

Federal Constitutional Court Rejects Ban on Benetton Shock Ads: Free Expression, Fair Competition and the Opaque Boundaries Between Political Message and Social Moral Standards.

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[1] On December 12, 2000, the Federal Constitutional Court (FCC) issued its judgment concerning the controversial "shock" advertising campaign of the Italian fashion designer and retailer United Colors of Benetton. (1) *Momentaufnahme* reported on the oral arguments before the FCC. (No. 3/2000 – Nov. 15, 2000). The Second Senate of the FCC found the 1995 decisions of the Federal Court of Justice (FCJ), which upheld bans on the Benetton advertisements, to be unconstitutional because the bans constituted an infringement of the constitutionally protected right to freely express one's opinion. The Benetton marketing campaign used large format photography depicting provocative issues, including: a duck smothered in oil, apparently from an oil-spill; children being exploited as laborers in a third-world factory; and a naked buttock bearing the stamp "H.I.V. Positive." Publication of the Benetton advertisements had been challenged as "unfair competition" by a leading consumer protection group (Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., Bad Homburg).

[2] The FCJ held, in its 1995 decision regarding the duck and child laborers, that a corporation was allowed to use strong imagery to create associations with controversial issues for the purpose of marketing the firm's goods, even if the imagery/issue lacked a connection to the firm's goods or services. For the FCJ, neither the "tastelessness" nor the "shock-effect" of an advertisement would, by itself, constitute a significant violation of fair competition. The FCJ reasoned that with these marketing devices a firm could engage in raising awareness of issues. The FCJ stated clearly that, when reviewing an advertisement on fair competition grounds, a court could not apply a mere aesthetic test. For the FCJ, it was clear that a company, just like any other private party, holds the right to express its opinions or to provide information concerning the reality of issues. The FCJ conceded a company's right to "take a stand," but the Court took the quality of the firm's issue-based advertisements to be the standard by which an advertisement's compliance with fair competition should be determined. The FCJ held that an advertisement that aimed exclusively at the viewers' emotions without adding to the debate over the issue invoked by the advertisement, would have to be prohibited as being outside the confines of fair competition. The FCJ found that the images of an oil-smothered duck and child laborers from the Benetton campaign crossed this threshold and that a ban on these advertisements was justified.

[3] Regarding the advertisement featuring the image of a buttock bearing the stamp "H.I.V. Positive," the FCJ found that the image violated the constitutionally protected right to human dignity (Art. 1.1 German Basic Law). According to the reasoning of the FCJ, victims of the AIDS virus confronted by the Benetton advertisement would suffer a violation of their human dignity because the stamp "H.I.V. Positive" signified the social labeling and exclusion of AIDS-victims. The FCJ concluded that the image could communicate (and reinforce) this harmful marginalizing message to non-AIDS victims as well. The FCJ concluded that violations of human dignity in advertising constituted a violation of fair competition, especially bearing in mind the objective of protecting younger viewers from the a message that reinforces marginalisation of AIDS victims.

[4] The case before the FCC required it to balance the competing principles of a fundamental right to freely express one's opinion (especially as a free press right) and the public's more opaque and flexible interest in fair competition. The FCC found the FCJ's ban on the publication of the Benetton advertisements to be a violation of a publisher's right to freely express its opinion as protected in Art. 5.1(1) of the German Basic Law (the constitutional complaint in the Benetton case had been brought by the publisher of *Stern Magazine*). The FCC concluded that the three photographs are constitutionally protected expressions of opinions. The FCC held that this status does not change merely because Benetton, by displaying its brand name along with the photo, employs the images for commercial purposes as "image-advertisement." Even if some viewers may have had the impression that the advertisement was exclusively or at least primarily aimed at promoting the firm's goods, this can hardly be taken as the only possible understanding of the advertisements. The Court noted that the experience with the advertisements had actually been to the contrary. The advertisements had been largely understood to be statements of Benetton's position on the respective issues.

[5] The FCC explained that Section 1 of the German Law against Unfair Competition (*Gesetz gegen den Unlauteren Wettbewerb – UWG*), upon which the FCJ based its 1995 decisions, is considerably vague in its wording. The FCC, however, found that the statute passes constitutional review as to its applicability to a stupendously wide array of possible fair trade issues. The FCC in its Benetton decision, therefore, invited no challenge to the continued application of the UWG.

[6] The FCC's Benetton decision is, however, remarkable for its clear message concerning the meaning and scope of the constitutional right to freely express one's opinions, which the FCC found to be violated by the FCJ's ban on the publication of the Benetton advertisements. The FCC used the following constitutional standard: did the FCJ, in its application of Section 1 of the UWG, adequately consider the fundamental importance of the constitutional right to freely express one's opinion. In answering the question in the negative, the FCC underlined the obligation of a civil court to enter into a balancing process in which the interests on the side of the "speaker" and the alleged overriding public interests (in fair competition, for example) are clearly outlined and weighed. The FCC made clear that it does not intend to perform this balancing for the first time on a case by case basis but that it is the obligation of the civil courts. The FCC concluded that the FCJ's decisions showed no clear signs of such open weighing of rights and interests and therefore they failed this constitutional test. This is the subtlety of the FCC's decision. It reinforced the judicial discretion of the FCJ (and the lower courts) while imposing a framework upon the exercise of that discretion, especially when such fundamental rights like the freedom to express one's opinion are at stake. The FCC not only requires the FCJ and the lower courts to sufficiently consider the constitutional interests at stake in a specific case, but the FCJ and lower courts must present that evaluation as part of their judgment. The FCC, for example, accepted the FCJ's rationale that there might be a standard accepted by a wider public that would refute the advertisements for aesthetic and/or ethical reasons. The FCC concluded, however, that the FCJ neither made clear nor followed such a standard in reaching its decision.

[7] The FCC agreed with the FCJ's concern that the omnipresence of suggestive advertising, especially when employing such provocative images, runs the risk of gradually making the viewer indifferent. The FCC did not, however, agree with the FCJ, which concluded that the Benetton ads compounded this problem by seeking to arouse feelings of compassion. The FCC found that there might be truth to the allegation that Benetton's advertisements reinforced a general trend towards indifference to other people's miseries and sorrows, but the Court found no legal implications arising from this characteristic of the advertisements.

[8] The FCC found that the prohibition of the advertisements was an unconstitutional restriction on the publisher's (and, implicitly, Benetton's) right to freely express its opinions. The advertisements are covered by this right because they present images that allude to socially and politically relevant topics and are thereby likely to arouse public interest and concern in the issues upon which they touch. Seen in the light of Art. 5.1 of the German Basic Law (the right to freely express one's opinion) it is of no relevance whether the message contains a concrete remedy to the problems raised or whether the message as such is apt to substantially add to the debate as the FCJ required. The constitutional protection encompasses even the speaker of emotional, unfounded or baseless remarks irrespective of whether it is considered by others as being useful or detrimental to the debate.

[9] Finally, with respect to the duck and child laborers advertisements, the FCC concluded that matters of taste can hardly be treated within the prohibitive standards of Section 1 UWG.

[10] The FCC also rejected the FCJ's application of the "human dignity" protection of Art. 1 to the "H.I.V. Positive" advertisement. The FCC agreed with the FCJ that there is room for such a prohibition in cases where a depicted individual or a group is subjected to critique or an attack that strips them of their quality as equally valuable human beings (one expression of the Art. 1 "human dignity" protections). The FCC disagreed, however, that this was the case with the "H.I.V. Positive" advertisement. The FCC found that the FCJ reached this conclusion regarding the "H.I.V. Positive" advertisement based only on the least favorable of several possible interpretations of the advertisement (that the advertisement reinforces the exclusion and stigmatization of people suffering from AIDS). The FCC noted that it was possible that, with the "H.I.V. Positive" advertisement, Benetton sought to criticize the exclusion and stigmatization of AIDS victims. The FCC concluded that such multiplicity is a necessary consequence of the fundamental right to free speech and freedom of expression.

[11] Another noteworthy drama in the Benetton "shock advertisement" saga played itself out while the constitutional case against the FCJ judgments was proceeding in the FCC. The Eighth Civil Senate of the FCJ (not the First Civil Senate, which had ruled on the ban in 1995) handed down a judgment on July 23, 1997, holding that Benetton was not liable to its contracted retailers for losses allegedly resulting from the "shock-advertisements." The FCJ, in this case, based its decision on reasoning remarkably similar to that used by the First Senate of the FCJ in its 1995 decision to ban the advertisements. In the 1997 tort case the FCJ concluded that no tortious harm resulted from the advertisements because the advertisements were likely to (or at least designed to have the effect of) improve business for the franchisees' by inspiring a feeling of pity and therefore solidarity with the firm that brought the advertisement. While reaching this conclusion regarding the absence of any harm in the case, the FCJ clearly stated that it constituted a violation of fair competition principles to draw economic benefits from the feelings of compassion and solidarity aroused by the Benetton advertisements.

[12] The FCC's Benetton decision is likely to raise as much criticism as praise for the clear standards the court set in

favor of the constitutionally protected right to freely express one's opinion. It will be important to tack what role the decision plays in the debate on how, and most importantly where, to cast the lines between (2) speech of private speakers and (3) speech that constitutes violations of overriding public or private interests. In our communications-heavy world, now often characterized as the "Information Society," this question raises important concerns about the democratic legitimacy of those charged with interpretative authority over communication. At the very least, with the Benetton case, the FCC has demonstrated its willingness to approach the issue with clarity; that is to say, while accentuating the fundamental rights without which the questions would be moot.

For more information:

Federal Constitutional Court Benetton Shock-Ads

Decision (German) on-line:

<http://www.bundesverfassungsgericht.de/entscheidungen>">www.bundesverfassungsgericht.de/entscheidungen

English language version of the Basic Law on-line: <http://www.uni-wuerzburg.de/law>

(1) See Entscheidungen des Bundesverfassungsgerichts [BVerfGE] Vol. 102, p. 347. Also published in: Neue Juristische Wochenschrift 2001, p. 591.

(2) Decision of the Federal Supreme Court (BGH) of July 6, 1995 in: 130 BGHZ 196.

(3) Decision of the Federal Supreme Court (BGH) of July 23, 1997 in: 136 BGHZ 295.