Nr. 7 Sekmadienis Ltd./Litouwen

Europees Hof voor de Rechten van de Mens 30 januari 2018 (Application no. 69317/14)

Case of Sekmadienis Ltd. *v.* Lithuania

(…)

"THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company is a limited liability company established under Lithuanian law with its registered office in Vilnius.

A. Advertisements run by the applicant company

6. In September and October 2012, for about two weeks, the applicant company ran an advertising campaign introducing a clothing line by designer R.K. The campaign featured three visual advertisements which were displayed on twenty advertising hoardings in public areas in Vilnius and on R.K.'s website (hereinafter "the advertisements").

7. The first of the three advertisements showed a young man with long hair, a headband, a halo around his head and several tattoos wearing a pair of jeans. A caption at the bottom of the image read "Jesus, what trousers!" (Jėzau, kokios tavo kelnės!).

8. The second advertisement showed a young woman wearing a white dress and a headdress with white and red flowers in it. She had a halo around her head and was holding a string of beads. The caption at the bottom of the image read "Dear Mary, what a dress!" (Marija brangi, kokia suknelė!).

9. The third advertisement showed the man and the woman together, wearing the same clothes and accessories as in the previous advertisements. The man was reclining and the woman was standing next to him with one hand placed on his head and the other on his shoulder. The caption at the bottom of the image read "Jesus [and] Mary, what are you wearing!" (Jėzau Marija, kuo čia apsirengę!).

B. Proceedings before the State Consumer Rights Protection Authority

10. On 28 September and 1 October 2012 the State Consumer Rights Protection Authority (Valstybinė vartotojų teisių apsaugos tarnyba – hereinafter "the SCRPA") received four individual complaints by telephone concerning the advertisements. The individuals complained that the advertisements were unethical and offensive to religious people.

11. After receiving those complaints, the SCRPA asked the Lithuanian Advertising Agency (Lietuvos reklamos biuras – hereinafter "the LAA"), a self-regulation body composed of advertising specialists, to give an opinion on the advertisements. On 2 October 2012 a seven-member commission of the LAA decided by five votes to two that the advertisements breached the General Principles and Articles 1 (Decency) and 13 (Religion) of the Code of Advertising Ethics (see paragraph 37 below). The LAA commission held:

> "In the commission's view, the advertisements may lead to dissatisfaction of religious people. [The advertisements might be seen as] humiliating and degrading people because of their faith, convictions or opinions. Religious people always react very sensitively to any use of religious symbols or religious personalities in advertising, so we suggest avoiding the possibility of offending their dignity.
>
> In this case the game has gone too far. (Šiuo atveju užsižaista per daug.)
>
> Humour is understandable but it can really offend religious people. We suggest finding other characters for communicating the uniqueness of the product.
>
> …
>
> It is recommended … to have regard for the feelings of religious people, to take a more responsible attitude towards religion-related topics in advertising, and to stop the dissemination of the advertisements or change the characters depicted therein."

12. On 8 October 2012 the SCRPA received a complaint from a law firm in Kaunas concerning the advertisements. The complaint stated that the advertisements degraded religious symbols, offended the feelings of religious people and created "a danger that society might lose the necessary sense of sacredness and basic respect for spirituality" (kyla pavojus visuomenei nustoti būtinos sakralumo pajautos ir elementarios pagarbos dvasingumui). It asked the SCRPA to fine the applicant company and to order it to remove the advertisements as being contrary to public order and public morals.

13. The SCRPA forwarded the aforementioned complaints and the LAA opinion (see paragraphs 10-12 above) to the State Inspectorate of Non-Food Products (Valstybinė ne maisto produktų inspekcija – hereinafter "the Inspectorate"). On 9 October 2012 the Inspectorate informed the applicant company that the advertisements were possibly in violation of Article 4 § 2 (1) of the Law on Advertising as being contrary to public morals (see paragraph 34 below). It stated:

> "The Inspectorate, having examined the material presented to it, is of the view that the advertisements use religious symbols in a disrespectful and inappropriate manner. Religious people always react very sensitively to any use of religious symbols or religious personalities in advertising. The use of religious symbols for superficial purposes may offend religious people. Advertisements must not include statements or visuals which are offensive to religious feelings or show disrespect for religious people."

14. The applicant company submitted written explanations to the Inspectorate. It firstly submitted that in the advertisements the word "Jesus" was used not as an address to a religious personality but as an emotional interjection which was common in spoken Lithuanian, similar to "oh my God!", "oh Lord!", "God forbid!" (Dievuliau, Viešpatie, gink Dieve) and many others. The applicant company argued that, because of its common use to express one's emotions, that word had lost its exclusively religious significance. It further submitted that the people depicted in the advertisements could not be unambiguously considered as resembling religious figures, but even if they were, that depiction was aesthetically pleasant and not disrespectful, unlike various kitschy and low-quality religious items typically sold in markets. It further contended that, in the absence of a State religion in Lithuania, the interests of one group – practising Catholics – could not be equated to those of the entire society. It lastly submitted that the LAA opinion had been based on emotional assessment but not on any proven facts, as demonstrated in particular by such phrases as "religious people always react very sensitively to any use of religious symbols or religious personalities in advertising" or "the game has gone too far" (see paragraph 11 above). The applicant company therefore argued that the advertisements had not breached any law and that holding to the contrary would be detrimental to the right to freedom of thought and expression, protected by the Constitution.

15. On 27 November 2012 the Inspectorate drew up a report of a violation of the Law on Advertising against the applicant company. The report essentially repeated the contents of the Inspectorate's previous letter to the applicant company (see paragraph 13 above), adding that "advertisements of such nature offend[ed] religious feelings" and "the basic respect for spirituality [was] disappearing" (nelieka elementarios pagarbos dvasingumui). It was forwarded to the SCRPA.

16. On 29 January 2013 the SCRPA asked the Lithuanian Bishops Conference (Lietuvos vyskupų konferencija), which is the territorial authority of the Roman Catholic Church in Lithuania, for an opinion on the advertisements. On 5 March 2013 the latter submitted the following opinion:

> "Religious symbols are not just simple signs, pictures or logos. In the Christian tradition, a religious symbol is a visible sign representing the invisible sacred reality.
>
> The advertisements … make both visual and written references to religious sacred objects, such as a rosary, the names of Jesus and Mary, and the symbol of the Pietà.

> Christ and Mary, as symbols of faith, represent certain moral values and embody ethical perfection, and for that they are examples of appropriate behaviour and desirable life for the faithful. The inappropriate depiction of Christ and Mary in the advertisements encourages a frivolous attitude towards the ethical values of the Christian faith, and promotes a lifestyle which is incompatible with the principles of a religious person. The persons of Christ and Mary are thereby degraded as symbols of the sacredness of the Christian faith. For that reason, such depiction offends the feelings of religious people. The degrading and distortion of religious symbols by purposely changing their meaning is contrary to public morals, especially when it is done in pursuit of commercial gain, and must therefore not be allowed, in line with Article 4 of the Law on Advertising."

17. On 21 March 2013 the SCRPA held a meeting in which representatives of the applicant company, the State Inspectorate of Non-Food Products and the Lithuanian Bishops Conference participated. A representative of the Bishops Conference repeated its previous position (see paragraph 16 above) and stated that it had received complaints from about a hundred religious individuals concerning the advertisements. Representatives of the applicant company also expressed essentially the same position as in their previous submissions to the Inspectorate (see paragraph 14 above). They in particular argued that the people depicted in the advertisements differed in several aspects from the depiction of Jesus and Mary in religious art, and that an educated and cosmopolitan society would not equate every picture with such art. They further submitted that the advertisements had relied on wordplay and they had been meant to be funny but not to offend anyone.

18. On the same day the SCRPA adopted a decision against the applicant company concerning a violation of Article 4 § 2 (1) of the Law on Advertising (see paragraph 34 below). It noted that the concept of "public morals" was not defined in any legal instruments, but it necessarily implied respect for the rights and interests of others. It also stated that "advertising must be tasteful and correspond to the highest moral standards" and that "advertising which might humiliate or degrade people because of their faith, convictions or opinions must be considered immoral and unacceptable". The SCRPA considered that "the elements of the advertisements taken together – the persons, symbols and their positioning – would create an impression for the average consumer that the depicted persons and objects were related to religious symbols". It further stated:

> "When determining whether the use of religious symbols in the present case was contrary to public morals, [the SCRPA] notes that religious people react very sensitively to any use of religious symbols or religious persons in advertising, especially when the chosen form of artistic expression is not acceptable to society – for example, the bodies of Jesus and Mary are adorned with tattoos. [The SCRPA] also agrees with the Lithuanian Bishops Conference that the use of religious symbols for commercial gain in the present case exceeds the limits of tolerance. [The SCRPA] considers that using the name of God for commercial purpose is not in line with public morals. With that in mind, [the SCRPA] notes that the inappropriate depiction of Christ and Mary in the advertisements in question encourages a frivolous attitude towards the ethical values of the Christian faith, promotes a lifestyle which is incompatible with the principles of a religious person, and that way the persons of Christ and Mary are degraded as the sacred symbols of Christianity ...
>
> In addition, the inappropriate depiction of Christ and Mary in the advertisements was not only likely to offend the feelings of religious people but actually offended them because [the SCRPA] has received complaints about them ... and the Lithuanian Bishops Conference has received a letter expressing dissatisfaction of the [nearly a hundred] religious individuals, which demonstrates that the feelings of religious people have been offended.
>
> It must be emphasised that respect for religion is undoubtedly a moral value. Accordingly, disrespecting religion breaches public morals."

19. Accordingly, the SCRPA concluded that the advertisements had breached Article 4 § 2 (1) of the Law on Advertising (see paragraph 34 below). When determining the penalty, it took into account several circumstances: the advertisements had been displayed in public places and must have reached a wide audience, and there had been complaints about them; at the same time, the advertisements had only been displayed for a few weeks and only in the city of Vilnius; the applicant company had stopped displaying them after it had been warned by the authorities, and it had cooperated with the SCRPA; it had been the first such violation committed by the applicant company. As a result, the applicant company was given a fine of 2,000 Lithuanian litai (LTL – approximately 580 euros (EUR); see paragraph 36 below).

C. Proceedings before courts

1. Vilnius Regional Administrative Court

20. The applicant company brought a complaint concerning the SCRPA's decision (see paragraphs 18 and 19 above) before an administrative court. It argued that the persons and objects shown in the advertisements were not related to religious symbols: neither the characters themselves nor their clothes, positions or facial expressions were similar to the depiction of Jesus Christ and the Virgin Mary in religious art; the only physical similarity was the long hair of the man but every man with long hair could not be presumed to be a depiction of Jesus. The applicant company also submitted that the expressions "Jesus!", "Dear Mary!" and "Jesus [and] Mary!" were widely used in spoken language as emotional interjections, and the advertisements had used them for the purpose of wordplay, not as a reference to religion.

21. The applicant company further argued that the Law on Advertising did not explicitly prohibit all use of religious symbols in advertising but only when such use may offend the sentiments of others or incite hatred (see paragraph 34 below). It submitted that the advertisements were not offensive or disrespectful in any way, and that the SCRPA had not justified why they "exceeded the limits of tolerance" or why "using the name of God for commercial purposes [was] not in line with public morals" (see paragraph 18 above). The applicant company also submitted that complaints by a hundred individuals (see paragraphs 10, 12 and 17 above) were not sufficient to find that the majority of religious people in Lithuania had been offended by the advertisements.

22. Lastly, the applicant company submitted that the advertisements were a product of artistic activity and were therefore protected freedom of expression, guaranteed by the Constitution.

23. On 12 November 2013 the Vilnius Regional Administrative Court dismissed the applicant company's complaint. The court considered that the SCRPA had correctly assessed all the relevant circumstances (see paragraphs 18 and 19 above), and concluded that "the form of advertising used by [the applicant company was] prohibited because it distort[ed] the main purpose of a religious symbol (an object of religion) respected by a religious community – that purpose being to refer to a deity or to holiness".

2. Supreme Administrative Court

24. The applicant company appealed against that decision. In its appeal it repeated the arguments raised in its initial complaint (see paragraphs 20-22 above). It also provided four examples of other advertisements for various products which had depicted religious figures, religious symbols and Catholic priests – one of those was an advertisement for beer depicting a wooden figure of Jesus, common in the Lithuanian folk art (Rūpintojėlis). The applicant company argued that such examples strengthened its argument that the use of religious symbols in advertising was not prohibited as such, unless it was offensive or hateful – and it submitted that its advertisements did not fall into either of those categories, as they did not include any slogans or visuals directly degrading religious people or inciting religious hatred.

25. On 25 April 2014 the Supreme Administrative Court dismissed the applicant company's appeal. The court held:

> "The entirety of the evidence in the present case gives grounds to conclude that the advertisements displayed by [the applicant company] are clearly contrary to public morals, because religion, as a certain type of world view, unavoidably contributes to the moral development of the society; symbols of a religious nature occupy a significant place in the system of spiritual values of individuals and the society, and their inappropriate use demeans them [and] is contrary to universally accepted moral and ethical norms. The form of advertising [chosen by the applicant company] does

not conform to good morals and to the principles of respecting the values of the Christian faith and its sacred symbols, and [the advertisements] therefore breach Article 4 § 2 (1) of the Law on Advertising.

...

In its appeal [the applicant company] alleges that there are no objective grounds to find that the advertisements offended the feelings of religious people ... It must be noted that the case file includes a letter by almost one hundred religious individuals, sent to the Lithuanian Bishops Conference, expressing dissatisfaction with the advertisements in question. This refutes [the applicant company's] arguments and they are thereby dismissed as unfounded."

3. Application by the President of the Supreme Administrative Court to reopen the proceedings

26. On 21 August 2014 the President of the Supreme Administrative Court asked that court to examine whether there were grounds for reopening the proceedings in the applicant company's case (see paragraphs 40 and 41 below). He considered that it was necessary to assess whether the decision of 25 April 2014 (see paragraph 25 above) had adequately addressed the applicant company's arguments related to the permissible restrictions of freedom of expression, guaranteed by the Constitution and various international legal instruments, and whether it had properly examined the necessity and proportionality of restricting that freedom, in line with the relevant case-law of the European Court of Human Rights. The President submitted that if any such shortcomings were identified, that would give grounds to believe that the Supreme Administrative Court had incorrectly applied the substantive law and that its case-law was developing in an erroneous direction.

27. On 20 November 2014 a different panel of the Supreme Administrative Court refused to reopen the proceedings in the applicant company's case. It emphasised that proceedings which had been concluded by a final court decision could be reopened only when there had been a manifest error in the interpretation or application of the law, and not when it was merely possible to interpret that law differently.

28. The court observed that the freedom of expression, guaranteed by the Constitution, was not absolute and could be restricted (see paragraphs 31 and 42-44 below), and one of the permissible restrictions was provided in Article 4 § 2 (1) of the Law on Advertising (see paragraph 34 below). It stated that the decision of 25 April 2014 (see paragraph 25 above) had not denied the applicant company's right to freedom of expression, but it had sought to balance that right against public morals, and the latter had been given priority. The court considered that the decision of 25 April 2014 had not denied the essence of the applicant company's right and had not been manifestly disproportionate because the fine had been close to the minimum provided in law (see paragraph 36 below), so there were no grounds to find that the law had been interpreted or applied incorrectly.

29. The court further observed that the advertisements had had a purely commercial purpose and had not been intended to contribute to any public debate concerning religion or religious symbols. Referring to the judgments of the European Court of Human Rights in Müller and Others v. Switzerland (24 May 1988, § 35, Series A no. 133) and Otto-Preminger-Institut v. Austria (20 September 1994, § 50, Series A no. 295-A), it stated that it was not possible to discern throughout Europe a uniform conception of the significance of religion in society and that even within a single country such conceptions might vary; for that reason it was not possible to arrive at a comprehensive definition of what constituted a permissible interference with the exercise of the right to freedom of expression where such expression was directed against the religious feelings of others, and a certain margin of appreciation was therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference. The Supreme Administrative Court considered that the panel which had adopted the decision of 25 April 2014 had taken into account the fact that Catholicism was the religion of a very big part of the Lithuanian population and that the use of its most important symbols in the advertisements, which distorted their meaning, offended the feelings of religious people.

30. The Supreme Administrative Court thus concluded that the decision of 25 April 2014 had adequately justified the restriction of the applicant company's freedom of expression and had correctly applied Article 4 § 2 (1) of the Law on Advertising.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional and statutory provisions

1. Constitution of the Republic of Lithuania

31. The relevant provisions of the Constitution read:

Article 25

"Everyone shall have the right to have his or her own convictions and freely express them.

No one must be hindered from seeking, receiving, or imparting information and ideas.

The freedom to express convictions, as well as to receive and impart information, may not be limited otherwise than by law when this is necessary to protect human health, honour or dignity, private life, or morals, or to defend the constitutional order.

The freedom to express convictions and to impart information shall be incompatible with criminal actions – incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation.

..."

Article 26

"Freedom of thought, conscience, and religion shall not be restricted.

Everyone shall have the right to freely choose any religion or belief and, either alone or with others, in private or in public, to profess his or her religion, to perform religious ceremonies, as well as to practise and teach his or her belief.

No one may compel another person or be compelled to choose or profess any religion or belief.

The freedom to profess and spread religion or belief may not be limited otherwise than by law and only when this is necessary to guarantee the security of society, public order, the health or morals of people, or other basic rights or freedoms of the person.

..."

Article 27

"Convictions, practised religion, or belief may not serve as a justification for a crime or failure to observe laws."

Article 28

"While implementing his or her rights and exercising his or her freedoms, everyone must observe the Constitution and laws of the Republic of Lithuania and must not restrict the rights and freedoms of other people."

Article 43

"The State shall recognise the churches and religious organisations that are traditional in Lithuania; other churches and religious organisations shall be recognised provided that they have support in society, and their teaching and practices are not in conflict with the law and public morals.

...

There shall be no State religion in Lithuania."

2. Law on Advertising

32. Article 2 § 8 of the Law on Advertising defines advertising as information, transmitted in any form and through any means, which is related to economic, commercial, financial or professional activity and encourages people to obtain goods or use services.

33. Article 3 (Principles of advertising) provides that advertising must be decent, accurate and clearly recognisable.

34. From 1 January 2001 until 1 August 2013, Article 4 § 2 (General requirements for advertising) provided:

> "2. Advertising shall be banned if:
> 1) it violates public morals;
> 2) it degrades human honour and dignity;
> 3) it incites national, racial, religious, gender-based or social hatred or discrimination, or if it defames or spreads disinformation;
> 4) it promotes force or aggression, or attempts to cause panic;
> 5) it promotes behaviour which presents a threat to health, security, and environment;
> 6) it abuses superstitions, people's trust, their lack of experience or knowledge;
> 7) without a person's consent it mentions his or her first and last name, opinion, information about his or her private or social life, or property, or uses his or her picture;
> 8) it uses special means and technologies affecting the subconscious;
> 9) it violates intellectual property rights to creations of literature, art, science, or related rights."

35. Article 4 § 2 was amended on 16 May 2013 and the new version entered into force on 1 August 2013. It remained essentially the same as before (see paragraph 34 above) but a sub-paragraph 10 was added:

> "10) it expresses contempt for religious symbols of religious communities registered in Lithuania."

36. At the material time, Article 22 § 5 provided that breaches of Article 4 of the Law on Advertising were punishable by a fine from LTL 1,000 to LTL 30,000 (approximately EUR 290 to EUR 8,690). In cases where the breach was of minor importance and had not caused significant damage to the interests protected by the Law on Advertising, the SCRPA could, relying on the principles of equity and reasonableness, give a warning and not a fine.

3. Code of Advertising Ethics

37. The Code of Advertising Ethics, which was adopted by the Lithuanian Advertising Agency (a self-governing body composed of advertising specialists) and is not legally binding, provides in its relevant parts:

General principles

> "Advertising must be lawful, accurate and fair.
>
> Advertising must not breach or ignore laws which are in force.
>
> Advertising must not include statements or visuals degrading human dignity, offending religious feelings or political convictions, or promoting behaviour which is dangerous to health and/or the environment.
>
> All advertising must be prepared with social responsibility and conform to the general requirements of fair competition, applicable to any business.
>
> Advertising must not mislead or harm the consumer or abuse consumers' trust or their lack of experience and/or knowledge. Advertising must not erode consumers' trust in advertising in general.
>
> Advertising must be clearly recognisable and distinguished from other information."

1. Decency

> "Advertising must not breach society's ethical norms. No advertising may breach the requirements of good taste, decency and respect for human dignity. Advertising is not contrary to this Code if it appears offensive to some people. However, advertisers are recommended to avoid careless words or visuals which may offend many people.
> Some advertisements, although conforming to the usual ethical norms, are considered unpleasant because they express a viewpoint on issues on which society's opinion is not uniform. In such instances the advertiser must have regard for social sensitivity because otherwise he or she risks losing his or her good reputation, and the advertised product may therefore suffer. The advertisement itself thereby loses its usefulness and importance."

13. Religion

> "Advertising must not offend the feelings of religious people and/or discredit philosophical convictions."

4. Law on Religious Communities and Associations

38. Article 5 of the Law on Religious Communities and Associations provides that the State recognises nine traditional religious communities and associations present in Lithuania which form part of its historic, spiritual and social heritage: Roman Catholic, Greek Catholic, Evangelical Lutheran, Evangelical Reformed, Russian Orthodox, Old Believers, Judaist, Sunni Muslim and Karaite.

39. Article 6 provides that other (non-traditional) religious communities can be recognised as forming part of the historic, spiritual and social heritage of Lithuania if they enjoy public support and if their teachings and rites do not violate the law and public morals. Such recognition means that the State supports the spiritual, cultural and social heritage of these religions. Religious communities can request recognition twenty-five years after their initial registration in Lithuania, and the recognition is granted by the Parliament. (Since 2001, the Parliament has granted recognition to four religious communities: the Evangelical Baptist Church, the Seventh-day Adventist Church, the Evangelical Church of Lithuania and the New Apostolic Church.)

5. Law on Administrative Proceedings

40. At the material time, Article 153 § 2 (10) and (12) of the Law on Administrative Proceedings provided that court proceedings which had been concluded with a final court decision could be reopened when, inter alia, there was demonstrable evidence that there had been a grave error in the application of substantive legal norms which might have led to the adoption of an unlawful decision, or when it was necessary to ensure the uniform development of the case-law of the administrative courts.

41. At the material time, Article 154 § 2 of the Law on Administrative Proceedings provided that the President of the Supreme Administrative Court could, in exceptional situations, submit a suggestion to reopen proceedings, at the request of the president of a regional administrative court or upon the receipt of information that there might have been grounds for reopening.

B. Rulings of the Constitutional Court

42. In its ruling of 20 April 1995, the Constitutional Court held:

> "One of the fundamental human rights is the right to have convictions and freely express them. The possibility for every human being to formulate freely his or her own opinion and views, as well as freely disseminate them is the indispensable condition for the creation and maintenance of democracy. Laws of a democratic State thus consolidate and protect the subjective right of a human being to have and freely express his or her convictions. Such laws also consolidate freedom of information as the objective public need … Freedom of information is not absolute or encompassing everything since, while using it, one comes upon such requirements which are necessary in a democratic society for protecting the constitutional order and human rights and freedoms. Therefore, limitations on freedom of information may be established …"

43. In its ruling of 13 February 1997, the Constitutional Court held:

> "Conflicts and contradictions sometimes arise between the rights and freedoms of individuals on the one hand and the interests of the society on the other. In a democratic society such contradictions are solved by balancing different interests and seeking not to

upset this balance. One of the ways to balance different interests is by limiting the rights and freedoms of individuals. The Convention for the Protection of Human Rights and Fundamental Freedoms provides for such a possibility. According to the Convention and the case-law of the European Court of Human Rights, such limitations are justified if … they are lawful and … necessary in a democratic society. The requirement of lawfulness means that the limitations have to be set only by means of a law that is publicly declared; the provisions of the law must be formulated clearly enough. When defining in law the limitations on individual rights, it is necessary to take account of the purpose and meaning of a corresponding right (or freedom) and the conditions of its limitation established in the Constitution. As to whether a concrete limitation is necessary in a democratic society, firstly, one must find out the aims of the limitation, and, secondly, find out whether the limitation is proportionate to the legitimate aim sought.

It is possible [that limiting individual rights will be necessary] in order to avoid collision with other fundamental rights. In such cases, the validity of the limitations should be assessed with regard to the criteria of common sense and evident necessity. It is also important to note that a conflict often arises between essentially equivalent constitutional legal values. Therefore, in such cases, limitations should not considerably upset the balance between them."

44. In its ruling of 10 March 1998, the Constitutional Court held:

"Freedom of expression, as well as freedom of information is not absolute. In that connection, Article 25 § 3 of the Constitution provides that the freedom to express convictions, as well as to obtain and disseminate information, may not be limited in any way other than as established by law, when it is necessary for the safeguard of the health, honour and dignity, private life, or morals of a person, or for the protection of the constitutional order.

Thus, it is established in the aforementioned constitutional provision that any limitation on the freedom of expression and information must always be conceived as a measure of exceptional nature. The exceptional nature of the limitation means that one may not interpret the constitutionally established possible grounds for limitation by expanding them. The necessity criterion as consolidated therein presupposes that in every instance the nature and extent of the limitation must be in conformity with the objective sought (requirement for a balance)."

45. In its ruling of 13 June 2000, the Constitutional Court held:

"One of the fundamental individual freedoms is entrenched in Article 26 § 1 of the Constitution: freedom of thought, conscience and religion shall not be restricted. This freedom guarantees an opportunity for people holding various views to live in an open, just and harmonious civil society. Not only is this freedom a self-contained value of democracy but also an important guarantee that the other constitutional human rights and freedoms would be implemented in a fully-fledged manner.

Interpreting the provisions of Article 26 of the Constitution in a systemic manner, it should be noted that the freedom of thought, conscience and religion is inseparable from the other human rights and freedoms entrenched in the Constitution: the right to have one's own convictions and freely express them, freedom to seek, obtain and disseminate information and ideas (Article 25 §§ 1 and 2), … freedom of culture, science, research and teaching (Article 42 § 1), as well as the other human rights and freedoms enshrined in the Constitution.

Freedom of thought, conscience and religion is also inseparable from the principles established in the Constitution: the equality of persons, the prohibition on granting privileges, non-discrimination (Article 29 §§ 1 and 2), … the secularity of State and municipal establishments of teaching and education (Article 40 § 1), the recognition by the State of traditional Lithuanian churches and religious organisations and other churches and religious organisations provided that they conform to the criteria provided for in the Constitution (Article 43 § 1), … and the absence of a State religion (Article 43 § 7) …

Freedom of [thought, conscience and religion] establishes ideological, cultural and political pluralism. No views or ideology may be declared mandatory and thrust on an individual, that is to say the person who freely forms and expresses his or her own views and who is a member of an open, democratic, and civil society. This is an innate human freedom. The State must be neutral in matters of conviction, it does not have any right to establish a mandatory system of views.

…

The State has the duty to ensure that no one encroach upon the spiritual matters of an individual, that is to say that no one impair his or her innate right to choose a religion acceptable to him or her, or not to choose any, to change his or her chosen religion or abandon it … On the other hand, the State has the duty to ensure that a believer or a non-believer, either alone or with others, make use of the freedom of thought, conscience and religion guaranteed to him or her in a way that the rights and freedoms of other persons would not be violated: under Article 28 of the Constitution, while exercising their rights and freedoms, persons must observe the Constitution and the laws, and must not impair the rights and freedoms of other people, while it is provided in Article 27 of the Constitution that a person's convictions, professed religion or faith may justify neither the commission of a crime nor the violation of law … [T]he provision of Article 26 § 3 of the Constitution that no person may coerce another person or be subject to coercion to adopt or profess any religion or faith, means that no religious or [other] ideas may be forced on an individual against his or her will …

…

Article 43 § 7 of the Constitution establishes the principle of the absence of a State religion in Lithuania. This constitutional norm and the norm providing that there are traditional churches and religious organisations in Lithuania, mean that the tradition of religion should not be identified with its belonging to the State system: churches and religious organisations do not interfere with the activity of the State, its institutions and that of its officials, they do not form State policy, while the State does not interfere with the internal affairs of churches and religious organisations … (Article 43 § 4 of the Constitution).

Interpreting the norm set down in Article 43 § 7 of the Constitution that there shall not be a State religion in Lithuania … as well as other constitutional provisions in a systemic manner, the conclusion should be drawn that the principle of the separateness (atskirumas) of church and State is established in the Constitution. [This principle] is the basis of the secularity of the State of Lithuania, its institutions and their activities. This principle, along with the freedom of convictions, thought, religion and conscience which is established in the Constitution, together with the constitutional principle of equality of all persons and the other constitutional provisions, determine neutrality of the State in matters of world view and religion."

46. In its ruling of 29 September 2005, the Constitutional Court held:

"Freedom of information … encompasses freedom to seek, obtain and impart diverse information. Information can also encompass such knowledge by imparting which one strives to exert influence upon the behaviour and choice of people, inter alia, inducing them to choose, acquire and/or use certain goods or to use certain services, or not to choose them. The dissemination of such information is commonly referred to as advertising … Freedom of information guaranteed by the Constitution includes also freedom of advertising, inter alia, freedom to advertise goods and services.

All advertising is information; this is a particular type of information. Advertising is an important means of competition …

It must be emphasised that disseminated information does not necessarily include only content of advertising nature or only content of non-advertising nature: it can contain both such elements."

III. RELEVANT INTERNATIONAL MATERIALS

47. The relevant provisions of the 1966 International Covenant on Civil and Political Rights (ICCPR) read:

Article 19

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

Article 20

"...

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

48. On 12 September 2011 the United Nations Human Rights Committee adopted General Comment No. 34 concerning Article 19 of the ICCPR, the relevant parts of which read:

"32. The Committee observed in General Comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.

...

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

...

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of Article 19, paragraph 3, as well as such Articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."

49. At its 76th Plenary Session, held on 17 and 18 October 2008, the European Commission for Democracy through Law (the Venice Commission) adopted the Report "On the Relationship between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred". In that Report, the Venice Commission overviewed the national legislation of several Council of Europe Member States and presented its conclusions, relying on, inter alia, the case-law of the European Court of Human Rights. The relevant parts of the Report read:

"76. The Venice Commission underlines ... that it must be possible to criticise religious ideas, even if such criticism may be perceived by some as hurting their religious feelings. Awards of damages should be carefully and strictly justified and motivated and should be proportional, lest they should have a chilling effect on freedom of expression.

...

78. A legitimate concern which arises in this respect is that only the religious beliefs or convictions of some would be given protection. It might be so on account of their belonging to the religious majority or to a powerful religious minority; of their being recognised as a religious group. It might also be the case on account of the vehemence of their reactions to insults ...

...

81. It must be stressed, however, that democratic societies must not become hostage to these sensitivities and freedom of expression must not indiscriminately retreat when facing violent reactions. The threshold of sensitivity of certain individuals may be too low in certain specific circumstances ... and this should not become of itself a reason to prevent any form of discussion on religious matters involving that particular religion: the right to freedom of expression in a democratic society would otherwise be jeopardised.

82. The Commission considers that any difference in the application of restrictions to freedom of expression with a view to protecting specific religious beliefs or convictions (including as regards the position of a religious group as victim as opposed to perpetrator) should either be avoided or duly justified."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

50. The applicant company complained that the fine imposed on it for the advertisements had breached its right to freedom of expression, as provided in Article 10 of the Convention, which reads:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article 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."

A. Admissibility

51. The Court considers that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

52. The Government did not dispute that there had been an interference with the applicant company's right to freedom of expression, but they submitted that that interference had been justified under Article 10 § 2 of the Convention.

53. They firstly argued that the interference had been in accordance with the law – namely, Article 4 § 2 (1) of the Law on Advertising (see paragraph 34 above) – and that the requirements of that provision had been sufficiently accessible and foreseeable to the applicant company. They submitted that the concept of "public morals" was necessarily broad and its contents could change over time, so it was impossible to provide a precise definition of public morals in law. The Government acknowledged that Article 4 § 2 (1) did not prohibit

the use of religious symbols or motifs in advertising per se, as that would be contrary to the principles of pluralism, tolerance and broadmindedness. However, they argued that morals could be based on religious views, especially taking into account the historic importance of Christianity in Lithuania and the number of Christians among the population (see paragraph 56 below). The Government thus argued that it should have been sufficiently clear to the applicant company that advertisements which insulted the feelings of religious people were contrary to Article 4 § 2 (1) of the Law on Advertising. The Government also submitted that the subsequent amendment of that provision, establishing an explicit prohibition of expressing contempt for religious symbols in advertising (see paragraph 35 above), had been initiated by the Lithuanian Bishops Conference and had been necessary to make the Law stricter and to serve "a preventive function".

54. As for the aim pursued by the interference, the Government submitted that it had been twofold – protection of morals (the morals arising from the Christian faith and shared by a substantial part of the Lithuanian population) and protection of the rights of others (the right of religious people not to be insulted on the grounds of their beliefs).

55. The Government further contended that the interference had been necessary in a democratic society and proportionate to the legitimate aims sought. They submitted that the advertisements had been purely commercial in nature and had not sought to contribute to any public debate affecting the general interest (see paragraph 29 above), and the margin of appreciation left to the national authorities was therefore broader, as acknowledged by the Court in, among other authorities, Hertel v. Switzerland (25 August 1998, § 47, Reports of Judgments and Decisions 1998-VI). The Government also submitted that there was no international or European consensus on the contents of morality for the purpose of Article 10 § 2 of the Convention. Relying on the Court's judgments in Handyside v. the United Kingdom (7 December 1976, § 48, Series A no. 24), Müller and Others v. Switzerland (24 May 1988, § 35, Series A no. 133) and A, B and C v. Ireland ([GC], no. 25579/05, § 223, ECHR 2010), they submitted that domestic authorities, by reason of their direct and continuous contact with the vital forces of their countries, were better placed than the international judge to give an opinion on the exact content of the requirements of morals in their country, as well as on the necessity of a restriction intended to meet them.

56. In that connection, the Government submitted that the majority of the Lithuanian population shared the Christian faith – according to the national census of 2011, more than 77% of Lithuanian residents indicated that they were Roman Catholics, whereas another 6% belonged to other Christian faiths, such as Russian Orthodox, Old Believers and Evangelical Lutherans. Furthermore, the Roman Catholic Church had had a long-lasting historical presence in Lithuania, it had significantly influenced the social and cultural customs and traditions of the population, and had particularly contributed to the anti-Soviet resistance during the period of occupation and to the restoration of independence of Lithuania in 1990. The Government therefore argued that the understanding of "public morals" in Lithuanian society was closely connected to the morals stemming from the Christian religious tradition, and that that understanding was shared by a substantial part of the population.

57. The Government further submitted that visual depiction of Jesus Christ and the Virgin Mary – key figures of the Christian faith – which rejected their holiness or mocked them was contrary to the fundamental principles of that faith. They contended that believers were particularly sensitive when such figures of fundamental religious importance were used to advertise a lifestyle which did not respect the religion and its symbols, as proved by the fact that actual complaints about the advertisements had been received (see paragraphs 10, 12 and 17 above). In addition, the advertisements had been displayed on public hoardings in the centre of Vilnius, some even in the proximity of the Cathedral, and thus religious people had not had the possibility to make an informed decision to avoid them.

58. The Government lastly submitted that the domestic courts had carried out a thorough analysis of the necessity of the impugned measure, in line with the principles developed in the Court's case-law and the applicant company had been given a fine which had been close to the minimum provided in law (see paragraphs 19 and 36 above), so there were no grounds to find that the interference had not been proportionate.

(b) The applicant company

59. The applicant company argued that the interference had not been "prescribed by law" within the meaning of Article 10 § 2 because at the time when the advertisements were published, the Law on Advertising had not prohibited the use of religious symbols or motifs in advertising, as proven by the subsequent amendment of that Law (see paragraphs 34 and 35 above). It submitted that had Article 4 § 2 (1) of the Law on Advertising foreseeably prohibited inappropriate use of religious symbols in advertising, it would have been sufficient to perform a "preventive function" (see paragraph 53 above) and an amendment would not have been necessary.

60. The applicant company did not contest that the interference had pursued a legitimate aim. However, it argued that that interference had not been necessary in a democratic society. Relying on the Court's judgments in Wingrove v. the United Kingdom (25 November 1996, § 52, Reports 1996-V) and Klein v. Slovakia (no. 72208/01, § 47, 31 October 2006), the applicant company contended that the advertisements had not been gratuitously offensive or profane towards objects of veneration – they had merely attempted to create a comic effect by using emotional interjections commonly used in spoken Lithuanian. It submitted that neither the domestic authorities which had examined its case, nor the Government in their submissions to the Court had elaborated what exactly in the advertisements had been offensive to public morals, other than the very fact that they had resembled religious figures – however, that in itself could not have been a sufficient reason to ban such advertisements in a secular and democratic State.

61. The applicant company also argued that, in the absence of a State religion in Lithuania, no single faith could claim to be the source of public morals, and that public morals could not be equated to religious morals. It submitted that Article 43 of the Constitution clearly distinguished between religious teachings and public morals, and gave primacy to the latter (see paragraph 31 above). It argued that the Government's submission that the moral choices of a large part of Lithuanian society were influenced by religion (see paragraph 56 above) had not been substantiated by any empirical evidence – to the contrary, one of the studies referred to by the Government had concluded that many Lithuanians considered themselves members of the Roman Catholic Church only in a "formal manner" and that religious tradition had limited impact on their lives. The applicant company submitted that approximately a hundred individuals who had complained about the advertisements (see paragraphs 10, 12 and 17 above) could not be considered representative of the approximately 77% of the Lithuanian population who considered themselves Catholic; furthermore, the public reaction to the advertisements had not been uniform – several public figures and scholars had expressed their support to the advertisements and disappointment with the domestic court decisions. The applicant company thus argued that the small number of complaints had not been indicative of the overall sentiment of the population, and thus the interference with its right to freedom of expression could not be justified by the need to protect public morals. It lastly submitted that even if some believers had been offended, freedom of expression also extended to ideas which shock, offend or disturb. Accordingly, the applicant company contended that the national authorities had overstepped their margin of appreciation.

2. The Court's assessment

(a) Whether there was an interference

62. The parties agreed that the fine imposed on the applicant company on account of the fact that the advertisements which it had displayed had been held to be contrary to public morals (see paragraphs 19 and 52 above) constituted an interference with its right to freedom of expression. The Court sees no reason to hold otherwise.

(b) Whether the interference was prescribed by law

(i) Relevant general principles

63. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects

(see, among many other authorities, Delfi AS v. Estonia [GC], no. 64569/09, § 120, ECHR 2015, and the cases cited therein).

64. As regards the requirement of foreseeability, the Court has repeatedly held 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 a person to regulate his or her conduct. That person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see Perinçek v. Switzerland [GC], no. 27510/08, §§ 131-33, ECHR 2015 (extracts), and Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], no. 931/13, § 143, ECHR 2017 (extracts)).

65. The level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed. The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails (see Delfi AS, § 122, and Satakunnan Markkinapörssi Oy and Satamedia Oy, §§ 144-45, both cited above).

(ii) Application of the above principles in the present case

66. In the present case, the impugned interference was based on Article 4 § 2 (1) of the Law on Advertising which prohibited advertising that "violates public morals" (see paragraph 34 above). The Court agrees with the Government that the concept of public morals is necessarily broad and subject to change over time, and as a result, a precise legal definition may not be possible (see paragraph 53 above). It considers that it would be unrealistic to expect the national legislature to enumerate an exhaustive list of actions which violate public morals (see, mutatis mutandis, Kudrevičius and Others v. Lithuania [GC], no. 37553/05, § 113, ECHR 2015).

67. At the same time, the Court observes that the Government had acknowledged that not every use of religious symbols in advertising would violate public morals under Article 4 § 2 (1) of the Law on Advertising (see paragraph 53 above). It appears that the applicant company's case was the first in which the domestic courts applied the concept of public morals to the use of religious symbols in advertising – the courts examining the case did not refer to any previous domestic case-law and nor did the parties provide any examples of such case-law to the Court (compare and contrast Müller and Others, cited above, § 29). The Court acknowledges that the very fact that the applicant company's case was the first of its kind does not, as such, make the interpretation of the law unforeseeable, as there must come a day when a given legal norm is applied for the first time (see Kudrevičius and Others, §§ 114-15, and Perinçek, § 138, both cited above). Nonetheless, it has doubts as to whether the interpretation given by the domestic courts in the present case – namely, that the advertisements violated public morals because the use of religious symbols in them was "inappropriate" and "distorted the meaning" of those symbols (see paragraphs 23 and 25 above) – could reasonably have been expected. The Court cannot stay blind to the fact that, while the applicant company's case was still ongoing, the national authorities felt the need to amend the Law on Advertising in order to establish an explicit prohibition on advertising which expressed "contempt for religious symbols" (see paragraph 35 above). It takes note of the applicant company's argument that such an amendment would not have been necessary had the prohibition of inappropriate use or contempt for religious symbols been established in Article 4 § 2 (1) with sufficient foreseeability (see paragraph 59 above).

68. However, the Court considers that in the present case the issue with the quality of law is secondary to the question of the necessity of the impugned measure in the applicant company's case (see, mutatis mutandis, Bayev and Others v. Russia, nos. 67667/09 and 2 others, §§ 63-64, 20 June 2017). It therefore finds it not necessary to decide whether in the present case the interference was prescribed by law within the meaning of Article 10 § 2 and will proceed to examine whether it pursued a legitimate aim and was necessary in a democratic society.

(c) Whether the interference pursued a legitimate aim

69. The Government submitted that the aim pursued by the interference had been twofold – protection of morals arising from the Christian faith and shared by a substantial part of the Lithuanian population, and protection of the right of religious people not to be insulted on the grounds of their beliefs (see paragraph 54 above). The applicant company did not contest that submission (see paragraph 60 above). The Court therefore accepts that the impugned interference sought a legitimate aim within the meaning of Article 10 § 2 of the Convention.

(d) Whether the interference was necessary in a democratic society

(i) Relevant general principles

70. The Court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, § 101, ECHR 2012; Bédat v. Switzerland [GC], no. 56925/08, § 48, ECHR 2016; and Satakunnan Markkinapörssi Oy and Satamedia Oy, cited above, § 124).

71. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see Mouvement raëlien suisse v. Switzerland [GC], no. 16354/06, § 48, ECHR 2012 (extracts); Animal Defenders International v. the United Kingdom [GC], no. 48876/08, § 100, ECHR 2013 (extracts); and Bédat, cited above, § 48).

72. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see Mouvement raëlien Suisse, cited above, § 48; Morice v. France [GC], no. 29369/10, § 124, ECHR 2015; and Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC], no. 17224/11, § 75, 27 June 2017).

73. The Court further reiterates that the breadth of the Contracting States' margin of appreciation varies depending on a number of factors, among which the type of speech at issue is of particular importance. It has consistently held that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see Baka v. Hungary [GC], no. 20261/12, § 159, ECHR 2016, and Satakunnan Markkinapörssi Oy and Satamedia Oy, cited above, § 167). However, 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 (see Wingrove, cited above, § 58, and Murphy v. Ireland, no. 44179/98, § 67, ECHR 2003-IX (extracts)). Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising (see markt intern Verlag GmbH and Klaus Beermann v. Germany, 20 November 1989, § 33,

Series A no. 165; Hertel, cited above, § 47; and Mouvement raëlien Suisse, cited above, § 61).

74. The Court lastly reiterates that, as paragraph 2 of Article 10 expressly recognises, the exercise of the freedom of expression carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane (see Otto-Preminger-Institut v. Austria, 20 September 1994, § 49, Series A no. 295-A; Murphy, cited above, § 65; İ.A. v. Turkey, no. 42571/98, § 24, ECHR 2005-VIII; Giniewski v. France, no. 64016/00, § 43, ECHR 2006-I; and Klein, cited above, § 47).

(ii) Application of the above principles in the present case

75. Turning to the circumstances of the present case, the Court firstly observes that in its submissions the applicant company did not dispute that the persons depicted in the advertisements resembled religious figures (contrast to its position before the domestic authorities in paragraphs 14, 17 and 20 above). The Court is likewise of the view that all the visual elements of the advertisements taken together (see paragraphs 7-9 above) created an unmistakable resemblance between the persons depicted therein and religious figures.

76. It further observes that the advertisements had a commercial purpose – to advertise a clothing line – and were not intended to contribute to any public debate concerning religion or any other matters of general interest (see paragraphs 6, 14, 17, 20, 29 and 55 above). Accordingly, the margin of appreciation accorded to the national authorities in the present case is broader (see paragraph 73 above). Nonetheless, such margin is not unlimited and the Court has to assess whether the national authorities did not overstep it.

77. Having viewed the advertisements for itself, the Court considers that at the outset they do not appear to be gratuitously offensive or profane, nor do they incite hatred on the grounds of religious belief or attack a religion in an unwarranted or abusive manner (see paragraphs 7-9 above; compare and contrast Müller and Others, cited above, § 36; Otto-Preminger-Institut, cited above, § 56; Wingrove, cited above, § 57; İ.A. v. Turkey, cited above, § 29; Klein, cited above, § 49; and Balsytė-Lideikienė v. Lithuania, no. 72596/01, § 79, 4 November 2008; see also Aydın Tatlav v. Turkey, no. 50692/99, § 28, 2 May 2006). The domestic courts and other authorities which examined the applicant company's case did not make any explicit findings to the contrary.

78. The Court has previously held that it is not to be excluded that an expression, which is not on its face offensive, could have an offensive impact in certain circumstances (see Murphy, cited above, § 72). It was therefore for the domestic courts to provide relevant and sufficient reasons why the advertisements, which, in the Court's view, were not on their face offensive, were nonetheless contrary to public morals (see, mutatis mutandis, VgT Verein gegen Tierfabriken v. Switzerland, no. 24699/94, §§ 75-76, ECHR 2001-VI). The Court also notes that, as submitted by the Government, not every use of religious symbols in advertising would violate Article 4 § 2 (1) of the Law on Advertising (see paragraph 53 above), which means that at least some explanation as to why the particular form of expression chosen by the applicant company was contrary to public morals was required by domestic law as well.

79. However, the Court cannot accept the reasons provided by the domestic courts and other authorities as relevant and sufficient. The authorities considered that the advertisements were contrary to public morals because they had used religious symbols "for superficial purposes", had "distort[ed] [their] main purpose" and had been "inappropriate" (see paragraphs 13, 23 and 25 above). In the Court's view, such statements were declarative and vague, and did not sufficiently explain why the reference to religious symbols in the advertisements was offensive, other than for the very fact that it had been done for non-religious purposes (see, mutatis mutandis, Giniewski, cited above, §§ 52-53, and Terentyev v. Russia, no. 25147/09, § 22, 26 January 2017; compare and contrast Balsytė-Lideikienė, cited above, § 80). It also observes that none of the authorities addressed the applicant company's argument that the names of Jesus and Mary in the advertisements had been used not as religious references but as emotional interjections common in spoken Lithuanian, thereby creating a comic effect (see paragraphs 14, 17, 20 and 24 above; see also, mutatis mutandis, Vereinigung Bildender Künstler v. Austria, no. 68354/01, § 33, 25 January 2007), although it appears that those emotional interjections must have been known to them.

80. The Court takes particular issue with the reasoning provided in the decision of the SCRPA, which was subsequently upheld by the domestic courts in its entirety. The SCRPA held that the advertisements "promot[ed] a lifestyle which [was] incompatible with the principles of a religious person" (see paragraph 18 above), without explaining what that lifestyle was and how the advertisements were promoting it, nor why a lifestyle which is "incompatible with the principles of a religious person" would necessarily be incompatible with public morals. The Court observes that even though all the domestic decisions referred to "religious people", the only religious group which had been consulted in the domestic proceedings had been the Roman Catholic Church (see paragraph 16 above), despite the presence of various other Christian and non-Christian religious communities in Lithuania (see paragraphs 38, 39 and 56 above). In this connection, the Court notes that the Constitutional Court of Lithuania has held that "no views or ideology may be declared mandatory and thrust on an individual" and that the State "does not have any right to establish a mandatory system of views" (see paragraph 45 above). It also draws attention to the position of the United Nations Human Rights Committee that limitations of rights for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition (see paragraph 48 above).

81. The Court further observes that some of the authorities gave significant weight to the fact that approximately one hundred individuals had complained about the advertisements (see paragraphs 18 and 25 above). It has no reason to doubt that those individuals must have been genuinely offended. However, the Court reiterates that freedom of expression also extends to ideas which offend, shock or disturb (see the references provided in paragraph 70 above). It also reiterates that in a pluralist democratic society those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (see Otto-Preminger-Institut, § 47, and İ.A. v. Turkey, § 28, both cited above; see also the position of the Venice Commission in paragraph 49 above). In the Court's view, even though the advertisements had a commercial purpose and cannot be said to constitute "criticism" of religious ideas (see paragraph 76 above), the applicable principles are nonetheless similar (in this connection see in particular the findings of the domestic authorities that the advertisements "encourage[d] a frivolous attitude towards the ethical values of the Christian faith" in paragraph 18 above).

82. The Government in their observations argued that the advertisements must have also been considered offensive by the majority of the Lithuanian population who shared the Christian faith (see paragraph 56 above), whereas the applicant company contended that one hundred individuals could not be considered representative of such a majority (see paragraph 61 above). In the Court's view, it cannot be assumed that everyone who has indicated that he or she belongs to the Christian faith would necessarily consider the advertisements offensive, and the Government have not provided any evidence to the contrary. Nonetheless, even assuming that the majority of the Lithuanian population were indeed to find the advertisements offensive, the Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to, inter alia, freedom of expression would become merely theoretical rather than practical and effective as required by the Convention (see, mutatis mutandis, Barankevich v. Russia, no. 10519/03, § 31, 26 July 2007; Alekseyev v. Russia, nos. 4916/07 and 2 others, § 81, 21 October 2010; and Bayev and Others, cited above, § 70).

83. Accordingly, the Court concludes that the domestic authorities failed to strike a fair balance between, on the one hand, the protection of public morals and the rights of religious people, and, on the other hand, the applicant company's right to freedom of expression. The wording of their decisions – such as "in this case the game has gone too far" (see paragraph 11 above), "the basic respect for spirituality is disappearing" (see paragraph 15 above), "inappropriate use [of religious symbols] demeans them [and] is contrary to universally accepted moral and ethical norms" (see paragraph 25 above) and "religious people react very sensitively to any use of religious symbols or religious persons in advertising" (see paragraphs 11, 13, 15 and 18 above) – demonstrate that the authorities gave absolute pri-

macy to protecting the feelings of religious people, without adequately taking into account the applicant company's right to freedom of expression.

84. There has therefore been a violation of Article 10 of the Convention.

(...)"

Ganna Yudkivska, *President*, Vincent A. De Gaetano, Faris Vehabović, Egidijus Kūris, Carlo Ranzoni, Georges Ravarani, Péter Paczolay, Judges

Noot

Jan Kabel
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Schaarste en overdaad aan motivering

De 'concurring opinion' van rechter De Gaetano lijkt op het oog de toon voor dit arrest te zetten. Hij is het eens met het resultaat, maar vraagt zich in gemoede af waarom deze zaak in godsnaam bij het Hof is beland. Met een beroep op Leviticus 19:28 ("Gij zult om een dood lichaam geen snijding in uw vlees maken, noch schrift van een ingedrukt teken in u maken") verwerpt hij de herleidbaarheid van de getatoeëerde figuren in de advertenties tot de joodse Jezus en Maria: tatoeages zijn volgens Leviticus immers volstrekt uit den boze, als tekens van heidense afgoderij. Volgens De Gaetano hadden klagers beter de firma kunnen boycotten in plaats van procedures te starten.

Zo gemakkelijk dacht men echter in Litouwen niet over de zaak. Ik behandel eerst de advertentie en de Litouwse regelgeving, dan de uiterst behoedzame procedure die in Litouwen is gevolgd, vergelijk die met hoe dat bij ons gaat, analyseer dan de uitspraak van het Hof en vraag me af of die inhoudelijk spoort met hoe daarover bij ons wordt beslist en of de uitspraak aanleiding geeft tot veranderingen in dat beleid. De motivering door het Hof is wat overdadig en ik vraag me ten slotte af wat dat moet betekenen.

De advertentie

De aureooltjes, de rozenkrans om de hals van de man, de slagzinnen, de piëta-achtige opstelling van de figuren en de zoetelijke blik van de mannelijke figuur lijken het hem te doen en zijn in ieder geval voor de klagers reden geweest om in deze posters een verwijzing te zien naar de figuren van Jezus en van Maria. Het ging om onderstaand afgebeelde drie posters die op straat te zien waren en op de website van de adverteerder. De posters bevatten reclame voor de nieuwe 2013-collectie van ontwerper Robert Kalinkin die op 20 oktober 2012 werd geshowd in de Siemens Arena door adverteerder Sekmadienis, een modewinkel in Vilnius. Sekmadienis betekent 'zondag' in het Litouws. De slagzinnen luiden vertaald respectievelijk: 'Jezus wat een jeans', 'Lieve Maria, wat een jurk', en 'Jezus Maria, wat draag je!' Robert Kalinkin is een modeontwerper, art director en set designer voor internationale videoreclames. Hij is zelf ook niet vies van een tatoeage zoals te zien is op zijn website, zie http://www.robertkalinkin.com/.

Het gaat hier om gewone reclame. Aan de commerciële uitingen die door de vroegere Europese Commissie voor de Rechten van de Mens (ECRM) en door het Hof (zie voor vindplaatsen https://hudoc.echr.coe.int/eng op naam van de klager en overigens ook het mooie overzicht van McGonagle en Voorhoof op alle uitspraken van het Hof over artikel 10: https://rm.coe.int/freedom-of-expression-the-media-and-journalists-iris-themes-vol-iii-de/16807c1181) tot nu toe zijn beoordeeld, kleefde in bijna alle gevallen een bijzonder tintje. Niet voor niets werden de uitingen in de uitspraken vanaf den beginne als 'commercial *speech*' omschreven. *Scientology/Zweden* (ECRM 5 mei 1979, *Yearbook* 1979, 252) ging over reclame voor een religieus product: een zondemeter, *Barthold/Duitsland*, *Stambuk/Duitsland, Hempfig/Duitsland* (ECRM 7 maart 1991, *Mediaforum* 1992-9, B60-61) en *Cassado/Spanje* over positieve berichten over vrije beroepsbeoefenaars voor wie een reclameverbod gold, *markt Intern/Duitsland* en *Hertel/Zwitserland* over schadelijke mededelingen voor bedrijven in een bedrijfsblad respectievelijk een hippieblad, *VgT/Zwitserland*, *TV Vest c.a./Noorwegen*, *Animal Defenders/UK* en *Raelien/Zwitserland* over reclame van politieke partijen en actiegroepen. Gewone reclame was aan de orde in *Krone Verlag/Oostenrijk* (vergelijkende reclame tussen twee kranten). In die laatste zaak kreeg de adverteerder een steuntje in de rug vanwege het feit dat vergelijkende reclame economisch nuttige informatie kan opleveren voor de consument en daarom door de EU via een bijzondere richtlijn uitdrukkelijk werd toegelaten, terwijl de Oostenrijkse rechter de desbetreffende vergelijkende reclame had verboden. Het informatiebelang van de consument bij commerciële reclame is een belang dat al vroeg door het Amerikaanse Hooggerechtshof is meegenomen bij de toetsing van reclameverboden aan de vrijheid van meningsuiting. Zie 425 U.S. 762-765 (1976) *Virginia State Board of Pharmacy/Virginia Citizens Consumer Council* en daarover *Praktijkboek Reclamerecht*, hoofdstuk XIIA, nr. 6, p. 19. Het EHRM zet dit soort zaken gewoonlijk in de sleutel van de uitingsvrijheid van de adverteerder en laat het consumentenbelang geen zelfstandige rol spelen bij de beoordeling. In ons geval is dat belang ook niet aan de orde, lijkt me. De informatie voor de modeshow had ook anders kunnen worden vormgegeven. Het gaat alleen om de vraag of de adverteerder de figuren zo had mogen afbeelden. Daarbij is wat artikel 10 EVRM betreft aan de orde de vraag of de uiting door de nationale rechter verboden mag worden vanwege de bescherming van de goede zeden dan wel van de rechten van anderen (lees: van religieuze groeperingen). Litouwen is een overwegend katholiek land. Volgens de volkstelling van 2011 was 77% van de bevolking katholiek. Litouwen kent uitdrukkelijk geen staatsreligie

(art. 43 van de Litouwse Grondwet). Wel worden bepaalde religieuze groeperingen uitdrukkelijk door de Staat als zodanig erkend in de Wet op religieuze gemeenschappen en verbanden. De Litouwse Reclamewet verbiedt onder meer reclame die in strijd is met de goede zeden dan wel "incites (…) religious (…) hatred or discrimination". De laatste strofe zal hier niet van toepassing zijn. Het gaat dus om uitleg van het begrip goede zeden. Tijdens de procedure is die wet aangevuld met een artikellid dat reclame verbiedt indien zij uitdrukking is van minachting voor religieuze symbolen van religieuze gemeenschappen die erkend zijn in Litouwen. Een beetje jurist zal begrijpen dat die exercitie de doodsteek kan zijn voor het Litouwse verbod.

De nationale procedure

De hete aardappel wordt flink heen en weer geschoven. De Litouwse Consumentenautoriteit is de toezichthouder op naleving van de Reclamewet. Na ontvangst van enkele klachten over de advertentie vraagt de Autoriteit eerst advies aan de Litouwse Reclame Codecommissie. Die commissie, de 'Lietuvos Reklamos biuras' is in 2005 opgericht en bestaat, anders dan bij ons, hoofdzakelijk uit leden van de reclamebranche. Zij ziet toe op naleving van de Litouwse reclamecode die, net zoals bij ons, grotendeels gebaseerd is op de Code van de Internationale Kamer van Koophandel (zie http://confindustriaradiotv.it/wp-content/uploads/2017/11/2.-2017_11-OBSCOE-Self-Coregulation.pdf onder LT en *IRIS Legal Observations of the European Audiovisual Observatory* 2006-5:16/27). Anders dan bij ons bevat de Litouwse Code een bijzondere regel met betrekking tot religie. Artikel 13 bepaalt dat reclame de gevoelens van religieuze groeperingen niet mag aantasten. De commissie oordeelt dat gelovigen doorgaans zeer gevoelig zijn voor het gebruik van religieuze figuren of symbolen in reclame en beveelt daarom aan dat de waardigheid van gelovigen moet worden ontzien door te stoppen met de advertentie of door andere figuren te gebruiken. Humor kan, aldus de commissie, in dit geval geen rechtvaardiging opleveren, want, zo begrijp ik de summiere referentie (zie punt 11 van het arrest), die pakt bij gelovige mensen juist averechts uit.

Wij kennen geen bijzondere reclamewetgeving op dit terrein. Het strafrechtelijk verbod op godslastering is bij wet van 23 januari (*Stb.* 2014, 39) geschrapt. Een WODC-onderzoek naar aanleiding van de motie Schrijver bij die wetswijziging tot aanpassing van de artikelen 137c t/m 137e WvS om te bewerkstelligen dat deze artikelen eveneens bescherming bieden tegen als ernstig ervaren belediging van burgers door belediging van hun geloof en geloofsbeleving, zonder de werking van de vrijheid van meningsuiting onnodig te beperken, heeft niet tot wijziging van de artikelen geleid. De artikelen 137c-137e WvS stellen als misdrijf tegen de openbare orde strafbaar het anders dan ten behoeve van zakelijke berichtgeving openbaar maken van een uitlating die voor een groep van mensen wegens hun godsdienst beledigend is. Het artikel sluit op het eerste gezicht optreden tegen een advertentie als deze niet uit, maar de rechtspraak die erop is gewezen wijst niet in die richting. Zie bijvoorbeeld de affaire Van Gogh met als laatste uitspraak Hof Amsterdam 26 januari 1993, *Informatierecht/AMI* 1993, p. 51-52 en verder Hof Amsterdam 20 februari 1996, *Mediaforum* 1996-4, p. B57 (*Holman*). Bovendien, hoewel het in die artikelen gaat om twee afzonderlijke delicten (belediging óf aanzetten tot haat, discriminatie, gewelddadig optreden) wordt bij een mogelijke veroordeling doorgaans vooral getoetst of de beledigende uitingen aanzetten tot haat, geweld, discriminatie of onverdraagzaamheid en daarvan is, zo staat vast, in deze zaak geen sprake. In het geval dat het alleen gaat om belediging, zal het artikel overigens helemaal niet kunnen worden toegepast op de advertentie, omdat die niet expliciet over een groep gelovigen gaat. Art. 137c Sr stelt strafbaar het zich beledigend uitlaten "over een groep mensen wegens hun godsdienst", doch niet het zich beledigend uitlaten over een godsdienst, ook niet als dit geschiedt op zo'n wijze dat de aanhangers daardoor in hun godsdienstige gevoelens worden gekrenkt (zie HR 10 maart 2009, ECLI:NL:HR:2009:BF0655).

De Richtlijn audiovisuele mediadiensten bevat in artikel 6 een algemeen verbod tot haatzaaien en in artikel 9 een reclameverbod van reclame die de menselijke waardigheid aantast of discriminatie bevordert, maar die artikelen helpen ons hier niet verder. De enige normen ter zake die wij kennen en die ook op dit soort gevallen worden toegepast zijn te vinden in artikel 2 en 4 van de Nederlandse Reclame Code die bepalen dat reclame in overeenstemming dient te zijn met de goede smaak en het fatsoen, c.q. niet nodeloos kwetsend mag zijn. De vorm van samenwerking tussen Autoriteit en Reclamecodecommissie die in de Litouwse zaak plaatsvindt, kennen wij ook wel: de vroegere Consumentenautoriteit, thans onderdeel van de Autoriteit Consument en Markt, en de Stichting Reclame Code hebben een Samenwerkingsprotocol gesloten. Dat protocol is echter alleen van toepassing op inbreuken met een collectief karakter op het consumentenrecht met betrekking tot misleidende en agressieve handelspraktijken op het gebied van reclame en vergelijkende reclame. Ons geval valt daarbuiten.

Met het advies dat de Litouwse Code Commissie geeft, is de zaak nog niet afgedaan. Er komt bij de Litouwse ACM nog een klacht binnen, ditmaal van een advocatenkantoor, en de ACM zoekt daarop steun voor haar oordeel bij de overheidsinspectie op non-foodproducten, de Litouwse Warenautoriteit om het zo maar eens te zeggen. De Nederlandse Voedsel- en Warenautoriteit, de NVWA, ziet ook toe op non-foodproducten maar alleen in zoverre het de veiligheid van die producten betreft. Daar gaat het hier natuurlijk niet om. De Litouwse warenautoriteit oordeelt in dezelfde lijn als de Litouwse Codecommissie: de Litouwse Reclamewet is vertreden. De bezwaren van de adverteerder worden gepasseerd.

En nog is de zaak niet rond. De Litouwse Bisschoppenconferentie wordt om een oordeel gevraagd. Zij heeft ook klachten binnengekregen. De Conferentie is wat preciezer in haar oordeel. Zij definieert religieuze symbolen als zichtbare tekens die verwijzen naar een onzichtbare heilige werkelijkheid. De advertentie refereert aan symbolen in die zin, te weten aan de rozenkrans, de namen van Maria en Jezus en aan de Piëta. Omdat Maria en Jezus symbool staan voor een goed en wenselijk menselijk gedrag, leidt de afbeelding van die figuren, zoals in de advertentie, tot een frivole houding tegenover dat gedrag en wordt de heiligheid van die symbolen gedegradeerd. Die moedwillige verandering van hun betekenis tast de gevoelens van gelovige mensen aan en is, in het bijzonder wanneer zij plaatsvindt voor commercieel gewin, in strijd met de goede zeden. De Litouwse consumentenautoriteit neemt dat oordeel over en met de conclusie dat respect voor religie een zedelijke waarde is en er dus in dit geval sprake is van strijd met de goede zeden, stelt de Autoriteit vast dat er sprake is van strijd met de Reclamewet en legt een boete op van 2000 LTL (ca. € 580). Bij dat oordeel speelt mede een rol dat er enerzijds bij de Bisschoppenconferentie enkele honderden klachten waren binnengekomen, de advertentie op straat te zien was en een groot publiek had bereikt en anderzijds dat de advertentie niet lang zichtbaar was geweest en na een aanzegging door de autoriteiten onmiddellijk was verwijderd. In beroep en hoger beroep bij het hoogste bestuursrechtcollege blijft dit oordeel overeind, zij het dat de motivering wat magerder is: de hoogste bestuursrechter oordeelt dat religie bijdraagt aan de zedelijke ontwikkeling van een maatschappij, religieuze symbolen daarom een belangrijke plaats innemen en oneigenlijk gebruik van die symbolen voor oppervlakkige doeleinden de betekenis ervan verandert en in strijd is met geaccepteerde morele en ethische normen. Die schaarste aan motivering wordt nog een probleem. Enkele maanden na die uitspraak gebeurt er iets bijzonders. De president van het college verzoekt om heropening van de zaak, omdat hij zo zijn twijfels heeft bij de vraag of het college wel in voldoende mate rekening heeft gehouden met de jurisprudentie van het Europese Hof. Het college, in andere samenstelling, wijst dat verzoek echter af, omdat er geen sprake zou zijn van een ondubbelzinnige dwaling in de uitleg van de wet. In de beslissing is wel degelijk rekening gehouden met het recht op vrijheid van meningsuiting van de adverteerder maar is dit recht afgewogen tegen de bescherming van de goede zeden, bij de minimale sanctie die is opgelegd is rekening gehouden met alle omstandigheden van het geval, het gaat om een commerciële uiting die in dit geval niet bijdraagt aan het publieke debat en het is nu eenmaal zo dat er in Europees verband geen gemeenschappelijke opvatting bestaat omtrent de betekenis van religie in een maatschappij, zodat, gelet op de zaken *Müller c.a./Zwitserland* en *Otto-Preminger-Institut/Oostenrijk* de nationale rechter een marge bij zijn oordeel is gegund.

Er kan dus bepaald niet worden gezegd dat de beslissing in een vloek en een zucht is genomen. En het beroep op de zaken *Müller c.a./Zwitserland* en *Otto-Preminger-Instituut/Oostenrijk* snijdt hout. In de laatste zaak zegt het Hof met zoveel woorden dat het recht op vrijheid van godsdienst meer in het bijzonder ook het recht op respect voor religieuze gevoelens bevat en dat er inderdaad geen Europese consensus bestaat over de plaats van de godsdienst in de samenleving. Het Hof ziet een provocatieve afbeelding van een object van aanbidding in strijd met wat behoort in een democratische samenleving omdat het kenmerk van die samenleving nu juist gelegen is in een geest van verdraagzaamheid. Ik teken daarbij aan dat de *Otto-Preminger*-zaak een ietwat dubbelzinnig karakter draagt. De tolerantie kan naar twee kanten worden uitgelegd. Enerzijds dienen als gezegd niet-gelovigen de symbolen van gelovigen te respecteren

door zich te onthouden van provocatieve uitbeeldingen van religieuze symbolen, anderzijds dienen gelovigen ontkenning van en aanvallen op hun geloofswaarheden door anderen te tolereren. Zie punt 47 van het arrest. Nieuwenhuis en Koning concluderen dat er geen Straatsburgse jurisprudentie bestaat waarin het Hof een inmenging met een artistieke uiting ter bescherming van religieuze gevoelens niet noodzakelijk in een democratische samenleving oordeelde (zie Aernout Nieuwenhuis & Sanne Koning, 'Kunst in Straatsburg. Een analyse van de jurisprudentie van het EHRM', *Mediaforum* 2010-3, p. 75). Zoveel te meer zou je denken, waar het, zoals hier, niet een artistieke maar een commerciële uiting betreft die volgens vaste jurisprudentie van het Hof op zichzelf al minder bescherming geniet dan andere uitingen. Een veroordeling van de advertentie past dus in de lijn van het Hof. Of dat inderdaad zo is, zien we straks.

De uitspraken van de Reclame Code Commissie

Denken wij daar anders over? Als gezegd is in ons land de enige bron voor uitspraken hieromtrent te vinden in de Nederlandse Reclame Code. Artikel 2 en 4 van die code bepalen dat reclame in overeestemming dient te zijn met de goede smaak en het fatsoen, c.q. niet nodeloos kwetsend mag zijn. Ik geef hieronder algemene conclusies weer uit de uitspraken op die artikelen, vergezeld van enkele voorbeelden.

Een toespeling op een religieus symbool voor commerciële doeleinden betekent niet dat reclame reeds om die reden nodeloos kwetsend is of in strijd met de goede smaak of het fatsoen. Het moet gaan om onnodig, dat wil zeggen niet functioneel gebruik van het symbool. Het gegeven dat een aanzienlijk aantal mensen zich gekwetst voelt, is op zichzelf ook niet voldoende. Reclame die onmiskenbaar tot doel heeft religieuze symbolen te bespotten, wordt als nodeloos kwetsend veroordeeld. Humor kan een corrigerende rol spelen op overige omstandigheden die het gebruik van een religieus symbool ontoelaatbaar zouden doen zijn.

Ik geef eerst een aantal afwijzingen en daarna een aantal toewijzingen van klachten. Code Commissie 13 maart 2012, Dossiernr: 2012/00217A oordeelt over een televisiereclame voor Red Bull in de vorm van een tekenfilm: "Drie mannen zitten in een boot. Een van de drie mannen – welke man kennelijk Jezus voorstelt – zegt: "Gasten, ik ben er klaar mee. We vangen vandaag toch niets meer. Ik ga naar huis", waarop hij uit de boot stapt en over het water wegloopt. Een van de overgebleven mannen zegt: "Jezus, blijf staan. Vertel, hoe doe je dat?" De man die Jezus voorstelt zegt: "Waar heb je het over?", waarop de man antwoordt: "Nou, over water lopen." De derde man zegt: "Volgens mij heeft hij Red Bull gedronken. Geeft je vleugels." Waarop Jezus zegt: "Dat heeft niets met Red Bull te maken." De ander geeft een gil en roept uit: "Nog een wonder!" "Niks wonder", antwoordt Jezus, "je moet gewoon weten waar de stenen liggen." Vervolgens glijdt hij bijna uit waarop hij zacht "Jezus!" uitroept." De Commissie onderkent dat deze commercial door een aanzienlijke groep mensen niet zal worden gewaardeerd. Dit enkele feit is echter onvoldoende om de reclame nodeloos kwetsend dan wel in strijd met de goede smaak of het fatsoen te achten zoals bedoeld in de genoemde bepalingen. Op cartooneske wijze wordt verwezen naar een verhaal uit de bijbel waarin Jezus een van de hoofdrolspelers is. Naar het oordeel van de Commissie is duidelijk dat sprake is van een op het product afgestemde reclame die niet-serieus en onmiskenbaar humoristisch is bedoeld. In Code Commissie 5 februari 2018, Dossiernr: 2017/00756/L (*Samsung*) wordt een referentie aan het doopritueel als niet kwetsend of in strijd met het fatsoen beschouwd, omdat die verwijzing duidelijk absurdistisch en humoristisch bedoeld is en het publiek de uiting ook zal begrijpen als een aanwijzing dat het switchen van telefoon gemakkelijker is dan je denkt. Maria in spijkerbroek afgebeeld in het Bijenkorfblad *BIJ* kan de toets der kritiek doorstaan, aldus de Codecommissie in haar uitspraak van 2 juni 1998, Dossiernr. 98.0122, helaas zonder enige motivering. Het gebruik van de termen Holy Cow en Holy Chicken en het aanbrengen van een rode stip op de kop van de kip in een tv-commercial voor Chicken Tonight's Milde Tandoori eveneens, omdat de gevoelens van gelovigen niet belachelijk worden gemaakt (College van Beroep 29 mei 2000, Dossiernr. 1082/99.0277). Een absurdistische presentatie die kennelijk humoristisch is bedoeld, redt een tv-reclame van Red Bull waarin vier wijzen (eentje extra van Red Bull) Maria en Jozef in de stal bezoeken, zie Code Commissie 18 december 2007, Dossiernr. 07.0713A. Lichte toon verhindert dat met het symbool van het heilig hart de spot wordt gedreven in Code Commissie 30 september 2008, Dossiernr. 08.0425.

Wanneer een of meer van de voorgaande elementen ontbreken, kan het oordeel gemakkelijk anders uitpakken. De slogan van een uitvaartbedrijf "Is er koffie na de dood" is onnodig kwetsend voor diegenen voor wie de vraag 'Is er leven na de dood' van wezenlijke betekenis is. Door de vraag te stellen wordt met die waarde onnodig de spot gedreven, aldus de Code Commissie in haar uitspraak van 3 maart 1993, Dossiernr. 93.7592. Een campagne van het modemerk HIJ vlak voor kerst 1995 met de slogans: "Twijfel niet. Hij is er, Hij is er ook voor U, Hij roept zich tot u" lokte bijna 3000 klachten uit en leidde tot een veroordeling door de Commissie, omdat "(d)e teksten in combinatie met de daarboven staande afbeeldingen van een jongeman die een vrome houding aanneemt tegen de achtergrond van glas-in-lood (kerk)ramen (…) rechtstreeks verband met Christus (leggen). Velen worden daardoor, alsmede door het feit dat de naam van adverteerster dubbelzinnig wordt gebruikt, in hun religieuze beleving geraakt. Dit klemt temeer nu de uitingen in de weken voor Kerstmis openbaar zijn gemaakt." Zie: Code Commissie 22 december 1995, Dossiernr. 95.8999, geciteerd in *Praktijkboek Reclamerecht*, hoofdstuk IVN, nr. 6. College van Beroep 20 juli 1993, Dossiernr. 775/93.7649B, geciteerd in *Praktijkboek Reclamerecht* t.a.p., betreft een advertentie waarin een gang naar de biechtstoel op één lijn wordt gesteld met het oplossen van praktische problemen. Daarmee wordt de betekenis van een, aldus het College, voor zeer velen wezenlijk element in hun religieuze beleving miskend, te weten het sacrament van de biecht. Op gelijke wijze veroordeelt Code Commissie 16 december 1996, Dossiernr. 96/9465F, geciteerd in *Praktijkboek Reclamerecht* t.a.p., het gebruik van het symbool de zondeval voor een parfummerk. Nu dat symbool een van de kernen van de geloofsbeleving van een belangrijk deel van de Nederlandse bevolking is, aldus de Commissie, zullen gelovigen in hun diepste religieuze gevoelens pijnlijk kunnen worden getroffen door het gebruik van dat symbool in de advertentie. De in een radioreclame voor Red Bull indringend uitgesproken kreet: ''Mijn God, Hoofdduivel, u ziet er verduveld slecht uit" kan gelovigen kwetsen in hun geloofsovertuiging en is daarom nodeloos kwetsend, aldus Code Commissie 9 oktober 2001, Dossiernr. 01.0415. Code Commissie 16 september 2003, Dossiernr. 03.0347 acht het uitbeelden van de Hindoeïstische God Ganesh met een glas bier en een sigaret in de hand voor de aanprijzing van muziekprogramma's van MTV nodeloos kwetsend voor Hindoes.

De Reclame Code Commissie en het College van Beroep hebben weliswaar rechters als voorzitter, maar zijn geen rechterlijk college. Het gaat om zelfregulering en de regels waar we het over hebben zijn als het ware uitgevonden door de Internationale Kamer van Koophandel die zich blijkens haar beginselverklaring inzet voor een goed klimaat voor internationaal zaken doen en voor eerlijke concurrentie. En hoewel het toezicht op de naleving van bepalingen voor audiovisuele commerciële communicatie via de Mediawet is uitbesteed aan de Stichting Reclame Code, vereist het toch wat onmogelijke toeren om dat particuliere toezicht als overheidstoezicht te bestempelen. Zie over dat onderscheid mijn artikel 'De moraal in het reclamerecht', *IER* 1986/2, p. 21-26. De uitspraken van het College van Beroep zijn dus geen uitspraken in laatste instantie waartegen bij het EHRM in beroep kan worden gegaan. Dat neemt natuurlijk niet weg dat de Reclame Code Commissie rekening kan houden met de rechtspraak van het Hof en dat doet zij ook. Zie bijvoorbeeld de hierboven geciteerde uitspraak inzake *Samsung*. Daarin overweegt de Commissie: "De uiting bevat geen ontoelaatbare verwijzing in tekst of beeld naar religieuze doopritueelen, mede gelet op de vrijheid van meningsuiting en recente rechtspraak van het Europees Hof van de rechten van de mens (EHRM 30 januari, zaak 69317/14)." Dat betreft onze zaak. Tegen de uitspraken van de Commissie en het College kan worden opgekomen bij de gewone rechter en tegen die uitspraken kan ten slotte weer bij het Hof worden geklaagd. Waar het gaat om de fatsoensregel is de uitspraak inzake de actiegroep Boycot Outspan tegen de Stichting Reclame Code een voorbeeld van een uitspraak waarin de adverteerder met gedeeltelijk succes een uitspraak van de Reclame Code Commissie aanvecht. Zie Hof Amsterdam 30 oktober 1980, *NJ* 1981/422.

Bedacht moet worden dat de fatsoensregel en de regel dat reclame niet nodeloos kwetsend mag zijn zelfreguleringsregels zijn die in eerste instantie beschouwd moeten worden als legaliseringsmechanismen voor de acceptatie door het publiek van reclame als marketinginstrument. Zie bijvoorbeeld de wijze waarop de Engelse particuliere toezichthouder, Committee Advertising Practises (CAP) omgaat met het gebruik van religieuze symbolen in reclame: https://www.asa.org.uk/advice-online/offence-religion.html. Daar is niets mis mee, maar het betekent wel dat adverteerders zelf aan de eigen publiciteit meer beperkingen opleggen dan die welke gelden voor andere vormen van publiciteit. Voor zover het dus gaat om dat soort normen, behoeft aan de toepassing ervan niet dezelfde maatstaf te worden aangelegd als die voor andere vormen van publiciteit. De

onderhavige zaak betreft regels die afkomstig zijn van de overheidswetgever, maar die inhoudelijk hetzelfde zijn als die afkomstig van de particuliere regelgever. Wij zullen zien of het Hof daar wat mee doet.

De beoordeling door het Hof

De eerste vraag die moet worden beantwoord is natuurlijk of het wel om religieuze symbolen gaat in de advertentie. De adverteerder ontkende dat. De figuren lijken wel op Jezus en Maria, maar noch de figuren zelf, de kleren, de houding of de gelaatsuitdrukking zouden verwijzen naar afbeeldingen van Jezus en Maria. De enige fysieke gelijkenis zou het lange haar zijn van de man, maar alle mannen met lang haar verbeelden nu eenmaal niet per definitie Christus. De uitroepen 'Jezus', 'Lieve Maria' en 'Jezus en Maria' moeten gezien worden als emotionele uitroepen en de advertentie gebruikt ze als een soort van woordenspelletje en niet als een religieuze verwijzing. Het Hof gaat terecht voorbij aan dat wat kinderachtige verweer en kijkt naar het geheel. Het oordeelt dat alle elementen tezamen genomen een onmiskenbare verwijzing opleveren naar religieuze symbolen. De boete die is opgelegd is een inmenging met de vrijheid van meningsuiting en dus moet worden onderzocht of zij tevoren voorzienbaar was, een legitiem doel dient en noodzakelijk is in een democratische samenleving.

De wettelijke regel luidde dat reclame niet in strijd mag zijn met de goede zeden. Die regel betekent niet, zoals de Litouwse regering al toegaf, dat elk gebruik van religieuze symbolen in strijd is met de goede zeden. De zaak tegen de adverteerder was de eerste zaak waarin deze regel werd toegepast, maar dat maakt niet uit: elke regel moet eens voor het eerst worden toegepast. Men kan echter niet over het hoofd zien dat de spelregels tijdens het spel zijn veranderd: de toevoeging aan het artikel van de delictsomschrijving 'minachting voor religieuze symbolen' zou niet nodig zijn als die minachting voorzienbaar was op basis van de regel dat reclame niet in strijd mag zijn met de goede zeden. Daar zou de zaak mee kunnen zijn afgedaan, maar dat doet het Hof niet. Het acht de voorzienbaarheid in dit geval van secundair belang in relatie tot de vraag of de inmenging noodzakelijk is in een democratische samenleving. Op die manier houdt het Hof dus dit soort vage regels overeind, omdat het er kennelijk van uitgaat dat het niet van nationale overheden gevergd kan worden dat ze elke inmenging precies omschrijven. Daar valt mijns inziens mee te leven, wanneer de motieven voor de inmenging op basis van zo'n vage regel, al is het dan maar achteraf, voldoende overtuigend zijn. Die lijn is eerder uitgezet in *Animal Defenders/UK*, punt 109. In de recente zaak *Bayev and others/Rusland* waarin het ging om een verbod van propaganda voor niet-traditionele vormen van seksualiteit gericht op minderjarigen, volgt het Hof dezelfde lijn. De formele kwaliteit van de regelgeving is ondergeschikt aan de toetsing van de inhoudelijke keuzes die de wetgever heeft gemaakt bij het ontwerpen van de regel. En als gevolg daarvan geldt dan dat hoe overtuigender die keuze is voor de algemeen geformuleerde regel, hoe minder het Hof aandacht zal besteden aan de gevolgen van die toepassing in het concrete geval en vice versa: hoe minder overtuigend die motieven zijn, des te meer zal gekeken worden naar de consequenties van die toepassing voor, in ons geval, de adverteerder. Tant pis dan voor de gelovigen. In *Animal Defenders* geeft de zorgvuldigheid die is betracht bij het tot stand brengen van het Engelse verbod van politieke tv-reclame, naast het gegeven dat er geen eenstemmigheid bestaat in Europa over dergelijke verboden, de doorslag: de campagne 'My Mate is a Primate' met een 4-jarige meisje in een kooi mag worden geweigerd op tv. Zo ook in de zaak *Raelien/Zwitserland*, waarin het verbod op het verspreiden van posters waarmee de Ralienbeweging zieltjes probeerde te winnen en die daarom door het Hof als "closer to commercial speech than to political speech" werd gekwalificeerd, overeind bleef vanwege de zorgvuldige 'detailed judicial review'. Daar mankeerde het dus aan in ons geval.

Over het legitieme doel van de regelgeving doet het Hof niet moeilijk. Het accepteert de redenering van de Litouwse overheid: het verbod dient ter bescherming van de goede zeden en van de rechten van gelovigen niet beledigd te worden op grond van hun door artikel 9 van het Verdrag beschermde geloofsovertuiging. Omdat het om een advertentie gaat met een commercieel doel die niet bedoeld is om bij te dragen aan het publieke debat, behoeft, als bekend, de noodzaak van zo'n verbod minder kritisch te worden bekeken, maar er zijn grenzen en het Hof is er om die te bewaken. Wat de aard van de advertentie betreft: het gaat niet om het aanzetten tot haat en de advertentie is ook niet onnodig beledigend. Maar dat sluit niet uit dat een op het eerste oog niet beledigende uiting onder omstandigheden een beledigende uitwerking kan hebben. In lijn met eerdere uitspraken (*VgT/Zwitserland* en *Murphy/Ierland*) moet de nationale rechter met relevante en voldoende argumenten aankomen op grond waarvan een op het oog niet beledigende uiting niettemin in strijd kan worden geacht met de goede zeden. En omdat het zo is dat het gebruik van religieuze symbolen in reclame niet per se is verboden, moet duidelijk worden gemaakt waarom deze specifieke uiting wel moet worden verboden. Daar is de nationale rechter in de ogen van het Hof niet in geslaagd. Het oneigenlijk gebruik van de symbolen voor oppervlakkige doeleinden waardoor hun betekenis verandert, is een motivering die niet meer zegt dan dat die symbolen niet gebruikt mogen worden voor niet-religieuze doeleinden. Bovendien is er een rechtvaardigingsgrond nu de Litouwse autoriteiten op geen enkele manier verweer hebben gevoerd tegen de stelling dat het gebruik van de namen Jezus en Maria als een emotionele uitroep kan worden beschouwd die ook nog eens een komisch effect verleent aan de uiting.

So far so good: aldus had de Nederlandse Code Commissie in dit geval ook kunnen beslissen, hoewel men zo zijn twijfels kan hebben over de vraag of hier sprake is van humor. Dat hoeft echter niet veel uit te maken, omdat het gebruik van religieuze symbolen in reclame niet per se is verboden. De humor dient dan als een correctie van overige omstandigheden die het gebruik van een religieus symbool ontoelaatbaar zouden doen zijn. Maar het Hof gaat veel verder en zet zijn overwegingen ook nog eens in de sleutel van de Handyside uitingen die beschermd moeten worden, de bekende "ideas that offend, shock or disturb". Zie met name punt 81. Dat lijkt me te veel eer voor deze advertentie; niettemin vervolgt het Hof onverdroten deze weg. Op de voet van *Otto-Preminger-Institut/Oostenrijk* dienen gelovigen in een pluralistische democratische samenleving andermans overtuigingen met betrekking tot religie, zelfs als die daaraan vijandig zijn, te tolereren. Ik kan me dat heel goed voorstellen als het ergens over gaat, maar in dit geval gaat het natuurlijk nergens over en zeker niet over de overtuiging van de adverteerder met betrekking tot het katholieke geloof die dan gerespecteerd zou moeten worden door de gelovigen. Die overdaad schaadt.

Net zoals de Nederlandse Reclame Code Commissie ziet het Hof kwantitatieve argumenten niet als doorslaggevend. Zelfs wanneer een meerderheid van de Litouwse bevolking de advertentie beledigend zou vinden, dan zou dat nog niet voldoende zijn om tot een verbod te komen. De rechten van een minderheid (lees in dit geval de adverteerders) zouden dan immers afhankelijk worden van de vraag of die rechten aanvaard worden door een meerderheid. Dat is in abstracto een juiste opvatting. Zeker als het gaat om wettelijke beperkingen die voor ieder gelden. Inhoudelijk gaat het hier echter om een bijzondere regel, zo blijkt uit de wetswijziging die in Litouwen is doorgevoerd, te weten een regel afkomstig uit de reclamezelfregulering waar zij als voornaamste doel heeft het marketinginstrument reclame onbevlekt en dus effectief te houden. Met dat kenmerk van de regeling heeft het Hof geen rekening gehouden.

De uitspraak is ook geannoteerd door Aernout Nieuwenhuis in *EHRC*, Jaargang 19 (2018), afl. 5, nr. 81.