30th EPRA Meeting (Dresden, Oct. 15-16, 2009)

Working Group 1 on « Political Advertising »

1. Objectives

- The case-law of the ECrtHR can be summed up in the following proposition: « *small, powerless actors deserve to have their voice heard on television whenever they wish to partake in a debate of general interest* ». While the legal consequences of the European Court's case-law are in themselves a relevant topic for the working group, I suggest to widen the discussions to the issue raised in the one-sentence summary above: if freedom of speech law demands that every (powerless) voice be heard on television, what regulatory, self-regulatory or legal initiatives are most likely to ensure the sort of high-quality participative democratic debate required by the ECrtHR? In this general framework, political advertising (in its largest meaning) is but one of many possible paths (allocating free airtime, or controlling governmentally-funded communication, are examples of other possibilities).

- The objectives of the WG would then be (1) to gather agreement on the question of whether television (still) requires a specific regulation that differs from other mass media (radio, written press) and (2) to sketch a table of efficient means to reach the objective of giving small actors a fair airtime or coverage when controversies of general interest are at stake.

2. Suggested topics for discussion

A.- Analysis & Consequences of the TV Vest case

- What are the legal consequences of the decision of the ECrtHR in the case of *TV Vest & Rogaland PensjonistPartiet v. Norway* (Dec. 11, 2008) ?
- If we compare the Norwegian case to other relevant decisions (*VgT*…, *Murphy*, *Appleby*, and other cases), what are the decisive factors for the Court to conclude to a violation of Art. 10 of the ECHR ?
- If a blanket ban on political advertising is no more compatible with Art. 10 ECHR, what are the means to apply a more nuanced, conditional, ban on political advertising ?
- Is a blanket ban on political ads still compatible with Art. 10 ECHR when television channels provide adequate coverage of small parties' political programmes before an election or of small actors' views on controversies of general interest?

B.- Political advertising vs. governmental communication: boundaries & control

- If political advertising needs to be controlled or banned, do we need to control governmentally-funded broadcast speech ?
- How should we then draw the line between governmental communication on a topic of general interest and political advertising ?

C.- Practical means to give small actors a fair airtime/coverage

- What are the most efficient means for television channels to provide adequate coverage of small political parties' programs or small actors' views when controversies of general interest are at stake?

D.- Television as a specific media requiring specific regulation?

- Does television require a regulation of its own that may differ from legislation applicable to other mass media (radio and written press, Internet)?

3. Overview of relevant case-law of the European Court of Human Rights

1. One category of speech receives the highest degree of protection under European free speech law : whenever the contentious message can be considered « *political speech* », « *speech on questions of public interest* » or a contribution to a « *public debate on a matter of general concern* », there will be « *very little scope* » for restrictions. Political advertising falls in this category. It needs to be understood in a very broad sense. In *Verein gegen Tierfabriken*, for instance, the speech at stake was a television commercial[1] about battery pig-farming: "*as it related to consumer health and to animal and environmental protection, it was undeniably in the public interest*"[2].

2. Classically, a strong guarantee under freedom of expression means that State authorities are not allowed to impose sanctions on journalists or generally any person exercising her right to speak freely. Cases related to political speech deal for instance with such issues as the right to « *have recourse to a degree of exaggeration or even provocation* »[3] or the limits of acceptable criticism for public figures (politicians for instance). The Court reaffirms constantly the general principle that « *there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest* », even if the judges do not always apply it with satisfying consistence[4].

3. But in its first *Verein gegen Tierfabriken(VGT) v. Switzerland* judgment, in 2001, the Court opened an original perspective when it held that the refusal to broadcast a TV commercial through which one association meant to address an issue of general interest caused a breach of Art. 10 ECHR[5]. The Swiss Commercial Television Company (*AG für das Werbefernsehen*, now *Publisuisse*) responsible for television advertising had referred to a legal prohibition of political advertising to explain its refusal. However, the Court observed that even if it could not « *exclude that a prohibition of "political advertising"* (could) *be compatible with the requirements of Article 10 of the Convention in certain situations* », « *all the applicant association intended to do with its commercial was to participate in an ongoing general debate on animal protection and the rearing of animals* »[6] and the 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*. »[7] Looking for the possible consequences of that judgment, one could only conclude that it seemed that Art. 10 ECHR now required a positive intervention

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[1] « *In response to various advertisements produced by the meat industry, the applicant association made a television commercial lasting fifty-five seconds, consisting of two scenes.*
The first scene showed a sow building a shelter for her piglets in the forest. With soft music playing in the background, the voiceover referred, among other things, to the pigs' sense of family. The second scene showed a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The voiceover compared the conditions in which pigs were reared to concentration camps, and added that the animals were pumped full of medicines. The advertisement concluded with the exhortation: "Eat less meat, for the sake of your health, the animals and the environment!" (ECrtHR, *Verein gegen Tierfabriken n. 2*, 30 June 2009, gr. ch., § 13)

[2] ECrtHR, *Verein*…, § 92.

[3] The commercial made by the Verein gegen Tierfabriken clearly made use of that right…

[4] See for instance ECrtHR, *Lindon, Otchakovsky-Laurens and July v. France*, gr. ch., 22 Oct. 2007 (see http://opiniondissidente.org/spip.php?article60 (in French) for a quick summary of the case) ; *Stoll v. Switzerland*, 10 Dec. 2007, gr. ch.

[5] See http://opiniondissidente.org/spip.php?article3 for a detailed analysis (in French).

[6] § 75.

[7] § 77.

from the State to implement something very similar to a right to broadcast through advertising space.

4. Even if the *Appleby* case does not directly relate to media, it deserves to be mentioned here to allow comparison[8]. In 2003, the Court had to decide whether Art. 10 entailed the right to access a privately-owned mall for expressive purposes. It held that « *that provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights.* »[9] Since applicants had been able to resort to other means to communicate their message to the public (they distributed leaflets in the old town centre), it was not necessary for them to have access to the privately-owned new town centre (mall and public offices). In *VgT*, the fact that the applicant could have used other means of communication than national television was of no visible influence on the courts' decision.

5. The same year, an applicant unsuccessfully tried to rely on the first *VgT* judgment. Noting that « *a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions* », the Court validated a prohibition of religious advertising in broadcast media[10].

6. In its recent *TV Vest* judgment[11], the Court found that a blanket prohibition on television political advertising (political advertising on other medias was allowed, as in the *VgT* case) caused a breach of Art. 10 ECHR when applied to a small political party that received no coverage during the electoral campaign. The Court observed that the applicant party, just like the applicant association in the Swiss case, did not fall « *within the category of parties or groups that were the primary targets of the disputed prohibition, namely those which because of their relative financial strength might have obtained an unfair advantage over those less endowed by being able to spend most on broadcast advertising.* »[12] Political advertising (in both

[8] To put it briefly: the case concerns a « privately-owned public space », and mass media can themselves generally be considered as such.
[9] ECrtHR, *Appleby and others v. United Kingdom*, 6 May 2003.
[10] ECrtHR, *Murphy v. Ireland*, 10 July 2003.
[11] ECrtHR, *TV Vest AS & Rogaland Pensjonist Parti v. Norway*, 11 Dec. 2008.
[12] Interestingly enough, the Court approves of the reasons that justify the ban : « *the Court notes that the rationale for the statutory prohibition of broadcasting of political advertising through television was, as stated by the Supreme Court, the assumption that allowing the use of such a form and medium of expression was likely to reduce the quality of political debate generally. In this way complex issues might easily be distorted and groups that were financially powerful would get greater opportunities for marketing their opinions than those that were not. Pluralism and quality were central considerations, as was the fact that it was the legislator who had given the ramification in question for the democratic processes, the legislator being better placed than any other State organs in assessing how best to achieve those objectives. The Government pointed out that the ban had been limited to political advertising on television due to the powerful and pervasive impact of this type of medium. Moreover, the prohibition had contributed to limiting election campaigns costs, to reducing participants' donor dependence and ensuring a level playing field in elections. It was aimed at supporting the integrity of democratic processes, to obtain a fair framework for political and public debate and to avoid that those who were well endowed obtained an undesirable advantage through the possibility of*

cases) was the only way for the applicants to get their message across the public through television.

7. In 2001, the *Verein gegen Tierfabriken (VgT)* had returned home from Strasbourg with a victory, but only to face a new refusal to broadcast their commercial. Consequently, they went on a new trip to France and their second application to the ECrtHR was again met with success. After drawing inspiration from EPRA reports in *TV Vest*, the Court has again shown consideration for EPRA by giving it decision in due time for this working group[13]. In this case, the Court had to « *ascertain whether, in view of the importance of the execution of its judgments in the Convention system and the applicable principles, the respondent State had a positive obligation to take the necessary measures to allow the television commercial in issue to be broadcast following the Court's finding of a violation of Article 10. In determining whether such an obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual*. »[14] The judges reiterate that « *the interference in issue was not necessary in a democratic society, among other reasons because the authorities had not demonstrated in a relevant and sufficient manner why the grounds generally advanced in support of the prohibition of "political" advertising could serve to justify the interference in the particular circumstances of the case.* » They observe that national authorities (in this case, the Federal Court) decided in the place of the applicant whether or not the broadcast of the commercial would still be relevant years after its initial refusal, and that there were no indication that the public debate on battery farming had changed or become less topical since 1994. The Court has thus confirmed its initial discovery that some right to use the media as a public forum is inherent to Art. 10 ECHR.

8. While this right of access has been, in the cases submitted to the Court, limited to questions relating to advertising space, there are of course other means for citizens to take an active part in public controversies. Another issue of importance has been left open by the Court in the last (to date) episode of the saga, when it rejected *« the argument that the applicant association had alternative options for broadcasting the commercial in issue, for example via private and regional channels, since that would require third parties, or the association itself, to assume a responsibility that falls to the national authorities alone*: *that of taking appropriate action on a judgment of the Court.* » Does that mean that the right to access (through advertising space) only concerns public television?

4. Speakers

- Norwegian Media Authority : the TV Vest case
- Catalan CAC: drawing the lines between political speech, government-funded communication and political advertising.

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using the most potent and pervasive medium. Also, it helped to preserve the political impartiality of television broadcasting. These are undoubtedly relevant reasons. »

[13] The grand Chamber of the Court gave its judgment on June 2009, 30.

[14] § 91