CASE OF HERTEL v. SWITZERLAND

(59/1997/843/1049)

JUDGMENT

STRASBOURG

25 August 1998

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67,
B-1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher
(place de Paris), B.P. 1142, L-1011 Luxembourg-Gare)

The Netherlands: B.**V**. Juridische Boekhandel & Antiquariaat
A. Jongbloed & Zoon (Noordeinde 39, NL-2514 GC 's-Gravenhage)

SUMMARY[1]

Judgment delivered by a Chamber

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

I. ARTICLE 10 OF THE CONVENTION

Not disputed that there had been an interference.

A. "Prescribed by law"

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

B. Legitimate aim

Protection of rights of others.

C. "Necessary in a democratic society"

Recapitulation of Court's case-law.

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

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

Conclusion: violation (six votes to three).

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

No separate issue arose

Conclusion: not necessary to decide issue (unanimously).

III. ARTICLE 50 OF THE CONVENTION

A. Pecuniary damage

No causal link established.

B. Costs and expenses

Recapitulation of case-law.
Payment of sums in respect of proceedings in domestic courts and before Strasbourg institutions.

Conclusion: respondent State to pay specified sum to applicant (eight votes to one).

COURT'S CASE-LAW REFERRED TO

7.12.1976, Handyside **v**. the United Kingdom; 26.4.1979, *Sunday Times* **v**. the United Kingdom (no. 1); 13.7.1983, Zimmermann and Steiner **v**. **Switzerland**; 8.7.1986, Lingens **v**. Austria; 20.11.1989, markt intern Verlag GmbH and Klaus Beermann **v**. Germany; 26.11.1991, *Sunday Times* **v**. the United Kingdom (no. 2); 23.6.1994, Jacubowski **v**. Germany; 23.9.1994, Jersild **v**. Denmark; 25.11.1997, Zana **v**. Turkey; 25.11.1997, Grigoriades **v**. Greece

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

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

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

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

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

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

PROCEDURE

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

The applications and request referred to Article 48 of the Convention, as amended by Protocol No. 9, which **Switzerland** has ratified. The object of the applications and request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 § 1, 8 and 10 of the Convention.

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

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

of the Chamber by Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 6, second sub-paragraph).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, had consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 5 and 12 December 1997 respectively. On 16 January 1998 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

5. On 2 March 1998 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 March 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr P. BOILLAT, Head of the International Affairs
Department, Federal Office of Justice, *Agent*,
Mr J. Lindenmann, Acting Head of the Human Rights
and Council of Europe Section,
Federal Office of Justice, *Adviser*;

(b) *for the Commission*
Mr M.A. Nowicki, *Delegate*;

(c) *for the applicant*
Mr R. SCHALLER, of the Geneva Bar, *Counsel*.
The Court heard addresses by Mr Nowicki, Mr Schaller and Mr Boillat.

AS TO THE FACTS

I. the CIRCUMSTANCES OF THE CASE

7. Mr **Hertel** has a degree in technical sciences from the Zürich Federal Institute of Technology and is the author of a thesis submitted to the Zürich Institute of Veterinary Sciences. He is now retired and lives at Wattenwil (Canton of Berne), where he conducts private research in his own laboratory.

A. The research paper published by the applicant and Professor Blanc and issue no. 19 of the *Journal Franz Weber*

1. The research paper published by the applicant and Professor Blanc

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

"…

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

Pitz, *Zellphysiologie des Krebses*, Akademie für Naturheilkunde, Munich, 1975; Günter Helmdach, *Die heutige Technik zerstört sich selbst*, Forschungsstelle für Dendroökologie, Auf der Brede 49, D-5608 Radevormwald, 1989].

The measurable effects on human beings of food treated with microwaves, as opposed to food not so treated, include changes in the blood which appear to indicate the initial stage of a pathological process such as occurs at the start of a cancerous condition."

2. Issue no. 19 of the Journal Franz Weber

9. The quarterly *Journal Franz Weber* devoted part of its nineteenth issue (January/February/March 1992) to the effects on human health of using microwave ovens.

10. On the cover there is a picture of the Reaper holding out one hand towards a microwave oven, together with the following title:

"The danger of microwaves: scientific proof"

11. In an editorial on page 2 Mr Franz Weber writes:

"…

To say that our journal is fearless is almost to state the obvious. The *Journal Franz Weber* was the first newspaper in the world to pinpoint the dangers of microwave ovens and has kept up its accusations despite massive attacks by the promoters. Today science proves us right (see pages 3–10). Microwave ovens should be banned. We would not be surprised if the researchers who have had the courage to defend the findings of their research were attacked in their turn, seeing that millions or even thousands of millions are at stake. But truth is in the end more durable than a deal involving thousands of millions at the expense of our health. We shall continue to fight for the truth in this case too.

…"

On the same page the following can be found under the heading *Imprint*:

"… Editorial staff: … H.U. **Hertel**, René d'Ombresson…"

12. On pages 3–10 there is an article by René d'Ombresson entitled "Microwave ovens: a health hazard. Irrefutable scientific evidence" and the introductory paragraphs are worded as follows:

"A scientific study demonstrates the health hazards of food prepared by microwave radiation and proves the *Journal Franz Weber* right.

Off to the scrap heap and the rubbish dumps with microwave ovens! The treatment to which they subject food is so pernicious that it causes a change in the blood of whoever eats it and this leads to anaemia and a precancerous condition. These are the findings of a rigorous study carried out by a professor of the *EPLF* [Lausanne Federal Institute of Technology] and an independent researcher, who were determined to answer once and for all the crucial question: are microwave ovens harmful or not? Here is a simplified summary of the study, followed by the study itself for those who are not put off by figures and scientific demonstrations. We were anxious to publish both these, albeit at the risk of repetition, so that the findings should be available to the widest possible public."

The article continues (pages 4–5):

"**Simplified summary of the research**

… warnings are being given by more and more people: microwave ovens are not harmless.

Legitimate anxieties

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

Giving a scientific reply

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

Sealing is sufficient…

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

And food?

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

Harmfulness demonstrated

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

Clinical research

…

Eight food variants

…

Incriminating results

Food treated by microwaves caused significant changes in the volunteers' blood (a drop in haemoglobin levels, an increase in the haematocrit, in leucocytes and in the levels of cholesterol particularly of the HDL and LDL forms). As regards lymphocytes, the drop was more rapid and more marked where the food was a vegetable prepared with microwaves than it was with other variants.

Such changes in the blood count appear to indicate the initial stage of a pathological process such as occurs in a precancerous phase. As the experiment covered only two months, it is reasonable to wonder about the longer-term effects, *a fortiori* if the effects of the radiation persist.

Long-term effects

Does food irradiated by microwaves absorb the radiation and transfer it to the organism it is supposed to feed? To answer this crucial question, the researchers applied a known bacterial bioluminescence method which allows the degree of stimulation or inhibition of bacteria in the blood to be measured. The results clearly show that irradiated food irradiates in its turn and that this prolonged effect on the blood must be taken seriously since the phenomenon is one of direct irradiation, whose consequences are only too well known.

Measuring the hidden dangers

…

Burying one's head in the sand

The scientific literature on the damage caused to living organisms by direct microwave radiation is particularly voluminous. It is so revealing that it is surprising that the use of microwaves has not long since been replaced by another technique that is less dangerous and better suited to nature. The pernicious effects of microwaves range from the destruction of cell membranes and cell respiration and cell-division disorders to haemolysis (destruction of red blood cells), leukaemia and the blockage of natural cycles.

Aligned-covered

…

Cathodic constraints

…

Living beings in danger!

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

A prey to viruses

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

Like a cancer cell

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

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

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

"**The complete research paper**

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

Bernard H. Blanc … Hans U. Hertel…

1. Introduction

…

Tolerance thresholds

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

Harmful or not harmful?

The quality of food prepared with microwaves has not been officially questioned. It is simply accepted that food prepared in this way is neither better nor worse than food cooked by conventional means. So far as is known, there has not yet been any scientific research which has clarified the possible effects on health of food defrosted or cooked in microwave ovens. Given the widespread use of this method of cooking, is it not appropriate that the question 'harmful/not harmful' should at last be answered scientifically?

In this study various foodstuffs were accordingly examined firstly in their raw state and secondly in technologically prepared form, defrosted or cooked by conventional means and with microwaves.

2. Description and mode of action of microwaves on living beings through direct radiation and through food prepared in microwave ovens

…

Well-known pernicious effects

The scientific literature on the damage to living organisms by direct microwave radiation is particularly extensive. It is so revealing that it is surprising that the use of microwaves has not long since been replaced by another technique better attuned to nature. The pernicious effects of microwaves range from the destruction of cell membranes and cell respiration and cell-division disorders to haemolysis, leukaemia and genetic changes including the blocking of natural cycles.

Infernal radiation

The artificial production of microwaves is based on the principle of alternating current. Matter (atoms, molecules, cells) which is irradiated by this electromagnetic radiation thus undergoes, according to the radiation frequency, between one and a hundred thousand million polarity reversals or oscillations per second. Not a single atom, molecule or cell of a living organism would be able to resist destructive forces of such power, even if it was only of the order of 1 milliwatt.

Mind the water!

Of all the matter and substances in nature which are polar, the hydrogen in water reacts with the greatest sensitivity. …

Mr 80% water, beware!

… the biological effects of artificially created microwaves will be correlated above all with the generation of heat by friction. And since plants, animals and human beings are 80% water, it is not difficult to imagine the biological dangers of such microwaves. …

Easy prey for viruses

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

Danger! Cell poison

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

Danger to the eyes, lungs and endocrine system

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

As powerful as a television transmitter

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

Microwave transmitters on the loose in the organism

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

A phenomenon unknown in nature

…

A proper clinical study

Whether and to what extent microwaves are harmful or harmless can at present be determined only by an indirect method – by assessing the effects on living organisms. The present research, based on a method of that kind, is designed to measure the effects of different foodstuffs, cooked by conventional means and with microwaves, as interpreted through changes in the parameters of the blood count of volunteers.

3. Research plan

…

4. Analysis and observation of the food variants

…

5. Discussion of the results

5.1. General findings

All the measures (original values and control values) of erythrocytes, haemoglobin, haematocrits and leucocytes are at the bottom of the normal range of variation. A haematological interpretation shows up indications of a tendency to anaemia among the volunteers.

That situation becomes more marked during the second month, when, together with a further deterioration of the blood parameters, an increased level of cholesterol becomes apparent.

…

5.2. Table 5 summarises the results

(See Table 5)

The differences in effects on the human organism of food prepared by conventional means or with microwaves are negligible for a single serving. Certain tendencies, however, are visible, in some circumstances significant ones, statistically confirmed by the Rank method.

Appearance of anaemia

In the vegetables prepared with microwaves (variant 7) the erythrocytes tend to increase. Among other blood factors, the erythrocytes have the property of being mobilised (probably from the spleen) and rapidly increasing in number in the blood under the influence of short-term stress. If the stress continues, the number falls. Anaemic tendencies thus appear.

Differences in food transit

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

Aggressiveness of milk heated with microwaves

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

Rheumatism, fever and pituitary insufficiency

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

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

Beware, leucocytes on the increase!

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

Decreasing lymphocytes

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

cases – initially in every instance – the lymphocytes decrease more significantly than with the other variants.

Cholesterol, the result of stress

Although, according to accepted opinion, cholesterol levels rise only slowly and over a long period, cholesterol and, more particularly, its HDL and LDL constituents increase after consumption of vegetables cooked with microwaves (variants 7 and 8). On the other hand, with milk (variants 1 to 4) the cholesterol level tends to remain unchanged, and in the case of unpasteurised milk (variant 1) it even drops significantly. This most interesting finding bears out the most recent scientific knowledge, according to which cholesterol, in a situation of acute challenge, can also increase rapidly owing not so much to the cholesterol content of food as to an external challenge.

Cholesterol out of nothing

Such challenges, as the present research shows, are also possible through foodstuffs which contain practically no cholesterol. Artificial radiation and poisons (antigens) have a cholesterol-forming effect. In an electromagnetic field, cholesterol undergoes changes in its crystal structure and is eliminated from the blood in the form of a deposit. In cancer patients the blood cholesterol level is always very high. This is why a raised blood cholesterol level may be regarded as an obvious sign of a precancerous condition or a developing cancerous condition.

Loss of iron

Iron levels tend to increase in vegetables prepared with microwaves (variants 7 and 8), contrary to all the other variants. Haemolysis might be thought to be the cause of this phenomenon, being itself a consequence of damage to the membranes of blood cells. Research undertaken up to now does not enable any significant conclusions to be drawn.

Established pathogenic disorders

In sum, the results obtained from analysing the blood count of the volunteers fed on food prepared with microwaves to the exclusion of the other variants show changes which bear witness to pathogenic disorders. They present a pattern which might correspond to the beginning of a cancerous development and deserves attention. These results match the effects of chemico-physiological deformations observed in living cells subjected to microwave irradiation.

Microwaves on the loose in the blood

The luminescence of bacteria in contact with the serum of volunteers who had consumed food irradiated by microwaves is significantly higher than that produced by the blood of other volunteers fed on the other food variants. The possibility of a transfer of the radiation energy by induction, through the consumption of foodstuffs prepared with microwaves, and their effect on a living organism, in this instance the blood, must be considered.

Such physical phenomena are scientifically proved. The destructive power of microwaves through direct irradiation, as attested in the scientific literature (see the previous paragraph), could also have harmful effects on human beings through indirect radiation, through irradiated food."

14. Half of page 3 is taken up with a drawing representing a microwave oven, through the glass panel of which can be seen the head of the Reaper. The same picture, reduced in size, appears on pages 4, 5, 6, 7, 8, 9 and 10.

15. On 27 January 1992 Professor Blanc made the following statement:

"Statement concerning false information about foodstuffs treated or prepared in microwave ovens which appeared recently in *Franz Weber Journal* (January-March 1992) [and] *Raum & Zeit* (Munich, January-February 1992).

While the published figures and the description of the preliminary experiment are correct, I totally dissociate myself from the presentation and interpretation of the preliminary exploratory experiment carried out in 1989, which was published without my consent by the co-author of the study in the journals cited above.

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

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

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

1. The proceedings against Mr Weber

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

scientific research proves what a hazard food that has been exposed to radiation in a microwave oven is to health and backs up the *Journal Franz Weber*" or "from stating … that microwave ovens must all be destroyed without exception because food is harmed by these dangerous appliances to such an extent that it causes, in those who consume it, a change in the blood count and leads to anaemia and a precancerous stage".

17. In an order of 7 April 1992 the President of the Vevey District Court dismissed the application. Firstly, he expressed doubts as to the applicability of the UCA, noting, in particular, the following:

> "… [the UCA as amended is] not … applicable to all forms of unfair behaviour regardless of the sphere in which it occurs. Its purpose is in fact only to ensure fair, undistorted competition (section 1 UCA) and it applies only in the context, admittedly understood in a broad sense, of economic competition. The Act cannot, on the other hand, govern fields unconnected with that, such as political, sporting or scientific competition … or the expression of philosophical, moral or religious convictions. In that sense, the issue [of the existence] of detriment to a competitive relationship may remain relevant…
>
> In the instant case it may be doubted whether such a relationship has really been damaged or threatened by the defendant's campaign against microwave ovens as that campaign is not in any way directed at any particular manufacturer or distributor of such appliances. … The situation is in this respect very different from the one ruled on in the judgment published in *RO* 117 IV 193, in which a journalist had given erroneous information about the merits of three rival brands of sewing machine. …"

Secondly, he held that, "supposing the UCA to be applicable", Article 28 c § 3 of the Swiss Civil Code did not allow the relevant interim orders to be made. In this connection, he noted the following reason in particular:

> "...
>
> ... the imminent infringement of which the [MHEA] complains is not, prima facie, apt to cause it any damage affecting it personally. On the other hand, some of its members may suffer damage in the form of loss of turnover. ... there is nothing to show that such damage might be very substantial, and it cannot be presumed that it will be.
>
> Indeed, no information has been provided on the turnover in respect of microwave ovens achieved by the members of the association, the relation which that turnover bears to the turnover in respect of other appliances, whether there has been any reduction in the sale of microwave ovens since the articles appeared in issue no. 19 of the *Journal Franz Weber* or any reconversion to purchases of traditional cookers. Prima facie, it seems doubtful that the defendant's campaign has entailed any large-scale disaffection of the general public. Admittedly, his journal has a large circulation, but it must be read above all by people who have already made up their minds and who in all probability did not envisage buying a microwave oven. As to other members of the public, while they might have heard about Franz Weber's statements, which have been echoed in the ordinary press, they will also have been aware of the reassuring statements published in particular by the WHO and the *OFSP* [Federal Office of Public Health] that have also been referred to in the general press. When one sees how ineffective anti-smoking campaigns are, despite being based on undisputed scientific data and being supported by the authorities, it is by no means certain that the defendant's statements, even if they were to be repeated, could substantially affect the market in microwave ovens for any length of time.
>
> ... In the light, *inter alia*, of the private expert's report by Professor Teuber [see paragraph 21 below], the clarification given by the WHO and the *OFSP* and his own modest knowledge of scientific method, the President takes it as read that the research carried out by Dr Hans **Hertel** is insufficient to support the categorical conclusions which the defendant thought he could draw from it. The most that can be deduced from that research is that it would be appropriate to carry out a more

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

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

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

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

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

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

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

We must also expressly emphasise that Mr **Hertel** has never been a member of our newspaper's editorial staff or paid as such. The fact that Mr **Hertel**'s name (like Dr Bill Clark's) appeared in the imprint under the heading *Editorial staff* instead of under *Contributors to this issue* was due to a mistake in the editorial office."

*2. The proceedings against Mr **Hertel***

(a) In the Canton of Berne Commercial Court

19. The MHEA asked Mr **Hertel** to publish a statement to the effect that he would no longer make unfair comments on microwave ovens. He did not reply.

20. On 7 August 1992 the association lodged an application under the UCA with the Commercial Court (*Handelsgericht*) of the Canton of Berne, seeking to have Mr **Hertel** prohibited, on pain of the penalties provided in Article 292 of the Swiss Criminal Code (imprisonment or a fine) and Article 403 of the Code of Criminal Procedure of the Canton of Berne (a fine of up to 5,000 Swiss francs or imprisonment, in serious cases for up to a year), from stating that food prepared in microwave ovens was a danger to health and led to in the blood of those who consumed it changes that indicated a pathological disorder and presented a pattern that could be seen as the beginning of a carcinogenic process, and from using, in publications and public speeches on microwave ovens, the image of death, whether represented by a hooded skeleton carrying a scythe or by some similar symbol.

21. As before the President of the Vevey District Court, the plaintiff association produced a private expert's report by Professor M. Teuber of the Food Research Institute of the Zürich Federal Institute of Technology. The report, dated 6 March 1992, concludes (translated from German):

"Blanc and **Hertel**'s experiments on the harmfulness of food heated by microwaves and their interpretations of them were not conducted and described according to scientifically recognised criteria. They are of no scientific value; the conclusions drawn from them as to the alleged harmfulness of food cooked by microwaves have no verifiable basis and are unsustainable."

22. In a judgment of 19 March 1993 the Commercial Court allowed the application. It gave the following reasons (translated from German):

"1. …

The amended UCA differs from the former enactment in having substantially wider scope. Its key characteristic is its functional approach, based on guaranteeing fair, undistorted competition. That approach is apparent from the new drafting of the Act's protective aim in section 1 UCA and has led to a new definition of the offence of unfair competition in the general provision of section 2. The requirement of a

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

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

good faith (*BGE* 109 IV 488, 97II 160). A statement is 'inaccurate' if it can objectively be seen to be false (Troller and Troller, p. 188). A statement is 'misleading' if, while not untrue, it creates a false impression through the use of devious means; as with the risk of confusion in the context of trademark disputes, the yardstick to be used here is that of the usual vigilance and discernment of the customers targeted. A statement may be 'unnecessarily wounding' in various ways. Firstly, the manner in which a statement is made may be considered improper if it goes far beyond what would appear reasonable in the light of what had caused the statement to be made. Secondly, even where an accurate factual basis exists, the value judgments expressed may be unlawful if they appear unjustified on the facts. Lastly, a statement may also be wounding if it is inaccurate or is mainly and without good cause intended to harm another. Criticism that is impermissible in form, content or aim is therefore unacceptable… It has already been held in *ZR* 27/1928 no. 163 … that the description 'dangerous' was derogatory in character. Advertising based on fear, using expressions such as 'take X, otherwise it will be too late', 'don't take any risks', 'better too early than too late', 'tooth decay is lurking', or even simply 'keep your hair' is also unacceptable…

…

… it is certain that it cannot be said that it is scientifically proved that food prepared with a microwave oven constitutes a danger to health and is carcinogenic. To date, there has been no scientific evidence that such a danger exists. The defendant's assertions are not corroborated either by his own research – which did not meet generally accepted scientific standards – or by that of other, respectable scientists. The opposite would seem to be nearer the truth, as is shown by the observations of the World Health Organisation and the Federal Office of Public Health. In that regard, the fact that Professor Blanc clearly dissociated himself from the conclusions drawn by the defendant from their joint research is likewise significant. The defendant's statements that food prepared in microwave ovens is a danger to health and leads to changes in the blood of those who consume it that indicate a pathological disorder and present a pattern that could be seen as the beginning of a carcinogenic process are manifestly false and untrue and consequently *inaccurate* within the meaning of section 3(a) UCA. The application must therefore be allowed. The applicant remains of course free to base his propositions on new scientific findings.

…

There would nonetheless have been a breach of the UCA even if the defendant's belief had been objectively accurate since, as has already been said, section 3(a) UCA also prohibits misleading or unnecessarily wounding statements. Such statements were made in the present case as will be explained in greater detail under point 4 below.

3. The Court cannot share the opinion of Professor Peter Nobel, published in *SJZ* 88, p. 251 and cited by the defendant, that for an unfair act to affect competition within the meaning of section 2 UCA there must be a corresponding intention, that is to say a subjective wish to have an impact on competition. That view is inconsistent with the aim pursued by the UCA, which is to guarantee, in the interests of all the parties

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

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

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

market. If it does so deal, even without seeking to make a profit, it will lose the exemption (Pedrazzini, loc. cit. p. 33).

The freedom to carry out scientific research, which can be considered a fundamental right (see Jörg Müller, *Die Grundrechte des Schweizerischen Bundesverfassung*, pp. 122 et seq.) has not been infringed in the instant case. The defendant was and remains entitled to pursue his research. The majority of legal writers consider that scientific freedom includes the freedom to carry out research, to teach and to use the result of research done by others (see Müller, loc. cit.). In that regard, it is necessary to distinguish scientific freedom from the freedom to communicate to others the knowledge gained. Like practically all fundamental rights, this freedom of expression (as an unwritten fundamental right) is not, however, without limits in its application. It is subject to restrictions, especially in the sphere of the mass media, by the legal order, which provides for the protection of reputation in the Criminal Code and for protection of all aspects of the personality, including economic ones, in the Civil Code and the UCA (see Müller, loc. cit., pp. 106 et seq.; *BGE* 117 IV 193: Bernina). Scientific freedom does not therefore justify publication – especially in non-specialist periodicals (publication in specialist reviews would have to be considered differently) – of provisional results of research that are misleading or devoid of sound scientific basis and do not enable conclusions to be reached with certainty. Scientific researchers must be aware of their responsibilities and give consideration to the issue of what status laymen will give to the expression of their opinion. These constraints apply to the defendant likewise. The mere fact that the application of a statute affects the exercise of a fundamental right by no means signifies that the restriction of that right is unlawful. When it enacted the UCA, the legislature knew perfectly well that there was a risk that the statute would come into conflict with the protected area of intellectual freedoms. That is why section 14 UCA provides, by way of a cross-reference to Articles 28 c and 28 f of the Civil Code, that preventive measures against periodicals may be ordered only in the strictly limited circumstances set out in Article 28 c § 3 of the Civil Code. In the absence of more detailed provision, the assumption must be that no privilege should attach to facts such as those in the instant case. Independently of that issue, it must also be observed that, on the basis of the principle that there is no hierarchy of fundamental rights (see Rohrer, *Die Beziehung des Grundrechten untereinander*, thesis, Zürich 1982, pp. 104 et seq.), it is necessary to weigh against the fundamental rights relied on by the defendant the right to freedom of trade and industry.

An essential feature is *how* language is used to communicate a scientific opinion when knowledge is still uncertain and, for example, is based solely on sample surveys or experiments involving small numbers of people (only eight in this instance) who do not represent a cross-section of the population. The more clear-cut the reports of opinions, the stricter are the requirements to be made of the linguistically correct representation of the opinions concerned. It is also significant that, even after the event, the defendant did not distance himself from gross simplifications and exaggerations in the article or from the image of the Reaper with a microwave oven, which appears on every page of the research paper.

Since the defendant has identified himself with the article in its entirety, the plaintiff's application must, in terms of competition law, be allowed. Through his assertions, which have been mentioned in detail above, and the use of the image of the

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

…

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

…"

(b) In the Federal Court

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

"…

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

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

Competition can only exist where the action of the person concerned has, or is apt to have, an effect outside the private sphere (Pedrazzini, *Unlauterer Wettbewerb*, p. 33). Consequently, the only acts that are competition-related are those which increase or reduce the market share or the rate of success in finding customers of businesses formed with a view to profit or which objectively pursue those aims (see David, *Schweizerisches Wettbewerbsrecht*, 2nd ed., 1988, p. 29). The decisive factor, as the court below rightly pointed out, is economic relevance in the sense of a potential aptitude to affect competition; for that purpose, an objective aptitude is sufficient and it is of no importance whether there was a subjective intention of intervening in the economic sphere. That being so, it is of no help to the appellant to rely on the academic legal theory that, although the need for a competitive relationship has been dispensed with, an act committed with the intention of affecting competition is required in all cases for there to be an infringement of the UCA (Nobel, loc. cit., *passim*). Quite apart from the fact that that theory entails the risk of confusion between the concept of illegality and elements of the notion of fault, the appellant is confusing motive and intention. He does not deny that he is seeking to protect consumers by influencing their behaviour in the market and thereby affecting the sales market for the product he criticises. That clearly shows a competitive intention, even if it is prompted by idealistic motives and not by the pursuit of gain.

(b) Scientific research and publications are not in themselves directed at competition if they remain within the academic context (David, loc. cit.). They so become, however, if the target readership may objectively construe the scientific opinions as being designed to influence the behaviour of market players and, in particular, of customers. It is unnecessary to explain this in greater detail where science is used as a disguised means of advertising and where scientific knowledge may serve to boost a product's sales (Baumbach and Hefermehl, *Wettbewerbsrecht*, 17th ed., 1993...). The same must apply, however, where allegedly scientific statements are used in a competitive context to influence negatively the sales of a particular product through denigration of it. Such statements likewise amount to acts of competition covered by the UCA and are subject to its requirement of fairness (Baumbach and Hefermehl, loc. cit.).

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

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

…

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

…

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

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

Positive or negative advertising containing scientific data must, accordingly, in the public interest and in order to ensure effective competition, only be accepted if the data reflect established scientific knowledge or at least if the advertising clearly states that there are differing opinions. If there is no absolute guarantee that the scientific data are correct, the uncritical publication of them is at least deceptive and is accordingly misleading within the meaning of section 3(a) UCA (Baumbach and Hefermehl, loc. cit., ...). That was so in the instant case. According to the Commercial Court there is absolutely no scientific confirmation of the applicant's argument; on the contrary, it has been mostly rejected. To hold it out as accurate in the context of competition is unacceptable under section 3(a) UCA, and accordingly the injunction issued by the Commercial Court does not infringe any provision of federal law.

(c) There can be no question of the UCA's having been applied in breach of the Federal Constitution or the European Convention. Statutes must, in particular, define fundamental rights and other, conflicting duties of the State so that these two concerns of constitutional law may be taken into consideration to the greatest possible extent (Müller, *Elemente einer schweizerischen Grundrechtstheorie*, p. 104). This notion of regulation and the values underlying it must also be taken into account in the drafting of statutes. The smooth operation of competition and economic freedom, freedom of expression, scientific freedom and freedom of the press must be guaranteed as well as possible, but at the same time limited so that the various constitutional objectives may be reconciled in practice. In that regard, it should be noted that the UCA provides a remedy only in respect of unfair statements, and the meaning and purpose of freedom of expression or freedom of the press cannot be to legitimise unlawful public assertions of that kind. (Hotz, *Zur Bedeutung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) für die Massenmedien*, in *SJZ* 86/1990, pp. 26 et seq.). Anyone claiming scientific freedom is therefore wholly free to expound his knowledge in the academic sphere but, where competition is concerned, he may not claim to have the truth on his side where the opinion he is putting forward is disputed. An opinion which has not been confirmed scientifically must in particular not be misused as a disguised form of positive or negative advertising of one's own work or the work of others. In the present case, that is all the more true as the Commercial Court expressly left the applicant free to base his proposition on new scientific findings.

6. The appeal must therefore be dismissed…"

II. Relevant domestic law

24. Section 1 of the Federal Unfair Competition Act of 30 September 1943 reads as follows:

"1. Any abuse of economic competition resulting from deception or any other conduct contrary to the principle of good faith shall be deemed to be an act of unfair competition within the meaning of this Act.

2. The principle of good faith is not complied with where, for example, a person

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

…"

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

Section 1

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

Section 2

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

Section 3

"A person acts unfairly if, in particular,

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

…"

Section 9

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

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

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

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

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

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

Section 10

"…

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

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

…"

PROCEEDINGS BEFORE THE COMMISSION

26. Mr **Hertel** applied to the Commission on 13 September 1994. He alleged a violation of Articles 6, 8 and 10 of the Convention.

27. The Commission (Second Chamber) declared the application (no. 25181/94) admissible on 27 November 1996. In its report of 9 April 1997 (Article 31), it expressed the opinion that there had been a breach of Article 10 (ten votes to five) and that no separate issue arose under Article 6 § 1 or Article 8 of the Convention (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[4].

FINAL SUBMISSIONS TO THE COURT

28. In his memorial the applicant said th at he stood by the terms of his application and observations to the Commission.

29. The Government invited the Court to

> "hold that there had been no violation of Article 10 of the Convention in the present case and that no separate issue arose under Article 8 or Article 6 § 1 of the Convention."

as TO THE LAW

i. alleged violation of article 10 of the convention

30. The applicant submitted that the ban imposed on him by the Swiss courts under the Federal Unfair Competition Act of 19 December 1986 had infringed Article 10 of the Convention, which provides:

> "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."

The Government contested that submission; the Commission agreed with it.

31. The Court observes that Mr **Hertel** is prohibited, on pain of the penalties provided in Article 292 of the Criminal Code and Article 403 of the Code of Criminal Procedure, from stating that food prepared in microwave ovens is a danger to health and leads to changes in the blood of those who consume it that indicate a pathological disorder and present a pattern that could be seen as the beginning of a carcinogenic process, and from using, in publications and public speeches on microwave ovens, the image of death (see paragraphs 20, 22 and 23 above). It is clear therefore that the applicant has suffered an

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

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

A. "Prescribed by law"

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

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

34. The Commission came to the same conclusion.

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

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

The UCA is not therefore confined in scope solely to economic agents: people, such as Mr **Hertel**, who are not market players are also concerned. Any remaining doubts as to the express intention of the legislature in that regard will be dispelled by reading the Federal Council's memorandum in support of the bill (memorandum of 18 May 1983, *FF* 1983 II 1037), from which it is clear that the bill's sponsors intended, like the legislature in 1943, to protect competition as an "institution", and not just "competitors". Moreover, it is explained in the memorandum (chapter 241.2, commentary on section 2 of the bill) that:

> "…
>
> Breaches of good faith standards occur in the context of conduct or commercial practices that affect relations between competitors or between suppliers and customers. ... The concept of conduct, which must be understood in terms of its effect on competitive relationships, enables the acts of third parties which have an important effect on competition but are not directly associated with it, whether on behalf of competitors or on behalf of customers, to be covered also. The categories of persons playing a significant role in competition will thus be extended. It is perfectly possible for consumers' associations also unfairly to affect competition by publishing comparative tests or referring to press articles, or radio or television programmes. The consequence of enlarging the scope of protection afforded by the UCA to a wider sector means that the members of that wider sector will have to assume their responsibilities and may be called upon to answer if they unfairly affect competition. Indeed the intention to enlarge the categories of people covered by the UCA is not a new one. It was said in the 1942 memorandum on the UCA (*FF* 1942 685) that unfair competition was not solely the province of competitors, as the Act also applied when third parties or associations intervened in the field of competition on behalf of certain businesses... That conception is explained in some of the constitutive parts of the UCA in which express reference is made to third parties... The new wording of this section makes it very clear and definitively so that the categories of people who may be found liable for acts of unfair competition are henceforth much wider. It is therefore unnecessary for third parties to be mentioned expressly with respect to conduct that does not involve a competitive position. Likewise, the long-standing debate as to the need for a competitive relationship if the UCA is to apply will thus become devoid of purpose. Legal writers have noted for some time that the requirement of a competitive relationship has led to inappropriate restrictions...
>
> ..."

The memorandum goes on to say (Chapter 241.31, commentary on section 3(a) of the bill):

> "… the very wide wording of the general clause ... takes account of the fact that third parties may also unfairly affect or distort competitive relations. In practical terms, this means that people, organisations or associations who are not themselves competitors may be liable for their denigratory statements. The decisive issue is

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

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

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

B. Legitimate aim

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

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

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

42. The Court observes that the Federal Unfair Competition Act of 19 December 1986 "is intended to guarantee, in the interests of all the parties concerned, fair, undistorted competition" (section 1 – see paragraph 25 above) and that a person who sustains or is "threatened with damage to his goodwill, credit, professional reputation, business or

economic interests in general" through an "act of unfair competition" may apply to a court for an order prohibiting such act (section 9, ibid.). It was under those provisions that the domestic courts granted the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances' application alleging unfair competition on the part of Mr **Hertel** likely to be prejudicial to the interests of its members. There is no doubt, therefore, that the aim of the measure was the "protection of the … rights of others".

C. "Necessary in a democratic society"

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

and his being prevented from taking part in scientific debate on the public-health issues raised by the use of microwave ovens.

44. The Government submitted that the interference in the applicant's freedom of expression was aimed at guaranteeing fair and free competition in the interests of society as a whole. It had therefore met a pressing social need.

The Swiss courts had issued the injunction only after carefully weighing up the opposing interests: on the one hand, the interest of the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances ("MHEA") and consumers in being protected against the propagation of false allegations about microwave ovens and, on the other hand, the applicant's interest in disseminating information of his choice. The applicant had been held out in the article in issue as an "expert"; the article had, moreover, been accompanied by the shocking image of death and had stated that it had been scientifically proved that the use of microwave ovens was dangerous for human health. In view of the fact that the *Journal Franz Weber* was intended for lay readers, not specialists, and had a circulation of more than one hundred thousand copies, a large section of the public would thus have been convinced that there was certainty on the issue. However, not only was the question highly controversial, but in addition the research carried out by the applicant had lacked the rigour necessary to be described as "scientific". Those circumstances justified the interference which, moreover, had been limited, as Mr **Hertel** had remained free not only to pursue his research into microwaves but also to publish and disseminate the results in non-economic spheres such as scientific or academic circles. It was also necessary to take into account the shocking statements the applicant had made in 1989, which had been reproduced in issue no. 8 of the *Journal Franz Weber*, that microwave ovens were "worse than the Dachau gas chambers".

Lastly, in view of the margin of appreciation enjoyed by the Contracting States in respect of unfair competition, Article 10 had not been infringed.

45. The Commission came to the opposite conclusion.

46. The Court reiterates the fundamental principles under its case-law, as most recently set out in the judgments of Zana **v**. Turkey (25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2547–48, § 51) and Grigoriades **v**. Greece (*Reports* 1997-VII, p. 2589, § 44):

(i) 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 set forth in Article 10, this freedom is subject to exceptions, which – as the Court has already said above – must, however, be construed strictly, and the need for any restrictions must be established convincingly (see the following judgments: Handyside **v**. the United Kingdom, 7 December 1976, Series A no. 24, p. 23, § 49; Lingens **v**. Austria, 8 July 1986, Series A no. 103, p. 26, § 41; and Jersild **v**. Denmark, 23 September1994, Series A no. 298, p. 26, § 37).

(ii) 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.

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

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

Such a margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of unfair competition (see the markt intern Verlag GmbH and Klaus Beermann **v**. Germany judgment of 20 November 1989, Series A no. 165, p. 20, § 33, and the Jacubowski **v**. Germany judgment of 23 June 1994, Series A no. 291-A, p. 14, § 26). It is however necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely "commercial" statements, but his participation in a debate affecting the general interest, for example, over public health; in the instant case, it cannot be denied that such a debate existed. It concerned the effects of microwaves on human health (indeed, the only issue was over the conclusions reached by Mr **Hertel** in his research as set out in issue no. 19 of the *Journal Franz Weber* and not the subject matter of that research). In that respect, the present case is substantially different from the markt intern and Jacubowski cases cited above.

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

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

As regards the content of issue no. 19 relating to microwave ovens, the applicant was thus neither author nor co-author of the title on the cover page (see paragraph 10 above), the editorial column (attributed to Franz Weber – see paragraph 11 above) or of pages 3 to 10 (attributed to René d'Ombresson – see paragraph 12 above). The only parts that can be attributed to him are, with the exception of the titles and sub-titles appearing on them, pages 5 to 10, which contain an extract of the research paper (see paragraph 13 above). The Court notes that nowhere is it expressly proposed that microwave ovens be destroyed or boycotted or their use banned and that the applicant did not repeat the statements he made in 1989 and which had been published in issue no. 8 (April/May/June 1989) of the *Journal Franz Weber*. In addition and above all, the applicant's views on the harmful effects on human health of the consumption of food prepared in microwave ovens are expressed in far less categorical terms than the Government intimated; that is to be seen in particular from the repeated use of the conditional mood and the choice of non-affirmative expressions. In that regard, the last lines from the extract, in which the applicant's conclusions from his experiments are summarised, are particularly striking. Thus, although it is stated that the results obtained "show changes which bear witness to pathogenic disorders", as regards any cancerous effects it is explained that the results present a pattern which "might" correspond to the beginning of a cancerous development and which "deserves attention"; likewise, there is no assertion that the consumption of irradiated food is harmful for man as a result of the induction of indirect radiation through food, but merely a suggestion that it "might" be (see paragraph 13 above).

49. It nevertheless remains the case that the dissemination of such statements was likely to have an adverse effect on the sale of microwave ovens in **Switzerland** and it is to be noted in that respect that the *Journal Franz Weber* has a not negligible circulation of more or less one hundred and twenty thousand copies. It must nevertheless be noted that the periodical is not general in content since it deals in particular with environmental and public-health issues and is distributed almost entirely by subscription; it therefore has, in all likelihood, a specific readership such that the impact of the ideas it contains should be limited. Indeed, that was the view of the President of the Vevey District Court (see paragraph 17 above). The Court also notes that in the present case it was not alleged that the publication in issue had a measurable effect on the sale of microwave ovens or caused actual damage to the members of the MHEA. In applying the UCA, the Commercial Court of the Canton of Berne and the Federal Court merely found that it was plausible that there had been such an effect. The Commercial Court in particular confined itself to holding (see paragraph 22 above):

> "… In each case … it must be ascertained whether the behaviour of the person concerned affects the relations between competitors or between suppliers and customers… Even if there is no certain proof of a connection between the drop in turnover in respect of microwave ovens and the [defendant's] behaviour, it is clear that the statements and publications complained of in the instant case are apt to diminish sales of microwave ovens and, consequently, to harm the businesses associated with the plaintiff. The objective aptitude to affect competition is therefore established."

50. It will be seen from the foregoing that Mr **Hertel** played no part in the choice of the illustration for issue no. 19 of the *Journal Franz Weber*, that those statements that were definitely attributable to him were on the whole qualified and that there is nothing to suggest that they

had any substantial impact on the interests of the members of the MHEA. In spite of all that, the Swiss courts prohibited the applicant from stating that food prepared in

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

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

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

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

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

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

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

report to the *Journal Franz Weber* – and had no intention of committing; he complained on that basis that the measure was "unfair" and amounted to a breach of Article 6 § 1.

53. The Government maintained that no question arose under Article 8 and that the complaint under Article 6 § 1 was unfounded.

54. Having regard to its finding of a violation of Article 10, the Court, like the Commission, considers that no separate question arises under Article 6 § 1 or Article 8.

III. application of article 50 of the convention

55. Article 50 of the Convention provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

56. Mr **Hertel** said that the injunction that had been imposed on him had entailed the closing of his laboratory and caused him damage which he put at 20,000 Swiss francs (CHF).

57. The Government invited the Court not to allow that claim.

58. The Delegate of the Commission expressed no view.

59. The Court finds no causal link between the damage alleged by the applicant and the interference with his right to freedom of expression. It therefore dismisses the claim.

B. Costs and expenses

60. The applicant claims CHF 72,917 for costs and expenses before the Swiss courts and the Strasbourg institutions (of which CHF 7,980 is claimed for the latter proceedings).

61. The Government submitted that as regards the applicant's costs and expenses before the Swiss courts, only those relating to the application to the Federal Court – amounting to CHF 13,000 – should be reimbursed as that had been the only recourse sought on a national level for a decision that there had been a violation as alleged and to remedy it. As to the costs of the proceedings before the Strasbourg institutions, a fair assessment would be CHF 8,000. In short, the Government declared that it was ready to pay the applicant CHF 21,000.

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

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

C. Default interest

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

for these reasons, the court

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

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

3. *Holds* by eight votes to one

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

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

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 August 1998.

Signed: Rudolf Bernhardt
President
Signed: Herbert Petzold
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the following separate opinions are annexed to this judgment:
(a) dissenting opinion of Mr Bernhardt;
(b) dissenting opinion of Mr Matscher;
(c) dissenting opinion of Mr Toumanov.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE BERNHARDT

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

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

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

DISSENTING OPINION OF JUDGE MATSCHER

(*TRANSLATION*)

1. I agree with the majority's view that the interference was prescribed by law and pursued a legitimate aim (see the markt intern Verlag GmbH and Klaus Beermann **v**. Germany judgment of 20 November 1989, Series A no. 165, §§ 28 et seq.). Those two issues must firstly be assessed in the light of the legislation of the State concerned.

2. On the other hand, I am unable to agree with the majority's finding that the measure in issue was not "necessary in a democratic society".

Unfair competition is a complex technical subject and it was in accordance with their case-law – which is similar to that of the courts of other European countries – that the Swiss courts held that the applicant's statements came within that sphere.

After weighing up the interests concerned, the Swiss courts held that the applicant's exaggerated statements – which, contrary to what was asserted by the applicant, were not based on any scientific evidence – infringed the Unfair Competition Act and granted the plaintiffs' application for an injunction barring him from continuing to publish the statements. He was not prohibited from continuing his research or from publishing that research in an appropriate way.

Furthermore, the argument that the person "really responsible" was not Mr **Hertel**, but Franz Weber, does not stand up, as the applicant had made his report available to Mr Weber and could have foreseen the use that would be made of it. Moreover, the applicant approved the publication because he did not dissociate himself from it and had made similar remarks in an interview that was also published in the *Journal Franz Weber*.

As in the markt intern case, I consider that in unfair competition cases States should be afforded a wider margin of appreciation than in other spheres of freedom of expression. Otherwise, the system for preventing unfair competition, one that is beneficial to the business world, will be destroyed. While there is debate between specialists in the field, it is not over whether interference in the freedom of expression is lawful, but only as to whether particular conduct does or does not amount to unfair competition. That is not an issue for the Court to decide.

I find that the respondent State did not go beyond that margin of appreciation, particularly as the penalty imposed on the applicant was not disproportionate.

DISSENTING OPINION OF JUDGE TOUMANOV

(*TRANSLATION*)

I agree with Mr Bernhardt's dissenting opinion.

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

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

Notes by the Registrar

2. The case is numbered 59/1997/843/1049. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

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

HERTEL JUDGMENT OF 25 AUGUST 1998

HERTEL JUDGMENT