.[336] Adjudication powers follow the

[331] See Article 9-11 of the Audiovisual Media Services Directive (2010/13/EU)
[332] See Section 10 b), c) and e) of the "Memorandum of Understanding Between OFCOM and the ASA (Broadcast) Limited and theBroadcasting Committeee of Advertising Practice Limited."
[333] Ibid. (Memorandum) 10. f)
[334] Section 9 of the Broadcasting Code ("Commercial references in television programming")
[335] Code on Scheduling of TV Advertising; Rules on Advertising Minutage, Breaks and Teleshopping
[336] See Section 32 of the BCAP Code

delegation of the regulatory ones. OFCOM handles the complaints regarding sponsorship and product placement, and the Advertising Standards Authority handles complaints regarding advertising spots and teleshopping.

6.3 Private censorship - Clearcast

Clearcast[337] is a private joint venture owned by six leading broadcasters in the UK[338], providing voluntary pre-clearance services on television commercials for television broadcasters. Its predecessor was the BACC (Broadcast Advertising Clearance Center). It reviews advertising scripts before production and advertising spots after production but before broadcast. Clearcast applies the BCAP Code in its operation. The BCAP Code refers to Clearcast as a voluntary pre-clearance system of broadcasters, but decisions of Clearcast are in fact binding upon terrestrial, cable and satellite broadcasters under their licensing agreements with OFCOM.[339]

The de facto binding effect is visible, for example, in the Animal Defenders case. The applicant's advertising was blocked by the negative pre-clearance by the BACC (the predecessor of Clearcast)[340] and it had to take legal steps to air its advertising.

In addition, no administrative judicial review is available against the Clearcast (BACC) decisions, as all pre-clearance arrangements are either voluntary or based on contractual (or license based) submissions.

6.4 The statistics

6.4.1The ASA cases – television broadcasting is still on the top of the list of complaints

[337] http://www.clearcast.co.uk/ (Last visited May 31, 2013)
[338] Clearcast Guide issued on February 22, 2012 p 6 – download available from http://www.clearcast.co.uk/news/show/143/ (Last visited May 31, 2013)
[339] Howard Johnson, "Communications Law Television Advertising - the Ofcom Backstop," *Comms. L. 2009, 14(1), 24-27* 14, no. 1 (2009): 24–27. p 2
[340] See Section 10 and 11 Animal Defenders v. UK App. nr. 48876/08

According to its annual report regarding 2012, the ASA handled 31,298 complaints regarding 18,990 ads, of which 3,700 was changed or withdrawn. [341]Television remains the most complained about medium (11.945 complaints about 5.234 cases).[342] Three issues are represented by this case load: complaints about misleading, offensive and harmful advertising.[343]

6.4.2 The OFCOM cases

Ofcom handles complaints regarding the breach of the OFCOM Broadcasting Code. As mentioned above, Section 9 of that code regulates the various forms of sponsorship and product placement. Although it is not a self-regulatory effort, it makes sense to compare the available information regarding the statistics of the complaints submitted to OFCOM regarding the Broadcasting Code. According to the annual report of OFCOM regarding years 2010/11[344], Ofcom has reached decisions on a total of 24,462 complaints (9,031 cases) regarding programme standards (including issues relating to political advertising and the scheduling of television advertising). Of the 9,031 closed cases (24,462 complaints) 168 cases were found to be in breach of the Broadcasting Code or other Ofcom codes or of licence conditions. Of these, three cases were subject to statutory sanctions (involving three separate broadcasters); 36 cases were resolved; and 8,827 cases were not in breach or were out of remit.

6.4.3 The Clearcast cases

According to its website, Clearcast copy clearance team considers over 33,000 scripts and views over 61,000 commercials every year (2012).

[341] See pages 10 and 29 of the annual report at http://asa.org.uk/About-ASA/~/media/Files/ASA/Annual%20reports/ASA_CAP%20Annual%20Report%20Online.ashx (Last visited May 18, 2013)
[342] Ibid. (ASA report) p 33
[343] Ibid. (ASA report) p 32
[344] See p 101 at http://www.ofcom.org.uk/files/2011/07/annrep1011.pdf (Last visited May 24, 2013)

7. FREEDOM OF SPEECH, FREEDOM OF THE PRESS, CENSORSHIP

Human rights are protected under the Human Rights Act 1998 **("HRA"),** which is the implementation of the European Convention on Human Rights in the UK. The HRA has incorporated by reference not only the Convention rights, but also the case law of the ECtHR and the European Commission of Human Rights.[345] Under English law, however, aside privileged categories of high value speech (like Parliamentary debates and the reports in the media about them, or reports of court proceedings), and other clearly defined areas, there are several widely drawn exceptions to the freedom of expression. In particular, reputation was given greater importance than the right to freedom of expression. At the same time the leading privacy related cases before the European Court of Human Rights against the United Kingdom where the conflicting fundamental right was freedom of the press, (Mosley[346], MGN[347]) were "no violation" cases, suggesting that the approach of the English Courts with respect to privacy vs. freedom of the press is in line with that of the ECtHR. Lord Bingham in R. v Shayler (2003) said, that free expression "is a fundamental right which has been recognized at common law for many years."[348] As to the role of the press and its limits, he said in the same case: "The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge."[349]

As regards protection of commercial speech, English law does not recognize that commercial motive would trigger different regulatory standards.[350] Munro brings several examples where the commercial or political motive does not affect speech regulation.[351] The only exception,

[345] See Section 2(1) of the Human Rights Act
[346] App. nr. 48009/08
[347] App. nr. 39401/04
[348] Referred to in Sec. 15.06 of Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2006).
[349] Ibid. (Clayton) Sec. 15.06
[350] Munro, "The Value of Commercial Speech." p 5
[351] See Ibid. p 5

he states, is commercial advertising, which is subject to detailed specific legislation, self- and co-regulation.

7.1 Censorship

As discussed in the Introduction censorship is not necessarily unconstitutional, but always suspicious and is subject to high scrutiny. The core points of such scrutiny are the purpose of censorship and content of the speech, which are the same issue approached from two angles. As to the purpose of censorship, for example, advertising self-regulatory content restrictions are reasoned with consumer protection[352] and consumer confidence in advertising[353], and therefore restrict speech that might be offensive for the audience[354]. Self-regulation that has overarching national application, like the one by ASA Broadcast in the UK, censorial effect concerns not only the broader population of the speakers and the wide range of audience, but also the members of the self-regulatory organization themselves. In this case the regulatory, monitoring and adjudication functions are separated to any express acceptance by a member to its own organization. The wide personal scope and general regulation of a broad variety of subject matters that encompasses the entire broadcast operation of the members exclude personal control over the content restrictions introduced by the self-regulation.

Turning to my target country, the UK, the self-regulatory code is mandatory there[355], and the authority of the SROs is nation-wide. Although the BCAP Code applies principally to the

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" In each instance, the essence of the offence lies in the publication of the matter defined as harmful or offensive. In the case of blasphemous libel, when a prosecution was brought in respect of a published poem, it was neither necessary nor relevant to consider whether the publication concerned might be classifiable as literary or artistic. In the case of prosecutions for the offences of incitement to racial hatred, it has been neither necessary nor relevant to inquire whether provocative speakers or pamphleteers were indulging in "political speech", as many of them arguably were. If a television broadcast is held to involve a substantial risk that it would seriously prejudice legal proceedings, it is immaterial whether the publisher is a public corporation (like the BBC) or a "commercial" television company. In all of these cases, if the material involved were classifiable as "commercial", it would not serve either to mitigate or to aggravate the commission of the offence."

[352] See BCAP Code Introduction, Section a.

[353] See for example the third paragraph of the Foreword to the "Memorandum of Understanding Between OFCOM and the ASA (Broadcast) Limited and theBroadcasting Committeee of Advertising Practice Limited."

[354] See Section 4 of the BCAP Code

[355] Lorraine Conway, *The Advertising Standards Authority (ASA)*, 2012. p 3

broadcast media, it indirectly affects the advertisers (as speakers) and the viewers and consumers (as recipients of information).In fact the authority of the ASA and Clearcast is not avoidable. The stakeholders of the ASA include the advertising industry, the advertisers and the media, while consumers and viewers are not represented.[356] As OFCOM put it, for example, in connection with the setup of the broadcast advertising co-regulation scheme, "(a) significant issue has been how to ensure that BCAP has sufficient motivation to enforce rules which may be controversial and unwelcome within industry such as food advertising."[357] It follows therefore that the circumstances for the self-regulatory censorship (general territorial scope of regulation and adjudication, spillover to non members and regulatory bias due to the professional membership) prevail in the UK, which warrants the analysis of the regulatory content and decisions of the self-regulatory authority in this dissertation.

8. WHY IS IT EASIER REGULATING ADVERTISING THAN REGULATING EDITORIAL CONTENT IN THE UNITED KINGDOM? SELF- AND COREGULATION AND THE ROLE OF PRIVATE CENSORSHIP.

8.1 Self-regulation of the printed press.

Aside specific criminal and civil law aspects, the printed press has so far not been subject to comprehensive restrictions in the UK, and is fully self-regulated.[358] This regime is subject to changes, as Lord Leveson is proposing replacing the Press Complaints Commission with a new organization with members that are independent from the press and the Government, and which is equipped with appropriate funding and more regulatory and adjudication power.[359] Critics of the Leveson proposals call the attention to the risk of introducing political control

[356] For the ASA (and BCAP and BASBOF) membership, see Lord Smith of Finsbury, "Leveson Inquiry into the Culture, Practices and Ethics of the Press Witness Statement The Rt Hon. Lord Smith of Finsbury, Chairman, Advertising Standards Authority," 2011. Section 2.3.5;
[357] OFCOM, "Initial Assessments of When to Adopt Self- or Co-regulation" no. March (2008), http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/summary/condoc.pdf. Section 2.40
[358] Eric Barendt and Lesley Hitchhens, *Media Law; Cases and Materials* (Pearson Longman, 2000). p 9
[359] *Leveson Inquiry Executive Summary*, 2012, http://www.official-documents.gov.uk/document/hc1213/hc07/0779/0779.pdf (Last visited February 26, 2013). Sections 57-76

over the press, replacing a fully self-regulatory organization with a powerful censorial body.[360]

The history of British press self-regulation has been in fact a continuing discussion on the necessity of the statutory control over self-regulation. Press self-regulation has existed since 1953, when the industry established the General Council of the Press with the principal function to promote press freedom[361] from control by proprietors. The concerns were the increasing ownership concentration of the press, and "differing degrees in accusations of inaccuracy and political bias on the one hand and alarm at the intrusion of journalists into the private lives of individuals on the other."[362]

The General Council of the Press has been widely criticized, for lack of independence (as its members were appointed by the press), lack of codes of ethics and continuing accusations of unethical journalism. It was replaced by the Press Council in 1962, which had 20% of its members independent of the press, but still had no general journalistic code of ethics. The situation did not improve and critiques were brought again principally for intrusions by the press into privacy. During the Eighties certain reports of tabloids (the Sun and the News of the World) on MPs and the Royal Family triggered in 1991 the replacement of the Press Council by the Press Complaints Commission ("PCC"), which created its Code of Ethics and concentrated on handling complaints rather than press freedom. Now the PCC is being widely criticized, again, for lack of independence and rigor and again for problems regarding privacy,

[360] See for example http://www.guardian.co.uk/media/2013/may/09/leveson-inquiry-press-coverage (Last visited May 19, 2013)
[361] Barendt and Hitchhens, *Media Law; Cases and Materials*. p 33 See also Mike Feintuck and Mike Varney, *Media Regulation, Public Interest and the Law*, Second (Edinburgh University Press, 2006). p 191-192
[362] Section 2.4 of Lord Justice Leveson, "An Inquiry into the Culture, Practices and Ethics of the Press; Final Report," 2012, http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp.

and it is preparing for its termination and replacement by a new organization. The principal claims of the Leveson inquiry[363] regarding the PCC are that

- the PCC lacks independence, as its members and its Chair are all senior industry members;
- the PCC is in fact not a regulator, but a mere complaint handling body;
- the PCC lacks appropriate financing;
- PCC membership is voluntary, therefore its coverage is not universal;
- PCC powers are inadequate, especially, that the available remedies are inadequate and that PCC had no right to conduct an investigation;
- the PCC has proved itself to be aligned with the interests of the press.

8.2 Self-regulation of editorial content v. advertising self-regulation

The past sixty years of self-regulation of the press has been full of scandals and debates. During this period the press has been threatened with introducing legislative control several times. Seven Parliamentary Commissions have been appointed, the self-regulatory organization has so far been reorganized three times, and as a result of the recent scandals, the Press Complaints Commission is facing abolishment and replacement with a more powerful regulator.

In comparison, the advertising self-regulatory organization which was established in 1961, has been a success story, with ever extending scope and authority. Today it is in charge of advertising regulation of all media in the UK, including broadcast and non-broadcast advertising.

The foregoing summary begs for comparison of the self-regulation of advertising with the self-regulation of the press. What are the reasons for these striking differences? It will be shown below, that the broadcast media and its self-regulatory organizations (the Clearcast and the ASA) operate as an efficient multi-level voluntary censorship system over commercial speech, which highly contributes to the efficiency of the advertising self-regulatory system.

[363] See Sections 41-46 of the Executive Summary of the Leveson Inquiry, p 12

8.3 Self-regulation of commercial advertising

In 1962, the advertising industry (agencies, media and advertisers) established its self-regulatory organization, the Committee of Advertising Practice ("CAP") for self-regulation of advertising in the printed press. Although that area was at the time covered by neither self- nor co-regulation, the threat of introducing statutory control was realistic. The ongoing debate regarding self-regulation of editorial content was at its peak at the beginning of the Sixties. In 1958 the Government appointed a general inquiry on consumer protection, part of which was related to advertising and sales practices. The inquiry was triggered by the quickly changing market and advertising practices. The subsequent report (the Molony Committee report of July 1962[364]) proposed a nation-wide Consumer Council and local advisory committees, and it rejected the statutory regulation over advertising and recommended voluntary control. The CAP created the non-broadcast advertising code and created the ASA in 1962 as an adjudicator of the Code.[365]

8.4 The PCC and the ASA; a comparison from regulatory point of view

The CAP/ASA have never had any major crisis, their stature and efficiency have never been seriously criticized, and their scope has constantly been extended during the years since 1961/62. I argue that it is due to the nature of the regulated area and the regulatory technique.

8.4.1The regulated area.

Regulatory control of advertising appears to be easier than that of editorial content. Obviously there are arguments regarding the nature of content itself. Editorial content (especially the news and current affairs program items, which typically trigger privacy related criticism) are often one and only as opposed to advertising spots which are artificially created for multiple

[364] Cmnd. 1781, July 1962, referred to in J. W. A. Thornely, "Final Report of the Committee on Consumer Protection," *Cambridge Law Journal* 21, no. 1 (1963): 1–7. p 1
[365] http://asa.org.uk/About-ASA/Our-history.aspx (Last visited 2013. May 22.)

broadcast. Therefore, timing and availability of adverts are not comparable to e.g. a news item, where the media must consider its competitor when it refrains from publication.

8.4.2 Regulatory argument.

I argue that regulation of the advertising industry is easier than regulation of editorial content, primarily for the built-in private censorship by the media. As explained in Section A. of Part I, advertising regulation primarily targets the media, and not the speaker (who in this case is the advertiser). In the case of advertising, the speaker uses two intermediaries to convey his message, the agencies and the media. Advertising regulations target these intermediaries and not the speaker directly. In the case of licensed broadcasters, three such private enforcement levels exist. First, the advertiser or the agency should obtain pre-clearance of the pre-production script and the post-production advertising by Clearcast. Then the broadcasters themselves may refuse broadcasting if there is a compliance problem. Third, the broadcasted advertising is subject to challenge by any of the audience before the ASA.

This is reflected in the BCAP Code, stating among the principles of compliance, that "All compliance matters (copy clearance, content, scheduling and the like) are the ultimate responsibility of each broadcaster."

As a result, in the case of advertising, the speaker (i.e. the advertiser) is controlled by the media, before any regulatory authority involvement in the enforcement process.

9. REGULATORY BIAS - ORGANIZATION OF UK ADVERTISING SELF- AND CO-REGULATION

One of the major criticism against the Press Complaints Commission is that it is not independent and it is biased towards the press. In fact advertising self-regulation is not different, as the members of the Committee of Advertising Practice ("CAP" - the body in charge of drafting the self-regulatory code) are also industry representatives. In the following I examine the stakeholders and risk of bias in the case of the CAP and the ASA.

Regulatory adjudication and financing tasks are separated within the ASA organization, among three organizations, the CAP, ASA and Basbof, all three of which are traditionally operating under the "ASA" brand. Regulation is in the hands of the Broadcast Committee of Advertising Practice ("BCAP"), complaints are handled by the ASA and the Broadcast Advertising Standards Board of Finance Ltd. ("Asbof") handles the levy of 0,1% of the cost of buying advertising space, for the funding of the advertising self-regulatory regime. As a result, these three organizations are financially independent of both the government and the industry.

9.1 Stakeholders of BCAP and the ASA

BCAP. "(B)CAP members (i.e. the entities represented in the decision making body) comprise trade associations representing the three main parts of the advertising industry, namely the advertising agencies, media owners (e.g. poster site owners and newspaper publishers) and advertisers."[366]

9.1.1 Members of the ASA Broadcast Council

Members of the ASA Broadcast Council are not stakeholder representatives (as in the case of the BCAP) but are indirectly appointed by the stakeholders. ASA Broadcast Council

[366] Lord Smith of Finsbury, "Leveson Inquiry into the Culture, Practices and Ethics of the Press Witness Statement The Rt Hon. Lord Smith of Finsbury, Chairman, Advertising Standards Authority." (Finsbury) Section 2.3.5, BCAP members are:
Advertising Association
British Sky Broadcasting Limited
Channel 4 Television Corporation
Channel 5 Broadcasting Ltd
Commercial Broadcasters Association (CoBA)
Direct Marketing Association
Electronic Retailing Association UK
Incorporated Society of British Advertisers
Institute of Practitioners in Advertising
ITV plc
RadioCentre
Clearcast
Radio Advertising Clearance Centre
S4C
http://www.cap.org.uk/About-CAP/Who-we-are/Our-committees.aspx (Last visited March 17, 2013)

Members are appointed by the Chairman of ASA(B) for a period of no more than two times three years. Under the agreement with OFCOM, two-thirds of the twelve members shall be independent of the industry.[367] The Chairman of ASA (B) is appointed by the board of Basbof and Asbof[368] jointly. Board members of both Asbof and Basbof are representatives of the advertisers, agencies and the media.[369] Consequently, through this representation, the industry has the right to appoint the ASA(B) Council members. Pursuant to the agreement with

[367] See Section 17 of the "Memorandum of Understanding Between OFCOM and the ASA (Broadcast) Limited and theBroadcasting Committeee of Advertising Practice Limited." See also http://asa.org.uk/About-ASA/Our-team/ASA-Council.aspx (Last visited June 1, 2013)

[368] The abbreviations Basbof and Asbof stand for the Broadcast and Non-Broadcast Advertising Standards Board of Finance, the third organization leg under the ASA umbrella, in charge of financing the broadcast and non-broadcast advertising self-regulation system.

[369] http://www.basbof.co.uk/operation.htm (Last visited June 1, 2013)
http://www.asbof.co.uk/operation.htm (Last visited June 1, 2013)
Bothe Basbof and Asbof Board members are representatives of the major industry bodies:

Basbof Board members represent the following organizations:

The Advertising Association	AA
Clearcast Ltd	BACC
The Radio Centre	RC
Incorporated Society of British Advertisers	ISBA
Institute of Practitioners in Advertising	IPA
The Satellite and Cable Broadcasting Group	SCBG

Two other directors represent television companies, including ITV.

Asbof Board members represent the following organizations:

The Advertising Association	AA
Cinema Advertising Association	CAA
Direct Marketing Association	DMA
Directory and Database Publishers Association	DDPA
Incorporated Society of British Advertisers	ISBA
Institute of Practitioners in Advertising	IPA
Institute of Sales Promotion	ISP
Internet Advertising Bureau	IAB
Newspaper Publishers Association	NPA
Newspaper Society	NS
Outdoor Advertising Association	OAA
Periodical Publishers Association	PPA
Royal Mail	RM
Scottish Daily Newspaper Society	SDNS
Scottish Newspaper Publishers Association	SNPA

OFCOM, the person appointed as Chairman of ASA (B) shall be free of interests in the advertising and media industries, and Ofcom must consulted regarding his appointment.[370]

9.1.2 Decision-making regarding code drafting and complaint handling.

The ASA(B) Council reaches its decisions by majority. With regards to BCAP, all questions arising at a meeting are decided by a majority of not less than three fourths of the votes.[371] In addition, the requirements of the Communications Act as to the preparation or amendment of broadcasting standards shall also be met.[372] Accordingly, the draft code or its amendments shall be published and OFCOM must hold consultations with stakeholders before finalization. (In this respect, due to the delegation of regulatory powers, the publication and consultation binds the CAP or BCAP.)

10. CONTENT RESTRICTIONS IN THE BCAP CODE: HARM AND OFFENSE

In 2012, 7,304 complaints were submitted to the ASA regarding offensive advertising in the broadcast media. This amount leads the chart of complaints sorted by subject matters. The second is misleading advertising (4,783) and the third is harmful advertising (1,961). In the following I will analyze the harm and offense related provisions of the Code and related rulings, as this area is the most complained of in the television broadcasting, and it appears to allow the most discretion for the decision maker.

10.1 Freedom of speech and harm and offense

Theory and standards of free speech and its restriction based on the "harm" and "offense" arguments is discussed in the Introduction. The point here is the definition of harm and offense in the self-regulatory code. A flexible, broad definition gives more space for speech

[370] Ibid. (MoU OFCOM) Section 15
[371] This is based on the information provided by Mr. Matt Wilson, Press Officer of the Advertising Standards Authority via E-mail, on June 5, 2013.
[372] See Section 324 of the Communications Act 2003

restriction, and if it is driven by economic considerations ("to increase the audience's confidence in advertising"[373]).

10.2 The Rules on Harm and Offense in the BCAP Code

Harm and offence regulation for the purposes of television advertising is a specific area, and does not overrule the otherwise applicable general civil and criminal law (obscenity, blasphemy, defamation, etc.) and advertising specific law regarding unfair commercial practices, misleading advertising, etc. These general rules prevail separately and are enforced by authorities other than the ASA(B). The ASA(B) applies the BCAP and CAP Codes only, and has no authority for adjudication of compliance with legislation.[374] As a consequence, advertising self-regulation and co-regulation contains mostly rules which are subsidiary to and beyond legislation.

At primary legislation level, the Communications Act 2003 regulates this matter, obliging OFCOM to prevent the inclusion of advertising which may be misleading, harmful or offensive in television and radio services.[375] Misleading advertising would logically fit under the category of harmful advertising. I assume that a a special Section of "Misleading advertising" has been created in the CAP and BCAP Codes because separate legislation exists both at EU[376] and UK level[377] regarding misleading advertising. The BCAP Code regulates the details of the prohibition of misleading, harmful and offensive advertising under the delegation of regulatory power by OFCOM to the BCAP. In the following I analyze the "harm and offence" related provisions of the BCAP Code, and do not discuss misleading

[373] "The advertising industry has a strong interest in maintaining the system and a level playing field, not least to maintain high levels of consumer trust in advertising, but also because advertising self-regulation is a cost-effective way to resolve grievances." See the homepage of the Committee of Advertising Practice - http://www.cap.org.uk/About-CAP/Our-role.aspx (Last visited July 6, 2013)
[374] "The ASA may decline to investigate where there is a dispute which, in its view, would be better resolved by another regulator or through the Courts." – See Section 01 of the BCAP Code
[375] Sec. 319 (2) (h)
[376] Misleading Advertising Directive 2006/114/EC, October,
[377] Consumer Protection from Unfair Trading Regulations 2008

advertising, as the latter area is regulated in detail by legislation and the relevant rules are strict enough not to allow discretion for the self-regulatory authority.

10.3 The regulatory standards for harm and offence in the BCAP Code

Besides prohibition of misleading advertising, harm and offence based restriction is the most important subject in the BCAP Code, which serves as a basis of most of its restrictions. The Code regulates harm and offence in three levels.

The first level is the principle set forth in Section 4, that

> "(A)dvertisements must not be harmful or offensive. Advertisements must take account of generally accepted standards to minimise the risk of causing harm or serious or widespread offence."

At this level of principle, the BCAP Code treats harm and offence as one category, which suggests equal standards of regulation and adjudication for harmful and offensive advertising. There would be, therefore, a theoretical risk, that the ASA uses the above provision as a general catch-all provision, giving a discretional power to restrict advertising. The ASA, however, do not use the general provision in its rulings. The complaints are always addressed in the lights of a specific rule.

The second level is the general rules (Sec. 4.1 – 4.12 of the BCAP Code) of the prohibition of harm and offence in advertising. Some of these categories reflect the AVMS Directive (respect for human dignity; prohibition of discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation; prohibition to encourage behavior prejudicial to health or safety; prohibition to encourage behaviour grossly prejudicial to the protection of the environment[378]).

[378] See Art. 9 of the AVMS Directive 2010/13/EU

The third level of the BCAP Code is the advertising restrictions in specific categories. Some of these areas (medicine, alcohol, tobacco) have been regulated in the AVMS Directive[379]. Others are categorically prohibited categories (tobacco, guns, betting systems, etc.). In the analysis below I will discuss the rules regarding Faith, Religion and Equivalent Systems of Belief which carry the risk of allowing discretion for the authority in filtering high value speech.

11. ANALYSIS OF THE GENERAL PROHIBITIONS ON HARM AND OFFENCE IN THE BCAP CODE

There are two possible classifications of these provisions, both of which would affect the standard of scrutiny before a state court. The first is to group the restrictions into harm-based and offence-based restrictions and the second is to classify them into content based and content neutral restrictions. The ASA process, however, seems to treat all the advertising restrictions in the same neutral mechanism. The ASA Council examines compliance only and does not measure underlying reasons for a violation of the Code, and there are no different levels of scrutiny depending on the potential or actual harm or offence threatened with or caused by the given commercial.

In the course of classification, based on the definition above, I considered "harm-based prohibition" as a prohibition of advertising that directly infringes the rights of other persons. I considered all other restrictions as "offence-based prohibition". Still there are problems with the separation, principally because most of the prohibitions of the BCAP Code (the ones which do not repeat a statutory provision or case law) concern matters which do not trigger legislative interference (e.g. the prohibition to exploit the special trust that minors place in parents, etc.). One may argue, therefore, that in fact none of the expressions meet the narrow definition of "direct infringement to other persons". This argument is supported by the fact

[379] Ibid. (AVMS Directive)

that the BCAP Code does not differentiate in the levels of scrutiny between harm and offence. In the charts below I first discuss the content based restrictions, in the two – rather arbitrary - categories of harm-based and offence-based restrictions and then show the content neutral restrictions. Theoretically these wide scope of restrictions are supported by the self-regulatory soft sanctions. This, however does not apply in the case of the licensed broadcasters, where OFCOM stands behind with its public powers to impose a fine, suspend and withdraw the broadcast license.

11.1 Content based restrictions: General harm and offence provisions in the BCAP Code

The two charts below show some of the ASA rulings upholding the complaints, grouped into harmful and offensive advertising spots. Since the ruling in each case upholds the complaint, the decision in each case was that the given advert cannot be shown in the given form or with the given content, or the time slot of broadcasting must be changed.

Harm-based restrictions	**Examples in the rulings**
4.1 Advertisements must contain nothing that could cause physical, mental, moral or social harm to persons under the age of 18.	Seven rulings were shown in this category where the complaints were upheld[380]. The rulings prohibited the ads or required moving the spot to a later time slot. Out of the seven ads there were three feature film trailers[381]; one night club advert[382]; and three ads encouraging potentially harmful behavior[383].
4.3 Advertisements must not exploit the special trust that persons under the age of 18 place in parents, guardians, teachers or other persons.	No rulings available
4.4 Advertisements must not include material that is likely to condone or	Six rulings were shown in this category where the complaints were upheld. All of these were

[380] I used the advanced search engine of the ASA (http://asa.org.uk/Rulings/Adjudications/Advanced-Search.aspx), with the following criteria: Media types: ”television” ; decision: ”upheld”; BCAP Television Code: ”4.1”

[381] Universal Pictures (UK) Ltd. (A12-207955); Paramount Pictures UK (A11-174211); Lions Gate UK Ltd. 140288

[382] KN Leisure Ltd t/a Angels Gentleman's Club (A12-213160)

[383] Quooker UK Ltd. (A12-217924); Citroen UK Ltd. (148400); YSL Beaute Ltd. (138579)

encourage behaviour that prejudices health or safety	ads potentially encouraging harmful behavior.[384]
4.9 Advertisements must not condone or encourage violence, crime, disorder or anti-social behaviour.	One ruling was shown in this category showing simulation of drug use[385]
4.12 Advertisements must not condone or encourage behaviour grossly prejudicial to the protection of the environment.	No ruling available

Offence-based restrictions	**Examples in the rulings**
4.2 Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.	Three rulings were shown in this category where the complaints were upheld. One was offending religious feelings[386], one was declared offensive for transgender persons[387], and one case was found offensive as it was simulating drug use[388]
4.8 Advertisements must not condone or encourage harmful discriminatory behaviour or treatment. Advertisements must not prejudice respect for human dignity	One ruling was shown in this category, which was declared offensive for transgender persons[389]
4.10 Advertisements must not distress the audience without justifiable reason. Advertisements must not exploit the audience's fears or superstitions.	Two cases were shown here. One was blocked for causing undue fear about the risk of getting cervical cancer from HPV[390], the other one was a film trailer[391]
4.11 Animals must not be harmed or distressed as a result of the production of an advertisement.	No ruling available

The above provisions of the BCAP Code are strict and unconditional restrictions of commercial speech and in its rulings the ASA follows the BCAP Code with less consideration of any countervailing interests of the advertisers or the audience. Below I compare some of the ASA rulings in the more sensitive cases with the standards before the ECtHR and those under the First Amendment regarding pure commercial speech and mixed speech.

11.1.1 Pure commercial content via television broadcasting.

[384] Quooker UK Ltd. (A12-217924); Citroen UK Ltd. (148400); YSL Beaute Ltd. (138579); sit-up Ltd. (A12-212249) and (A12-209847); BNL Media Ltd. (A12-198084)
[385] YSL Beaute Ltd. (138579)
[386] The Sofa Factory Ltd. (A12-186954)
[387] Paddy Power Plc. (A12-188096)
[388] YSL Beaute Ltd. (138579)
[389] Paddy Power Plc. (A12-188096)
[390] Home Test Direct (UK) Ltd. (A12-185655)
[391] Paramount Pictures UK (A11-174211)

In its Sofa Factory ruling[392] (see above regarding Sec 4.2 in the chart on offence-based restrictions), the advert was blocked by the ASA, as using an image of Guru Nanak, the founder of Sikhism and sacred Sikh verses in an advertising was offensive.

As discussed in the Introduction, the ECtHR applies proportionality analysis, whereby the Court "*determine(s) whether the actual "restrictions" and "penalties" complained of by the applicant were "necessary in a democratic society"*[393]. Such proportionality analysis is coupled with a margin of appreciation, whereby "a measure of discretion is allowed to the Member States in the manner in which they implement the Convention's standards, taking into account their own particular national circumstances and conditions"[394].

It seems that the ECtHR allows higher margin of appreciation in the case of speech allegedly offending morals or related to religion. See for example the Murphy case[395] (religious advert on television – no violation) and the Mouvement raëlien suisse v. Switzerland (bilboard advertising campaign by an NGO accepting the existence of extraterritorial creatures – no violation). In Mouvement Raelien the ECtHR applied the following test:

> "As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ..."[396]

The U.S. Supreme Court applies a four prong intermediate scrutiny test (Central Hudson[397]) to television broadcast advertising (Section C. of Part I.).

> "For commercial speech to come within that provision (the First Amendment – added by GB), it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the

[392] The Sofa Factory Ltd. (A12-186954)
[393] Handyside §47
[394] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerpen, Oxford, 2002). p2
[395] Murphy v. Ireland App. Nr. 44197/98
[396] § 48 App Nr. 16354/06
[397] Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York; 447 U.S. 557

> governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[398]

In the United States offensive speech may in general not serve as a basis for speech restriction as it would be against the prohibition of viewpoint based regulation of speech[399]. There are specific contents, however, which are not considered protected speech, therefore they are exempt from the prohibition of viewpoint-based regulation. These are the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'.[400]

Had the above Sofa Factory case been tried under the First Amendment jurisdiction, the arguments supporting the blocking of the Sofa advertising above would be the commercial motive, the fact that the medium is broadcast television and that the message had profane elements (in terms of using sacred persons and songs for commercial purposes).

11.1.2 Mixed speech.

In the Home Test Direct Case the ASA blocked a HPV test advertising (see above regarding Section 4.10 of the BCAP Code), which advertised the test with supporting (true) arguments that

> „Each day in the UK, around eight women are diagnosed with cervical cancer. Three of those will die." A female presenter stated, „We now know that virtually 100% of cervical cancers are caused by the human papilloma virus, usually just known as HPV."

The ASA found the advert scaremongering, as it did not include several important pieces of information about the risks of cervical cancer:

> "whilst we acknowledged how important it generally was to emphasise the seriousness of cervical cancer, we concluded that these ads were irresponsible and likely to cause undue fear and distress about the risk of getting cervical cancer from HPV."

[398] Ibid. 566
[399] See Elena Kagan, "Regulation of Hate Speech and Pornography After R.A.V.," *60 U. Chi. L. Rev. 873 1993* 60 (1993). referring for example to the case of R.A.V. v. City of St. Paul 505 U.S. 377 (1992)
[400] Chaplinsky v. New Hampshire 315 U.S. 568 (1942) referred to in Sajó: A szólásszabadság kézikönyve, Budapest, KJK-KERSZÖV, 2005

The HPV case of the ASA is an example of mixed speech, which would most probably enjoy higher protection under the ECHR and would not result in strict scrutiny under the First Amendment jurisdiction.

In the Hertel v. Switzerland case[401] the ECtHR faced a somewhat similar situation, where Mr. Hertel was penalized for an article about harmful effects of microwave ovens on health. Although the article contained evidently misleading information, the ECtHR found that the penalty violated Mr. Hertel's free speech rights, since the speaker was participating in a debate affecting public interests. It seems therefore that in the ECtHR case law high value speech elements certainly increase the level of scrutiny.

As shown in the Introduction, the U.S. Supreme Court is not sensitive of mixed speech, and high value elements in commercially motivated speech rarely lose strict scrutiny[402] by the Court. One of the rare examples of the opposite, i.e. when high value elements save commercial speech from regulation is Bigelow v. Virginia[403] of 1975, where the advertising had a clear commercial motive, of offering abortion treatments; however, it also contained factual material of clear public interest: "Abortions are now legal in New York. There are no residency requirements."[404] The Court declared this message protected considering the importance of its non-commercial elements for the general public.

[401] App. Nr. 25181/94 (1998)
[402] See for example the case of Kasky v. Nike in the Introductory Chapter regarding constitutional protection of commercial speech (Section C of Part I)
[403] 421 U.S. 809 (1975)
[404] Ibid. (Bigelow) 822

11.2 Content neutral restrictions in the BCAP Code

Restriction	Examples in the rulings
4.5 Advertisements must not include sounds that are likely to create a safety hazard, for example, to those listening to the radio while driving.	No ruling available
4.6 Advertisements must not include visual effects or techniques that are likely to affect adversely members of the audience with photosensitive epilepsy	One case was shown here, which included flashing images, and therefore was annoying for sensitive viewers.[405]
4.7 Advertisements must not be excessively noisy or strident.	No ruling available

The only available ruling is related to a car advertising spot by Citroen, including a flashing image that may cause photo-sensitive epilepsy. The advertising was cleared by Clearcast and subsequently double checked by OFCOM. The review by OFCOM showed that

> "Ofcom therefore concluded that the large 'YES' flashing on its own did not constitute a breach. However, they also concluded that the smaller 'YES' words met all three conditions above (brightness, sequence of flashing, percentage of the screen) and therefore did constitute a breach.

In this ruling the ASA simply accepted the position of OFCOM as to the compliance of the flashing image complements with the OFCOM requirements and did not ponder on any competing arguments in favor of the advertiser.

12. ANALYSIS OF THE THIRD LEVEL REGULATION: THE BCAP RULES REGARDING FAITH, RELIGION AND EQUIVALENT SYSTEMS OF BELIEF[406]

This Section of the BCAP Code is a good example how big of a twist is given to an otherwise valuable class of speech, when it solely serves commercial motives. This category allows an extremely narrow space for commercials under this category on the following grounds:

[405] Citroen UK Ltd. (A11-164759)
[406] Section 10.3 of the old BCAP TV Code which was replaced by the BCAP Code in 2010

> "(i) to reduce the social harm that can result from damage to inter-faith relations (ii) protect the young and allow parents to exercise choice in their children's moral and philosophical education (iii) protect those who are vulnerable because, for example, of sickness or bereavement (iv) prevent potentially harmful advertisements from exploiting their audience"[407]

and in addition the Communications Act prohibits political advertising in broadcast media[408], and that prohibition is interpreted to cover a broad scale of "objects, which are essentially political"[409].

As a result, the BCAP Code allows adverts in this category which "the audience is likely to regard merely as entertainment and that offer generalised advice that would obviously be applicable to a large section of the population, for example, typical newspaper horoscopes."

As a consequence, all the available ASA Rulings upholding the complaints are related to borderline cases, which advertise guidance on personal affairs on a religious basis in return for a fee. A few examples:

[407] BCAP Code Section 15 "Faith, Religion and Equivalent Systems of Beliefe"
[408] Sections 319 (2) (g) and 321 (2) of the Communications Act 2003
[409] Lord Bingham in the Animal Defenders judgment, quoted in Section 22 of the ECtHR judgment Animal Defenders v. the United Kingdom App. nr. 48876/08

Advert	Problem
"Seeking Goodness Centre Spiritual Scholar, Professor Mohammad Zain; All the ladies and gentlemen who are in any kind of problem should contact [me] urgently on this number 07943 … NORTH WEST LONDON …"[410]	The advert offered individual advice on personal problems.
"(...) Since 1952, Professor Mohammed has been helping people in need. For anything on astrology, numerology, tarot card reading, palmistry or horoscope, contact Professor Mohammed. (...) Serving since 1952, Disobedient children, Black Magic, Domestic Issues, Children, Business, Marriage, Professor Mohammed 0796 xxx xxxx.'	The advert promoted an unacceptable category as defined by rules 3.1 (i) (the occult) and 10. 3 (The occult, psychic practices and exorcism). The advert offered individual advice on personal problems.

In this category pure commercial speech is allowed only, as mixed speech (i.e. political advertising, personal advice) is prohibited. Therefore, contrary to the general regulatory regime, mixed nature of speech results in prohibition, rather than stricter scrutiny of the restrictions. This regime was to some extent tested in the Animal Defenders judgment of the ECtHR, which found that the prohibition of political advertising in the UK does not violate Article 10 of the ECHR.[411]

13. THE TOP FIVE MOST COMPLAINED ABOUT ADS OF 2012 AS PER THE ANNUAL REPORT OF THE ASA FOR 2012[412]

Although the above cases show that the ASA sometimes applies stricter standards for offensive speech as the ECtHR, the most complained cases show that the ASA clearly resists audience pressure. The chart below shows the most complained cases with the ASA decisions.

[410] Professor Mohammad Zain (92852)
[411] Sec. 125 of the Animal Defenders v. UK judgment (48876/08)
[412] http://asa.org.uk/About-ASA/~/media/Files/ASA/Annual%20reports/ASA_CAP%20Annual%20Report%20Online.ashx (Last visited July 10, 2013)

It is telling that all the top five cases were television ads, and offensive speech related. It is also interesting to experience the level of sensitivity of the general audience, which is reflected by the ads complained about. In my personal perception the top five most complained television advertisings did not give ground for complaint. I am providing the Internet link to the video footages in the respective Fn wherever possible. The footages and the complaints illustrate very well the level of potential exposure of advertising content to a less flexible approach by a self-regulatory organization.

Advert	**Reasons and number of complaints received**	**ASA decision**
Two TV ads by Gocompare.com Ltd., a price comparison website lead the list. One of them, featured a footballer kicking a football into the stomach of an opera singer[413], the other featuring the famous former tennis champion taking aim and shooting the main character with a rocket launcher[414]	Offensive (1008 and 797 respectively)	The complaints are not upheld. The ads were not offensive, as would be seen as light-hearted and comical.
ASDA Stores Ltd. This TV ad, which featured a mother carrying out various tasks in preparation for Christmas.[415]	Sexist (620)	Not upheld. The ASA also rejected complaints that the ad was offensive to single fathers or men who played a primarily domestic role.
TV ads for a TV programme of Channel Four Television titled "My Big Fat Gypsy Wedding"[416]	Offensive, racist and unfairly denigrated and degraded Gypsy and Traveller communities (373)	Partly upheld. After a request from the Independent Reviewer of ASA Adjudications to re-open the investigation, the ASA agreed that some of the images together with the accompanying text were offensive and

[413] See the advert here: http://www.youtube.com/watch?v=caOAk-V6P94
[414] See the advert here: http://www.youtube.com/watch?v=NT3paR9NNvA
[415] See the advert here: http://www.youtube.com/watch?v=TUO2oUOImHA
[416] See the trailer here: http://www.youtube.com/watch?v=2HAUmII_hcg

		irresponsible.
Kerry Foods Ltd. nudity in a TV ad for Richmond Ham.[417]	Offensive nudity (371)	Not upheld. The ASA found that the nudity was not offensive.

14. SANCTIONS

The key points about the ASA (B) / BCAP operation are that, on the one hand, the BCAP Code are binding upon all the market players, i.e. they are not voluntary but at the same time ASA does not have the power to apply public force to impose penalties or to use injunction. Under the Communications Act, it is the media service provider that bears the responsibility for ensuring the content it carries complies with the Act. The ASA(B) itself does not have any formal legal or statutory powers. It works with persuasion and consensus.[418] However, the potential administrative sanction by OFCOM as an indirect threat lends major power to this co-regulatory system.

- Adverse publicity may result from the rulings published by the ASA weekly on its website and the ad alerts mailed by CAP to its members. As the ASA system covers the entire UK advertising market, such communications work in fact as prohibitions of commercial communications that were qualified as inconsistent with the Codes.

  > The importance of adverse publicity is reflected in the Direct Line judgment of the Administrative Court[419], where the Court held that (...) Where a body acted in a judicial or quasi-judicial capacity, informing members of the public what decision had been arrived at, then a duty existed to give all parties ample opportunity to make whatever representations would normally be appropriate in those circumstances.[420]

- Ad Alerts - CAP can issue alerts to its members, including the media, advising them to withhold services such as access to advertising space.
- The media, contractors and service providers may withhold their services or deny access to space.
- Trading privileges (including direct mail discounts) and recognition may be revoked, withdrawn, or temporarily withheld.

[417] See the advert here: http://www.youtube.com/watch?v=A0FgZ9QCcdY
[418] See Section 2.6.1 of Lord Smith of Finsbury, "Leveson Inquiry into the Culture, Practices and Ethics of the Press Witness Statement The Rt Hon. Lord Smith of Finsbury, Chairman, Advertising Standards Authority."
[419] R. v Advertising Standards Authority Ltd Ex p. Direct Line Financial Services Ltd, Queen's Bench Division 8 August 1997, [1998] C.O.D. 20
[420] Westlaw UK case notes

As an efficiency indicator of the above soft law measures, in 2009/2010 (up to June 1) the ASA informally resolved 42% of the incoming complaints.[421]

15. REMEDIES, APPEAL[422]

There are two forums for legal review of ASA decisions, the Independent Review Procedure and judicial review by the administrative court.

15.1 Independent review procedure

Under the so-called Independent Review Procedure, Sir Hayden Phillips, who is the Independent Reviewer since 2010 (previously the Chairman of the National Theatre), examines requests to review ASA Council adjudications. If Sir Phillips decides to accept the request for review, he investigates the matter and makes a recommendation to the ASA Council. The Council's decision on requests for review is final.

15.2 Judicial review in general

In a judicial review process the decision of a public authority (or a piece of legislation) is challenged before court. The judicial review process is different from civil proceeding by an ordinary action. The latter is a time consuming process, which is in any event not available against public authorities.[423] As a legal remedy, judicial review represents a procedural guarantee for the parties in connection with the particular decision. It also means review of not only the decision, but the underlying private regulation from point of view of compliance with statutes and common law. The Administrative Court reviews the authority decisions as to

421 http://asa.org.uk/~/media/Files/ASA/Misc/ASA's%20Final%20Response%20to%20the%20Process%20Review.ashx (Last visited May 31, 2013) - The ASA's Final Response to the Process Review, October 5, 2011, p 6

422 See Cap Code p 101-102 ("Independent Review Procedure"); see also Conway, *The Advertising Standards Authority (ASA)*. (Conway) p 5

423 See the "Judicial review" section by Maureen O'Brien in Westlaw UK Insight

its illegality, irrationality or procedural impropriety instead of looking into the merits of the decision.

15.3 No judicial review regarding Clearcast

As Clearcast operates either on the basis of contractual arrangements or based on the license terms between OFCOM and licensed broadcasters, it is not considered as public authority. This means that the longer and costlier ordinary civil action is the only available legal remedy against Clearcast.[424]

15.4 Judicial review against the ASA rulings

Court cases[425] involving the ASA may be grouped into two categories. These are cases regarding procedural rights, (such as availability of judicial review, suspending effect of challenging an ASA ruling before court); judgments regarding the substance of the matter.

15.4.1 Procedural rights

Availability of a judicial review against the ASA rulings. As discussed in the Introduction (Section B. of Part I.) self-regulation is a borderline case of public and private law, regulation (being a matter of public law) pursued by a private party. The question of judicial review against ASA is not a matter of private law, which is generally available for civil wrong (tort or contract), and is a matter of substantive law. Although the ASA is a private organization, its rulings over the market players are not based on their unilateral or contractual submission to the authority of ASA, but based on a private regulation. Here the question is whether the

[424] See for example the Soda Stream / Clearcast dispute, where Clearcast banned a television advertising from a £11m "SodaStream effect" global campaign, hours before it was due to air. The ad was banned in the UK but it was cleared to run in other countries such as the US and Australia.
SodaStream's appeal against the ban was turned down, prompting the challenger drinks maker to consider legal actions against Clearcast.
http://www.brandrepublic.com/bulletin/brandrepublicnewsbulletin/article/1173389/sodastream-pulls-threat-legal-action-against-clearcast/?DCMP=EMC-CONBrandRepublicdailynewsbulletin (Last visited June 1, 2013)

[425] I retrieved Administrative Court cases using the Westlaw UK Database with the search term ”the Advertising Standards Authority” and used passages from the Westlaw ”Case analysis” sections in the discussions .

parties concerned with the ASA rulings are entitled, on a procedural basis, to a judicial review. The leading case of judicial review of self-regulation is the Datafin judgment[426] where the Court of Appeal stated in connection with the availability of judicial review against a private organization ("Takeover Panel") that "the fact that the Panel is self regulating…makes it not less but more appropriate that it should be subject to judicial review."[427] The court in the Datafin judgment used two arguments supporting judicial review over a decision of a private organization, namely that it performs a public duty or public functions, and that its decision has public law consequences. ASA is recognized by the court as being a public organization for the purposes of Judicial Review before administrative court[428] on the basis that ASA is pursuing public functions, which is sufficiently important to trigger attention of administrative courts.[429] The Administrative Court also stated that ASA is considered a unique organization, having a quasi judicial capacity informing members of the public what decision had been arrived at.[430]

No suspending effect of ASA publication – conflicting speech rights. In the leading case of Vernons[431] it was stated that the court "will not prohibit publication of a public or private authority, even where the substance of that information is to be challenged on appeal, unless there is evidence that to allow it to be published would cause irreparable damage."[432] The point in Vernons is about two conflicting publications, the allegedly misleading advertising, and the ruling of ASA on the misleading nature. The court in Vernons did not appreciate the

[426] R. v Panel on Takeovers and Mergers Ex p. Datafin Plc [1987] Q.B. 815 (CA (Civ Div) – referred to in Cane, "Self Regulation and Judicial Review."
[427] Quoted in Cane (Ibid.) p 9
[428] Conway, *The Advertising Standards Authority (ASA)*. (Conway) p 5
[429] See R. v Advertising Standards Authority Ex p. Insurance Services, Divisional Court, 06 July 1989
See also Treasury Solicitor, The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators, 3rd Edition, 2000 - referred to in Alexander Horne, *Judicial Review : A Short Guide to Claims in the Administrative Court*, 2006, http://www.parliament.uk/documents/commons/lib/research/rp2006/rp06-044.pdf (Last Visited March 11, 2013). p 7-8
[430] R. v Advertising Standards Authority Ltd Ex p. Direct Line Financial Services Ltd. Queen's Bench Division 08 August 1997; [1998] C.O.D. 20
[431] R. v Advertising Standards Authority Ltd Ex p. Vernons Organisation Ltd.; Queen's Bench Division 09 September 1992; [1992] 1 W.L.R. 1289; [1993] 2 All E.R. 202;
[432] Quote is from the Case Analysis of Westlaw UK

restricting effect of the ASA ruling on the advertising, and focused on the free speech aspect of publishing the ruling. The Vernons judgment is reflected for example in the Debt Free Direct case[433] where the court plainly stated that "there would have to be exceptional grounds for preventing a public body from publishing an adjudication, and the mere fact that the adjudication was subject to legal challenge was not a sufficient justification"[434].

15.4.2 Decisions on the merits

Rules applied, deferential approach. Judicial review of self-regulation by the administrative court raises the question whether analysis of the CAP or BCAP CODE belong to the administrative court or not. In other words, do courts apply the Codes or refrain from the merits of the particular disputes, leaving the interpretation of the Code to the self-regulator? The case law shows that the Administrative Court generally exerts high deference to the ASA and that "judicial review is not concerned with the 'merits' of a decision or whether the public body has made the 'right' decision."[435] Judicial review in general concerns whether a public body has acted unlawfully, and the court does not attempt to revise the judgment of the decision maker. The court review, therefore is based only "on a matter of reasonableness when the claimant is able to provide a strong clear case".[436]

[433] R. (on the application of Debt Free Direct Ltd) v Advertising Standards Authority Ltd; 15 May 2007; [2007] EWHC 1337 (Admin)

[434] The quote is from the Case Analysis of Westlaw UK

[435] Ibid.(Horne) p 10

[436] See Horne p 15.

"... The Judge Over Your Shoulder states that "reasonable":

"[I]s not the same as saying [a] decision must be absolutely correct or that the Court would necessarily have made the same decision. It means that in making the decision you must apply logical or rational principles. If a decision is challenged, the Court will examine the decision to see whether it was made according to logical principles, and will often expressly disavow any intention to substitute its own decision for that of the decision maker[…] There are sound practical, as well as legal/constitutional reasons for the Court adopting this "hands off" approach: the decision maker may be aware of policy implications or other aspects of the public interest which are not obvious to the Court."

Referred to by Horne (The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators, 4th Edition, 2006, Treasury Solicitor, Paragraphs 2.22-2.23)

In Robertson, the Administrative Court "held, dismissing the application, that the question of whether a column was an advertisement was for ASA to decide and, unless the decision was manifestly unreasonable, the court would not intervene."[437]

15.4.3 "Public authority" horizontal effect and "prescribed by law" – reference to the ECtHR case law;

In the Matthias Rath case, the court stated that

> "the adjudications of the ASA published under the Codes were "prescribed by law" for the purposes of Art.10(2) (of the European Convention on Human Rights – *added by GB*). The Control of Misleading Advertisements Regulations 1988 provided statutory recognition of accepted methods for handling complaints. It was therefore apparent that the Codes were recognized within subordinate legislation. They also satisfied the requirements of accessibility and precision set out in Barthold v Germany (...). Accordingly, whilst not having direct statutory effect, the Codes fell within the meaning of Art.10(2)."[438]

Article 10 of the ECHR provides, inter alia, that it protects against interference by public authority, and that an interference is per se violating the convention if it is not prescribed by law. Considering the Datafin, Direct Line and Matthias Rath judgments, one may conclude that English Courts not only allow judicial review against the ASA rulings as a procedural measure, but also consider the ASA as public authority for the purposes of Article 10. What follows is that in the UK there is no need for the horizontal effect doctrine (see Section B. of Part I.) to provide judicial protection against the ASA rulings, as the ASA is considered a public authority both from point of view of procedure and substantive law.

In Matthias Rath, the court used the Barthold test of precisity and accessibility to the adjudications of the ASA and not to the Code, which supports the notion mentioned above,

[437] Charles Robertson (Developments) Ltd v Advertising Standards Authority; Queen's Bench Division 04 November 1999; [2000] E.M.L.R. 463 (quote is based on the Case Analysis by Westlaw UK)

[438] R. v Advertising Standards Authority Ltd Ex p. Matthias Rath BV
Queen's Bench Division (Administrative Court)
06 December 2000
[2001] E.M.L.R. 22; [2001] H.R.L.R. 22

that English courts directly review the rulings and do not apply the self-regulatory codes, i.e. the compliance of the rulings with the self-regulatory codes does not affect the judgment of the court.

15.4.4 Legal provisions applied

"The Code establishes a standard against which marketing communications are assessed."[439] The ASA in its complaint handling applies the CAP Code exclusively, unless expressly stated in the Code itself. This is the case, for example, of the Consumer Protection from Unfair Trading Regulations 2008[440], when the ASA adjudicates on complaints about marketing communications that are alleged to be misleading, or of the Consumer Protection (Distance Selling) Regulations 2000[441]. It is clear that a self-regulatory organization does not have duly delegated power to provide adjudication over disputes regarding state law. Still, the courts consider ASA decisions equivalent to government authority resolutions.

16. SUMMARY

It was shown in this Chapter that most of the commercial communications are regulated by private entities, which is backed up by OFCOM either in public law (co-regulation arrangement with ASA (B) and BCAP), or in civil law (contractual arrangements with licensed broadcasters requiring the pre-clearance by Clearcast). The most important censorial effect over broadcast advertising is the allocation of legal liability for program content to the broadcasters. Unlike the case of editorial content, in the case of commercial communication the speaker (i.e. the advertiser) cannot convey his/its message without the media. Moreover, the speaker (the advertiser) has no public law relation with the pre-clearance authority, therefore the convenient judicial review path is not available for it.

[439] CAP Code p 99 (Note: the CAP Code is numbered as long as specific areas of advertising is regulated
[440] Section 3 of the CAP Code
[441] SEction 9 of the CAP Code

Regulation of advertising spots and teleshopping is in private hands in the United Kingdom with a remote control by the independent regulatory authority (OFCOM). Content of such commercial communications go through a multiple filter of private censorship. The first filter is pre-clearance by Clearcast, a private joint venture held by the six leading broadcasters in the UK, with indirect monitoring power stemming from the broadcast licenses by OFCOM, which obliges licensed broadcasters to use Clearcast before airing an advert. The second filter is the complaint handling by the ASA Broadcast, which has a de facto stature of a regulatory authority, despite being a private organization. Both of these self-regulatory authorities operate on the basis of the BCAP Broadcast Advertising Code, which is the product of the Broadcast Committee of Advertising Practices.

All the three players are ultimately controlled by the advertising and media industry. This control has a contractual limit with respect to ASA and BCAP. Their co-regulatory arrangement with OFCOM requires maintaining the independence of the ASA(B) / BCAP from the industry. There is no such arrangement with Clearcast. ASA (B), however, is entitled to overrule the Clearcast decisions in the case of a complaint. The ASA, however is not an appeal organization for Clearcast, i.e. ex officio cannot take any measures against the Clearcast decisions.

The BCAP Code leaves a very narrow space or no space for flexibility in the advertising content restrictions. The harm and offense section of the BCAP Code opens wide possibilities for complaints based on both content-based and content neutral restrictions.

The above self-regulatory system operates within the general legal environment of public and civil law. English Courts allow judicial review of the ASA rulings, which is an important legal guarantee against regulatory bias. In the judicial review, however, the Court checks the

illegality, irrationality or procedural impropriety only, instead of looking into the merits of the decision.

B. Advertising self- and co-regulation and its legal environment in the Federal Republic of Germany

1. INTRODUCTION

Germany is described by the European Advertising Standards Alliance as the model "where, due to the presence and detail of national legislation, limited scope is available for self-regulation to operate, (...) where advertising falls under the auspices of unfair competition law, characterized by very strict and detailed legislative controls on advertisement content (...)"[442] In this Chapter I argue that in Germany commercial speech is restricted using the "indecent speech" argument. This works at two levels, under the unfair competition law and based on self-regulatory codes. On the basis of the unfair competition legislation, speech may be qualified as indecent and as such may constitute unfair commercial practice. Under the regulatory codes of the Werberat, commercial speech may be restricted as "indecent" speech.

Private censorship of "indecent speech". In this Chapter I am taking a closer look at commercial speech restrictions in German self-regulatory codes based on "indecency" and commercial speech restrictions under the unfair competition law as "contempt of humanity". Self-regulatory organizations are involved in both cases, opening the possibility of taking legal or quasi legal measures against advertisers. I argue that these legal measures inadvertently or purposefully increase the circle of speech restrictions and that the goal of this extensive censorship is as much the support of efficiency of commercial speech (an economic motive) as consumer protection.

Self-regulation, self-regulators and their stakeholders. In Germany broadcast and non-broadcast advertising self-regulation are handled together, i.e. there is no media-based split of work as in the UK. Still, there are two dominant self-regulatory organizations. The

[442] See EU Commission Health & Consumer Protection Directorate -General, "Self-Regulation in the EU Advertising Sector : A Report of Some Discussion Among Interested Parties" no. July (2006): 1–38. p 15-17

Wettbewerbszentrale operates to assist enforcement of competition and consumer protection laws, including the UWG and it has no code of conduct. The Wettbewerbszentrale in fact operates as a private civil prosecutor to enforce the UWG, which is enforced by civil courts and (aside of a minor flavor of criminal offences as enforcement tool) no government authorities are involved in its enforcement. The Wettbewerbszentrale is a non- governmental organization, representing the entire economic spectrum of the Federal State, and it is being open for anybody to join. Therefore the usual suspect of regulatory bias does not appear to prevail in the case of this organization. The Werberat is the only advertising self-regulatory body at federal level, having its own codes of conduct (it actually has several codes, as shown below). The Werberat represents the advertisers, the media, agencies and professionals and therefore it is directly interested in the efficient operation of the advertising industry.

The rules. Comprehensive regulation of commercial communication is covered by the Unfair Competition Act (2004)[443] **("UWG")**, as part of the prohibition of unfair commercial practices. Broadcast advertising is covered by local legislations by the member states of the Federal Republic of Germany **("Länder")** and by a federal level Interstate Broadcasting Treaty. No generally applicable advertising act exists in Germany. The self-regulatory codes issued and administered by the Werberat consist of speech restrictions in sensitive areas (alcohol, minors, gambling, etc.), and most importantly provide the Werberat the possibility to restrict speech based on requirements of decency and ethics. In terms of procedural rights, the operation of both the Werberat and the Wettbewerbszentrale is based on consumer (audience) complaints, and their rules create a legal (or semi-legal) link between the consumers (audience) and the advertiser. This latter may be called as a right to "class action" in favor of the audience in connection with unfair commercial practices, which would otherwise not exist

[443] Act Against Unfair Competition (latest version published on 3 March 2010 (Federal Law Gazette [BGBl.]) Part I p. 254"

under the UWG. In addition, the Werberat also represents a forum for consumer and audience complaints which otherwise would not be available.

The issue. As said in the Introductory Chapter, I argue that protecting the audience against advertising has as much economic considerations as consumer protection elements, as advertising that offends, cheats or hurts its target audience represents less value for the advertiser as it frightens away audience. My analysis of the German model supports this notion. The Wettbewerbszentrale and the Werberat, by directly connecting the consumers (audience) with advertisers, may serve as a constant opinion poll supporting the efficiency of advertising and thereby represents as much the interest of advertisers as the audience. The real point, however, is that there is a legal connection too, which results in restricting the constitutional right to speech (although commercial speech, which is arguably of less value). The price paid for the audience satisfaction is thus the potential decline of pluralistic content.

The legal basis of self-regulatory restriction of speech: "offense". Offense (in the German Codes "common sense of decency" or "allgemeine Anstandsgefühl") is the generally used and most efficient method of adjusting content to satisfy the generally prevailing audience expectations. The restriction is carried out in two channels. On the one hand as requirements in the Werberat codes and on the other, as offensive speech qualifying as unfair commercial communication, when it constitutes insult against human dignity, and enforced by the Wettbewerbszentrale under power delegated by the UWG. It appears that (aside of content restrictions regarding protection of minors) there is no distinction in Germany between regulation of offensive speech via broadcasting and other media.

Structure. Below I first describe the legislative framework of commercial communication via broadcasting, second, I discuss the self- and co-regulatory organizations, the codes and

analyze the self-regulatory decisions, and in the end of this Section I discuss constitutional aspects of commercial speech and self-regulation in Germany.

2 REGULATION OF COMMERCIAL COMMUNICATION IN GERMANY

2.1 The legal system of the federal state.

The Federal Republic of Germany has two levels of legislation. Federal level legislation is applicable in the entire state, while legislation at the level of the "Länder" (member states) govern local matters. Pursuant to the German Basic Law[444], the legislative power is generally reserved for the Länder unless legislative power is expressly allocated to the Federation in the Basic Law.[445] The Basic Law uses a category of the so called "concurrent legislative power" ("konkurrierende Gesetzgebung"), where "the Länder shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law."[446] Federal legislation takes precedence over the law of the Länder[447], no matter if the given subject matter belongs to the concurrent or exclusive legislative power.[448]

2.2 Legislation regarding commercial communication

In Germany the advertising industry is the most regulated area among the various forms of communication.[449] There is no stand-alone comprehensive advertising law in Germany. The basis of the advertising regulation is the Unfair Competition Act ("Gezetz gegen unlauteren

[444] Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 English translation is available here: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0030
[445] Article 70 (1)
[446] Article 72 (1) "Die Länder haben das Recht der Gesetzgebung, soweit dieses Grundgesetz nicht dem Bunde Gesetzgebungsbefugnisse verleiht."
[447] Article 31 of the Basic Law
[448] There is some argument about whether the legislation on the prohibition of unfair competition falls in the exclusive domain of the Bund as part of "gewerblicher Rechtschutz" (then it would be regulated by Article 73 (1) No. 9) or whether it also falls under the concurrent legislation – then the legal basis would be Article 74 (1) No. 11). The most important commentary (Uhle in: Maunz/Dürig, Grundgesetz-Kommentar, 67. Ergänzungslieferung 2013, Art. 73, para. 197.), however, states that "gewerblicher Rechtschutz" only refers to patents, copyright and other IP rights, but not unfair competition by itself. Consequently the law of unfair competition falls in the ambit of concurrent legislation. Considering that the UWG in its original form and content was adopted in the early 20th century (1909) before the Basic Law of Germany (1949) and has been unchallenged since then, the argument is largely academic. The constitutional basis of the federal legislation prohibiting unfair competition thus is Article 74 (1) 11 for all practical purposes.
[449] ZAW website: http://www.zaw.de/index.php?menuid=72 (in German, Last visited April 4, 2013)

Wettbewerb" – **"UWG"**). Unlike the UK unfair competition regulations, the UWG generally addresses B-to-B and B-to-C relations, but there is a split as to platforms. Advertising in broadcast communication is regulated separately by the Media laws of the Länder and the Interstate Broadcasting Treaty. The sensitive markets (politics, gambling, etc.) and sensitive products (tobacco, medicines, etc.) are regulated in specific federal level acts.[450]

The general "platform (or media-) specific" legislations are the local member state legislation regarding the press, the local media laws and the Interstate Broadcasting Treaty. The main areas of law regulating advertising are unfair competition law[451], media law (content regulation), press law, and specific advertising related regulations.[452] Germany does not have a separate legislation implementing the European Convention on Human Rights.

2.3 Unfair competition law (UWG)[453]

2.3.1 Substantive provisions.

The UWG is the principal source of regulation of commercial communication. It replaced the old UWG of 1909 and serves as the implementation of the UCP Directive and the Misleading Advertising Directive. The UCP Directive handles unfair practices in business-to-consumer **("B-to-C")** relation, leaving the regulation of business to business **("B-to-B")** relations to the member states, and the Misleading Advertising Directive regulates business-to-business

[450] See for example the Data Protection Law (Bundesdatenschutzgesetz) – English translation: http://www.gesetze-im-internet.de/englisch_bdsg/index.html ; Medical Treatments Advertising Law (Heilmittelwerbegesetz) - http://www.gesetze-im-internet.de/heilmwerbg/ (in German) ; Temporary Tobacco Law (Vorläufiges Tabakgesetz) - http://www.gesetze-im-internet.de/lmg_1974/ (in German)

[451] The UWG (Act Against Unfair Competition) is the principal source of the German advertising regulation. See e.g. Axel Beater, *Medienrecht* (Tübingen: Mohr Siebeck, 2007). p 262 (in German), or see also Frank Fechner, *Medienrecht* (Tübingen: Mohr Siebeck, 2007)., Section 45, p 162 (in German)
Act Against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette [BGBl.]) Part I p. 254"– "Gesetz gegen den unlauteren Wettbewerb in der Fassung der Bekanntmachung vom 3. März 2010 (BGBl. I S. 254)
NB, Germany has a separate Act against restraint on competition (Gesetz gegen Wettbewerbsbeschränkungen) (full text with the latest amendment published in BGBl)

[452] E.g. Decree on Food Labeling (Lebensmittel-Kennzeichnungsverordnung), Temporary Tobacco Law (Vorlaufiges Tabakgesetz); Medical Treatments Advertising Law ((Heilmittelwerbegesetz); etc.

[453] For a good summary, see Manuela Finger and Sandra Schmieder, "The New Law Against Unfair Competition : An Assessment," *German Law Journal* 6, no. 1 (2005): 201–216.

relations only, leaving the regulation of B-to-C relations in this area to the member states. Unfair competition regulation is kept separate from antitrust legislation (i.e. the regulation of merger control and the prohibition of cartel and abuse with dominant position).[454]

The regulatory subjects of the UWG are prohibition of unfair and misleading commercial practices, regulation of comparative advertising and unconscionable pestering[455] ("unzumutbare Belästigungen" – "unsolicited communications" – in EU law[456], and "aggressive commercial practices", a term used in the CPRs 2008 of the UK).

2.3.2 Offensive speech and the UWG

Speech may qualify as offensive and reading together the general clause of Section 3 (2) and Section 4. 1 (examples of unfair commercial practices) may qualify as unfair commercial communication. Section 3 (2) generally addresses speech as a potential infringement of the UWG:

> "Commercial practices towards consumers shall be illegal in any case where they do not conform to the professional diligence required of the entrepreneur concerned and are suited to tangible impairment of the consumer's ability to make an **information-based decision** *(emphasis by GB)*, thus inducing him to make a transactional decision which he would not otherwise have made. (...) "

Section 4. 1 lists conduct showing "contempt of humanity" ("Menschenverachtung") as an example of unfair commercial conduct.[457]

The textbooks[458] mention here the leading case of the Benetton Shock Advertising to illustrate the approach of German courts to offensive commercial communications under the

[454] "Gesetz gegen den unlauteren Wettbewerb" and the Act against restraint on competition (Gesetz gegen Wettbewerbsbeschränkungen)
[455] Section 7 of the UWG
[456] Section 13 of *DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications)*, 2002.
[457] Section 4. 1 of the UWG: "Unfairness shall have occurred in particular where a person uses commercial practices that are suited to impairing the freedom of decision of consumers or other market participants through applying pressure, through conduct showing contempt for humanity, or through other inappropriate, non-objective influence;"

UWG. This case was initially judged under the UWG and the Benetton advertising campaign was declared by the Federal Court of Justice unfair commercial practice and as such unlawful under Sections 3 (2) and 4. 1. Subsequently the Constitutional Court declared the Benetton Shock Ads as speech protected under Article 5 of the Basic law.

> "In the Benetton case marketing campaign used large format photography depicting provocative issues, including: a duck smothered in oil, apparently from an oil-spill; children being exploited as laborers in a third-world factory; and a naked buttock bearing the stamp "H.I.V. Positive." Publication of the Benetton advertisements had been challenged as "unfair competition" by a leading consumer protection group."[459]

The FCJ held that an advertisement that aimed exclusively at the viewers' emotions without adding to the debate over the issue invoked by the advertisement, would have to be prohibited as being outside the confines of fair competition.

2.3.3 Remedies and enforcement

The UWG is based on civil law remedies. These include court injunction to stop the unfair practices (cease and desist order)[460], right to claim damages[461] and confiscation of the profit realized by unfair acts[462]. The possibility of submitting damage claim is available only for the party concerned. Cease and desist and extra profit confiscation may, however, be claimed by third parties as well, under a special legislative delegation, which is the statutory basis of the operation of the Wettbewerbszentrale. The UWG also provides for criminal sanctions to protect unfair competition.[463] As the UWG provides for civil and criminal remedies, its enforcement is in the hands of courts and the Federal Competition Office Bundeskartellamt has no role here.

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[458] Harte-Bavendamm and Hennig-Bodewig, *UWG; Gesetz Gegen Den Unlauteren Wettbewerb; Kommentar* (München: C.H. Beck, 2004). p 683-684 (Section 111a)

[459] By Peer Zumbansen, "Federal Constitutional Court Rejects Ban on Benetton Shock Ads : Free Expression , Fair Competition and the Opaque Boundaries Between Political Message and Social Moral Standards .," *German Law Journal* (2000): 1–3, http://www.germanlawjournal.com/article.php?id=14.

[460] Section 8 of the UWG

[461] Section 9 of the UWG

[462] Section 10 of the UWG

[463] Section 16 of the UWG

Delegation of enforcement power. Although the UWG recognizes the potential existence of codes of conducts[464], none of these provisions create legal basis for self-regulation in connection with unfair competition and they merely reflect the respective parts of the UCP Directive. Section 8 (3) 2, (reading together with Section 8 (1) and 8 (3) 1 and 10), however, is the basis of the major, federal level advertising co-regulation effort in Germany, authorizing private organizations to start a civil court proceedings to enforce the UWG by cease and desist judgments and confiscation of extra profits realized by unlawful conduct.

The most important criteria for an organization to become eligible for starting such a lawsuit are:

- legal personality,
- corporate purpose of the promotion of commercial or of independent professional interests,
- having a considerable number of entrepreneurs as members,
- and operating in the same or similar type of market and finally that the action affects the interests of their members.

This delegation of enforcement power has existed since the old UWG of 1909 and served as a basis for founding the self-regulatory organization, named Wettbewerbszentrale ("Competition Centre") representing the entire German economy at the Federal level, which certainly makes it eligible for Court actions under Section 8 (3) 2. of the UWG.

The key aspect of this provision is that the UWG is not open for lawsuits by consumers (audience). Therefore, the organizational representation is the only channel for consumer complaints to the civil courts.

In summary, under the UWG speech may qualify offensive and illegal as unfair commercial conduct. Private involvement is related to the enforcement, for which a broad delegation has been given, which was used to establish a self-regulatory organization representing consumers' interests before civil court.

[464] E.g. in the Definition Section and later among the examples of unfair commercial practices.

2.4 Media law –The Interstate Broadcasting Treaty

I briefly discuss media legislation for the sake of good order only, as German media law does not include speech restrictions other than the ones included in the Audiovisual Media Services Directive, and self-regulatory organizations have no role in regulating broadcast media or enforcing media legislation.

2.4.1 Substantive provisions

As mentioned above, media law remained in the regulatory power of the Länder, subject to the enforcement and monitoring of local media authorities. Consequently, both the electronic media and the press are regulated locally by the Länder. Local legislation of press and electronic media are separated, as the press is generally accorded more freedom than the electronic media.[465] The goal of the Interstate Broadcasting Treaty is to create a harmonized system of media throughout the federal state.[466] In addition, the Treaty implements the Audiovisual Media Services Directive[467]. Similarly to the AVMS Directive, the Interstate Broadcasting Treaty regulates linear broadcasts[468] as well as on-demand mass media services to a limited extent.

The Treaty regulates operation of public service broadcasters, licensing and operation of commercial broadcasts, ensuring plurality of opinion, transmission techniques and substance and organization of supervision and enforcement. Advertising related regulations are part of

[465] One exception is Saarland, which enacted a new media law in 2002, which contains provisions for all media including press and broadcasting. See Hans-Bredow-Institut, "Country Reports - Study on Co-Regulation Measures in the Media Sector" no. June (2006), http://ec.europa.eu/avpolicy/docs/library/studies/coregul/annex_4_en.pdf (Last visited March 31, 2013). p 165

[466] See Wolfgang Schulz, Thorsten Held, and Stephan Dreyer, *Regulation of Broadcasting and Internet Services in Germany A Brief Overview*, 2008. p 10

[467] AVMS Directive 2010/13/EU

[468] Sections 1 (1) and 58 (3) of the Interstate Broadcasting Treaty

the programme content restrictions. In that respect, the Treaty follows the wording of the AVMS Directive.[469]

Based on an express authorization given by Section 46 of the Treaty, the Länder have jointly issued guidelines for the implementation of the Treaty in connection with advertising in the broadcast media.[470] These guidelines (separate for radio and television) contain practical clarifications and explanatory notes to the advertising related provisions of the Treaty.

2.4.2 Enforcement

Unlike the UWG, which is a civil law based legislation, the Treaty is of administrative nature. It is binding upon the broadcasters and enforced by the local independent media authorities. These local media authorities "are not part of the state administration, but independent agencies; therefore, they have internal bodies consisting of representatives of socially relevant groups or they are composed of experts."[471] The tools of enforcement are formal notice, imposing fine, or revocation of the license of the infringing broadcaster.[472] These administrative powers are provided by the Treaty and the particular state laws, which remain in force besides the Treaty provisions on sanctions.[473] In addition, to improve efficiency of the enforcement system, the national media authorities introduced the institution of an informal notice called "regulation by raised eyebrows", i.e. co-operating with the broadcasters, and

[469] See Sections 7 and 8 of the Interstate Broadcasting Treaty and Art. 9 of the AVMS Directive
[470] Joint guidelines of the National Media Authorities regarding advertising, the separation of advertising from editorial content and for sponsoring, ("Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring"). See http://www.lpr-hessen.de/files/Werberichtlinien_HF.pdf for radio (in German, Last visited March 31, 2013) and see http://www.kjm-online.de/files/pdf1/Werberichtlinien_Fernsehen1.pdf for television. The joint guidelines are referred to in Hans-Bredow-Institut, "Country Reports - Study on Co-Regulation Measures in the Media Sector." p 159-160
[471] Schulz, Held, and Dreyer, *Regulation of Broadcasting and Internet Services in Germany A Brief Overview*. (Schulz) p 18 see the link for the national media authorities: http://www.die-medienanstalten.de/
[472] Art. 49 of the Treaty
[473] See Art. 50 of the Treaty

promoting public awareness for problems within the broadcasting system and stimulating research in this area.[474]

3. SELF-REGULATION OF BROADCAST ADVERTISING IN GERMANY

3.1 General.

Self-regulation of editorial contents and advertising are separated. In Germany these areas are covered by two separate federal level self-regulatory bodies. Editorial contents are handled by the German Press Council ("der Deutsche Presserat")[475], and advertising is handled by two self-regulatory organizations. The Centre for Protection against Unfair Competition (Zentrale zur Bekämpfung unlauteren Wettbewerbs – **"Wettbewerbszentrale"**[476]) is a self-regulatory organisation that is primarily engaged in the private enforcement of the UWG. The German Advertising Council ("der Deutsche Werberat" – **"Werberat"**)[477] (which operates within the German Advertising Federation ("Zentralverband der deutschen Werbewirtschaft – "ZAW"[478]) deals with particular issues that are beyond the scope and reach of legislation (these are issues like taste and decency).[479] Unlike in the UK (see the BCAP and ASA (Broadcast), Germany has no separate self-regulatory organization for linear radio and television advertising.

In the following I discuss the status and operation of the Wettbewerbszentrale and the Werberat, looking at their goals, legal status (the industry they represent), delegated and de facto powers (effect on consumers and industry), sanctions applied and remedies.

[474] Ibid. (Schulz) p 18
[475] http://www.presserat.info/inhalt/der-presserat/aufgaben.html (in German, Last visited March 31, 2013)
[476] http://www.wettbewerbszentrale.de (in German, last visited April 1, 2013)
[477] http://www.werberat.de/deutscher-werberat (in German, last visited March 31, 2013)
[478] http://www.zaw.de (in German, Lat visited April 1, 2013)
[479] European Advertising Standards Alliance, *Advertising Self-regulation in Europe and Beyond ("the Blue Book")*, 6th ed. (EASA, 2010). p 90

3.2 Wettbewerbszentrale

As mentioned above in connection with the UWG, the Wettbewerbszentrale is in fact a private prosecutor operating to enforce the UWG before civil courts. Its main role is to create a legal knot between the audience and the advertisers, which is otherwise not available under the UWG, as complaints may normally be submitted by competitors only.

3.2.1 Powers

The power of the Wettbewerbszentrale regarding unfair commercial communication is rooted in Section 8 (3) 2. of the UWG, which authorizes trade associations for public action for civil court injunction of "cease and desist".[480] Since it applies the law only, the Wettbewerbszentrale does not have its own codes of ethics, and its actions ultimately lead to civil court proceedings. As mentioned above, the UWG is a legislation based on civil and criminal law, and it does not include rights for government authorities. As a consequence, the Bundeskartellamt (the Federal Competition Office) for example does not have a role in the enforcement of the UWG. The Wettbewerbszentrale in fact takes the role of a private prosecutor, collecting complaints and monitoring the market. Damage claim is reserved by the UWG for competitors only[481]; however, the UWG authorizes trade associations and industry chambers to sue before civil court the party violating the UWG for confiscation of profits.[482]

[480] The relevant Sections of the UWG:
Section 8 (1) Whoever uses an illegal commercial practice pursuant to Section 3 or Section 7 can be sued for elimination, and in the event of the risk of recurrence, for cessation and desistance. (...)
Section 8 (3) 2. The claims under subsection (1) shall vest in (...) associations with legal personality, which exist for the promotion of commercial or of independent professional interests, so far as a considerable number of entrepreneurs belong thereto, and which distribute goods or services of the same or similar type on the same market, provided such associations are actually in a position, particularly in terms of their personnel, material and financial resources, to pursue the tasks, under their memoranda of association, of promoting commercial or independent professional interests, and so far as the contravention affects the interests of their members (...)"

[481] Section 9 of the UWG
[482] Section 10 of the UWG

3.2.2 Proceedings.

Anybody may submit a complaint to the Wettbewerbszentrale (as opposed to the court process, where only competitors of authorized entities may start a lawsuit – see above). The Wettbewerbszentrale deals with about 14,000 complaints a year. The proceedings of the Wettbewerbszentrale have an extrajudicial phase, where the merits of the claim are assessed, and the Wettbewerbszentrale decides whether it accepts the complaint for enforcement or refuses to handle it. As to the potential refusal of the claims, one should not forget that the UWG does not allow individual consumers to sue before court. This is reserved for competitors, associations and public organizations. Therefore, the Wettbewerbszentrale serves as a forum for individual consumers to enforce their claims, first before the Wettbewerbszentrale and thereafter before civil court.

Out of Court. If the claim is accepted, the Wettbewerbszentrale

> "writes to the trader, asking him to sign an undertaking to amend or discontinue the advertising/commercial practice. This declaration contains a penalty clause. As this penalty clause"[483]

is included in the declaration itself, such penalty is in fact a self-imposed one, for which no delegated administrative power is necessary for the Wettbewerbszentrale. If the extrajudicial phase is carried out but proves to be unsuccessful, the Wettbewerbszentrale sues the violating party before state court for a cease and desist injunction. With opening the doors for any consumer complaints, the Wettbewerbszentrale is a real watchdog. It is therefore reasonable to look at the industry side remedies against the extrajudicial decisions. These decisions are not binding upon the advertiser (trader).

[483] See "The Role of the Wettbewerbszentrale in the Enforcement System against Unfair Commercial Practices in Germany" at http://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=32204 (Last visited July 31, 2013)

> "If the trader is unwilling to amend or discontinue the advertisement or commercial practice, the legal proceedings commence or the Wettbewerbszentrale starts conciliation before the Board of Conciliation of the regional Chamber of Commerce."[484] The above mentioned undertaking with the penalty clause, however, is an enforceable civil law document, which provides contractual power for the Wettbewerbszentrale, which is enforceable before civil court.

Court proceeding. In 2011, 600 cases out of 14,000 complaints ended up before civil court under the UWG. According to its homepage, the Wettbewerbszentrale can secure a preliminary court injunction at an incredible pace of one day, which is subject to a non-compliance penalty of up to EUR 250,000. The preliminary injuction is of course followed by the court proceeding, which may in the end permit the communication, but it is silenced until final judgment.[485]

3.2.3 Broadcaster liability in the Wettbewerbszentrale process under the UWG.

As the Wettbewerbszentrale handles UWG related matters, and since the UWG generally applies to all commercial communications irrespective of platforms, there is no difference between treatments of broadcast and non broadcast advertising. Broadcasters may be subject to the UWG in their capacity as market players and not as media service providers. In other words, they may only be subject to an UWG related Wettbewerbszentrale process as speakers of alleged unfair or misleading commercial communication.

3.2.4 Speech restrictions resulted by the Wettbewerbszentrale operations; Emotional advertising.

[484] Ibid.
[485] In addition, the Wettbewerbszentrale is authorized by law (§ 13 Unterlassungsklagengesetz / Law on injunctions; implementation of the Directive 98/27 EG on Injunctions for the Protection of Consumers' Interests) to request information from postal and telephone authorities and companies on a customer's personal data. Therefore the Wettbewerbszentrale has the powers to disclose the identity of the owner of a German P.O. Box or telecommunication service.

As discussed above, the UWG allows restrictions of speech on the basis that it constitutes unfair commercial communication. The statutory delegation of the enforcement power to trade associations does not change the quality of such speech restriction, but it widens the circle of plaintiffs and to some extent opens the potential circle of complaints. The leading example is the Benetton Shock advertising case which was initially declared by the Federal Court of Justice as unfair competition.

> "The FCJ held that an advertisement that aimed exclusively at the viewers' emotions without adding to the debate over the issue invoked by the advertisement, would have to be prohibited as being outside the confines of fair competition."[486]

The restriction of "emotional advertising" is a distinguishing feature of German law[487], and it seems that creating legal connection between the advertisers and the audience played an important role in extending speech restrictions of unfair competition law to a wider circle of speech, by qualifying them emotionally offensive. (NB. from the EU perspective the German approach of emotional advertising is even regarded as a potential restriction of free movement of goods.[488])

3.3 Werberat

Compared with the Wettbewerbszentrale, the Werberat is a full-fledged self-regulatory organization with codes of conduct, complaint handling and decision making processes. Its goals are to handle those areas which may not be efficiently grabbed by legislation: taste and decency, social responsibility[489]. While the Wettbewerbszentrale focuses on the enforcement of state legislation, acting before state courts, the Werberat focuses on self-regulatory codes

[486] Zumbansen, "Federal Constitutional Court Rejects Ban on Benetton Shock Ads : Free Expression , Fair Competition and the Opaque Boundaries Between Political Message and Social Moral Standards ."
[487] Joanna Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe* (Hamburg: Verlag Dr. Kovac, 2008). p 171
[488] Ibid. (Krzeminska) p 172
[489] European Advertising Standards Alliance, *Advertising Self-regulation in Europe and Beyond ("the Blue Book")*. (Blue Book) p 90 see also Hans-Bredow-Institute at the University of Hamburg, "Final Report: Study on Co-Regulation Measures in the Media Sector" no. June (2006). p 58

mainly in areas beyond the reach of law, and it handles complaints on its own, without involving state courts.

3.3.1 Codes of conduct

The Werberat created several short codes of conduct which cover sensitive regulatory areas for its complaint handling procedure.[490]

3.3.2 Offense in general

Pursuant to the "offense principle" by Joel Feinberg[491], restriction on speech solely on the basis that it causes harm is not sufficient, because there are very offensive expressions which do not cause harm but still also must be restricted. As mentioned in Section D of Part I, I use the term offense here as the basis of restricting speech that does not cause harm but is still restricted as it may hurt people's feelings, beliefs, etc. Speech contrary to prevailing moral, general ethics and decency come under this category.

As shown below, the German self-regulatory codes include offensive speech under the general section and under "Basic Rules" and under "Discrimination". According to its own words, the goal of the Werberat is to provide protection for Consumers against advertising if

[490] See http://www.werberat.de/grundregeln (Last visited June 16, 2013) The list of codes is as follows:
Basic rules for commercial communications (Grundregeln zur kommerziellen Kommunikation)
Discrimination and vilification of people (Diskriminierung und Herabwürdigung von Personen)
Children and young people (Kinder und Jugendliche)
Food (Lebensmittel)
Alcoholic drinks (Alkoholhaltige Getränke)
Gambling (Glückspiele)
Risky accident motifs (Unfallriskante Bildmotive)
Tire Advertising (Reifenwerbung)
Traffic noise (Verkehrsgeräusche)
Advertising with celebrities (Werbung mit Prominenten)

[491] Feinberg: The Moral Limits of the Criminal Law, Vol. 2. Offense to Others, Oxford: OUP referred to in David van Mill, "'Freedom of Speech'," *The Stanford Encyclopedia of Philosophy (Winter 2012 Edition)*, 2012, <http://plato.stanford.edu/archives/win2012/entries/freedom-speech/>.(van Mill)

ads, commercials, billboards and online advertising are unobjectionable but generally upset citizens.

3.3.3 Offense clauses in the Werberat codes – general rules and protection against discrimination

Interestingly there is no Werberat code that is generally applicable to commercial communication causing harm or offense. The offense clauses appear in two codes.

The Code named "Basic rules for commercial communications" ("Grundregeln zur kommerziellen Kommunikation") provides that

> "Commercial communications must comply with the generally accepted basic values of society and the prevailing standards of decency and morality."[492]

The Code named "Discrimination" ("Diskriminierung") provides that

> "In commercial advertising images and text must not violate human dignity and the common sense of decency. (...)
> Above all, no statements or representations may be used (...) that contradict the prevailing general convictions (beliefs) (for example, by excessive nudity)."[493]

NB. it is somewhat confusing that references to common sense of decency and morality and prevailing general convictions are included in the Werberat Code regarding Discrimination. The fact that the Discrimination Code includes reference to these categories, and other codes do not, weakens the generality of the application of the rules mentioned in the basic rules, and questions their scope as applicable under the Discrimination Code. For example excessive nudity or offense of religious feelings is not necessarily a matter of discrimination.

3.3.4 Statistics

[492] "Kommerzielle Kommunikation hat die allgemein anerkannten Grundwerte der Gesellschaft und die dort vorherrschenden Vorstellungen von Anstand und Moral zu beachten."

[493] "In der kommerziellen Werbung dürfen Bilder und Texte nicht die Menschenwürde und das allgemeine Anstandsgefühl verletzen. (...)
"Vor allem dürfen keine Aussagen oder Darstellungen verwendet werden, (...) die den herrschenden allgemeinen Grundüberzeugungen widersprechen (zum Beispiel durch übertriebene Nacktheit)"

In terms of numbers, [494] in comparison with the 14,000 complaints submitted to the Wettbewerszentrale for unfair commercial communication, the volume of the Werberat cases is small. 915 consumer complaints were submitted in connection with 417 cases in the year 2012. Detailed statistics are not publicly available. According to the Werberat homepage, the complaints are related to breach of law, discrimination, incitement to violence and protection of minors. The Werberat examined 305 cases, of which 233 was ended with no objection, and 72 was found problematic. 66 of these adverts were either called off (57 cases) or amended (9 cases), and sanctions were applied only in 6 cases.

In terms of the subject of complaints by industry area and content, [495] the mostly complained area is the self-promotion campaign of the media (29 cases), followed by the service sector (25), consumer electronics (25), tourism (24) and clothing (23). The most complaints were submitted in connection with discrimination against women, followed by complaints regarding discrimination against other groups of the society. As the cases show below, most of the discrimination related cases in fact qualify as indecent speech.

In terms of media used, the most complained adverts were by far billboards (81 cases) and television adverts (80), followed by brochures and flyers (36) and the Internet (31).

4. Analysis of Werberat decisions.[496]

In the following charts I show broadcast and non-broadcast advertising related decisions, indicating the applicable self-regulatory code and an otherwise applicable legislation (based on my personal view).

[494] http://www.werberat.de/bilanz-2012 (In German, last visited June 15, 2013)
[495] http://www.werberat.de/branchen-vor-dem-werberat (In German, last visited June 15, 2013)
[496] Summaries of selected Werberat decisions are available at http://www.werberat.de/spruchpraxis (In German, last visited June 15, 2013). The cases are grouped by decade. Otherwise parties, ref. nr and exact dates are not indicated.

4.1 Broadcast advertising cases[497]

Facts	**Complaint**	**Applicable self-regulatory code**	**Decision**
The operator of an Internet platform showed in his TV spot under the heading 'dive sites' three men in wheelchairs, partially missing arms and legs - apparently because of an earlier attack by sharks had taken place.	Severe disabilities are exploited for advertising purposes	Discrimination Code	The spot must had to be amended
Eve is shown with the apple as the first great connoisseur of humanity, on an advert by a supermarket chain on the occasion of his jubilee, under the heading: "Thank you, Eva!", Subtitle: "We love food for 100 years	The reference to the biblical story of creation violated the viewers' religious sentiments.	Basic rules, decency and moral;	No violation. The story of creation was not ridiculed. The advert lacked discriminatory elements.
A French car manufacturer used in a spot different national anthems to describe competing car models.	The respective nations are denigrated.	Basic rules, decency and moral; Discrimination	No violation, as the national anthems were not used in a negative context.
TV commercial of a bank: A reputably dressed man jumps from the bridge, it looks like suicide, apparently because of financial hardships - until finally it becomes clear that it is a bungee jumper.	Playing with human despair	Basic rules, decency and moral	The advertising was found unacceptable.
A complainant generally called for prohibiting television advertisements regarding feminine hygiene.	Request to prohibit television advertisements regarding feminine hygiene.	Basic rules, decency and moral	No violation. Today people openly talk about sex. Menstruation problems are discussed in school education.

[497] The cases are taken from the Werberat website at "Spruchpraxis" (Adjudication praxis) and "Beschwerdefälle aus 40 Jahren" (Cases of 40 years) at http://www.werberat.de/spruchpraxis (Last visited July 25, 2013)

4.2 Non-broadcast advertising cases

Facts	**Complaint**	**Applicable self-regulatory code**	**Decision**
"We can do everything except speaking Hochdeutsch." This advertisement for the business location Baden-Württemberg..	Denigration of the German language	Discrimination code	Complaint refused
Models in lingerie on surfaces of trams	Offensive and demeaning women	Discrimination code	The Advertising Council considered the tolerance level of German society. Advertising underwear in public is not offensive if no abusive and humiliating elements are included
A company that offers genealogy research referred in its website to Albert Einstein, Marilyn Monroe, Elvis Presley and Adolf Hitler.	Given the crimes committed by Hitler reference for genealogical research is particularly cynical. Also, the pictorial equation of Hitler with significant people of the time history is unacceptable.	Basic rules, decency and moral	The advertising was found unacceptable.
A television broadcaster advertised its new animated series that deals with the Vatikan under the heading " "laughter rather than hanging out" in full-page ads. The advert shows an empty cross, Christ sits in the foreground in front of a TV set with his Crown of Thorns and remote control in his hands and laughs.	Offense to religious feelings.	Discrimination Code	The advertising was found unacceptable.

Although these cases are examples only, it is clear that requirements of decency play an important role in the Werberat adjudication and that consumer / viewer complaints are the drivers of the Werberat complaint procedure. It is also apparent that regarding the rules and adjudication there is no difference between broadcast and non-broadcast advertising. In the following I briefly compare the treatment between broadcast and non-broadcast media by the Werberat, the procedure, sanctions and remedies.

4.3 The different treatment of broadcast media and the press.

The Werberat gained competence over private television in the Eighties and over the Internet services in the Nineties. Today, all forms of commercial communications are within its competence.[498] Only a few of the Werberat codes differentiate among communication platforms. The Werberat has a large discretion even if a particular code of conduct recognizes a difference between platforms. In the basic procedural guidelines, and in the guidelines regarding protection against discrimination, the Werberat shall inter alia consider the broadcast platform of the advertising medium.[499] The Werberat code regarding protection of children and young people applies to television and radio broadcast only. These aspects are regulated at legislative level by each of the sixteen Länder, and by the Interstate Broadcasting Treaty. There is no Federal law generally addressing the advertising to minors. [500] In the above examples, broadcast advertising is subject to the Interstate Broadcasting Treaty, which prohibits discrimination in advertising[501]. Taste and decency based content restrictions are, however, beyond the scope of legislative restrictions (except for provisions regarding protection of minors).

[498] See http://www.werberat.de/4-jahrzehnte-werbeselbstregulierung (in German, Last visited April 3, 2013)
[499] "den Charakter des die Werbung verbreitenden Mediums" - http://www.werberat.de/grundregeln and http://www.werberat.de/diskriminierung (both last visited April 3, 2013)
[500] See Peter Schotthofer, "Legal Briefing: Advertising to Children in Germany," *Young Consumers: Insight and Ideas for Responsible Marketers* 3, no. 4 (2002): 50–51, http://www.emeraldinsight.com/10.1108/17473610210813628. (ez túl rövid, jobbat találni!)
[501] Art 7 (1) 2 of the Interstate Broadcasting Treaty

5. COMPLAINT HANDLING, SANCTIONS AND REMEDIES.[502]

Besides adopting codes of conduct and guidelines, the principal task of the Werberat is to handle complaints by the public regarding commercial communication. Anybody may submit a complaint. The process is simple: if the Werberat accepts the complaint, it calls the advertiser to stop or modify it, otherwise

a) it publishes the fact that the advertiser violated the code and / or
b) it calls the media to refuse the advertising.

The Werberat acts solely upon its own codes and guidelines and does not handle unlawful advertising cases. It forwards UWG related complaints to the Wettbewerbszentrale and in criminal cases signalizes to the prosecution.

5.1 Legal status of the Werberat; Remedies against Werberat decisions.

As shown above, the UK advertising self regulatory organizations (ASA) have convenient legal backstops and strong stand alone rule making powers. Under an agreement with the state regulator (OFCOM), the UK self-regulator may even have procedural monopoly in handling complaints. As a consequence, for the purposes of judicial review, the ASA is considered as a government organization, the decision of which is subject to a judicial review by the Administrative Court. This is not the case in Germany. The Werberat is a private organization, which acts on its own, no appeal to state courts is possible against its decisions. There are two aspects here, that of the petitioners (mostly consumers having ethical and aesthetic problems with a particular advert) and the speakers (i.e. advertisers, whose interest is to convey their commercials).The civil and constitutional status of the Werberat from these two aspects are discussed below.

[502] See http://www.werberat.de/verfahren (in German, last visited April 4, 2013)

6. THE EFFECT OF SELF-REGULATORY SPEECH RESTRICTIONS ON PLURAL CONTENT OF BROADCAST MEDIA

Decency based speech restrictions obviously increase audience satisfaction and viewing statistics, but they may potentially harm pluralistic content, if the adjudication is in the hands of biased self-regulatory organizations.[503] Of course, editorial independence, which is in the focus of the relevant European guidance, has less role in formulating advertising content, but freedom of commercial speech, which is accepted both at European level and in Germany applies to the pluralistic content of commercial speech as well. There are two issues here. First, whether "decency" is a constitutionally acceptable basis of restricting commercial speech in broadcasting and second, whether a self-regulatory organization is a constitutionally appropriate organ to regulate, monitor and enforce such a restriction. As referred to in the Introduction, advertising self-regulatory codes of both Germany and the UK openly declare that their goal is to avoid "widespread offence" (BCAP Code of the UK) and to preserve and strengthen consumer confidence in commercial communications" (Code of the German Werberat). These demonstrate that the principal goal of self-regulation is consumer satisfaction, rather than consumer protection. Although it is hard to make an objective judgment without knowing the detailed background, it appears, however, that some of the Werberat cases were decided on the basis of consumer satisfaction rather than consumer protection. (For example, the advertising which was found unacceptable on the ground that it plays on human despair, or the one which offended religious feelings.)

Naturally, the level of scrutiny (or in the case of the ECtHR, the level of margin of appreciation) is different in the case of commercial speech. This issue will be discussed below.

[503] See the Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content

7. CONSTITUTIONAL ASPECTS OF COMMERCIAL COMMUNICATION AND ITS SELF-REGULATION

I have shown so far that under the UWG, fundamental right to speech may be restricted, namely that speech may qualify as unfair commercial practice if it constitutes a "contempt of humanity" ("Menschenverachtung"). This raises four issues, namely, if it is constitutionally acceptable to apply UWG based restrictions over the fundamental rights and second, what is the value of humanity in relation to free speech and the third question is whether offensive (indecent) speech is protected, and if yes, to what extent. Finally the constitutionality of private regulation of speech will be discussed.

7.1 The Basic Law

The right to freedom of expression is based on Article 5 of the German Basic Law.

> 1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
>
> (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.
>
> (3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.[504]

7.2 The Lüth case[505]; Limitations of free speech rights; Hierarchy of values and balancing.

Unlike the First Amendment, free speech is not absolute in Germany. It may be restricted by ordinary legislation provided that it is a general law (Article 5 (2)) and speech may not violate human dignity. The German Constitutional Court set the principles of Article 5 adjudications in its judgment of 1958 in the Lüth case.

[504] English translation taken from: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0030 (Last visited June 4, 2013)

[505] BVerfGE 7, 198 (1958) My summary is based on Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham and London: Duke University Press, 2012). p 442 et seq.

In Lüth the German Constitutional Court upheld the free speech right of Herr Lüth vis-á-vis another individual, Herr Harlan. Harlan was a popular director under the Nazi regime, and the producer of the anti-Semitic film Jud Süss. In 1950 he directed a new, romantic movie. Herr Lüth, who was at the time Hamburg's director of information, was outraged by Harlan's post war reappearance and called for a boycott of Harlan's new movie. A film distributor of Harlan's movie obtained a court order prohibiting Lüth to continue his calls for boycott. The Lüth case was a civil lawsuit where the regional court of Hamburg decided against Lüth on the basis of the German Civil Code. Lüth filed a constitutional complaint with the Constitutional Court asserting his basic right to free speech. The Constitutional Court decided in favor of Lüth. In its judgment the Constitutional Court, among others, indicated an objective hierarchy of values, the effect of fundamental rights in private-law disputes, and vice-versa, and the restrictions by private law on fundamental rights. The Court provided guidance for the judicial analysis of Article 5 cases, and clarified the meaning of the term "general laws".

7.2.1 Objective hierarchy of values.

The Court stated in Lüth that the Basic Law is not a value neutral document and that the value system is centered upon human dignity. In Lüth the Court also indicated that in case of conflict, speech in the interest of common good is more valuable than speech supporting private and especially individual economic interest.

This scale of values, however, does not show a general guidance for constitutional treatment of low value or high value speech. In the Criminal Prisoners (Strafgefangene) Case the Court stated that free speech protects every opinion, and any differentiation between them according to their moral quality would largely limit this comprehensive protection and in any event the differentiation between "valuable" and "worthless" opinions would often be difficult or

impossible in a pluralistic liberal democratic state where every opinion, even the ones in conflict with prevailing ideas are worthy of protection.[506]

The value system of the Basic Law affects all spheres of law, and private relations must be brought in conformity with such a value system.[507] In Lüth the Civil Code was found to be a general law which, pursuant to Article 5(2) of the Basic Law, may limit the fundamental rights. Therefore, interactions between the Basic Law and private law are mutual. These interactions between fundamental rights and other areas of the German legal system are discussed below.

7.2.2 Mutual interactions between public law and civil law.

In Lüth the Court pointed out that there is two way interaction between public law (rules regulating the legal relationships between the citizen and the state) and civil law (regulating the legal relations between individuals, non-state organizations, etc.[508]

On the one hand, the Basic Law directly affects the content and judicial interpretation of civil law, on the other hand, as provided in Article 5(2) of the Basic Law, general statutes of civil law may restrict fundamental rights. Moreover, under the Mutual Effect ("Wechselwirkung") theory, the Constitutional Court set limits to restrictions on fundamental rights by private law. The Court stated in Lüth that "general laws set bounds to a basic right but in turn those laws must be interpreted in the light (...) of this basic right (...) so any limiting effect on the basic right must itself be restricted."[509] Below I discuss cases regarding the basic right to free speech and general laws.

[506] BVerfGE 33, 1 (1972) "Daraus folgt der umfassende Charakter dieses Rechts. Es soll jede Meinung erfassen. Eine Differenzierung nach der sittlichen Qualität der Meinungen würde diesen umfassenden Schutz weitgehend relativieren. Abgesehen davon, daß die Abgrenzung von "wertvollen" und "wertlosen" Meinungen schwierig, ja oftmals unmöglich wäre, ist in einem pluralistisch strukturierten und auf der Konzeption einer freiheitlichen Demokratie beruhenden Staatsgefüge jede Meinung, auch die von etwa herrschenden Vorstellungen abweichende, schutzwürdig." Also referred to in the Election Campaign Case BVerfGE 61, 1 (1982) Section B II

[507] See András Sajó, *Freedom of Expression* (Warszawa: Institut Spraw Publicznych, 2004). p 58

[508] See Nigel Foster and Satish Sule, *German Legal System and Laws*, 4th ed. (Oxford: Oxford University Press, 2010). p 155

[509] Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*. p 446

7.2.3 The emanation (Ausstrahlung) of fundamental rights to civil law ("Drittwirkung" or horizontal effect doctrine).

The dispute in Lüth was a civil law dispute, where Harlan's claim was based on the paragraph of the German Civil Code regarding damages (§ 826). Lüth argued the case evoking his fundamental right to free speech, which is a public law argument. Under the horizontal effect doctrine, rules of public law shall be applied to private relations if they breach into (the domain of) private law through general clauses of private law.[510]

In Lüth the Constitutional Court held that

> "(T)he fundamental rights primarily serve to protect citizens against the state, however, fundamental rights in the Basic Law embody an objective system of values applicable in all areas of law."[511] As a consequence, disputes between private parties remain substantively and procedurally private-law dispute, but courts apply and interpret private law in conformity with the constitution.

The horizontal effect is important in connection with restrictions on commercial speech by private organizations (self-regulatory organizations) for private economic reasons. This matter is mostly regulated by civil law and unfair competition regulation. Civil law comes in the picture as private economic interests are involved (substantive matter) and the parties (i.e. the speaker and the self-regulator) are non-state organizations. Unfair competition legislation covers misleading and otherwise unfair commercial practices.

Cases regarding professional advertising bans are good examples for clash of free speech and economic interest. These complex cases have aspects of both private law (private regulation of professional practices) and public law elements (unfair competition), infiltrated with the fundamental rights to free speech and the right to occupational freedom (Art. 12 of the Basic

[510] "Deshalb sind mit Recht die Generalklauseln als die "Einbruchstellen" der Grundrechte in das bürgerliche Recht bezeichnet worden (Dürig in Neumann-Nipperdey- Scheuner, Die Grundrechte, Band II S. 525)." See also **Dorsen** p. 884

[511] Lüth case Headnote 1.

Law) . In the famous Barthold case (famous for being a leading ECtHR case[512]) the German Constitutional Court, in 1980, dismissed the constitutional complaint of a veterinary surgeon in connection with a self-regulatory ban regarding professional advertising. Barthold argued, inter alia, that the German state court has no authority to apply rules of professional conduct, and that the prohibition infringes his right to free speech.[513] In the Steuerberater case of 1982[514], the Court accepted the application of the professional advertising ban on a pure advertising message which was related to the services of a person having no sufficient professional qualification. It is important, that the Court decided the advertising ban in Steuerberater case on the basis of the occupational freedom and free speech aspects were not taken into account, as at the time commercial speech was considered as being outside the realm of free speech protection.[515] The first case where the Constitutional Court found that free speech right may in certain circumstances extend to economically motivated expressions was the Frischzellentherapie case[516] of 1985. In that case the Constitutional Court held that professional codes of conduct may validly prohibit professional advertising, however, such prohibition may not restrict the right to free speech regarding utterances with opinion-forming content.[517]

7.2.4 The effect of civil law on fundamental rights. The meaning of general law.

Article 5 (2) of the Basic Law provides that fundamental rights may be limited "in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour".

In the Schmid-Spiegel Case the Constitutional Court (referring to Lüth) stated that

[512] ECtHR App. no. 8734/79
[513] Ibid. (Barthold) Section 23
[514] BVerfGE 60, 215 referred to in Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe*. p 164
[515] Ibid. (Krzeminska) p 165
[516] BVerfGE 71, 162 referred to in Ibid. p 164
[517] See Ibid.

> "the interrelationship between the constitutional right to freedom of expression and the "general laws" must not be seen as a one-sided restriction on the effectiveness of the constitutional rights by general laws; rather, an interplay takes place in the sense that the 'general laws' by their terms set bounds to the constitutional right (...)"[518]

The definition of general laws. The Court stated that general law means a law that "do(es) not prohibit an expression as such, rather designed to protect the public interest and wholly unrelated to the suppression of an opinion."[519] There is no precise definition of general law in the German jurisprudence. The two most important advertising related pieces of legislation, the Civil Code[520] and the Unfair Competition Act[521], have been considered as general law. Of course it depends on the circumstances of the given case whether a provision of general law limits a fundamental right or not. The actual effect of the general law is decided by courts on a case by case basis.

7.2.5 Balancing. Where is the test?

In Lüth the Constitutional Court stated that

> "the private law judge is required to weigh the importance of the basic right against the value of the interest protected by the "general laws" to the person allegedly injured by the utterance of the opinion. A decision in this respect requires the judge to consider all the circumstances of the individual case. An incorrect balancing of the factors can violate a person's basic right and provide the basis for a constitutional complaint to the Federal Constitutional Court."[522]

As a result of this ad hoc balancing exercise, there is no such a clear cut system of tests in Germany as in the U.S., where the different levels of scrutiny are paired with particular tests. As Schauer writes:

[518] BVerfGE 12, 113 – quoted from Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*. p 451
[519] BVerfGE 7, 198 (Lüth) quoted from Ibid. p 446
[520] The Civil Code was declared to be a general law in Lüth
[521] Von Münch, Kunig, and (Eds.), *Grundgesetz-Kommentar, Band I. Praambel Bis Art 20* (München: C.H. Beck, 1992). p 405 referring to BGHZ 14, 163. See also the Benetton Shock Advertising case: "An interpretation of § 1 of the Unfair Competition Law, meaning that an immoral advertising picture that violates the human dignity of the persons depicted is constitutionally unobjectionable." ("Eine Auslegung des § 1 UWG dahin, dass eine Bildwerbung sittenwidrig ist, die die Menschenwürde abgebildeter Personen verletzt, ist verfassungsrechtlich unbedenklich.")
[522] Lüth case as quoted in Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*. p 447

> "In theory, it remains possible that freedom of expression adjudication in Canada, in Europe and in other countries other than the United States will remain, in Q'adi-like fashion, continuously open-ended and continuously case- and context- specific. But this possibility is highly remote, and were it to occur it would constitute a challenge not only to American free speech development, but to all we know about the growth and rigidification of the common law generally"[523].

The cases, however, show that speech in the interest of the public (freedom of the press) prevail over private interest, and even speech based on economic motive is protected if it contains elements of general interest.

A few examples of leading cases regarding balancing. In Lüth, the Constitutional Court decided in favor of the right to free speech, as in the given circumstances speech right served public interest which was found superior to the private economic interest of the other party. In the "art critique case"[524] the Constitutional Court held that the free speech right of two journalists criticizing university professors are stronger than the professors' right to personal dignity. In Schmid-Spiegel[525] the speaker's basic right was preferred to the personal honor of the suffering party in a criminal libel case, as the Court considered that the value of free press was higher than the reputational right of the private persons in the given case. In the Chemist Advertising Case the Constitutional Court approved sharp limits on misleading advertising.[526] In the Benetton Shock Advertising case[527] the Constitutional Court found that freedom of the press in utterances regarding socially and politically relevant questions is more significant than a general law to protect market competition.

[523] Frederick Schauer, Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture, in EUROPEAN AND U.S. CONSTITUTIONALISM (Georg Nolte ed., 2005), quoted in By Jacco Bomhoff, "Lüth ' s 50 Th Anniversary : Some Comparative Observations on the German Foundations of Judicial Balancing," *Yale Law Journal* 79, no. December 2007 (2008): 2003–2006.
[524] BVerfGE 54, 129; 1980 referred to in Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe*. p 160
[525] BVerfGE 12, 113, my reference is based on Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*. p 450 et seq
[526] BVerfGE 53, 96 (1980) referred to in Kommers Ibid. p 498
[527] BVerfGE 102, 347 (2000) referred to in Kommers Ibid. p 499

7.3 Guarantee of the freedom of the press, films and broadcasting

With respect to the press, films and broadcasting, the Basic Law provides not only a freedom against the state, but it defines a duty by the state to guarantee this freedom against private repression.[528] According to the Constitutional Court, this duty to guarantee the freedom of broadcasts and films is born by the lawmaker as a protective duty by the state. In the Blinkfüer case[529], for example, the Constitutional Court had to decide in a civil lawsuit between a small weekly newspaper, Blinkfüer (as complainant) and the publishing house Axel Springer (as defendant), because of a boycott call by Springer against Blinkfüer for propaganda from East Germany. Here two speech rights were in conflict. The Court stated that Springer abused its speech rights and used its market power to silence Blinkfüer. The Court distinguished Lüth (see below), as the statements of Lüth, "appealing solely to moral and political sensibility, could not at all restrict (Harlan's speech rights) directly and effectively."

As Article 5 (1) of the Basic Law provides, "freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed", regulation of linear radio and television broadcasting is based on the approach that the state is obliged to safeguard the public function of the press and maintain the plurality of content.[530] This obligation includes the guarantee of the rights of both the speakers and listeners. The Constitutional Court stated in the Press Freedom Case[531] that the freedom of the press and the freedom to broadcast are separate and independent freedoms under Article 5 (1) and not merely a subcategory of the right to express and disseminate one's opinion. While press freedom is principally subject to private law, as this area is protected from state intervention, in the case of broadcasting, the state is expected to intervene, and therefore regulation in this area (licensing, content restrictions, public

[528] See e.g. Sajó, *Freedom of Expression*. p 59
[529] BVerfGE 25, 256
[530] See Ibid. p 68
[531] quoted in Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*. p 502

service broadcasters, etc.) is typically subject to public law. In the case of broadcasting the freedom of speech was to be secured by legislation, to make sure that the broadcaster remains free from state intervention.

7.4 Summary

In summary, it was shown above that the fundamental right to freedom of expression may be restricted by civil legislation, provided that it qualifies as a general law. It was also shown that human dignity is in the center of the objective value system of the fundamental rights, and therefore it may also serve as a basis for speech restriction. It was shown, however, that there are no strict value scales among fundamental rights and that German courts always have to use ad hoc balancing in deciding over conflicts between fundamental rights. I discuss below how commercial content and/or motive affects this balancing exercise and whether the UWG qualifies as such a general law, and therefore speech restriction on the basis of unfair competition may be constitutional.

8. FREEDOM OF COMMERCIAL SPEECH.

Despite the fact that Article 5 of the Basic Law was declared to cover all opinions[532], it was only in 1985 that commercial advertising was accepted as speech falling under the protection of Article 5 of the Basic Law. Beforehand, if ever considered in light of constitutional rights, it was discussed as economic activity, falling under Article 12 of the Basic Law.[533] Since there is no speech categorization in Germany and the adjudication is always ad hoc balancing, commercial speech is not defined in Germany.[534] However, content and motive of speech

[532] See the Criminal Prisoners Case (BVerfGE 33, 1)
[533] See Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe*. p 164-165 "Advertising between Article 5 GG and Article 12 GG"
[534] See e.g. Krzeminska p 178, or Münch, Kunig, and (Eds.), *Grundgesetz-Kommentar, Band I. Praambel Bis Art 20*. p 357
„Die motive, die der einzelne Teilnehmer am Kommunikationsprozess konkret verfolgt, können hier ebensowenig wie sonst zu einer Restriktion des Schutzbereichs führen. Schon gar nicht kann der Schutz des nicht nur im politischen oder kulturellen, sondern gleichrmassen im wirtschaftlichen Bereich auf umfassend freie Kommunikation zielenden Art. 5 I 1 davon abhaengig gemacht werden, ob der einzelne mehr oder minder

impacts the balancing exercise and there is a tendency, whereby distinction is made between pure commercial speech and mixed speech, where elements of public interest are mingled with private economic interest. These two categories will be discussed below.

8.1 Pure commercial speech.

Although speech is protected irrespective of its content or motive, speech uttered with the purpose of contributing to a public debate is presumed to be free, no matter if it is right or wrong[535] subject to the limits by general laws[536] and protection of personal honor[537]. Commercial speech is considered as part of the commercial practices and therefore regulated by the Unfair Competition Act[538] of 2004 ("UWG"). The UWG is considered as a "general law" for the purposes of Article 5 (1), which may limit the fundamental right to free speech. This limitation operates through the general clause of the UWG.

Under the old UWG (of 1909, which was replaced in 2004 by the new law)

> "any person who in the course of business commits, for purposes of competition, acts contrary to honest practices may be enjoined from further engaging in those acts and held liable for damages."[539]

Under the new UWG

> "Article 3
>
> (1) Unfair commercial practices shall be illegal if they are suited to tangible impairment of the interests of competitors, consumers or other market participants.
>
> (2) Commercial practices towards consumers shall be illegal in any case where they (...) are suited to tangible impairment of the consumers ability to make an information-

eigenützige Ziele verfolgt. Handeln um der Gewinnerzielung willen laesst eine ausserung nicht aus dem schutzbereich des grundrechts herausfallen."

[535] See the Election Campaign Case BVerfGE 61,1 (1982)

[536] Lüth BVerfGE 7, 198

[537] Mephisto Case BVerfGE 30, 173

[538] Act Against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette [BGBl.]) Part I p. 254"– "Gesetz gegen den unlauteren Wettbewerb in der Fassung der Bekanntmachung vom 3. März 2010 (BGBl. I S. 254)

[539] Translation in Krzeminska p 170

> based decision, thus inducing him to make a transactional decision which he would not otherwise have made."[540]

The UWG prohibits both misleading and unfair commercial practices. The above general clause of the UWG represents the fairness requirement as a distinct aspect for the German courts in the balancing exercise. Unfair commercial speech shall be unlawful, provided that it causes tangible impairment of the interests of consumers, competitors and other market participants.

8.2 Limiting speech based on the UWG: the markt intern case[541] before the European Court of Human Rights.

The effect of the UWG on the balancing adjudication makes a difference between high value speech, and pure commercial speech, that represents private economic interest and does not contribute to public debate or does not serve or reflect public interests otherwise. Misleading statements of facts are in general unprotected[542]; fairness, however, in the context of public debates and political matters is not a precondition for constitutional protection

> "In determining what (...) is covered by the protection of the fundamental right, the element of taking a position (...) in the context of a clash of ideas is decisive; the worth, the rightness, the wisdom of the statement do not come into (consideration).[543]

The markt intern case is an illustration that under Article 1 of the old UWG not only false statements of facts but also unfair opinions can be restricted. Markt intern was a publishing firm which "was founded and run by journalists, seeking to defend the interests of small and medium-sized retail businesses against the competition of large-scale distribution

[540] http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#UWGengl_000P3 (Last visited June 10, 2013)
[541] My summary and analysis are based on the ECtHR judgment, App. nr. 10572/83
[542] "The deliberate assertion of untrue facts is no longer protected by Article 5 (1) GG..." Election Campaign Case BVerfGE 61, 1 Section B II. – translation in *Decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Federal Republic of Germany; Vol2/ Part I and II Freedom of Speech 1958-1995* (Karlsruhe: Nomos Verlagsgesellschaft, Baden-Baden, 1998). p 247
[543] Election Campaign Case BVerfGE 61, 1 (1982) translation is taken from Ibid. (Decisions of the Constitutional Court) p 248

companies"[544]. The legal dispute was related to publications by markt intern, criticizing an English mail-order firm, Cosmetic Club International ("the Club"). At the complaint of Club, the German Courts (including the Federal Supreme Court of Germany and the Constitutional Court) obliged markt intern to stop disseminating the critical information about the Club. The key argument from point of view of the impact of UWG on the constitutional right to free speech was that the communication by markt intern

> "merely represented a value judgment, and as such could not give rise to objections. Yet, under section 1 of the 1909 Act, the decisive issue is not whether the statement is to be regarded as a value judgment or as an allegation of fact. The expression of a value judgment can also exert an unacceptable influence in the field of competition under section 1 of the 1909 Act (...).

8.3 Professional advertising related cases

The cases regarding professional advertising ban on doctors are good illustration for the dilemma on speech restrictions both in connection with pure advertising and mixed speech.

In the leading Frischzellentherapie case[545] the Court stated that

> "Advertising bans on professions, which limit the practice of the profession (...) are permissible if they are justified by sufficient reasons of public interest and if they satisfy the principle of proportionality."[546]

As the Constitutional Court pointed out in the Doctors' Advertising Ban Case (Arztliches Werbeverbot)[547], one side of the balancing is that

> "The medical profession should be pursued to serve medical needs rather than for economic success, and the advertising ban prevents a health policy unwanted commercialization of the medical profession."[548]

[544] §9 of markt intern v Germany (App. nr. 10572/83)
[545] BVerfGE 71, 162 (1985)
[546] Ibid. Section 50 at http://www.servat.unibe.ch/dfr/bv071162.html (Last visited June 12, 2013)
[547] BVerfGE 85, 248 (1992)
[548] "Die ärztliche Berufsausübung soll sich nicht an ökonomischen Erfolgskriterien, sondern an medizinischen Notwendigkeiten orientieren. Das Werbeverbot beugt einer gesundheitspolitisch unerwünschten Kommerzialisierung des Arztberufs vor." Section 51, BVerfGE 85, 248 (1992) http://www.servat.unibe.ch/dfr/bv085248.html (Last visited June 12, 2013)

The Court, by considering the right to free speech, the other side of the balancing, held that the interpretation of the general prohibition of medical advertising ban by the courts, by invariably prohibiting publications about their career in the press, disproportionately restricts fundamental rights under Article 5 of the Basic Law.

In the Medical Specialist Designations (Facharztbezeichnungen) Case of 2002[549] the Constitutional Court discussed professional announcement in the light of the freedom of profession rather than free speech. The Court stated that

> "The freedom of profession under Article 12 paragraph 1 GG includes the right to inform the public in an appropriate form about professional qualifications acquired truthfully."[550]

Under the case law of the Constitutional Court, the restrictions on pure commercial speech are in principle permitted, pursuant to the UWG. However, any restriction must be reasonable (e.g. invariably general restriction is disproportionate) and restrictions are limited in case of speech that concerns the general interest. This latter point leads to the question of mixed speech.

8.4 Mixed speech

As mentioned above, the Constitutional Court held in the Frischzellentherapie case that professional codes of conduct may validly prohibit professional advertising; however, such prohibition may not restrict the right to free speech regarding utterances with opinion-forming content. The Benetton Shock Advertising Case[551] is the leading example of a mixed speech

[549] BVerfGE 106, 181 (2002) http://www.servat.unibe.ch/dfr/bv106181.html (Last visited June 12, 2013)

[550] The original German text: "Die Freiheit der Berufsausübung aus Art. 12 Abs. 1 GG umfasst das Recht, die Öffentlichkeit über erworbene berufliche Qualifikationen wahrheitsgemäß und in angemessener Form zu informieren (...)."

[551] See the decision in German at
http://www.bundesverfassungsgericht.de/en/decisions/rs20001212_1bvr176295.html
The decision is available also in English at:
http://www.bundesverfassungsgericht.de/en/decisions/rs20001212_1bvr176295en.html

related dispute. The Constitutional Court overruled the judgment of the Federal Court of Justice, upholding bans on the Benetton shock-ads. The FCC in its decision

> "underlined the obligation of a civil court to enter into a balancing process in which the interests on the side of the "speaker" and the alleged overriding public interests (in fair competition, for example) are clearly outlined and weighed".[552]

The Constitutional Court stated that the protection of Article 5(1) extended to "business advertising that expresses a value judgment and contributes to the formation of opinions."[553]

8.5 Summary

In summary, speech with commercial content or motive is not considered a separate category, but commercial content affects the balancing exercise, to the detriment of commercial speech. It was shown that the UWG qualifies as general law, and accordingly speech may be restricted if it constitutes unfair commercial communication. At the same time, valuable content has a decisive effect on the balancing exercise between the right to speech and competing interests (e.g. fair competition). In the Benetton case free speech right prevailed over the "emotional advertising" and "unfair competition" arguments. The Federal Constitutional Court rejected the restrictive approach by the self-regulatory organization (Wettbewerbszentrale) and subsequently by the Federal Court of Justice. It stated that if the commercial communication contributes to socially or politically important debate,

> "the constitutional protection encompasses even the speaker of emotional, unfounded or baseless remarks irrespective of whether it is considered by others as being useful or detrimental to the debate"[554].

My summary is based on a paper by Peer Zumbansen, "Federal Constitutional Court Rejects Ban on Benetton Shock Ads : Free Expression , Fair Competition and the Opaque Boundaries Between Political Message and Social Moral Standards .," German Law Journal (2000): 1–3, http://www.germanlawjournal.com/article.php?id=14.(Last visited March 29, 2013)

[552] Ibid. (Zumbansen) p 1

[553] Quote from Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*. p 499

[554] Zumbansen, "Federal Constitutional Court Rejects Ban on Benetton Shock Ads : Free Expression , Fair Competition and the Opaque Boundaries Between Political Message and Social Moral Standards ." p

9. CONSTITUTIONAL ASPECTS OF SELF-REGULATION IN GERMANY

As discussed in the Introductory Chapter, from the point of view of constitutional analysis, there are three important questions regarding self-regulation; legitimacy (public – private divide), regulatory bias (self-censorship), and accountability.

9.1 Legitimacy.

It was explained that self-regulation is at the junction of public and private law. Public law analysis puts the emphasis on protection of fundamental rights, while the starting point of private law is the flexibility and discretion of the parties. Restrictions of free speech rights do not raise constitutional problems to the extent that they are based on and remain within the boundaries of the express consent (i.e. may be considered as a contractual or corporate relationship) by the regulated persons. The German self-regulatory organizations are way beyond the circle of express consents and their rule making and operation extends to third parties. The Wettbewerbszentrale represents third parties in lawsuits against advertisers, and the Werberat Codes, which affect consumers, audience and trade organizations, are created and handled by the advertisers, media, agencies and professionals. In such cases, the main issue is legitimacy, i.e. whether the self-regulatory acts, and adjudication, which are generally applicable, or at least affect third parties without their consent, represent the will of democratically elected legislative bodies.

As mentioned above, the aim of the Wettbewerbszentrale is to extend judicial review to consumer complaints in an organized way, and the main effect of its operation is to create legal connection between the audience and the advertisers. This operation is based on an express authorization by the UWG, and therefore democratic legitimacy exists. It appears, however, that the opening of the courtrooms for civil claims by the audience resulted in an extraordinary restriction of commercial speech: prohibition of emotional advertising, which

may provide smooth operation for the German industry, but is not in line with the European markets and may also be questionable in light of the ECtHR jurisdiction.

As far as the Werberat is concerned, its codes of conduct are purely self-regulatory acts, without delegation. However, despite the high voluntary compliance (6 cases sanctioned out of 72 problematic ads, based on 915 complaints), it is arguable whether the Werberat Codes could be considered as legislation, since the number of cases is small.

9.2 Regulatory bias – stakeholders and decision making

In the advertising industry the main driver of self regulation is declared to be consumer protection. As explained in the Introduction, I argue that consumer satisfaction is more important for the advertising industry than consumer protection, and free speech right is suppressed (by limiting "offensive speech") in order to better serve the advertisers. The stakeholders and decision making of the self-regulatory organization are the indicators of regulatory bias.

9.2.1 Werberat

The Werberat is part of the German Advertising Federation[555] **("ZAW")**, which is a federal level self-regulatory organization representing the advertisers (four representatives elected to the Werberat), the media (three elected representatives in the Werberat), advertising agencies (two elected representatives in the Werberat) and professionals (one representative in the Werberat). The Werberat consists of 10 representatives elected by the ZAW members in the above proportion.

9.2.2 Wettbewerbszentrale

[555] Zentralverband der deutsche Werbewirtschaft e.V. – **"ZAW"** www.zaw.de (in German, Last visited April 4, 2013)

The Wettbewerbszentrale was founded in 1912, shortly after the old UWG of 1909 was enacted. It is a self-regulatory organization with legal personality, the principal purpose of which is to assist in enforcing the UWG, other legislation regarding market competition and consumer protection[556]. The Wettbewerbszentrale is organized at federal level.

> "All chambers of commerce, most trade corporations, about 800 other industrial or commercial associations and approximately 1200 companies are among its members."[557]

The membership is open, anybody (natural and legal persons and other associations) may join.[558] It is financed from membership fees, which are agreed with members upon their joining on a case by case basis.[559] The daily operation and decision making is in the hands of the Chief Executive Director ("Hauptgeschäftsführer").[560] He or she is appointed by the Management Board ("Präsidium"), which in turn is elected by the General Assembly ("Mitgliedversammlung") with simple majority, upon the proposal by the Advisory Board ("Beirat").[561] The Advisory Board is elected by the General Assembly with simply majority of the votes. The Advisory Board shall be elected to make sure that the main groups of professions are represented therein.

9.2.3 Summary

In summary, it appears that merely on an organizational ground there is little ground for a suspected bias in the case of the Wettbewerbszentrale in favor of the advertising industry. It was, however, founded to enforce the UWG on the basis of consumers complaints, which carries the goal to serve consumer (viewer, audience) satisfaction. This ultimately gravitates

[556] See Articles of Incorporation ("Satzung") §2 (1) http://www.wettbewerbszentrale.de/de/institution/satzung/ (In German, Last visited June 14, 2013)
[557] "The Role of the Wettbewerbszentrale in the Enforcement System against Unfair Commercial Practices in Germany" at the homepage of the Wettbewerbszentrale http://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=32204 (Last visited June 14, 2013)
[558] Articles of Incorporation § 3
[559] Articles of Incorporation §4
[560] Ibid. §7 (5)
[561] Ibid. 6-8§

to speech restrictions. In the case of the Werberat, the stakeholder representatives suggest an organizational bias to serve the advertising industry as opposed to pluralistic content.

9.3 Accountability of self-regulatory organizations – private and judicial review.

Accountability means control over the SRO. There are two forums for such control. The first is internal control by the members or contracting parties, who have expressly submitted themselves to the private jurisdiction of the given SRO. The second is public control. Since the Wettbewerbszentrale channels consumer complaints to court, there is no lack of external public control over its operation. (NB complainants are not so much protected, as the Wettbewerbszentrale filters the complaints without third party control. This, however, is not a matter for an analysis of regimes restricting speech.)

There is no such judicial control with respect to the Werberat. Speakers may have problems with either the Werberat codes or the Werberat decisions. It is not merely the theoretical question of fundamental right to speak. As seen, for example, in the Benetton shock ads case and the PETA Deutschland case, advertising often seeks to test the audience's tolerance limits. Therefore, the speech rights versus restrictions "prescribed by" a private party often reflecting ethical and aesthetic norms are a daily practical concern. I discuss this matter from the points of view of civil law and constitutional law.

9.3.1 Speakers' rights under civil law.

As far as the codes of conduct are concerned, it seems obvious that in abstracto no judicial review of codes of conducts by the Werberat are available in Germany, as these are private documents (and no statutes, where judicial review is possible under Art. 100 of the Basic Law) and before a German civil court one needs an actual case to start a lawsuit.562 As far as

[562] Under the German Code of Civil Procedure A declaratory action („Feststellungsklage") is exceptional. It may only be filed to establish the existence or non-existence of a legal relationship, to recognise a deed or to establish that it is false, if the plaintiff has a legitimate interest in having the legal relationship, or the authenticity or

appeals against the Werberat decisions are concerned, according to its Rules of Procedure, no remedy is available for the advertiser against the decision of the Werberat. The only appeal mentioned there is that of the complainant against refusal of a complaint against the particular advertising, and even this is handled in-house by the Werberat. Therefore, only the generally available judicial review remains for the speakers. The Werberat is a private organization, and unlike in the UK, no administrative remedies are available against its decisions. However, as the Werberat is a non-state organization, a lawsuit before civil court is a generally available alternative in Germany, both directly against a particular advertising[563], irrespective whether a process before the Werberat is commenced or pending, or not. It seems though that this possibility is theoretical only, as according to the Werberat statistics, 96% of the cases results in voluntary amendment of the problematic advert and only 4% ends up with the above mentioned sanctions.

9.3.2 Speakers' rights under the Basic Law. Drittwirkung.

Werberat decisions restricting commercial speech in order to protect consumers is a classic example of the question of horizontal effect; when a private regulator (Werberat) restricts speech of a private party (the advertiser). Under German law, constitutional protection against private restraint is in the most advanced stage in Europe.[564] Since the famous Lüth case, fundamental rights enshrined in the Basic Law are regarded not only as individual defenses against the state, but also as an 'objective system of values', which must apply

falsity of the deed, established by a judicial ruling at the court's earliest convenience. See Sec. 256 of the Code of Civil Procedure in English: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0899

[563] See for example the case of PETA Deutschland v. Germany before the European Court of Human Rights (43481/09). The judicial review aspects of the case are as follows (based on the legal summary on HUDOC): "In 2004 German branch of the animal rights organisation PETA (People for the Ethical Treatment of Animals) planned to launch an advertising campaign entitled "The Holocaust on your plate" (...). The president and the two vice-presidents of the Central Jewish Council in Germany sought an injunction ordering PETA to refrain from publishing seven specific posters on the Internet or displaying them in public. (...) The regional court granted the injunction (...) That decision was upheld on appeal."

[564] OO Cherednychenko, "Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?," *Utrecht Law Review* 3, no. 2 (2007): 1–25, http://www.utrechtlawreview.org/index.php/ulr/article/view/45. p 4

throughout the whole legal order, directing and informing legislation, administrative acts and court decisions.[565] In practice this means that legal disputes over civil law, for example, under Section 826 of the Civil Code, as in the Lüth case shall be judged by German court by taking into account Article 5 (freedom of expression) of the Basic Law. In this exercise the court shall balance between the two rights, that of the consumers to be protected against aesthetic or ethical harassments and on the other hand that of the advertisers to convey their messages to their audience. In this balancing exercise the weight of commercial speech is not very promising. As seen above in connection with the markt intern and the Benetton shock ads cases, "German courts accord less protection to speech when the commercial purpose is identified"[566].

10. SUMMARY; "ALL KORREKT"

In this Chapter I discussed the public and private regulation of commercial speech in Germany. It was shown that commercial speech is restricted under the general notion of offensive speech. This is embodied in unfair commercial communication under the UWG. In the case of the UWG, the self-regulatory element is the Wettbewerbszentrale, which by creating a legal link between audience and advertisers de facto extended the circle of speech restrictions to prohibition of purely emotional advertising. The other form of speech restriction is much smaller. The Werberat codes, by using the notion of indecent speech, also extended the possible circle of speech restrictions. The constitutional analysis showed that although these speech restrictions serve mainly economic purposes (increase audience satisfaction), there is little basis for constitutional complaints; in case of the unfair competition based arguments, the legitimacy and accountability is ensured, in the case of the decency argument the small scale of self-regulatory act questions that the self-regulatory codes of the Werberat could have legislative effect.

[565] Ibid. (Cherednychenko)
[566] See Ibid. p 11

III. CASE STUDIES OF CROSS-BORDER ADVERTISING SELF-REGULATION

A. Cross-border advertising self-regulation in the European Union – the case of the European Advertising Standards Alliance

1. INTRODUCTION

I claim in this dissertation that the European advertising self-regulation (both at national and cross border level) has emerged to serve the business goal of consumer (viewer) satisfaction and that consumer protection is secondary only. This goal is principally served at national level by restricting speech on the basis of the "offense" argument in order to expose consumers / viewers to the least possible harassment, rather than protecting them against harm. This is supplemented with international level self-regulation to solve the problems with cross-border advertising campaigns stemming from national regulatory discrepancies. This international self-regulation has a relatively small case load, but extends the application of national codes to complaints from abroad, which, taking into account the broad definition of offense in national codes implies additional restrictions of commercial speech on the basis of viewer complaints. . The European Advertising Standards Alliance **("the EASA"),** as a private organization was set up by the advertising industry at the informal initiative of the Commission encouraging the advertising industry to pre-empt Community level legislation to handle problems with cross border campaigns. The cross-border complaint system **("CBC System")**, set up under the auspices of EASA, has been in fact developed into a direct co-operation among EASA members, and so it is not a standalone operation of a multinational self-regulatory organization. Its essence is the multilateral practice of EASA member SROs to forward complaints against adverts by foreign media to the SRO of the country of origin for adjudication and to mutually accept each other's decisions. This regulatory pre-emption of EU

level legislation by the EASA members was made without express delegation of power and may raise questions of legitimacy both at national and international level.

The EASA and its reason. The EASA is the only full-fledged European level advertising self-regulatory organization.[567] It was established "to address distortions that arise with trans-frontier TV advertising if the two codes of practice (or legislation) are different in substance".[568] The private harmonization of advertising regulation of Europe was in fact never achieved, as it was not even attempted. Instead, it has been agreed by the EASA members that in case of complaints in their country about advertising from abroad, they submit the complaint to the self-regulatory organization **("SRO")** of the country of origin (or in the case of Internet based advertising or direct mail, the country where the advertiser is domiciled).

This way the problem of cross border international campaigns was solved, leaving, of course, the issue that multiple standards may prevail simultaneously for advertising in a particular country, i.e. national rules to cover advertising originated from the target country and the rules of the country of origin.[569]

The issues

Country of origin; legitimacy. First, the application of the country of origin principle in handling cross-border advertising campaigns affect both jurisdiction and self-regulation and

[567] There are sector specific international organizations in Europe dealing with issues of advertising. Three of them are mentioned by Verbuggen: European Forum for Responsible Drinking, Brewers of Europe and International Food and Beverage Alliance. See Paul Verbruggen, *Transnational Private Regulation in the Advertising Industry - Final Version*, 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256043. p 55-70

[568] Leon Brittan – quoted in Ibid. p 24

[569] European Advertising Standards Alliance, *Advertising Self-regulation in Europe and Beyond ("the Blue Book")*. p 52

This latter issue of simultaneously prevailing multiple standards, however, is valid for all similar cross-border regulatory situations (e.g. the national media regulations of the EU Member states, where the country of origin is also applicable). The country of origin and mutual recognition principles at a larger scale create a deregulatory competition among the states concerned by inducing the creation of simple, flexible and cheap regulatory regimes.

substantive law and thereby directly influence the rights of advertisers, agencies and the media. This brings up the question of legitimacy of the system.

Offensive advertising; consumer satisfaction poll. The second reason is that the EASA CBC System is an international contribution to the "consumer satisfaction poll" that is the basis of the national self-regulatory censorship of advertising content. By involving foreign voices in the opinion poll, EASA potentially eliminates the national differences of culture, traditions, etc. and might increase the basis of self-censorship to keep foreign consumers satisfied. Potentially big case load. The reason for using careful wording of "potentially" and "might" is that the number of cases submitted to the EASA is small. In the past seven years the annual number of cases ranged between 70 and 200. The CBC System, however carries the potential of an unforeseeable number of cross-border cases, which is signaled by the steady (but presently modest) increase of the number of complaints for Internet based commercials.

Summary of content. Following the description of the status of the EASA and its stakeholders and its role in the CBC System, I will discuss the application of the country of origin and mutual recognition principles by EASA members, the potential problem of the "international opinion poll" as a side effect of the CBC System and finally analyze the unique questions of the legitimacy of the CBC System.

2. THE EASA, ITS STATUS AND STAKEHOLDERS.

EASA was created by European advertising SROs in 1992 as a private non-profit organization based in Brussels, i.e. the legal framework of its organization and operation are Belgian law.

The goal of EASA was to pre-empt comprehensive EU level legislation to solve the problem of cross border advertising campaigns. The regulatory threat was expressed in 1991 in a speech delivered at the Forum Europe Conference in Brussels in June 1991 by Sir Leon

Brittan, then Vice-President of the European Commission and Commissioner for competition policy.

> "Self-regulation on a purely national basis cannot cope with the distortions that arise with trans- frontier TV advertising if the two codes of practice (or legislation) are different in substance. That is a real problem. (…) If the advertising of particular product is to be governed by self-regulation on a national basis – as at first sight seems reasonable – then different brands of the same product could end up being advertised in a particular territory according to different sets of rules. (…) The point I want to make, therefore, is that not only should we be looking at the scope for self- regulation at the national level, but also at the European level. That is a challenge I, personally, would like to see picked up by the industry."[570]

EASA do not have regulatory and decision making powers binding upon its members. Its mission includes the usual roles of international self-regulatory organizations of this kind (i.e. representation, support of rule making by best practice promotion, research, etc.). Its principal achievement and real distinctive feature is the operation of the CBC System, which includes an informal undertaking by the EASA members to apply the country of origin and mutual recognition principles in the course of complaints about cross-border campaigns.[571]

The members of EASA are national advertising SROs and associations of the advertising and media industry.[572] The CBC System is operated by its Secretariat as a "routine administration".[573] EASA is funded from membership fees, its management and decision-

[570] Quoted in Verbruggen, *Transnational Private Regulation in the Advertising Industry - Final Version*. p 25

[571] There are diverging opinions about EASA. Senden, for example, wrote (back in 2005) that "...the EU has praised the industry's action, although the true import of the EASA is unclear". (Linda Senden, "Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?".) McGonagle at the same time praised EASA unreservedly:

> "The transfrontier dimension to advertising is of cardinal importance and would have to be addressed within a co-regulatory framework, just as it had to be addressed in self-regulatory circles. EASA's system for handling complaints with a cross-border dimension sets out to offer complainants the same redress that is available to potential complainants in the country in which the media containing the advertisement originally appeared. Consistent with this 'country of origin' principle, advertisements are required to comply with the applicable rules in the country in which the advertisement is originally disseminated. The Cross-Border Complaints System relies on the network of self-regulatory bodies which are members of EASA." Tarlach McGonagle, "Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea." p 6

[572] See the EASA homepage at http://www.easa-alliance.org/About-EASA/EASA-Members/page.aspx/155 (Last visited June 30, 2013)

[573] European Advertising Standards Alliance, *Advertising Self-regulation in Europe and Beyond ("the Blue Book")*. (Blue Book) p 49

making mechanism follows, again, the general practice of organizations of this type (Annual General Assembly, Board of Directors, Executive Committee, special task forces).[574]

3. THE CBC SYSTEM

3.1 The documentary basis; legal nature

As all regulatory measures in self-regulation, the documentary basis of the CBC System is also informal, i.e. it is not based on a binding legal document. The presently prevailing formulation of the CBC System is in the EASA Statement of Common Principles & Operating Standards of Best Practice of 2002 adopted by the Board of Directors of EASA on June 13, 2002 **("Best Practice 2002").**[575]

The Best Practice 2002, is a recommendation for the EASA members as to the content of their own self-regulatory codes. Its provisions relevant to the CBC System are as follows:

- Codes should reflect national culture, law, and commercial practices, within the spirit of mutual recognition.
- The EASA Secretariat is responsible for the co-ordination of the cross- border complaints system and liaison with appropriate bodies at an EU level to ensure the swift resolution of complaints. (...)
- SROs should adhere to the procedures of EASA's cross-border complaints system when handling complaints about advertising carried in the media of another member country.[576]
- SROs should apply the country of origin principle, as established in the EASA cross-border complaints procedure, to identify the competent SRO.
- SROs should transfer cases promptly and co-operate in their resolution.
- SROs should notify each other and the EASA Secretariat of the receipt, progress and outcome of a cross border case.

As seen from the above provisions, the Best Practice 2002 does not itself create the CBC System. Instead, it merely recommends to the member organizations to include its elements into their codes. Although the CBC System is in fact voluntary, it is evident from EASA's annual and quarterly reports on CBC that in practice the system works. Some of the national

[574] Ibid. (Blue Book) p 49
[575] The information that the Best Practice 2002 was adopted in the form of a Board Resolution is not publicly available and was informally provided by the EASA.
[576] In the case of Internet based campaigns the location of the advertiser is the connecting factor for the purposes of the CoO.

codes do not even contain reference to the CBC, merely the website of the relevant SRO (e.g. ASA, Werberat, ÖRT) include information about it.

3.2 Examples for CBC regulation in Codes or website guidance by national SROs

Self-regulatory organization	Relevant provision
Advertising Standards Association (UK)	”If your complaint is about an advertisement that originated from a country outside the UK, then it will be treated as a cross-border complaint. This means that the ASA will refer the complaint, through EASA, to the regulator in the country where the ad originated.” [577]
ÖRT (Hungary)	”The cross-border complaint system is an agreement among all the EASA members whereby they will treat cross-border complaints in the same way as national ones.”[578]
Werberat (Germany)	”Problems involving cross-border advertising are addressed by the European Advertising Standards Alliance (EASA) based in Brussels (www.easa-alliance.com). This institution, largely founded at the initiative of ZAW, forwards complaints relating to foreign advertisements to the national advertising standards authority in the country concerned. Through the EASA, Deutscher Werberat is also in constant exchange with other self-regulatory bodies of the European advertising industry.”[579]
Werberat (Austria)	”The Austrian Werberat is the member of EASA, the umbrella organization of all European advertising self-regulatory organization. You as viewer of an advertisment, have the right to submit a cross-border complaint to start a foreign complaint procedure.”[580]
The Dutch Advertising Code	”13. CROSS-BORDER ADVERTISING The Advertising Code Authority is affiliated to the European Advertising Standards Alliance (EASA) at Brussels (website www.easa-alliance.org) EASA objectives include ensuring that complaints about advertisements are handled swiftly and effectively. To

[577] http://asa.org.uk/About-ASA/Working-with-others/Cross-border-complaints.aspx
[578] http://www.ort.hu/hu/onszabalyozas/easa
” Hungarian original: “A határokon átnyúló reklamációk (CBC) rendszere egy megegyezés, amelyben az EASA tagságát alkotó összes önszabályozó szervezet megállapodott arról, hogy a nemzeti reklamációkkal megegyező feltételek szerint kezelik a határokon átnyúló panaszokat.”
[579] http://www.werberat.de/keyfacts
[580] http://www.werberat.at/show_90.aspx (Last visited June 30, 2013) ”Der Österreichische Werberat ist Mitglied der EASA - European Advertising Standards Alliance - der Dachorganisation aller europäischen Selbstbeschränkungsorganisationen. Als KonsumentIn der Werbung haben Sie dadurch die Möglichkeit, ebenfalls sogenannte "cross-border complaints", also grenzüberschreitende Beschwerdeverfahren einzuleiten.”

	realize this target EASA established the cross-border complaint submission procedure. By definition, a complaint involving cross-border advertising is one submitted by an individual or organization about an advertisement which appears in the Netherlands but originates in another country. (...) The chairman of the Advertising Code Committee determines whether the complaint concerns cross-border advertising and should this be the case, and he finds no grounds for handling the complaint himself, it is referred to the EASA member, which is responsible for further examination and handling of the complaint. Should the complaint subsequently be handled, the rules of the EASA-member apply."[581]

The above examples do not spell out the details of the CBC System and only mention that cross-border complaints will be forwarded to the country from which the advertising is originated. The CBC System extends rights of both the complainants and the advertiser / media. It gives the complainant the self-regulatory remedies generally available to consumers within the country of origin of the media and assures the advertiser / media with the legal treatment of their home country in case of cross border advertising.

As a result of the informal documentary basis, the CBC System may be considered a long time pursued multilateral private *modus vivendi* rather than an international contract. The guarantee of the operation of this network is the mutual expectation of compliance. There is no special remedy available for the complainant against the decision of the SRO to submit the given complaint to another country. This support my argument that in terms of complainants' rights the CBC System is closer to an opinion poll than to a remedy.

[581] https://www.reclamecode.nl/bijlagen/20120701_NRC_Engels.pdf (Last visited June 30, 2013)

3.3 The basic principles

According to the Best Practice 2002 and the EASA communications[582] and yearbook[583], the two leading principles of the CBC procedure are stated to be the mutual recognition and country of origin.

3.3.1 Mutual recognition

The principle of 'mutual recognition' is a legal instrument of Community level harmonization of various national legislation, which was first introduced by the European Court of Justice ("ECJ") with its landmark judgments in the Cassis de Dijon[584] and the Dassonville[585] cases. The principle of mutual recognition was initially applied to goods only, but it was extended to services by the Court, starting from the 80s.[586] According to the mutual recognition principle, Art 34 of the TFEU (then Art 30 of the EC Treaty)[587] should be understood that "when goods had been lawfully marketed in one Member State, they should be admitted into any other state without restriction."[588] The importance of this principle is that producers of goods traded in different Member States no longer have to adapt their goods to each market where they are sold, and the costs of detailed legal harmonization are also avoided.[589] Both the EASA Best Practice 2002 and the EASA guidance uses the principle of mutual recognition but in a different meaning (see the explanation below).

[582] http://www.easa-alliance.org/Complaints-compliance/Cross-Border-Complaints/page.aspx/247 (Last visited July 2, 2013)
[583] The "Blue Book" referred to in footnotes above.
[584] ECJ, "Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis De Dijon case) C-120/78," 1979.
[585] C-8/74
[586] Claes-mikael Jonsson, *Comparing the Mutual Recognition Principle and the Country of Origin Principle Part I : Understanding the Principles*, 2005, http://www.epsu.org/IMG/pdf/Mutual_recognition_prinEN.pdf.
[587] "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."
[588] Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials*, ed. Craig and De Búrca, vol. 4, Fifth (Oxford University Press, 2011). Fifth Ed. 2011 p 649
[589] Ibid. (Craig, De Búrca) p 596

3.3.2 Country of origin

The country of origin principle **("CoO")** is originally also a Community instrument. It is used as a legislative technique in the Community level legislation. The CoO is applied in the case of regulating cross-border services and means that the governing law and/or jurisdiction (depending on the drafting of the actual clause) shall be of the country where the service provider is located rather than those of the host country. The country of origin principle is much stricter than the principle of mutual recognition. While mutual recognition does not concern questions of jurisdiction and to some extent allows the application of the host country law, the CoO principle fully excludes the application of the host country law and in some cases (e.g. the AVMS Directive) also moves the jurisdiction to the authorities of the country of origin. Therefore, the CoO principle is applied exceptionally in the EU legislation; moreover, "none of the EU legislations concerning the free movement of goods, takes the step, to a clear-cut country of origin principle"[590].

The general application of the CoO was, for example, considered and dropped in connection with the Services Directive[591]. The CoO was proposed by Commissioner Bolkenstein. [592]. Bolkenstein recognized the problems with the administrative and legal problems with cross-border services in the host countries and instead proposed to cut the Gordian knot with "a much more radical idea that these service providers should in principle be regulated by the state of origin and not the host state..." [593] The Bolkenstein proposal of applying the CoO triggered major disputes and it was abandoned in the legislative process.

[590] Jonsson, *Comparing the Mutual Recognition Principle and the Country of Origin Principle Part I : Understanding the Principles*. (Jonsson) p 7
[591] Directive 2006/123/EC
[592] Its opponents called the bill the Frankenstein Directive as it was a threat to the social systems and public service ethic of many Member States, as the general introduction of the CoO principle would have fully exempted service providers from the laws of the host country. See Craig and Búrca, *EU Law: Text, Cases, and Materials*. quoting B De Witte, Setting the Scene – How did Services get to Bolkenstein and Why? p 813 – 814
[593] B De Witte, Setting the scene – How did Services get to Bolkenstein and Why?, EUI Working Papers, 20/2007; - referred to in Craig – De Búrca p 813

There are a number of areas, however, where the CoO is applied. As said above, it is not applied for goods and has so far only been used within certain groups of services, where the service itself moves (as opposed to cross-border services, which involve moving the persons providing the services).[594] The most important legislation from point of view of cross-border advertising services are the Television without frontiers directive[595] and the subsequent Audiovisual media services directive.[596]

3.4. The CBC procedure; EASA is administering only.

It is for the national SRO to decide if a complaint has cross-border implication, and there is no special rule for the complainant. Cross-border complaints are submitted by the target country SRO directly to the home country SRO, which decides in the merits of the complaint and informs EASA. EASA is involved in the process to the extent that its Secretariat assists in the co-ordination and publishes the decision in its quarterly and annual CBC reports. The CBC process also demonstrates that its essence is the application of the general principles of dealing with the cross-border complaints by national SROs and the EASA's contribution remains at administrative level only that does not affect the outcome of the cross-border complaints related adjudications in their merits.

[594] Jonsson, *Comparing the Mutual Recognition Principle and the Country of Origin Principle Part I : Understanding the Principles*. p 7 Jonsson discusses the most important EU legislation where the CoO applies (e.g. E-Commerce Directive, AVMS Directive, the Directive on electronic signatures). He notes that there is no standard formula for the CoO principle, as its drafting varies in the different documents.
[595] Directive 89/552/EEC
[596] "For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are (...) those established in that Member State (...). "Art. 2.2 a) of the AVMS directive. There are some other jurisdiction related rules in the AVMS directive, but the main principle is that of the country of origin.

4. APPLICATION OF THE COUNTRY OF ORIGIN AND MUTUAL RECOGNITION PRINCIPLES IN THE EASA CBC SYSTEM

4.1 Application of the CoO principle.

In EU level legislation application of the CoO principle has several methods. Under the AVMS Directive, for example, the CoO stipulates not only that the law of the home country applies to broadcasters, but also that home country authorities shall have jurisdiction; the e-commerce directive applies the CoO principle, but excludes any legal effect on private international law, nor does it deal with the jurisdiction of Courts.[597]

The EASA CBC System refers the cross-border complaints to the jurisdiction of the SRO of the country where the advertising is originated. The connecting factor for the CoO is the media carrying the advertising. Since there are no further limitations as to applicable law, the SRO of the host country may apply its own code, co-regulation or legislation depending on the status of the given SRO. ASA Broadcast, for example, qualifies as government authority under UK law, its decisions being subject to judicial review, and the applicable BCAP Code is a detailed, full-fledged regulation of broadcast advertising, drafted under the delegation of regulatory power by OFCOM. The Werberat, at the same time, is strictly private, with limited codes and with no privileged status, and the Wettbewerbszentrale does not even have a code and its alternatives for a decision are either to open a lawsuit before German courts or not.

This means that under the CBC System the host country SRO has neither regulatory, nor jurisdictional power regarding foreign advertising. This follows the country of origin principle as applied in the AVMS Directive, which fits cross-border broadcast advertising cases. Application of the CoO principle, however but may not fit other media which is not regulated at EU level (e.g. the press) or where the CoO principle is different from the one applied in the

[597] See Articles 1.4 and 3 of Council and EP, *E-commerce Directive 2000/31/EC*, 2000. referred to in Jonsson, *Comparing the Mutual Recognition Principle and the Country of Origin Principle Part I : Understanding the Principles*. p 13

CBC System (see the case of the e-commerce directive above, where the jurisdiction is not touched by the CoO principle).

This is especially important considering that the CoO principle is never applied to goods, and that advertising is a service, but it is regulated as a good (product) if it is connected with goods.

Under the ECJ case law television signals are considered provision of services[598], but despite the fact that advertising is part of the signal, it is regulated as a product, for two reasons. First, under the Treaty, as long as advertising is associated with sale goods, its regulation is assessed in the light of free movement of goods, since the service related provisions of TFEU are subsidiary to those on free movement goods.[599] Second, the Dassonville judgment[600] extended the scope of the Treaty rules on free movement of goods to *"all trading rules which are capable of hindering (...) intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions".* [601] If advertising regulations, which might well restrict trade, qualify as measures equivalent to quantitative restrictions[602], the rules on free movement of goods apply.

4.2 Examples for the application of the CoO principle.

In fact any of the CBC cases could be quoted here. For the sake of illustration I mention two cases, neither of which is unique from point of view of the CoO comparing with other CBC cases.

[598] Para 6 Sacchi
"In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services."
[599] Art 57 TFEU: "Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."
[600] C-8/74 judgment of the ECJ
[601] Para 5 of C-8/74
[602] Berger p 2

The "stallions and mares" advert.[603] This ad triggered 319 complaints by British viewers (which was the largest number of cross-border complaints in EASA's records of recent years[604]). The complaints were submitted to the British SRO, ASA, regarding an ad broadcasted on the website of an online betting platform. The ad featured women, some of whom were apparently transgender, during a horse race and invited the viewer to "spot the trans-women from the normal women" referring to them as "stallions and mares". The complainants found the ad to be offensive because it ridiculed transgender individuals and could also lead to harassment or violence.

> "As the company was based in Ireland, the British SRO, ASA, transferred the complaint to the Irish SRO, ASAI, under the cross-border procedure."[605]

After its investigation ASAI noted that the advertisement had not respected the dignity of transgender persons and was in breach of Code section 2.16 "marketing communications should respect the dignity of all persons…" Therefore, the advertisement should not be broadcasted again. Complaint upheld, case closed.[606]

End of the world as an offense. This case was based on a complaint from an Irish consumer to the Irish SRO, ASAI, about an ad for deodorant on British television. The ad featured the product and stated "Get your final edition for the end of the world in 2012". The complainant found the ad offensive and likely to cause distress and widespread offence.

> "As the media was based in the UK the Irish SRO, ASAI, transferred the complaint to the British SRO, ASA under the cross-border procedure."[607]

After careful consideration the British SRO found that even though the ad referred to the end of the world, given the tone of the ad and what it was promoting, neither its content nor

[603] See the spot at youtube: http://www.youtube.com/watch?v=1XZ5MOB3nww (Last visited July 2, 2013)
[604] EASA, "Cross Border Complaints Annual Report 2012." p 7
[605] 2456/2463 - Paddy Power in EASA, "EASA Cross-Border Complaints Quarterly Report N ° 56 2012/02."
[606] Ibid.
[607] 2429 UNILEVER – LYNX in EASA, "Report on Cross Border Complaints 2011" (2011).EASA, "EASA Cross-Border Complaints Quarterly Report N ° 55 2012/01" 55, no. March (2012).

scheduling was likely to cause harm or distress to children or viewers in general. Complaint not upheld, case closed. [608]

5. APPLICATION OF THE MUTUAL RECOGNITION PRINCIPLE.

According to the EASA documents "mutual recognition" as applied in the CBC System has two meanings, both of them are somewhat different from the "mutual recognition" as used in EU context. This difference is important in connection with the legitimacy of the CBC System, in that it cannot be claimed that it is a simple implementation of generally applied principles and laws of the Community.

The first meaning is given by the Best Practice 2002:

> "Codes should reflect national culture, law, and commercial practices, within the spirit of mutual recognition."

This is a rule making related principle, which is subsidiary to the jurisdictional rule of the CoO principle, while in the EU legislation it is applied as a principle used in the course of the application of existing laws. The purpose of mutual recognition is served for example by the application of the ICC standards for advertising code.[609]

The second meaning is discussed in the reference guide of EASA[610] , whereby mutual recognition is applicable if the rules and procedures differ in the country of origin from those of the host country (e.g. ideas of taste and decency), the host country SRO "endeavor to apply " the mutual recognition principle, and accept the rulings of the counterpart SRO in the country of origin wherever possible.[611]

Examples in the CBC cases. The application of the principle of mutual recognition assumes some sort of contradiction between SROs of different countries. There is no sign of any disputes in the CBC cases of the past three years.

[608] Ibid.
[609] ICC, "Consolidated ICC Code on Advertising and Marketing Communication Practice."
[610] European Advertising Standards Alliance, *Advertising Self-regulation in Europe and Beyond ("the Blue Book")*. p 52
[611] Ibid. (Blue Book) p 52

6. A SIDE EFFECT OF THE CBC SYSTEM; EXTENDING THE OPINION POLL.

The CBC System opened the possibility of complaints for any person in the EASA member states regarding any advertising. Although it is a necessary consequence of handling cross-border advertising and it may to some extent be balanced by the country of origin principle (i.e. that advertising is adjudged by home country SROs), still I argue that the side effect of the CBC System is that it potentially opens the circle of the "opinion poll" of viewers. Considering the broad definition of offensive speech in national codes, this implies additional potential restrictions of commercial speech at the will of the relevant SRO on the basis of viewer complaints, which are now collected not only from the home country, but also from some thirty other ones.

As mentioned above, the complainant has no procedural rights in the CBC System other than being informed about the outcome of the process. This at first sight appears to be inequitable, but considering the potential of many millions of cross border complaints (which is in fact not even remotely the case at the moment but potentially possible), any further complainant right would represent a huge pressure on the SROs to upheld offensive complaints. This potential pressure is in fact carried by the CBC System in its present form anyway, and it is unclear whether it would be able to pass a test of a million complaints.

6.1 Examples.

The CBC cases include some examples where complaints of viewers / consumers of third countries, outside of EASA members, are also accepted. This extends the potential of the consumer complaints even more.

The Tiger Car Rental Case. This case was started on the basis of a complaint from a Canadian consumer to the British SRO, ASA, about an ad for car rental on an Irish website. The website

claimed that there were no hidden fees and that all the vehicles would come with unlimited mileage.

> "As the advertiser was based in Ireland, the British SRO, ASA, transferred the complaint to the Irish SRO, ASAI, under the cross-border procedure. (...) The complaint resolved informally and the case was closed."[612]

Israeli consumer complaint against a Slovakian advert. Complaint from a legal representative of an Israeli consumer to EASA, concerning a direct mail offering a free updating of data on a "fair guide".

> " (...) the complainant found the advertisement to be misleading. EASA transferred the complaint to the Slovakian SRO, SRPR, under the cross-border procedure. SRPR noted that the advertiser has persistently disregarded decision against its advertising by the SRPR, and therefore transferred the case to the appropriate authorities."[613]

7. STATISTICS OF THE CBC CASES[614]

7.1 Numbers

The most important information about the CBC cases is the relatively small workload comparing with that of some of the national SROs[615]. The total number of cross-border complaints with EASA members in 2012 was 414, and these complaints were related to 61 commercials.[616] The number of complaints and cases was comparable in previous years (2011: 73/50; 2010: 200/44).

7.2 Issues; Misleading and offensive commercials

The other important information is that in practice the CBC System is about two issues: misleading and offensive advertising. According to EASA's annual report, 77% of the

[612] 2425 - Tiger Car Rental EASA, "EASA Cross-Border Complaints Quarterly Report N ° 55 2012/01."
[613] 2579-2585-2588-2594-2598-2599-2600 - Construct Data Publishers a.s. in EASA, "EASA Cross-Border Complaints Quarterly Report N ° 57 2012/03" 57, no. September (2012): 1–7.

[614] The information in this Section is based on the EASA, "Cross Border Complaints Annual Report 2012." p 6 Available at http://www.easa-alliance.org/page.aspx/249 (Last visited July 2, 2013)
[615] According to its annual report regarding 2012, the ASA handled 31,298 complaints regarding 18,990 ads, of which 3,700 was changed or withdrawn.
[616] Ibid. (Ibid.) p 6 The high number of complaints compared to the number of commercials is caused by the 319 complaints regarding the "Paddy Power" commercial "Stallions and mares".

complaints received in 2012 was about allegedly misleading advertising, and the remaining 23% was claimed to be offensive.

The statistics are comparable in the previous years. In 2011 174 complaints were submitted for misleading advertising and 15 for offensive ads. The 2010 figures are 47 misleading and 13 offensive ads.[617]

7.3 Outcome

The only noteworthy fact here is that the number of upheld cases is not high comparing with other SROs. (In 2012 ASA handled 18,990 ads, 3700 of which was changed or withdrawn[618]; the Werberat handled 305 cases, of which 72 was changed or withdrawn.[619])

With respect to the year 2012, the chart below shows both the number of complaints / number of adverts complained about. Only the number of complaints is available regarding 2010 and 2011.

Year	Transferred to state authority	Upheld	Not pursued	Not upheld	Out of remit	Resolved informally
2012	17/6	25/18	5/5	23/22	10/6	4/4
2011	6	7	14	19	2	14
2010	141[620]	6	20	21	2	3

7.4 The media of CBC cases

The most important piece of information is the constantly decreasing number complaints against television broadcast advertising, and the steadily increasing number of complaints against Internet based advertising.

[617] Out of these 13 complaints 8 was expressly named "offensive speech" 4 was named "portrayal of women" and 1 was named "violence".

[618] http://asa.org.uk/About-ASA/~/media/Files/ASA/Annual%20reports/ASA_CAP%20Annual%20Report%20Online.ashx (Last visited July 2, 2013)

[619] http://www.werberat.de/bilanz-2012 (Last visited July 2, 2013)

[620] This high number reflects one major problem of a German rogue trader targeting the Italian market. (See Annual CBC Report 2012 p. 15

Media	2009	2010	2011	2012
Internet	5	15[621]	39	52[622]
TV	3	18	9	4
Direct mail	35	20	11	18
Press	19	2	3	1

8. LEGITIMACY OF THE EASA AND THE CBC SYSTEM

EASA actually is not a rule maker, and the CBC System is based on a network of national self-regulatory codes or operational practice of national SROs. Therefore, the question of legitimacy arises in the context of this network, rather than that of the EASA itself.

8.1 The legal effect of the CBC System

As described in the introduction, legal effect of a particular measure means that the given measure is applicable beyond the circle of express consents, affects rights of third parties and that it is enforceable.

Procedure wise, a CBC decision consists of a statement by a national SRO that it forwards a complaint abroad and does not decide on its merits. This decision is based on an informal international *modus vivendi*. Therefore, it is beyond the boundaries of any self-regulation or legislation and none of the parties have any rights and even opportunity to influence or appeal such a decision. Still, the CBC decisions affect applicable law and jurisdiction over cross-border campaigns. Thus, they affect rights of advertisers and media.

Based on the foregoing, it is a reasonable claim that CBC related decisions are fully enforceable and affect third parties' rights and obligations.

Enforcement of the decision on the merits is not part of the legal analysis of the legitimacy of the CBC System. In any event, enforcement of the final decision on the merits varies country

[621] The 138 complaints about the German rogue trader targeting Italy were considered as one single complaint to avoid a distorting effect.

[622] The 319 complaints about the Paddy Power advert were considered as one single complaint to avoid a distorting effect.

by country, and it depends on the legal status of the national self-regulatory organization. As seen in the UK Chapter, the decisions of the ASA Broadcast are fully enforceable and there is a full voluntary compliance of the Werberat decisions. The main regulatory tools of the EASA ally nationally organized SROs are their codes of conduct, which directly bind the SRO members and indirectly affect clients. Neither industry members nor clients can avoid the code, since it usually covers the whole industry[623] and represents an irresistible de facto pressure on both industry and clients. The SRO codes therefore apply with or without express consent.[624]

8.2 Legitimacy of the CBC System

I examine legitimacy of the CBC System through the so called "procedural" and "substantive" dimensions of legitimacy explained by Majone regarding regulatory agencies.

According to Majone,

> "procedural legitimacy implies that the agencies are created by democratically enacted statutes which define the agencies' legal authority and objectives; that the regulators are appointed by elected officials; that regulatory decision-making follows formal rules, which often require public participation; that agency decisions must be justified and are open to judicial review. Substantive legitimacy, on the other hand, relates to such features of the regulatory process as policy consistency, the expertise and problem solving capacity of the regulators, their ability to protect diffuse interests and, most important, the precision of the limits within which regulators are expected to operate." [625]

As mentioned above, the CBC System is voluntary and the EASA has only administrative role in it. The System works as a network of informal consents by the EASA member SROs to accept the recommendations of the Best Practice 2002. Therefore, the question of legitimacy is unique in that it concerns the SRO members and not the EASA itself. More precisely, the legitimacy concerns two levels. At the national SRO level it concerns the

[623] See the EASA Best Practice Self-regulatory Model, recommending "the universality of self-regulatory system. "An effective advertising self-regulatory system should apply without exception to all practitioners – advertisers, agencies and media".

[624] See for example The EASA Best Practice Self-Regulatory Model in Blue Book p 241
"A key element of any self-regulatory advertising system is an overall code of advertising practice.This should be based on the universally accepted ICC Codes of marketing and advertising practice..."

[625] Majone, Regulating Europe, Routledge, 1996. p 291

unilateral statement of the SRO to waive its jurisdiction in favor of the SRO of the country of origin. At the international level, the legitimacy concerns the entire network of the CBC System, which appears as a distinct operation without a legal personality of its own.

8.3 Procedural and substantive legitimacy at national level

The unilateral adherence to the CBC System means that the national SRO

- on the one hand waives its right to adjudicate foreign advertising in its home country and
- on the other hand accepts the jurisdiction of foreign SROs over adverts of media and advertisers of its home country if they advertise abroad.

The question of national level procedural legitimacy depends on the legal status of the given SRO and the area of the complaints.

The German Wettbewerbszentrale, for example, is not authorized to give up the application of the German Unfair Competition Act for misleading cross-border advertising. In this respect there is quite a spectacular clash between the territorial effect of the unfair competition legislations throughout Europe (e.g. the German UWG, the BPRs and CPRs of the UK, the Hungarian Competition Act, etc.) and the country of origin principle of the CBC System. If broadcast advertising constitutes unfair competition, the unfair competition act of the host country applies to any subsequent disputes, while under the CBC System the case is referred back to the country of origin. The importance of this topic is shown by the statistics; misleading advertising cases represent three-fourths of the CBC cases of the EASA. This means that the governing substantive law and the applicable self-regulation is necessarily different in the case of misleading cross-border advertising cases.

At the same time, national level procedural legitimacy is somewhat supported by the informal Commission agreement to self-regulation. In its White paper[626], issued as a result of the failure of the 10 year project, the "Lisbon strategy" of the Community, the Commission formulated three problems regarding EU (at the time Community) legislature, namely, that the

[626] COM(2001)428

EU legislation is too detailed, inflexible and inefficient and recommended limited use of co-regulation in the course of implementing measures.[627] With this White paper, better law-making was made part of the Lisbon strategy.[628] The two pillars of the Community level regulatory reform was deregulation and diversification of the modes of governance, including the support of self- and co-regulation.[629]

National level substantive legitimacy is less of a problem, assuming that advertising self-regulation possesses the usual strengths of expertise and efficiency.

8.4 Procedural and substantive legitimacy at international level.

An argument in favor of the procedural legitimacy of the CBC System is the implied delegation of regulatory power by the Commission (see the reference to the Brittan speech above in Section 2).

International level procedural legitimacy of advertising self-regulation is also supported by the Interinstitutional Agreement (2003), which considers co- and self-regulation as alternative methods of regulation.[630] The agreement defines self-regulation (which may be considered as the EASA type of regulatory method) as

> "the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).

[627] This recognition certainly reflects the story with the Community's General Programme for the Removal of Technical Trade Barriers. This project, whereby the Commission had attempted to harmonize technical standards across the member states by means of directives failed completely: because of the technical complexity of the issues it took excessive amount of time to produce harmonizing directives which often would cover only a small range of products. Thus, it took ten years to pass a single directive on gas containers made of unalloyed steel, while the average time for processing fifteen harmonizing directives which were passed as a package in September, 1984 was 9,5 years. (See Ibid. (Majone) p 24)

[628] The relevant EU level documents are as follows:
The European Governance White Paper (2001)628,
the Commission "Action Plan 'Simplifying and Improving the Regulatory Environment (2002),
The European Parliament, Council and Commission Interinstitutional Agreement on Better Law-making (2003) and
the Communication of the Commission to the European Parliament and the Council on Better Regulation (2005).

[629] Linda Senden, "Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?". p 5-8

[630] Sections 16 and 17 of the "Interinstitutional Agreement on Better Lawmaking (2003/C 321/01)" (2003).

> As a general rule, this type of voluntary initiative does not imply that the Institutions have adopted any particular stance, in particular where such initiatives are undertaken in areas which are not covered by the Treaties or in which the Union has not hitherto legislated. As one of its responsibilities, the Commission will scrutinize self-regulation practices in order to verify that they comply with the provisions of the EC Treaty."[631]

8.5 The democratic legitimacy gap

Although involvement of the industry supports legitimacy of the EU legislature on expertise and efficiency rationales[632] , involving the industry in regulation brings the classical question of democratic legitimacy, i.e. that "people need some sort of legislative and governing body elected by them". In the case of the EU, the legislative fiascos gave support to "substantive legitimacy" over the classic procedural legitimacy. Pescatore asserts that

> "true, substantive legitimacy ensues from the adequate performance of the functions of government; legitimate power is understood to be the power that responds best to the expectations and needs of the public and that is capable of resolving the problems affecting it, i.e. that is best for the general interest." [633]

This notion appears to lend theoretical support to self-regulation, preferring "good regulation" over a "democratic one".

9. SUMMARY

The above discussion and legal analysis of the CBC system shows that the CBC System supports the business goal of the advertising self-regulation to keep the customer satisfied, by filtering offensive speech. Although offensive speech is not the leading issue, it has been one of the two issues which are driving the CBC System. At present there is a small case load, but the number of cases regarding the Internet keeps increasing and it is unforeseeable whether in the future there would be a major increase. Such an increase might have an impact on the

[631] Section 22 of the Interinstitutional AgreementIbid.
[632] See Baldwin, R. and McRudden, C. Regulation and public law, 1987, London: Weidenfeld & Nicolson (quoted in Majone, *Regulating Europe*. p 90
[633] P. Pescatore, 'Les exigences de la démocratie et la légitimité de la Communauté Européenne', Cahiers Dr Euro 10 (1974), 505-506. quoted in Linda Senden, "Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?". p 10

national self-regulation of offensive speech, because the national codes are flexibly drafted in this respect and might allow space for taste and decency based complaints from outside the country. The examination of the legitimacy of the CBC System brings unique results. Since it is not a standalone entity (the EASA has administrative role only and cannot be considered a host of the CBC System), legitimacy must be examined both at national and international level. At national level the application of the CoO principle may be of concern, as that principle is not generally applicable in the EU and may contradict national unfair competition legislation. At the international level, the CBC System contributes to the substantive legitimacy of the EU organs and considering a number of informal documents and declarations by the EU organs, encouraging cross border self- and co-regulation, the cross border self-regulation may be justifiable.

B. Legislative effect of lobbying and its legitimacy – A case study of the European tobacco industry vs. the European tobacco advertising directive

> "With 21 million deaths predicted to occur this decade as a result of smoke-related illnesses, the industry must rapidly find new customers."
> (Carrigan, Marylyn, 1995)[634]

1. INTRODUCTION

Paternalism vs. liberalism. Scientists began to recognize the connection between tobacco and cancer during the 1950s.[635] This was followed by a long stream of lawsuits in the U.S. against the tobacco industry and then gradually came regulatory restrictions of tobacco use and restrictions of tobacco related commercials in many places all over the world. Introducing regulatory restrictions was a difficult case: other than passive smokers, at least on a short term[636] nobody likes the idea of tobacco control: tobacco makes people (investors and workers) rich and makes others (smokers) happy; in addition, it contributes to the success of politicians by increasing GDP. Tobacco control regulation is therefore a paternalistic intrusion to life[637] for a large part of the society. These contradictions were reflected in the long process of Community-wide introduction of tobacco advertising prohibition.

This Chapter argues that the tobacco related legislative lobbying had regulatory effect and claims that as such it warrants examination of questions of legitimacy. My research shows that:

- The Community legislature is generally open to lobbying efforts, because lobbying strengthens its legitimacy by supplying expertise, experience and information.

[634] Carrigan, Marylyn. 1995. "Positive and Negative Stakeholder Conflicts for the Tobacco Industry." Journal of Marketing Management 11: 469–485 p 472

[635] Eric A. Feldman and Ronald Bayer, Eds, *Unfiltered - Conflicts over Tobacco Policy and Public Health* (Cambridge, Massachusetts: Harvard University Press, 2004). p 1

[636] It has become obvious that on a longer term costs stemming from health related problems outweigh the economic advantages of the tobacco industry. In fact, leading tobacco industry countries mix the two: export tobacco and control internal consumption.

[637] See for example Robert J Baehr, "A New Wave of Paternalistic Tobacco Regulation," *Iowa Law Review* 95 (2010): 1663–1697.

- However, in the case of the tobacco related lobbying, the lobbying success was the result of national level actions and not those in Brussels. This raises two points, both of which results in the lack of transparency and problems with the so called "due process legitimacy rational":
  - First, that national level lobbying is accessible for a few national players, making the Community legislative process unclear for third parties with respect to the "lobbied" matter.
  - Community level lobbying rules are also informal and access to the arena was open for a few selected players only.[638] This weakness on the due process side weakens the Community level legislative legitimacy.
- The TADs had two drivers in the Community, namely the protection of the common market and protection of public health. Although with half a million deaths annually health is obviously a much bigger problem than business considerations, the TAD prohibited tobacco advertising in the Community on business ground. This business centered approach contributed to the success of industry lobbying.
- As far as jurisdictional remedies are concerned, court action in connection with legislative omissions or delays (which was being the case with the tobacco directive) raises "division of power" issues, and the doctrine of "positive obligations". It also raises the question whether courts may be expected to act not only a "negative legislator" but a "positive" one as well[639]. The precondition for all that, however is whether public health as the main driver of the tobacco related legislation can be accepted as a fundamental right capable to trigger any action on a constitutional ground. In this Chapter I have found no such basis, therefore I conclude that on the ground of right to health no constitutional remedies are (were) available against the TAD related legislative lobbying at the Community level.

Structure. After a brief history of tobacco regulation, the stakes and stakeholders in the European tobacco industry will be described. This will be followed by the description and brief analysis of the Community level legislation related to tobacco advertising and the lawsuits before the European Court of Justice that challenged validity of the tobacco advertising directives. Then the legislation process, the lobbying measures and their effects will be described. The final Section is the legal analysis of legislative effect and legitimacy of the lobbying efforts against the tobacco directive.

[638] See e.g. Yvette Taminiau and Arnold Wilts, "Corporate Lobbying in Europe , Managing Knowledge and Inforniation Strategies" 130, no. May (2006): 122–130. 127 See also Commission, "Lobbying in the European Union CONSTITUTIONAL AFFAIRS" no. JANUARY 2004 (2007). The European Commission and The European Parliament, "Lobbying in the EU : An Overview" (n.d.). http://www.eurunion.org/News/eunewsletters/EUInsight/2008/EUInsight-Lobbying-Sept08.pdf (Last visited December 11, 2012)

[639] See the conference papers for the XIV Conference of Constitutional Courts of Europe, Vilnius, 2008 on Legislative Omissions in Constitutional jurisprudence

3. HISTORY

Good old times. Not too long ago huge billboards of tobacco ads were all around both in Europe and in the U.S. with messages like "How come I enjoy smoking and you don't?"[640] or "Discover the most refreshing low 'tar'[641]" or more recently "The sweet smell of success"[642]. Today it is hard to imagine a TV advertising stating "according to a repeated nationwide survey more doctors smoke Camels than any other cigarettes! Why not change to Camels in the next thirty days?"[643], but a few years back these ads were part of our media environment.

The European Union prohibited television advertising of tobacco products starting from the 90s with the Television without frontiers directive[644] **("TWF Directive")** and subsequently by the Audiovisual Media Services Directive[645] **("AVMS Directive").** These Community / Union legislative acts covered the prohibition of tobacco advertising in the electronic media. Following the failed legislative attempt on the first Tobacco Advertising Directive[646] **("TAD 1")** (the story of which follows below) the ban on TV was extended by the second Tobacco Advertising Directive[647] **("TAD 2")** to printed press, billboards, radio and sponsorship of international events by 2005[*648*]. (TAD 1 and TAD 2 are sometimes collectively **"TADs"**.)

[640][640] R.J. Reynold's Salem Cigarettes billboard from 1976
[641] Kool cigarette billboard from 1978
[642] Macanudo Cigar – Baron De Rothchild from 1995
[643] Advertising spot from the U.S. 1949 http://www.youtube.com/watch?v=D-y_N4u0uRQ&feature=related
[644] Directive 89/552/EEC
[645] Directive 2010/13/EU
[646] Directive 98/43/EC
[647] Directive 2003/33/EC
[648] July 31, 2005 See Art 10 of TAD 2. Note, however, that the ECJ judgment upholding validity of TAD 2 is dated December 12, 2006. According to Art. 242 of the EC Treaty, "actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended." The ECJ, however, did not suspend implementation of TAD2. In October, 2005 and February 2006 the Commission even sent formal notices to Germany and Luxembourg, which failed to implement TAD 2 in time (i.e. by July 31, 2005). These actions seems to be surprising in light of the pending challenge of TAD 2 before the ECJ. (See: Rossini, M.: Two EU Member States Singled Out for Non-Compliance with Tobacco Advertising Directive - IRIS 2006-3:8/10; http://merlin.obs.coe.int/iris/2006/3/article10.en.html (Last visited December 9, 2012)

As a comparison, in the U.S., television advertising of tobacco has been prohibited as of January 2, 1971 when the federal Public Health and Cigarette Smoking Act of 1969[649] was passed. The last cigarette advert on TV in the U.S. was aired at 11:59 p.m. on January 1, 1971 during a break on "The Tonight Show" by the Virginia Slims brand.[650] The brand, however, remained on air, for example as the principal sponsor of the Women's Tennis Association's Virginia Slims tournament, as other forms of tobacco marketing, including sponsorship and press and billboard ads were banned in the U.S. only very recently (22 June 2010) by the Food and Drug Administration of the U.S. Department of Health and Human Services[651] based on the authorization of the Family Smoking Prevention and Tobacco Control Act[652]. Although the lethal effect of tobacco was proved already in the fifties, it is telling that it has taken so long to introduce a comprehensive tobacco advertising ban both in the U.S. and in the EU; the comprehensive ban was contrary to the interests of the industry, the agriculture, the workers, smokers and the media (just to mention the main stakeholders). One can generally assume therefore that the lobbying process described and analyzed in this Chapter is

[649] 15 USCA § 1331 et seq. entered into effect on December 31, 1970, "with the final concession to the broadcasters (...) to delay for one day the blackout of cigarette commercials from December 31, 1970, to midnight January 1, 1971. That would give them a last shower of cash from the New Year's Day football bowl games" (Wagner, 1971: 216). It was estimated that the loss to television and radio stations would amount to about $220 million a year, or about 7.5% of their total advertising revenues." (http://www.druglibrary.org/schaffer/library/studies/nc/nc2b_10.htm - Last reviewed Dec 7, 2012). The last TV advert regarding tobacco in the U.S. is claimed to be Virginia Slims on a new years eve show. Law 15 § USCA 1335. provides for unlawful adverts on medium of electronic communication, providing that "After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."
More liberal regulatory efforts had been attempted before the advertising ban by the Public Health and Cigarette Smoking Act. The FCC attempted to balance cigarette ads by requiring "equal time" for anti-cigarette advertising, using the fairness doctrine. See Banzhaf v. FCC (405 F. 2d 1082) upholding the constitutionality of the FCC ruling.
"The cigarette ruling does not ban any speech. In traditional terms, the constitutional argument against it is only that it may have a 'chilling effect' on the exercise of First Amendment freedoms by making broadcasters more reluctant to carry cigarette advertising. (...) We note also that cigarette advertising accounts for a sizable portion of broadcasting revenues, and we think it at best doubtful that many stations will refuse to carry cigarette commercials in order to avoid the obligations imposed by the ruling."
[650] Wikipedia – Tobacco advertising / 4.4.1. United States
[651] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents
http://www.gpo.gov/fdsys/pkg/FR-2010-03-19/pdf/2010-6087.pdf (last visited October 9, 2012)
[652] 21 USCA § 387 f

not exceptional, and several other – may be less visible – measures might also have been taken.

4. THE STAKES AND STAKEHOLDERS

Lobbying against the TADs at national level was decisive in the TAD related legislative process. The lobbying process was – both in favor and against - fuelled by local interest groups. Therefore, to show the place and importance of tobacco related stakeholders, this Section is a brief description of the tobacco industry and its penumbra on the one hand and tobacco related health problems the tobacco control lobby on the other. The snapshot was made at the time of the TADs, i.e. the period between 1987 and 2003 (or sometimes, when no information was available, I also used data of years closest possible to the TADs' period). Unless otherwise indicated, the text below uses contemporary terminology, and the legal analysis is based on the laws prevailing at the period being discussed.

Stakes and stakeholders are discussed in three levels below: a) Europe (Community or 'Western Europe'), b) member states which played a key role in the voting process regarding the TADs and c) individuals and entities.

4.1 Europe and European level stakeholders

4.1.1 The cigarette industry in Europe.

Western Europe is the world's second largest cigarette-manufacturing region. It accounted for 15.4 percent of world production in 1997, well behind Asia's 48,5 percent and just ahead of North America's 15,2 percent.[653] 672 billion cigarettes are consumed in the EU every year[654],

[653] Gilmore, McKee, Tobacco-Control Policy in the European Union, in Eric A. Feldman and Ronald Bayer, Eds, *Unfiltered - Conflicts over Tobacco Policy and Public Health*. p 220

[654] As of 2006. Confederation of European Community Cigarette Manufacturers http://www.ceccm.eu/keyFacts.html referring to the"Impact Assessment on the Proposal for a COUCIL DIRECTIVE amending Council directive 95/59/EC, 92/79/EEC and 92/80/EEC on the structure and the rates of excise duty applied to manufactured tobacco - SEC(2008) 2266"

generating 72 billion Euros in government excise tax revenues[655]. The European market leader[656] is the Swiss based Philip Morris International[657], whose world-wide operating income by 2002 hit USD 5.7 billion, more than a hundredfold increase over 1970.[658] Philip Morris (U.S.) has held a dominant position in the European Union (EU 15) over the last 20 years, with a 36.5% share of the market[659] at the beginning of 2003; the other major (but much smaller) operators are Gallaher (operating in the U.K., but controlled by the Japan Tobacco since 2007), Imperial (U.K.), British American Tobacco (U.K.) and Japan Tobacco.[660] It is noteworthy that the European market of smoked tobacco is dominated by companies outside of Europe, especially in the light of the significant amount of subsidy extended by the European Community / Union to the tobacco industry (see the Section below regarding the European Common Agricultural Policy).

Besides the tobacco industry, the media is also heavily concerned with tobacco control regulation, because tobacco industry intensively uses commercial communication. The estimated annual ad spending on tobacco in Europe ranges between USD 600 – 1,000 million.[661] This makes the media industry a natural ally in the course of the legislative lobbying regarding tobacco advertising and increases the lobbying potential.

[655] As of 2006. Confederation of European Community Cigarette Manufacturers http://www.ceccm.eu/keyFacts.html referring to DG TAXUD excise duty tables (tax receipts-manufactured tobacco, VAT excluded, pages 5, 6, 7 and 8 data of 2008)

[656] See Gerard Hastings and Kathryn Angus, "INFLUENCE OF THE TOBACCO INDUSTRY ON EUROPEAN TOBACCO - CONTROL POLICY" (n.d.). p 3

[657] Philip Morris International was earlier affiliated to the US based Altria Group (earlier named Philip Morris Companies Inc.) and spun off in 2008 to be an independent entity. http://en.wikipedia.org/wiki/Altria

[658] Philip Morris International http://www.pmi.com/eng/about_us/pages/our_history.aspx (Last visited October 26, 2012)

[659] Referred to as the market of smoked tobacco – see Fn „a" on p 195 of Hastings

[660] Ibid. p 196

[661] A quote from Paul Maglione, director of communications and issues management for Philip Morris Europe in Wentz, Laurel, Will anti tobacco ad plan spark more limits News, Global News; Pg. 53

4.1.2 The European Common Agricultural Policy and the Tobacco industry

The split personality of the European Community over tobacco[662] is fully reflected in its controversial agricultural policy. In order to stimulate intra Community agricultural tobacco leaf production to adapt to internal Community demands of both quality and quantity, the common agricultural policy of the European Community was in the given period providing a premium to tobacco production to the tune of 1 300 million ecu[663] a year (US$ 1 500 million, UK£ 900 million). This amounts to 2,500 ecu ($3100, £1 700) per minute, and is more in one year than the total amount spent on tobacco subsidies by the US in the last 50 years.[664] Such subsidies are paid by the Commission to the processors[665] in the form of a premium to persuade them to buy their leaf tobacco from Community farmers. (Otherwise they might buy from outside the Community, on markets where prices are lower.) In addition, the Community was securing guaranteed minimum prices for the tobacco growers for a predefined annual quantity of tobacco. [666]

However, due to soil and climate conditions in Europe, most EU-grown tobacco is of varieties for which there is little commercial market, and therefore almost all tobacco is sold at a

[662] Randall, Ed. 2000. "European Union Health Policy With and Without Design: Serendipity, Tragedy and the Future of EU Health Policy." Policy Studies 21 (2) (June): 133–164.
"The Union's split personality over tobacco is well known and serves to highlight the tremendous difficulties that any international body has when it is expected to manage a diverse portfolio of responsibilities including health, agriculture and trade."

[663] European curreny unit.
"The **ecu** was the former currency unit of the European Communities. It was adopted in 1979 and was the cornerstone of the European Monetary System (EMS). The ecu was used as a standard monetary unit of measurement of the market value/cost of goods, services, or assets and was composed of a basket of currencies of the European Communities. A private market also developed for the ecu, allowing its use in monetary transactions. It was replaced by the euro at a ratio of 1:1 on 1 January 1999."
See European Commission, EUROSTAT Glossary: European currency unit at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:European_currency_unit_%28ecu%29 (Last visited October 24, 2012)

[664] Randall p 10

[665] Processing is the phase whereby tobacco leaves are prepared for cigarette production. Tobacco processors therefore are the intermediaries between growers and cigarette manufacturers. (authority to find)

[666] Joossens, L, and M Raw. 1991. "Tobacco and the European Common Agricultural Policy." British Journal of Addiction 86 (10) (October): 1191–202. p 4

minimum price that is often about 10 percent of the subsidies received. Thus only about 55 percent of the subsidy is available for support of agricultural incomes. The remainder covers seeds, fertilizer, etc. Therefore, many argue that it would cost considerably less simply to give the farmers the money earmarked for income support, without requiring them to produce a product that few want.[667] According to a report by Doeke Eisma, the EP's draftsman, for the 1999 health budget proposal, 'the total EU health budget was at the time less than 5 per cent of the EU premiums paid for tobacco'. [668]

At the same time, Member States were maintaining national excise tax on tobacco products. Its rate varied country by country, but the average was around 70%.[669] In 1987 The Europe Against Cancer Program proposed to align the Member States various taxes to the higher tax revenue to finance national preventive actions.[670] This initiative was not completed in the given period. Actually, taxation of tobacco products and consumption became a both widely and wildly debated matter.[671]

4.2 Member States

The member states voting at the Council in the TAD related legislation were key in the legislative process. As shown below, a blocking minority of the representatives in the Council by the UK, Germany, the Netherlands and Denmark was maintained between 1992 and 1997. Thereafter Germany's lawsuit against the Council and the Parliament, and the British tobacco industry challenge of TAD 1 before the local national court was also key in causing a further delay of 5 years.

Detailed statistics regarding national tobacco production are unfortunately not publicly available in the Eurostat, therefore secondary sources must be consulted.

[667] Gilmore and McKee, Tobacco-Control Policy in the European Union in Eric A. Feldman and Ronald Bayer, Eds, *Unfiltered - Conflicts over Tobacco Policy and Public Health*. p 233
[668] Randall, p 10
[669] Com (86) 717 final Brussels, 16 December 1986 p 16
[670] See "Proposed action 1" in Commission, "Europe Against Cancer 2" no. 86 (1986).
[671] See e.g. Sijbren Cnossen, "HOW SHOULD TOBACCO BE TAXED," *CESifo* 49, no. 89 (2001).

Several sources confirm that wealthy states are more developed in tobacco control[672], but a new study of Studlar, Christensen and Sitasari more specifically analyzes the correlation between various economic, political and social factors of the EU 15 member states and their approach to the comprehensive tobacco control policy. They show that the better the industry representation towards the political decision makers is organized, the more likely it is that more comprehensive tobacco control policies will be hindered.

> "The strongest, most consistent findings (in their analysis are that) corporatism[673] and higher levels of smoking prevalence hinder the adoption of more comprehensive policies, while higher GDPs, higher levels of tobacco taxation, more healthcare spending, having domestic cigarette manufacturers, and EU actions aid the adoption of more comprehensive policies. Corporatism is described in the research as "how competitive and co-ordinated interest group interactions are with the government"[674].

The leading role of Germany and the U.K.[675] in forming the blocking minority against TAD 1 supports the finding above. Although no detailed statistics are publicly available, several sources confirm the leading role of these countries in the European tobacco industry.[676] As shown below, the national tobacco industry in these countries had enough economic weight and financial resources to influence the national approach against tobacco control in these countries.

[672] See e.g. Hana Ross and Frank J Chaloupka, "Economics of Tobacco Control" (2002). and H Saffer and F Chaloupka, "The Effect of Tobacco Advertising Bans on Tobacco Consumption.," *Journal of Health Economics* 19, no. 6 (November 2000): 1117–37, http://www.ncbi.nlm.nih.gov/pubmed/11186847.

[673] Studlar and the others use the term "corporatism" to indicate the level of the industry's organization for interest representation "based on how competitive and coordinated interest group interactions are with the government..." See Donley T. Studlar, Kyle Christensen, and Arnita Sitasari, "Tobacco Control in the EU-15: The Role of Member States and the European Union," *Journal of European Public Policy* 18, no. 5 (August 2011): 728–745. p 734

[674] Ibid.

[675] See Mark Neuman, Asaf Bitton, and Stanton Glantz, "Public Health Tobacco Industry Strategies for Influencing European Community Tobacco Advertising Legislation" 359 (2006): 1323–1330.

[676] See for example the Tobacco Atlas by the WHO, written by Dr. Judith Mackay and Dr. Michael Eriksen http://www.google.hu/books?hl=hu&lr=&id=BqNIwTkoYOoC&oi=fnd&pg=PA9&dq=European+tobacco+industry&ots=T0Y_AxxnnP&sig=ckRmE82YbM8aOLU0ADQgU0oNKAc&redir_esc=y#v=onepage&q=European%20tobacco%20industry&f=false (last visited December 9, 2012)

4.3 Individuals

4.3.1 Industry workers, growers

In the period of TAD 1 and TAD 2 (1998 -2003), in the EUR 15 countries[677] the number of workers in the tobacco industry ranged between 74,100 (second quarter of 1998) and 65,100 (second quarter of 2003).[678] These numbers represent 0.16% of the total number of employed persons in the industry sector of the EU, which during the same period was basically unchanged at 45 million.[679] Workers in the tobacco industry naturally shared the interests of their employers with respect to tobacco control regulation. The Pan-European lobby organization, called the Union of Industrial and Employers' Confederations of Europe and the world wide umbrella organization called IUF, the International Union of Food Workers, and the European Trade Unions Confederation are mentioned by the sources as organizations actively supporting the tobacco industry lobby. The European Trade Unions Confederation, for example, had a great influence on the European Economic and Social Committee (EESC)[680]. The EESC was established by the EEC Treaty[681] in order to channel interests in the Community decision making of

"the various economic and social components of organized civil society, and in particular representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers and the general interest."[682]

[677] I.e. Member States until the first the first Eastern enlargement of 2004, i.e. France, Germany, the Benelux and Italy (founders); UK, Ireland and Denmark (first enlargement); Greece, Spain and Portugal (the Mediterranean enlargements) and finally Sweden, Austria and Finland (the EFTA enlargement). – See for example the last page of Craig – De Búrca for a good summary map.
[678] EUROSTAT – Code DA 16 under NACE R1 – "Manufacture of Tobacco Products"
[679] EUROSTAT - Code C-F under NACE R1 – "Industry"
[680] Eric A. Feldman and Ronald Bayer, Eds, *Unfiltered - Conflicts over Tobacco Policy and Public Health*. p 230
[681] Arts 257 – 262 EC Treaty)
[682] Art 257 of the EC Treaty

The EESC as consultative body for the Community legislature has important role in the legislation process.[683]

4.3.2 Public health

The opposite end of the scale between supporters and challengers of the TAD is the public health related lobby[684].

The public health lobby was driven by the fact, that every year in the EU, as many as 695 000 Europeans die prematurely of tobacco-related causes – more than the populations of Malta or Luxembourg (WHO source). It is estimated that, in terms of negative economic impact, smoking costs the EU countries at least €100 billion a year.[685]

Tobacco is an extraordinary regulatory subject, in that cigarettes kill even when used precisely as the manufacturer recommends. No other product does this. Alcohol, cars and even food products (given the obesity epidemic) kill people, but only when abused.[686] As a consequence, the only regulatory technique that would address public health related concern is restricting tobacco consumption and/or advertising; it is often claimed that tobacco would be a prohibited substance if its market introduction was attempted today.

The summary above is meant to demonstrate the sources of the major pressure on the Community legislature regarding tobacco control. Each of the various stakeholders described above – individuals and private entities through their interest groups – played a role in influencing the Community legislation. The following Sections describe how.

[683] Art 262 EC Treaty
[684] This weird term of art "public health lobby" is used by the literature, most probably to underline the bureaucratic approach of the Community legislature to regulatory matters, no matter if life or death is concerned.
[685] EU Commission Directorate General Health & Consumers / Public Health / Tobacco / Policy http://ec.europa.eu/health/tobacco/policy/index_en.htm (Last visited November 5, 2012)
[686] Gerard Hastings and Kathryn Angus, "INFLUENCE OF THE TOBACCO INDUSTRY ON EUROPEAN TOBACCO - CONTROL POLICY." p 1

5. THE REGULATION.

5.1 Background.

Although strongly disputed (principally by the industry itself), research shows that tobacco advertising not only influences brand preferences but also increases tobacco consumption[687] and that comprehensive tobacco advertising bans can reduce tobacco consumption.[688] It has also been proven that only comprehensive advertising ban affects the level of tobacco consumption: "a limited set of advertising bans will not reduce the total level of advertising expenditure but will simply result in substitution to the remaining non-banned media"[689].

Before the TAD only a limited advertising ban existed, as provided for in the TWF Directive with respect to electronic audiovisual media (e.g. radio and press advertising of tobacco was not prohibited at the EU level). A comprehensive ban was introduced by **TAD1** and – following its repeal by the ECJ - **TAD2**. As shown below, this "yes/no" nature of this matter simplifies the drafting and consequently the lobbying process. As the TAD related legislation process shows, the tendency was to move from a limited ban towards a comprehensive one.

5.2 The rules

As seen above , only a comprehensive tobacco advertising ban is effective in terms of reduction of consumption. Therefore, although the policy questions are complex, tobacco advertising regulation is not a particularly sophisticated regulatory task. It is typically a

[687] "The World Bank reviewed the evidence regarding the effects of cigarette advertising, concluding that advertising increases cigarette consumption ending advertising would reduce consumption provided that it is comprehensive, covering all media and uses of brand names and logos. Modeling these data for the entire EC, the World Bank concluded that the comprehensive advertising ban proposed by the 1998 EC directive would have reduced overall cigarette consumption within the EC by 7%." in Neuman, Mark, Asaf Bitton, and Stanton Glantz. 2006. "Public Health Tobacco Industry Strategies for Influencing European Community Tobacco Advertising Legislation" 359: 1323–1330. p 1322

[688] See for example: Stewart, MJ, 1993. The effect of advertising bans on tobacco consumption in OECD countries. International Journal of Advertising. 12, 155-180

[689] Saffer, H, and F Chaloupka. 2000. "The Effect of Tobacco Advertising Bans on Tobacco Consumption." Journal of Health Economics 19 (6) (November), p 1134

Hamletian yes/no question: to introduce it or not to introduce it. This is reflected in the relevant European legislation.

5.2.1 The Television without frontiers directive[690]

The TWF directive was the first Community level legislation restricting tobacco advertising.[691] In its first version (until 1997) the restriction provided that

> *"All forms of television advertising of cigarettes and other tobacco products shall be prohibited."*[692]

5.2.2 The first tobacco advertising directive

TAD 1 was a rather succinct piece of legislation, too. It introduced a sweeping tobacco advertising ban on "all forms of advertising and sponsorship in the European Community regarding tobacco products".[693]

The very few carve outs were as follows:

- Brands used for both tobacco and so called "diversification products": Member States were authorized to allow using tobacco brands for non-tobacco products and services used in good faith before the directive was enacted;[694]
- Communications for tobacco trade professionals,[695]
- Presentation of tobacco products in tobacco sales outlets, and shops[696]
- Sale in the Community of publications containing tobacco advertising, provided that those were published and printed in third countries and were not intended for Community use[697].

5.2.3 Repeal of TAD 1

Germany, who was outvoted in the political process regarding TAD 1, challenged TAD 1 before the ECJ. Besides the pressure from the tobacco lobby (see the details below),

[690] Directive 89/552/EEC
[691] See M. Alegre p1
[692] Art 13 of the TWF Directive
[693] Art 3.1 of TAD 1
[694] Art 3.2 of TAD 1
[695] Art 3.5 of TAD 1
[696] Art 3.5 of TAD 1
[697] Art 3.5 of TAD 1

Germany's principal concern was the gradual expansion of EU (Community) competencies and a fear that this directive would trigger a domino effect, which subsequently could lead to prohibitions on alcohol, automobile or sweets advertising.[698] With respect to TAD 1 the German challenge was successful, however, this case turned out to be the only one so far where the ECJ annulled a Directive based on the argument that the Community organs have overstepped their competence in the course of a legal harmonization measure.

As far as the arguments are concerned, the two cards Germany dealt were cards related to the above mentioned internal market and public health related issues (see Introductory Section above regarding the two drivers of Community level legislation). As to the internal market, Germany claimed that the total ban on tobacco advertising in printed press and radio does not serve the internal market and the real reason behind the prohibition is protection of public health, where the Community does not have regulatory competence. According to the German argument,

> *"If the Community legislature were permitted to harmonise national legislation even where there was no appreciable effect on the internal market,*(emphasis added – GB) *it could adopt directives in any area whatsoever and judicial review of the legislation's compliance with Article 100a* (now 114) *would become superfluous"*[699].

As to public health, Germany argued that the

> *"public health policy is the centre of gravity of the Directive yet harmonising measures in that field are expressly prohibited by (...) Article 129(4) first indent, of the EC Treaty* (now 168, provided, that the harmonization ban has been lifted in the Lisbon Treaty - GB)*"*[700].

The ECJ accepted Germany's first argument and rejected the second one. It stated that the mere existence of disparities between the national legal systems of the member states would, without anything more, be insufficient for harmonization action and the EU legislative measure shall 'actually contribute to eliminating obstacles' to free movement of goods and

[698] Obergfell p 1
[699] Sec 29 of C-376/98
[700] Sec 35 of C-376/98 Note that the Lisbon Treaty (from December 1, 2009) slightly refined the prohibition of EU harmonization regarding matters of public health and placed common safety concerns of public health matters among the shared competencies of the EU. See Arts 4.2 (k) and 168.4 (c) TFEU.

services (...).[701] In fact the ECJ listed in its judgment those areas where the Court would accept legal harmonization and those where it would not. This is what was called by Professor Weatherill as a *"drafting guide"*[702] provided by the ECJ to the Commission, and reflected in TAD 2: the second regulatory attempt avoided the comprehensive ban and - as proposed in the ECJ judgment – regulated the four principal areas emphasizing the cross border effect. The case was closed, the ECJ annulled the Directive by accepting the argument that the Community overstepped the boundaries of its legislative power.

5.2.4 TAD2

As the ECJ annulled TAD 1 on the basis that it needlessly prohibited tobacco advertising in areas which do not have common market aspects, TAD 2 gave up the general tobacco advertising prohibition by explicitly naming the areas where Community level tobacco advertising prohibition applies.

Under TAD 2 the tobacco advertising prohibition has been narrowed to

- press and printed publications
- radio broadcasting
- information society services, and
- tobacco related sponsorship of international events or having cross border effects, including free distribution of tobacco products[703]

Carve-outs of the prohibition by TAD 2

Since TAD 2 does not provide for a comprehensive ban, carve-outs make sense only in the contexts of areas concerned by the tobacco advertising prohibition. The only area is the

[701] See Harrison, Jackie; Woods, Lorna. 2007. European Broadcasting Law and Policy. Cambridge University Press. p 79; See another analysis of The Tobacco Directive cases in Roger A. Shiner. 2003. Freedom of Commercial Expression. First. OUP. p 101 et seq. See also Weatherill, Stephen. "The Limits of Legislative Harmonization Ten Years after Tobacco Advertising : How the Court ' s Case Law has become a ' Drafting Guide '." German Law Journal 12 (03).

[702] Wheaterill p 827

[703] Articles 1.1 and 5 of TAD 2; prohibition of tobacco advertising on television continued to be covered by the TWF Directive, therefore not mentioned here

printed press where a carve-out of TAD 1 was taken over. The tobacco advertising ban does not apply to the sale in the Community of publications containing tobacco advertising, provided that those were published and printed in third countries and were not intended for Community use[704].

5.2.5 Challenge of TAD2

Germany challenged TAD 2 too[705], but lost the case this time. The principal arguments remained the same:

a) the prohibitions in TAD 2 are superfluous, mere disparities among national legislation without an actual effect on the internal market may not be a basis for a harmonization measure, and
b) the Community has no right to harmonize Community law on the ground of protection of public health, which is an area belonging to the member states.

The Court refused both arguments. In connection with the first matter, it appreciated that TAD 2 changed the general advertising prohibition to a prohibition of advertising in the printed press, radio, internet, and sponsorship having cross border effect. The Court found that the existing disparities among the national tobacco control legislations[706] present barriers to the internal market in those areas[707], therefore the legal harmonization is not superfluous[708]. In connection with the second matter, the ECJ repeated its previous opinion.

> "While it is true that Article 152(4)(c) EC excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health, that provision does not mean, however, that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health."[709]

[704] Art 3.1 of TAD 2
[705] C-380/03 (TAD 2 decision)
[706] Sec 46 Ibid
[707] Ibid, Sections 56, 57, 59 with respect to the printed press, Sections 61, 63 and 68 regarding radio and the Internet and Section 65 regarding sponsorship
[708] Ibid Sections 78 and 88
[709] Ibid. Sec 95

6. THE EU REGULATORY PROCESS AND THE LOBBYING MEASURES

6.1 The Commission

6.1.1 The central role of the Commission in the EU legislation

The Commission's central role stems from its monopoly of legislative and policy initiative.[710] The Commission's position is further strengthened by the fact that the Council may modify Commission proposals unanimously only[711], the Commission may amend its legislative proposal at any time[712], and neither the Council nor the Parliament or a member state can compel the Commission to submit a legislative proposal except in those few cases where the Treaty imposes an obligation to legislate.[713] The composition (i.e. the appointment of members) and operation of the Commission are important to understand the reason why the major tobacco lobby efforts failed at the Commission level.

6.1.2 The composition of the Commission

The members of the Commission are appointed by the Council with the approval of the Parliament.[714] There are three aspects to their appointments: they must be professionally competent, independent and must come from a member state. Each member state may have one Commissioner (not more and not less).[715]

6.1.3 The operation of the Commission

[710] See Giandomenico Majone, *Dilemmas of European Integration* (Oxford University Press, 2005). p 45 Although this principle was formalized only by the Lisbon Treaty[710], informally existed before then - Craig – De Búrca p 11
[711] Art 250.1 EC Treaty (293.1 TFEU)
[712] Art 250.2 EC Treaty (293.2 TFEU)
[713] Ibid p 45
[714] Art 214 EC Treaty (the appointment process and composition were changed in the TFEU – see Arts 244-250)
[715] Art 213 EC Treaty (Art 245 TFEU)

"In the performance of their duties, members of the Commission shall neither seek nor take instructions from any government or from any other body."[716] Each Member State undertakes to "respect this principle and not to seek to influence the Members of the Commission in the performance of their tasks"[717]. The Commission's voting is by simple majority of its members.[718] It is acting as one body, and its members are collectively responsible for the Commission decisions.[719]

6.2 The Council

The Single European Act extended the qualified majority voting **("QMV")** at the Council with respect to a range of areas which had previously provided for unanimity.[720] The new Art 100a EC brought legal harmonization ("approximation of laws")[721], which served as the principal Treaty basis for the TADs under the QMV. The QMV eased the legislative process but obviously strengthened the EU legislature as opposed to the member states' sovereignty. According to the codecision process introduced by the Maastricht Treaty as of 1993, the Council brings its decisions with QMV except where there is some form of disagreement with the Parliament (e.g. amendments of a bill rejected by the Parliament), where unanimity is required.[722]

The QMV was a key factor in the tobacco lobby efforts to block or at least to postpone the TADs. With the blocking votes of Germany, the Netherlands and the United Kingdom, no qualified majority was possible in Council meetings regarding the tobacco-control from 1992 to 1996. During this period (basically between 1987 and 1995) qualified majority was fifty-four votes in favor, out of the total of 76 votes. Member states were entitled to weighted

[716] Art. 213.2 EC Treaty (Art 245 TFEU, as amended)
[717] Art 213.2 EC Treaty (Art 245 TFEU, as amended)
[718] Arts 213 and 219 EC Treaty (Art 250 TFEU, as amended)
[719] Arts 1, 13 and 14 of the Rules of procedure (Official Journal L 308/26; 2000. 12.8.)
[720] Craig – De Búrca p 11
[721] See SEA Art 18, inserting the new Art 100a in the EC Treaty regarding QMV at the Council and codecision process involving the Council and the Parliament regarding approximation of laws
[722] See Art 189c Maastricht Treaty

votes. The biggest voting rights were allocated to Germany (10), France (10), Italy (10), the UK (10) and Spain (8). Five votes each were given to Belgium, Greece, the Netherlands and Portugal. Three votes were given to Denmark and Ireland, respectively and two votes to Luxembourg.[723]

The QMV process and the various in-built deadlines had been introduced in the hope of accelerating EU legislation. This did not happen. "Decision-making did not accelerate, backlog did not decline and old proposals were not suddenly unblocked as a result of the 1987 (or 1992) institutional reforms." [724] Reasons include the expansion of the Parliament's role in the decision making, and also that under the unanimity an abstention was equivalent to support a proposal, while under the QMV an abstention is equivalent to voting against a proposal, since (under the rules above) fifty-four votes were still required to adopt the measure.[725] This way of counting abstentions, an official publication of the Council points out, "sometimes results in the paradoxical situation where a decision for which a qualified majority cannot be reached ... is taken more easily unanimously as a result of abstention by certain members of the Council, who do not wish to vote in favor, but who do not want to prevent the Act concerned from going through."[726]

6.3 The Parliament

The legislative role of the Parliament had gradually increased from an advisory and supervisory body under the Rome Treaty[727] through a cooperating partner under the SEA[728] to a body having equal power with the Council. Since the Maastricht Treaty (1992), which introduced the codecision process, the European Parliament and the Council of the European

[723] EC Treaty Art 148.2
[724] Ibid. p 57 quoting Jonathan Golub, "In the Shadow of the Vote? Decision Making in the European Community," International Organization 53, no. 04 (August 12, 2003): 733–764,
[725]Ibid p 57
[726] Giandomenico Majone, *Dilemmas of European Integration; The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2005). p 57 quoting Hix, S, The political system of the European Union. London: MacMillan
[727] EEC Treaty Art 137
[728] EC Treaty 149 – inserted by Art 7 SEA

Union are given equal powers in the legislative process.[729] Under the codecision process being the procedure relevant to the TADs (and which was ultimately made as "ordinary legislation process" by the Lisbon Treaty[730]) the Parliament has the right to approve, amend or reject the Commission's legislative proposals. In the codecision process the European Parliament (which consists of directly elected representatives of the peoples of the Member States and consequently represents party politics rather than government interests[731]) acts with absolute majority of its component members in case it amends or rejects a "common position" by the Council.[732] Otherwise the European Parliament acts by an absolute majority of the votes cast.[733]

7. THE LEGISLATIVE PROCESS AND LOBBYING

This Section summarizes the principal lobby measures and their effects at the three legislative bodies and before the ECJ. It will be shown, that the lobbying actions targeting the various Community organizations needed to be adapted to the operational specificities of these organs. Simply saying, the Commission was provided with expertise and information and the Council and the Parliament were influenced through lobbying at the member states.

Legislative effect of the tobacco lobby is a key claim of this paper. Such legislative effect is exceptional, since political lobbying principally represents merely information channeling to the decision makers. The TAD related tobacco lobby is also exceptional in that it was a counteractive lobbying[734] instead of being a proactive action to reach a regulatory aim.

[729] Art 189 of the Maastricht Treaty of 1992:
"In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives (...)"
[730] Art 289.1 TFEU
[731] See Article 138.1 of the Maastricht Treaty. The emphasis on party politics is spelled out in Article 138a of the Maastricht Treaty
[732] Maastricht Treaty Art. 189b 2.c
[733] Maastricht Treaty Art 141
[734] See e.g. David Austen-smith and R Wright, "Counteractive Lobbying *" 38, no. 1 (1993): 25–44. p 26-29

7.1 The legislative process and lobbying at the Commission level

7.1.1 Tobacco-control

TAD 1 was in the first place proposed by the Europe Against Cancer program ("EACP") which was initiated in 1986 by President Francois Mitterand of France (persuaded by his close friend Professor Tubiana) and Prime Minister Bettino Craxi of Italy (under the influence of Professor Umberto Veronesi)[735]. EACP was one of the fruits of the EC's new public health competence[736], introduced by the Single European Act[737]. EACP was headed by Michel Richonnier, a French commission official having full support by Jacques Delors, the president of the Commission at the time.[738] Realizing that tobacco control legislation would face considerable opposition, EACP commissioned the Brussels based Bureau for Action on Smoking Prevention (BASP) to provide expert information service on tobacco control in Europe, which played a vital role in European tobacco control until 1995.[739] The first proposal for the TAD 1 was submitted by the Commission in 1989.

7.1.2 The industry lobby[740]

The industry lobby was unprepared for any fight before the early 1990s. Most probably that is the reason why the Commission output regarding TAD 1 was plain prohibition of tobacco

[735] Unfiltered p 224
[736] Ibid p 225
[737] See Article 21 of the Single European Act, adding the (then) new Art 118a giving legislative powers to the Community organs on health and safety of workers.
[738] Ibid p 225
[739] See Unfiltered p 225, or also Neuman p 1327; Bitton p 37; In 1995, BASP's contract was not renewed. The explanations for that differ. It is claimed that BASP did not apply in the tender for renewal, but it is also mentioned that the anti-tobacco pressure exerted by BASP on the Commission became uncomfortable. (See Unfiltered p 228)
[740] Descriptions of industry lobby measures are mostly based on the report by Mark Neuman, Asaf Bitton and Stanton Glantz, who reviewed the many thousands of internal industry documents disclosed as a result of the Tobacco Master Settlement Agreement of 1998 between 46 US state attorneys general and the tobacco industry. See Neuman, Bitton, and Glantz, "Public Health Tobacco Industry Strategies for Influencing European Community Tobacco Advertising Legislation."

advertising, and it appears that the industry exerted little influence in the actual drafting of the TADSs.[741]

The details:

- In 1989 the industry created the Confederation of European Community Cigarette Manufacturers **("CECCM")[742],** an organization to harmonize political efforts of all major European tobacco manufacturers.[743]
    - CECCM had for example an alternative proposal for a tobacco control directive drafted. Although the further history of this draft is unclear, there are documentary evidence that the draft was to be submitted to the Commission by Martin Bangemann, the German Commissioner and Head of DG III at the time[744]
    - CECCM supported the legal challenge of TAD 1 by commissioning two studies to determine if there was a sufficient basis for a legal challenge to prove the advertising ban to be "null and void on constitutional" grounds.[745]

- "By 1991, Philip Morris had built coalitions with the International Chamber of Commerce (ICC) and the Union of Industrial and Employers' Confederations of Europe, two pan-European lobbying bodies. Permanent media contacts of the tobacco industry included a number of advertising industry groups: the European Association of Advertising Agencies, the International Advertising Association, the European Advertising Tripartite, and the European Group of Television Advertising. Ultimately, Philip Morris came to view the European advertising industry as a powerful source of opposition to the EC advertising directive.
  In 1992, Paul Maglione, Director of Communications and Issues Management, Phillip Morris Corporate Services, Brussels, stated: *"The advertising, media, and publishing communities . . . have publicized their oppositions to advertising bans to an extent that we could only dream about two years ago."*[746]
- "The governments of Germany, the UK, and the Netherlands, who formed the core of the blocking minority against the EC advertising directive, objected to BASP's

[741] "In the case of tobacco advertising, the Commission conducted a largely solitary campaign. As with most of its early public health measures, the Commission proceeded without consulting health care groups or generating public interest (...). The tobacco initiatives were the product of Commission officials and a handful of experts, acting with the support of only the most senior political figures from France and other countries." Francesco Duina and Paulette Kurzer, "Smoke in Your Eyes: The Struggle over Tobacco Control in the European Union," *Journal of European Public Policy* 11, no. 1 (January 2004): 57–77. p 59
[742] See http://www.ceccm.eu/mission.html (Last visited December 8, 2012)
[743] Neuman p 1325
[744] Neuman, Bitton, and Glantz, "Public Health Tobacco Industry Strategies for Influencing European Community Tobacco Advertising Legislation." p 1326
[745] Ibid. p 1326
[746] Ibid. p 1327

activities. In 1995 these three EC member states pressured the European Commission to withdraw funding from BASP."[747]

- Internal industry documents[748] show that at the Commission level the industry used lobbyists to influence "the staffs of the permanent national representations and the members of the Committe of Permanent Representatives **("COREPER")**, which is responsible for preparing the work of the Council of the European Union.[749] COREPER consists of ambassadors of the Member States in Brussels.[750].

Partly as a result of the above efforts of the tobacco industry, the EACP and its penumbra organizations started to decline from 1992. The EACP was brought under tight control of the Commission, Richonnier and two of his deputies had left, Tubiana, the influential chair resigned, and in 1995 the BASP contract was not renewed.[751] The Guardian reported at the time that BASP collapsed as "...EU officials took steps to ensure that BASP was effectively excluded from future funding, because of the perception that it had become the 'leading anti-tobacco lobby in Europe'".[752] It must be added that besides coinciding timing, none of the sources presents direct connection between the above events and the awakening of the industry lobby.

7.1.3 Much ado about nothing. The effect of the industry lobby at the Commission level.

Although the tobacco industry exerted major efforts in order to influence the decision-making at the Commission level, it had no visible trace. It was obvious that the Commission is open for consultations but even the major efforts by the industry, workers and media lobby were not sufficient to make a meaningful imprint on the Commission's regulatory output in favor of the tobacco industry. It appears to have two reasons. The first is a factual one; the tobacco lobby started late, the basic approach of the comprehensive advertising ban was already on the

[747] Ibid. p 1328
[748] Internal industry documents were published by U.S. tobacco companies as a result of the Tobacco Master Settlement Agreement of 1998 between 46 US state attorneys general and the tobacco industry. See Ibid.
[749] Art 240 TFEU (Art 207 TEC)
[750] See http://europa.eu/legislation_summaries/glossary/coreper_en.htm
[751] Unfiltered p 227-228
[752] Ibid. p 1328

table, being inerasable by further compromise proposals. The second is embedded in the legislation process and the bureaucratic status of the Commission and its officials. The collective decision-making coupled with professional and political independence of the commissioners makes it impossible to exert meaningful influence of the Commission's operation.

7.2 The legislation process and lobbying at the Council level

7.2.1 Voting

As far as the TAD related legislation process before the Council is concerned,

> "from 1989 on, when the first proposal was presented, a coalition of five member states vetoed all measures until December 1997: Denmark, Germany, Greece, the Netherlands, and the UK"[753].

> "After ten failed consultations (Agence France Presse 1996), the TAD1 was adopted in late 1997, due to the fact that the U.K. position changed in 1997 after the election of a Labor government, and ministers of health from the UK and also the Netherlands had joined the majority in voting for the directive. Denmark abstained, along with their Spanish counterparts, who made a last-minute move that almost blocked the directive."[754]

The Spanish abstention would have blocked the directive, without Greece's last-minute turnaround, who after being offered a variety of minor concessions[755], finally voted in favor. Germany and Austria remained opposed, but the minimum sixty-two out of eighty seven votes[756] was obtained."[757] TAD 1 was approved by the Council.

[753] Duina and Kurzer, "Smoke in Your Eyes: The Struggle over Tobacco Control in the European Union." p 67
[754] Eric A. Feldman and Ronald Bayer, Eds, *Unfiltered - Conflicts over Tobacco Policy and Public Health*. p 23
[755] E.g. a clumsy carveout tailor-made in favor of Greece (expressly mentioned in TAD 1) regarding a certain "special system under which licenses are granted for social reasons ('periptera')". In light of the authors experience of last minute crisises in international commercial negotiations, it is not difficult to visualize the situation whereby this language was pushed through.
[756] Note that the number of votes, including the number of votes required in favor) had increased in 1995 with the EFTA enlargement.
[757] See Unfiltered p 234-236; Duina and Kurzer, "Smoke in Your Eyes: The Struggle over Tobacco Control in the European Union." p 61

7.2.2 Lobby at the Council level

The Council-level lobbying focused on both the member states and Community organs in Brussels.

The United Kingdom was among the strongest allies of the industry and both the Conservatives and the Labor government had strong financial links with the tobacco industry. The "former prime minister, Margaret Thatcher, received a large consultancy payment from Philip Morris and the outgoing finance minister (and previously health minister), Kenneth Clarke, became deputy chairman of British American Tobacco.[758] As to the Labor government that followed the conservatives after the 1997 elections, "the Labor Party had received £1 million from Ecclestone in 1998 to exempt it from the TAD1's rules" (Guardian 1998)[759].

In Germany, former Chancellor Helmut Kohl and "Dr Werner Chory, the German Secretary of State in the Federal Ministry for Youth, Family, Women, and Health, (...) both were prominent tobacco allies in the German Government in its opposition to the advertising ban."[760]

"Le Monde reported that Spain's turnaround *(with respect to the TAD 1 voting – see above in this Section - note by GB)* 'apparently followed a call from Kohl to Jose Maria Aznar'[761]".[762]

In Denmark, Philip Morris created a coalition "known (in English) as the Committee for Freedom of Commercial Expression, which included more than fifty prominent Danes" (...) and managed to portray itself as distinct from Philip Morris. (...) The industry saw it as a great success in the fight against the advertising ban, describing it as "instrumental in securing the

[758] Unfiltered p 235
[759] Duina p 70
[760] Neuman, Bitton, and Glantz, "Public Health Tobacco Industry Strategies for Influencing European Community Tobacco Advertising Legislation." p 1325
[761] Spain's prime minister between 1996 and 2004
[762] Duina p 67

commitment and public declaration of the Minister of Health to oppose an advertising ban."
[763]

7.2.3 The legislation process and lobbying at the Parliament level

The deadlock period of 1992-1996 mentioned above (Sec...) was due to blocking Council decisions. Although with a thin majority, the Parliament – despite massive lobbying by the tobacco and advertising industries – voted to impose the tobacco advertising ban in February, 1992 (with 150 votes in favor, 123 against, and 12 abstentions).[764] This proposal was stalled at the Council until 1997 December (see the explanation of the deadlock situation above in Sec ...), when an agreement was cut. Subsequently the Parliament, in May, 1998, persuaded by the tobacco-control lobby (see Sec... regarding the Commission preparatory phase), ratified TAD 1 with no amendments, although almost all German members, with the exception of the Greens, voted against."[765]

7.3 Germany's action before the European Court of Justice

As mentioned above (Sec ...), Germany was outvoted in the political process regarding the TADs and challenged both TAD 1 and TAD 2. The challenge of TAD 1 before the ECJ as a worst case scenario was orchestrated way before the adoption of TAD 1. In a CECCM Board Meeting of April 1, 1992, DM50 000 was allocated

> "for two studies to determine if there was a sufficient basis for a legal challenge to prove the advertising ban to be "null and void on constitutional" grounds in the event that the blocking minority is lost at the Council level"[766].

Simultaneously with the German challenge, TAD 1 was attacked by British tobacco companies before the High Court of Justice of England and Wales, which submitted the principal legal questions to the ECJ for preliminary ruling.[767]

[763] Eric A. Feldman and Ronald Bayer, Eds, *Unfiltered - Conflicts over Tobacco Policy and Public Health*. p 238
[764] Unfiltered p 234
[765] Ibid. p 235
[766] Neuman p 1326
[767] See C-74/99 before the ECJ; 'ex parte Imperial Tobacco Ltd. and Others'

Besides the prospect of annulling the directives, the delay in implementation was also an important factor for both the tobacco-control and the tobacco industry, just taking into account the astounding annual number of deaths on the one hand and production and trade figures on the other. Germany lodged its first challenge in 1998, and eight years passed until the ECJ brought its final decision on the validity of TAD 2 in 2006.

8. ANALYSIS

Normally, corporate influence on decision making consists of supplying knowledge, information and expertise768, and no direct impact of a particular lobby effort can be recognized in the legislative decision. The tobacco lobby case contradicts expectations as the evidence shows direct connection with lobby measures and regulatory result. These include especially the building and maintaining of the blocking minority of member states in the Council voting process and the simultaneous challenge of TAD 1 by Germany and the British tobacco companies (as forecasted and prepared by the CECCM – See Sec... above).

It follows from the above sections that legislative lobbyists at the Community level may only expect success in counteractive lobbying769 and that there is little hope in successful lobbying for a positive decision. It is due to the Commission's professional approach, collective decision-making and collective responsibility and the multi level decision making in the Community, involving the Commission, the Council and the Parliament. The counteracting lobbying is made possible by the veto powers at the Council. The question is, whether such counteractive lobbying has legislative effect that triggers its analysis from point of view of private regulation?

[768] See e.g. Taminiau and Wilts, "Corporate Lobbying in Europe , Managing Knowledge and Inforniation Strategies." p 122

[769] In this context the term "counteractive lobbying" stands for actions hindering legislative measures.

8.1 Legislative effect of private measures in general

The term "legislative effect" is meant to cut the Gordian knot of defining the circle of legal measures belonging to private regulation. It is hereby suggested that this circle is drawn on an empirical basis, stating that a legal measure has legislative effect if the following criteria are met:

- it directly or indirectly affects rights and obligations of
- an indefinable number of persons,
- who themselves had no power and/or possibility to avert such effects
- not a single or sporadic intervention[770]

8.2 Legislative effect of counteractive lobbying by the tobacco industry in the case of the TADs

Considering the above criteria of legislative effect, it is reasonable to claim that the counteractive lobby efforts by the tobacco industry had legislative effect:

- The legislative intent to enact a comprehensive tobacco advertising ban was clearly visible in the late eighties.[771] Considering that the EC Treaty clearly defines deadlines of the co-decision procedure[772] the regulatory delay between 1989 and 2005 was clearly excessive.
- This regulatory delay had limited impact on member states having comprehensive tobacco advertising ban already. It, however, affected several member states without tobacco control legislation.
- Through the Cassis de Dijon principle and Art 28 EC (now Art 34 TFEU) tobacco advertising could be exported even to those member states that had a comprehensive local tobacco advertising prohibition, with respect to cross border movement of press products, internet and radio carrying tobacco advertising.
- Usually complexity warrants regulatory intervention; therefore normally lack of regulation does not have direct impact on the stakeholders' behavior. Life goes on without traffic lights, zebra crossings, even contract law or most of the administrative regulations. Tobacco is among the exceptions. It is being simple, but at the same time dangerous and addictive. Research shows that there is a direct and inverse proportionality between tobacco consumption and tobacco control regulation.

[770] The element of defining co-regulation by the Hans – Bredow Institute p 4
[771] Duina and Kurzer, "Smoke in Your Eyes: The Struggle over Tobacco Control in the European Union." p 67
[772] See Arts 249-256 EC Treaty (Arts 288-299 TFEU)

8.3 Legitimacy

As discussed in the Introductory Chapter, Baldwyn and McCrudden[773] approaches regulatory legitimacy (i.e. the acceptance of the regulator by the regulated) in a broad and practical way naming a four reasons besides the classic one (mandate by democratic elections). The five rationales by regulators to invoke legitimacy are the "legislative", "accountability", "due process", expertise" and "efficiency" rationales. (...)[774]

This list encompasses a broad range of legitimacy justifications, covering both the so called "procedural" and "substantive" dimensions of legitimacy.

8.3.1 Procedural and substantive legitimacy

According to Majone

> "procedural legitimacy implies that the agencies are created by democratically enacted statutes which define the agencies' legal authority and objectives; that the regulators are appointed by elected officials; that regulatory decision-making follows formal rules, which often require public participation; that agency decisions must be justified and are open to judicial review. Substantive legitimacy, on the other hand, relates to such features of the regulatory process as policy consistency, the expertise and problem solving capacity of the regulators, their ability to protect diffuse interests and, most important, the precision of the limits within which regulators are expected to operate."[775]

Below, I discuss legitimacy of the TAD related lobbying measures and the Community legislature considering the above rationales.

8.3.2 The legislative and accountability rationales

[773] Baldwin, R. and McCrudden, C. Regulation and public law, 1987, London: Weidenfeld & Nicolson (quoted in Majone, *Regulating Europe*. p 90
[774] Baldwin, R, Regulatory legitimacy in the European context in Majone, Regulating Europe, Routledge, 1996. p 90
[775] Majone, Regulating Europe, Routledge, 1996. p 291

Majone describes the Community legislation as a "mixed government" as opposed to the majoritarian democracy model[776], where the governance is rather based on mutual agreement of representative bodies than on the will of a political sovereign.

> "The organizing principle of the Community is not the separation of powers but the representation of national and supranational interests."[777]

The Commission's leading role in the legislation process (See Section 6.1 above) presents a legitimacy deficit, as the Commission officials are non-elected and not accountable to elected representatives of voters. The Community needs further legitimacy support.[778] This legitimacy support is given by the industry, in the form of lobbying and self-regulation. Lobbying activity strengthens the democratic rational of EU legislature,

- by representing regulatory issues and providing direct feedback (as opposed to the indirect feedback of long term market tendencies and experience) by the regulatory targets and
- by supplying expertise.

The latter point is discussed next.

8.3.3 The expertise and efficiency rationales.

What remains is to demonstrate expertise and efficiency. The Commission itself "suffers from a structural lack of human resources and lack of expert knowledge, and EU decisions are taken at a large distance from day-to-day economic affairs in the Member States" [779]. This "professional legitimacy" problem is a driver for the Commission to use expertise of interests groups in the policy making process. In this process direct interaction providing reliable information for public officials remains the single most important way to achieve influence.[780] Although often highly formalized, EU decision-making to a large extent depends

[776] Majone, *Dilemmas of European Integration*. p 49 referring to Dahl
[777] Ibid. p 46-47
[778] See for example Majone, *Regulating Europe*. p 296-299
[779] Taminiau and Wilts, "Corporate Lobbying in Europe , Managing Knowledge and Inforniation Strategies." p 124
[780] Ibid p 128

on informal communications, which has implications for private lobbying efforts and for the formation of corporate political strategies.[781]

8.3.4 The due process rationale

Due process means

> "using procedures that gain consent. Thus, processes of participation, consultation and openness lend legitimacy to actions by allowing interest representation and by appealing directly to those parties liable to be affected by such actions."[782]

The literature confirms my personal experience, that influencing the Community legislature requires special expertise in the given field and the detailed knowledge of the complex multi-level decision making process (especially the informal processes) of the Community (Union) and also requires long term trust-based personal relationship with Community / Union bureaucrats.[783]

Although the Community legislature is open for informal inputs influencing its decisions, this informal process is selective in that only major market players can afford the financial and personal resources necessary for this lobbying activity. The Community legislature in the TAD related legislation process in fact served as a lobbying arena for the tobacco industry on the one hand and those favoring tobacco-control on the other. The rules governing the interaction in this arena were, however informal and access to the arena was open for a few selected players only.[784]

It appears therefore that the Community legislature did not stand the test of the due process rationale. Moreover, as a more general inference, one may conclude that shortage of expertise and efficiency necessarily leads to lack of due process, because due process opens the

[781] Ibid 127
[782] Robert Baldwyn, "Why Accountability?," *Brit. J. Criminol.* 27, no. 1 (1987). p 97-98
[783] See Ibid. (Taminianu)
[784] See e.g. Taminiau and Wilts, "Corporate Lobbying in Europe , Managing Knowledge and Inforniation Strategies." 127

participation of the regulated parties in the process of regulation without filtering them on the basis of their particular properties, such as expertise or personal trust. This notion is very close to the "democratic argument", except that the emphasis is on the process and not on the actual participation. As seen above, lack of due process creates a situation of democratic imbalance. It is beneficial for the powerful parties and paralyzes the weak ones and removes the decision making from the party having public power of regulatory decision making to the parties having de facto power to influence the decision.

As mentioned above, this assumption has been proven by research by Studlar, Christensen and Sitasari, who showed that the better the industry representation towards the political decision makers is organized, the more likely it is that more comprehensive tobacco control policies will be hindered.

9. SUMMARY

The story of the Tobacco Directives shows that that the Community legislature is generally open to lobbying efforts, because lobbying strengthens its legitimacy by supplying expertise, experience and information. It was shown that lobbying is accessible only for a few selected players both at national and Community level. The tobacco lobby case was special, in that it was a counteractive and not a proactive lobbying. In the decision making regime of the Community counteractive lobbying efforts have a much bigger effect than proactive lobbying. The other specific feature of the tobacco lobby case was the direct effect of such counteractive lobbying on rights and obligations of the actors. It was shown in this Chapter that regulation of the tobacco advertising is a plain yes/no question, as partial prohibitions are not efficient. Therefore a clear connection existed between the lack of legislation (a situation whereby tobacco commercials are permitted) and the actors' rights. Therefore the success of the tobacco lobby in delaying the directive on prohibiting tobacco advertising had de facto

legislative effect, as it affected rights and obligations of a wide circle of actors (tobacco industry, media, consumers etc.) who had no possibility to avert such effects.

This legislative effect warrants the examination of legitimacy of the lobby efforts. Legitimacy was examined from several angle and I found that in the given case lobbying played an important role in terms of expertise, experience and information, but the lobbying channels was accessible only for a few selected players both at national and Community level which raises concerns from point of view of the due process rationale.

CONCLUSIONS

"Welcome to the machine."

(Pink Floyd)

1. INTRODUCTION TO THE CONCLUSIONS

In the Hungary of the Seventies and Eighties the media was fully censored. My daily, "Magyar Nemzet", was therefore full of boring courtesy reports on the daily schedule of our leader, outstanding exemplary achievements of the Hungarian metallurgy industry, our coal mines, housing projects, full employment, so it is no wonder that I started reading my newspaper at its end, at the Sports section, which was at least true and therefore interesting. The case of the conclusions of a long dissertation may be somewhat similar; usually it is the first piece the reader reads and therefore it must get to the point without long and winding argumentations. So now the moment of truth has come.

In all honesty, despite my long years in the television business, I initially had no idea where I will end up with my research on advertising self-regulation. How can this "state within the state" be possible? What (who?) is the driving force behind? Is there a problem at all? As the reader may be aware, there is an unfortunate gap between legal practice and theory, and that is especially true in the television business, which, being an equity intensive, highly influential branch of industry, is used to dictating the rules rather than listening to legal arguments. So when I switched to being a doctoral student from a television lawyer, I moved to the other side of the table and became a listener instead of a speaker (dictator?). Here are the answers to ma questions.

2. WHY LINEAR BROADCASTING?

I focused on linear broadcast services wherever it was practically possible, for two reasons. First, this platform brings unique regulatory issues (linear programming does not allow viewer control, there is a dominance of advertising based financing of linear broadcast operation, and exposure to pressure by the advertising industry). Second, as the statistics show, despite the steady development of online advertising, linear broadcasting is still the most powerful media triggering most of the complaints.

3. THE STATUS OF ADVERTISING AND MEDIA REGULATION

Advertising and the media will be intertwined forever and advertising will be regulated indirectly through the media for the same period of time. Therefore I realized during my research that although regulation of commercial and editorial contents are different, they hit basically the same target; the media industry.

It is telling that television broadcasters have populous legal departments packed with busy lawyers and the General Counsel of a broadcaster is usually a member of the executive board. Advertising agencies, at the same time, normally survive with a part time outside counsel. As a consequence, it may be true that the agencies (as clients) dictate the business terms but it is the broadcasters' lawyers who dictate the contracts.

4. THE ROLE OF ADVERTISING SELF-REGULATION.

4.1 The role of self-regulation in speech restriction

As shown by the cases of the UK and Germany, the workload of the advertising self-regulatory organizations basically consists of complaints regarding misleading (70%) and offensive commercials (30%). This statistics was the first hint suggesting that my research may in the end would make sense. Setting aside complaints concerning misleading commercials, which is a matter for unfair competition legislation, and where advertising self-

regulation plays a role in the voluntary enforcement, the stats show that advertising self-regulation is dominated by a single aim: to keep the customer satisfied. In this regard my research shows that in practice the main job of advertising self-regulation is to address "soft issues" where the violation offends people without causing actual harm. This speech restriction is a constitutionally suspect area. Regulation of speech regarding these "soft issues" may result in restriction of speech violating the right to freedom of speech. States do not regulate this area, it seems moreover, that they do not prevent self-regulation here. Therefore self-regulation addresses the "soft issues" of "packaging" (i.e. form and language) of commercial messages. The regulatory subjects in the codes of ethics usually appears as "harmful", "offensive", "indecent", "immoral", etc. speech. This kind of speech is hard to regulate. Its boundaries are unclear and depend on the ever changing morals, ethics and customs prevailing in the society at a particular time.

In the practice of the German Werberat, for example, a complainant called for prohibiting television advertisements regarding feminine hygiene in general, on the basis of the basic requirements of the code of ethics regarding decency and moral. The Werberat rejected the complaint arguing that today people openly talk about sex, and menstruation problems are discussed in school education.

This example demonstrates that in theory any complaint may go under a flexibly drafted code (the German code for example provides that "commercial communications must comply with the generally accepted basic values of society and the prevailing standards of decency and morality"), which gives discretion to the self-regulatory organization in speech restrictions.

It seems that not only the customers are satisfied with the self-regulatory restriction of speech on soft issues, but the states too. The state silence regarding the soft issues" signals implied support to self-regulate. In the UK this is topped with opening the doors for administrative

review of the self-regulatory decisions by state courts, which increases accountability of the self-regulator, but lends enforceability to self-regulatory decisions. Moreover, states are not only "silent" in connection with "offensive speech". As seen in the UK Section, the delegation of regulatory power to BCAP in connection with broadcast advertising derives from the Communications Act.

4.2 The other direction: role of private actions counteracting state regulation

As shown in the case study regarding the industry actions against the statutory prohibition of tobacco advertising may serve "liberty" of consumers against paternalistic regulation. I interpreted and introduced the industry lobby against the prohibition of tobacco advertising as a form of self-regulation, since it was a private action having de facto regulatory effect. The tobacco directive case brought up a series of conflicts, where initially the economic interests of the media and tobacco industry prevailed.

Pressure in favor of tobacco advert prohibition	Pressure against tobacco advert prohibition
Eliminating barriers of trade in the internal market (EU level interest)	EU level support of agriculture (high financial support to the tobacco growers)
Public health (national level interest)	National excise tax revenue
	Individual business interests of tobacco growers, producers and the media
	Individual private interests (Smokers' interests to better access to information on tobacco use; viewers' interest in having access to media sponsored by the tobacco industry, etc.)

The successful lobby efforts in delaying the prohibition of tobacco advertising served the interests against speech restriction, the EU dimension of which gave a special twist to the underlying arguments; the proposed EU level speech restriction was principally based on the economic ground of "protecting the internal market", rather than "public health". Therefore in the legal dispute regarding the tobacco advertising prohibition, basically the EU level fundamental freedom of movement of goods clashed with the fundamental right to free speech. In this case, self-regulation (i.e. the industry lobby) supported speech rights against state regulation.

5. WHAT WOULD BE THE WORLD WITH NO ADVERTISING SELF-REGULATION?

I showed in my dissertation that voluntary restriction of speech on the basis of the "offence" argument is the unique premium service rendered by the advertising self-regulation for both of its members and the state. Besides this premium service, self-regulation of course represents the usual advantages attributable to self-regulation (efficiency, cost savings and expertise). So without self-regulation our life on the one hand might be a bit more expensive, but on the other hand the cultural environment would be more interesting, sometimes shocking, and maybe richer in information . So the answer to the question posed in the

introduction: the bill for the efficient advertising self-regulation is paid by the audience, but at least for the moment the price is modest.

6. How does it work? Regulatory capture, offensive speech and the audience opinion poll

6.1 Regulatory capture

The self-regulatory organization decides whether commercial speech is offensive, indecent, immoral, or not. It is hard to define objective criteria for offensiveness or indecency, and in case of commercial advertising they are not defined.[785] This leaves space for discretion by self-regulatory organizations, who, like any other regulator, must rely on their client base in order to maintain their substantive legitimacy. As mentioned below in connection with legitimacy, illegitimate institutions are always exposed to a non-systemic (e.g. economic) force to support their existence. In case of a legitimacy deficit, self-regulatory organizations would be necessarily more exposed to the influence by their own members than a state organ whose mandate is more widely based.[786] This regulatory capture is illustrated in my dissertation by the self-regulation of offensive speech. The purpose of the regulatory speech restriction is to maintain the trust and satisfaction of viewers and consumers in advertising, which furthers the economic interests of advertisers, agencies and the media. This business driven goal influences both the drafting and adjudication of commercial speech restrictions.

6.2 The fuel in the machinery: the consumer complaints mechanism

Monitoring is a core function of advertising self-regulation that is operated through the consumer complaint mechanism. It has three advantages. First, there is no public alternative,

[785] There are no rules, like the one related to the permitted level of horror in the case of "15" rated movies in the UK providing that "Strong threat and menace are permitted unless sadistic or sexualised." See the website of the British Board of Film Classification at http://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202009_5.pdf (Last visited July 14, 2013)

[786] See e.g. Ogus, "Rethinking Self-Regulation." p 98

as maintenance of such a wide-range mechanism is expensive and not reasonable enough to appropriate public funds for it. Second, the advertising industry benefits from it, as it provides constant feedback on advertising. Third, consumer complaint mechanism creates a direct connection between consumers and viewers on the one hand and the advertisers (media) on the other, which is otherwise not available, as national laws normally do not give direct standing for consumers against misleading, offensive, indecent, generally harmful or prohibited advertising. This consumer complaint mechanism is extended to cross-border complaints under the auspices of the EASA, broadening thereby the exposure of commercial speech.

7.A SERENDIPITY; THE PRIVATE CENSORSHIP OF THE MEDIA AS THE REASON FOR SUCCESS OF THE ADVERTISING SELF-REGULATION.

Sometimes unexpected ancillary result of a research (sometimes called serendipity) may be more important than the success of the research itself. (The Viagra, for example, was originally studied to cure high blood pressure.) I consider the recognition of the importance of private censorship of the media over commercial communication as an important serendipity to my research. Considering the fact that both advertising regulation and advertising self-regulation hit the media and not the speaker, this private censorship may be rather considered forced than voluntary, but in any event plays an essential role in the success of advertising self-regulation.

7.1 Serendipity 1: the UK

In the Section regarding the case study of the UK, it is shown that the most important censorial effect over broadcast advertising is the allocation of legal liability for program content to the broadcasters. Unlike the case of editorial content, where the speaker is the media itself, in the case of commercial communication the speaker (i.e. the advertiser) cannot convey his/its message without the media. In fact, the broadcast media, being the ultimately

responsible party for the content, act as a voluntary private censor over the content of commercial messages.

7.2 Serendipity 2: Germany

The German example shows that less media control results in less power for the self-regulator. In Germany there are two self-regulatory organizations. The Wettbewerbszentrale deals with unfair competition based complaints, while the Werberat deals with the "soft issues". Neither of them builds upon the media censorship so much as their colleagues in the UK, and their independent regulatory and adjudication status are not nearly so strong as that of the ASA Broadcast of the UK.

The Wettbewerbszentrale contacts the trader directly in case of a complaint, and if it is not successful, it sues the violating party before the state court for a cease and desist injunction. In 2011, 600 cases ended up before civil court under the UWG. Broadcasters may be subject to the UWG in their capacity as market players and not as media service providers. In other words, they may only be subject to an UWG related Wettbewerbszentrale process as speakers of alleged unfair or misleading commercial communication.

If the Werberat accepts a viewer complaint, it calls the advertiser to stop or modify it, otherwise it

a. publishes the fact that the advertiser violated the code and / or
b. calls the media to refuse the advertising.

The UK advertising self regulatory organizations (ASA) has convenient legal backstops and strong stand alone rule making powers. Under an agreement with the state regulator (OFCOM), the UK self-regulator may even have procedural monopoly in handling complaints. As a consequence, for the purposes of judicial review, the ASA is considered as a government organization, the decision of which is subject to a judicial review by the

Administrative Court. This is not the case in Germany. The Werberat is a private organization, which acts on its own, and no appeal to state courts is possible against its decisions.

8. LEGITIMACY.

Although legitimacy itself does not solve problems with speech restrictions, it is an important indicator of the support of self-regulation by the society (procedural legitimacy) and by the industry (substantive legitimacy). Illegitimate institutions are hard to sustain, and an illegitimate system or organization is always exposed to a non-systemic (e.g. economic) force to support its existence. Tacit or explicit support of illegitimate institutions by the state, therefore, is uncomfortable for the state and existence of such phenomena are indicators of dysfunctions in the society.

It is difficult to assess legitimacy of private actions, and there is no "absolute legitimacy" of self-regulation for two reasons. First, the circle of people concerned by the private measure (the reference base for a democratic assessment) is a moving target; therefore, the demand for the procedural legitimacy is sometimes unclear. This is especially complicated in the case of a cross-border self-regulatory measure. Second, it is impossible to assess the professional quality of a professionally sophisticated institution, therefore, the second best indicator, the participation of stakeholder representatives in the operation, must be used.

In this dissertation I discussed procedural and substantive legitimacy in all my case studies.

My findings are summarized in the chart below.

Institution	Procedural legitimacy	Substantive legitimacy	Legitimacy vs. legal status
The Advertising Standards Authority (Broadcast) and the Broadcast Committee of Advertising Practice of the UK	+ Rule making, monitoring and adjudication powers are delegated by OFCOM on the basis of the Act of Parliament	+ Participation of stakeholder representatives in the decision making	Strong standalone status, equivalent to a government authority. This corresponds to the available procedural and substantive legitimacy
The "Wettbewerbszentrale" (Germany)	+ Monitoring and enforcement powers are based on the Unfair Competition Act	+ Participation of stakeholder representatives in the decision making	Strong status regarding limited powers. This corresponds to the available procedural and substantive legitimacy
The "Werberat" (Germany)	? No delegated power, major informal influence (96% voluntary compliance with Werberat decisions)	+ Participation of stakeholder representatives in the decision making	Strong informal status, limited procedural legitimacy. The question mark suggests that high voluntary compliance supports de facto procedural legitimacy.
The European Advertising Standards Alliance (cross-border)	- No delegated power, no decision making power	not relevant	Not relevant, as the cross-border complaint system is directly arranged by the national SROs, and therefore concerns their legitimacy directly
International lobby measures against the full prohibition of tobacco advertising in Europe	- Major informal influence	+ / - Partly relevant. The effect of lobby measures were mostly due to economic pressure	Strong power, no legitimacy.

Although my research was not broad enough to find clear answers, the above chart at least flags the questions or possible tendencies for further research.

- The legitimacy deficit is not an absolute indicator. Legitimacy of an institution or a measure must be looked at in conjunction with its de facto powers. Legitimacy deficit means, at least in terms of self-regulatory measures, that a tension exists between the level of legitimacy and the de facto powers exercised.
- The procedural and substantive legitimacy blurs in the case of self-regulatory measures, as the stakeholder participation in the decision making (that is the "second best" indicator of substantive legitimacy) may also be an indicator of procedural legitimacy (indicated with the question mark at the Werberat).
- The only case of clear inadequacy between powers and legitimacy was the tobacco lobby measures. Although the lobby effort finally failed, in sum it may be considered successful from the point of view of the lobbyists, taking into account the long legislative delay.

9. CRISIS? WHAT CRISIS? THE STANDARDS FOR COMMERCIAL SPEECH RESTRICTION.

I argue in the dissertation that discretional restriction of speech using the "offence" card is of concern because it violates free speech rights, including the principles of pluralism and the right of the audience to receive information. It is clear, that the self-regulatory codes are drafted vaguely, allowing broad space for discretion. However, looking at the linear broadcast media adverts, my review of the self-regulatory decisions in Germany and the UK do not reveal major departure from the general standards applied for editorial content.

The chart below shows the assumable (and approximate) standards of adjudication and examples in the UK, Germany and in the ECtHR case law.

	Rule	Standard (to the extent possible)	Examples
UK self-regulation	Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.	The starting point is the restriction of offensive and harmful commercial speech. Harm and offence are equally treated. Strict and unconditional restrictions of commercial speech with less consideration of any countervailing interests of the advertisers or the audience.	Sofa Factory case (prohibition for offending religious feelings) Home Test Direct Case (prohibition of mixed speech as scaremongering) My Big Fat Gypsy Wedding (prohibition for offending human dignity)
German self-regulation	Commercial communications must comply with the generally accepted basic values of society and the prevailing standards of decency and morality.	The starting point is the restriction of indecent and immoral commercial speech. Mixed speech enjoys higher protection. Human dignity is the center of protection.	Benetton shock advertising case (Mixed speech, speaker's right upheld) "Laughter rather than hanging out" case – prohibited as offense to religious feelings
ECtHR	Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (...) The exercise of these freedoms (...) may be subject to such (...) restrictions (...) as are prescribed by	The starting point is the freedom of speech. Its restriction is permitted as an exception from the rule. Commercially driven speech does not form a separate category, but the margin of appreciation is higher in case of speech with pure commercial content. Mixed speech enjoys higher protection.	Barthold, Hertel, Stambuk (Mixed speech) Casado coca (pure commercial speech)

	law and are necessary in a democratic society, in the interests of (...)for the protection of health or morals, for the protection of the reputation or rights of others (...)		

10. REMEDIES AGAINST SELF-REGULATION; ACCOUNTABILITY OF SELF-REGULATORY ORGANIZATIONS – PRIVATE AND JUDICIAL REVIEW.

Accountability means control over the self-regulatory organization. Out of the two fora (internal and external control), I discussed the external one in the dissertation. The key issue regarding external remedies against self-regulation is that it is at the junction of public and private law. It is difficult to challenge it on the basis of civil (private) law, as self-regulation is a general measure having regulatory effect. Public law remedies are not available either, as the rule setter is a private body. Restrictions of free speech rights do not raise constitutional problems to the extent that they are based on and remain within the boundaries of the express consent (i.e. may be considered as a contractual or corporate relationship) by the regulated persons. I dealt with self-regulation that is applicable beyond the circle of express consents and affects third parties, too.

The dissertation discussed the various national approaches to advertising self-regulation: in the UK, the self-regulatory authority has been delegated regulatory and adjudication powers under a contractual arrangement, and is considered a government body for the purposes of judicial review. No express delegation was made Germany, where the self-regulatory organization is acting under a general statutory authorization, which widely extends the right of non-governmental organizations to represent consumer complaints in matters of unfair competition.

This latter solution is generally termed constitutionalizing self-regulation[787] or horizontal effect doctrine.

11. SUMMARY OF THE CONCLUSIONS

In my dissertation I showed the operation and ups and downs of advertising self-regulation. It was demonstrated that the premium service rendered by advertising self-regulation is the business driven restriction of commercial speech in the interest of viewer satisfaction. Although the regulatory method is wide and gives space for discretion by the self-regulatory authorities, they do not tend to abuse it. I also showed that the success of advertising self-regulation is due to the multiple layers of private censors over content of commercial speech, which is the result of the unique regulatory technique of commercial communication, which targets the media rather than the speakers directly. As to legitimacy of self-regulation it was revealed that there is no "absolute legitimacy" in the case of self-regulation, and the legitimacy deficit must be discussed in terms of the level of legitimacy and the de facto powers exercised. Finally the unique nature of self-regulation was discussed, as a phenomenon situated at the junction of private and public law, and that as a result a sort of legal metamorphosis is necessary for remedies: constitutionalization of private law or privatization of fundamental rights.

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