Reclamerecht

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EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
30 januari 2018
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Sekmadienis Ltd./Litouwen

Een Litouwse toezichthouder legt, na overleg met de Litouwse bisschoppenconferentie, aan kledingbedrijf Sekmadienis een plaatsingsverbod en een boete van € 580 op wegens strijd met de goede zeden van drie reclameposters. Deze posters bestonden uit afbeeldingen van een getatoeëerde jonge man in een spijkerbroek en een jonge vrouw met een rozenkrans in een witte jurk, beiden met een stralenkrans, en met als begeleidende teksten "Jezus, wat een broek!"; "Lieve Maria, wat een jurk!" en "Jezus en Maria, wat draag jij!". Motiveringen van het bestuursorgaan: "Dit spel is te ver gegaan"; "de fundamentele eerbied voor godsdienst is aan het verdwijnen"; "het ongepaste gebruik van godsdienstige symbolen verlaagt die symbolen en is in strijd met algemeen aanvaarde morele en ethische normen" en "godsdienstige personen reageren erg gevoelig op elke gebruik van godsdienstige symbolen of personen in reclame". Artikel 10 lid 2 EVRM-analyse.

- *Beperking voorzien bij wet: Onduidelijk is of een verbod op godsdienstig gevoelige uitingen valt onder een verbod op uitingen in strijd met de goede zeden, maar het Hof laat dat in het midden omdat het tot een schending concludeert op grond van het niet voldaan zijn aan de evenredigheidstoets.*
- *Legitieme doelstelling: Niet betwist wordt dat (i) de bescherming van de zeden die uit het christelijke geloof voortvloeien; en (ii) de bescherming van gelovigen tegen beledigingen wegens hun geloof, legitieme doelstellingen vormen.*
- *Noodzakelijk in een democratische samenleving:*
  a) Er is sprake van gelijkenis met godsdienstige figuren.
  b) De reclame dient een commercieel doel en beoogt niet bij te dragen aan een openbaar debat over godsdienst of andere zaken van openbaar belang, waardoor sprake is van een bredere, maar niet onbeperkte beoordelingsruimte van de nationale autoriteiten bij het opleggen van beperkingen.
  c) De reclameposters lijken niet onnodig grievend of godslasterlijk te zijn, haat te zaaien op grond van geloofsovertuiging of een godsdienst op ongepaste wijze aan te vallen.
  d) De nationale autoriteiten hadden daarom relevante en voldoende redenen moeten geven waarom deze uitingen desondanks in strijd waren met de openbare zeden. Niet ieder gebruik van godsdienstige symbolen in reclame is daar immers mee in strijd.
  e) De enkele motivering dat de reclame godsdienstige symbolen "voor oppervlakkige doelstellingen" had gebruikt, hun "eigenlijk doel had vervormd" en "ongepast" was, was in dat kader onvoldoende.
  f) Hetzelfde geldt met name ook voor de motivering dat de reclame "een levensstijl bevordert dat onverenigbaar is met de beginselen van een godsdienstig iemand", met name omdat niet wordt toegelicht wat die levensstijl zou zijn, hoe de advertenties die stijl zouden bevorderen en waarom een levensstijl dat onverenigbaar is met de beginselen van een godsdienstig persoon daarmee noodzakelijkerwijs ook onverenigbaar zou zijn met de goede zeden1. Dit klemt te meer nu de beboetingsprocedure is gevoerd in overleg met alleen de Rooms Katholieke kerk, terwijl in Litouwen ook andere (christelijke en niet-christelijke) geloofsgemeenschappen bestaan. Daarbij geldt dat beperkingen van de vrije meningsuiting ter bescherming van de openbare zeden niet gebaseerd kunnen zijn op slechts één traditie.
  g) Dat ongeveer 100 personen over de reclame hebben geklaagd is niet doorslaggevend. De vrijheid van meningsuiting omvat mede uitingen die beledigen, schokken of verontrusten. Daarnaast mogen diegenen die ervoor kiezen hun geloof te belijden niet redelijkerwijs verwachten gevrijwaard te blijven van alle kritiek: zij moeten gedogen en aanvaarden dat anderen hun geloof ontkennen, of zelfs geloofsvijandige leerstukken verspreiden.
  h) Er kan niet van worden uitgegaan dat iedere christen de campagne noodzakelijkerwijs beledigend zou vinden. En zelfs indien dat het geval zou zijn, zou dat geen verbod rechtvaardigen. De uitoefening van een vrijheid door een minderheid kan immers niet afhankelijk worden gesteld van de aanvaarding door de meerderheid: anders zou die vrijheid niet meer effectief uitgeoefend kunnen worden.
  i) Daarmee zijn de Litouwse autoriteiten er niet in geslaagd een juist evenwicht te treffen tussen de bescherming van de rechten van gelovigen en van de vrijheid van meningsuiting. Uit de door hen gebruikte motivering (zie hiervoor) blijkt dat zij absolute voorrang hebben verleend aan het beschermen

van de gevoelens van gelovigen, zonder op gepaste wijze rekening te houden met de vrijheid van meningsuiting van Sekmadienis.

Unaniem: schending.

Art. 10 EVRM

nr. 69317/14

ECLI:CE:ECHR:2018:0130JUD006931714

Arrest van het Hof

PROCEDURE

1. The case originated in an application (no. 69317/14) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian limited liability company, Sekmadienis Ltd. ("the applicant company"), on 20 October 2014.

2. The applicant company was represented by Mr K. Liutkevičius, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

3. The applicant company alleged that there had been an interference with its right to freedom of expression, contrary to Article 10 of the Convention, on account of the fact that it had been fined for publishing advertisements deemed to be contrary to public morals.

4. On 8 September 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. Advertisements run by the applicant company

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

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

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

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

B. Proceedings before the State Consumer Rights Protection Authority

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

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

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

> towards religion-related topics in advertising, and to stop the dissemination of the advertisements or change the characters depicted therein."

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

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

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

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

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

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

> "Religious symbols are not just simple signs, pictures or logos. In the Christian tradition, a religious symbol is a visible sign representing the invisible sacred reality.
> The advertisements ... make both visual and written references to religious sacred objects, such as a rosary, the names of Jesus and Mary, and the symbol of the Pietà. Christ and Mary, as symbols of faith, represent certain moral values and embody ethical perfection, and for that they are examples of appropriate behaviour and desirable life for the faithful. The inappropriate depiction of Christ and Mary in the advertisements encourages a frivolous attitude towards the ethical values of the Christian faith, and promotes a lifestyle which is incompatible with the principles of a religious person. The persons of Christ and Mary are thereby degraded as symbols of the sacredness of the Christian faith. For that reason, such depiction offends the feelings of religious people. The degrading and distortion of religious symbols by purposely changing their meaning is contrary to public morals, especially when it is done in pursuit of commercial gain, and must therefore not be allowed, in line with Article 4 of the Law on Advertising."

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

that the advertisements had relied on wordplay and they had been meant to be funny but not to offend anyone.

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

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

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

C. Proceedings before courts

1. Vilnius Regional Administrative Court

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

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

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

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

2. Supreme Administrative Court

24. The applicant company appealed against that decision. In its appeal it repeated the arguments raised

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

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

> "The entirety of the evidence in the present case gives grounds to conclude that the advertisements displayed by [the applicant company] are clearly contrary to public morals, because religion, as a certain type of world view, unavoidably contributes to the moral development of the society; symbols of a religious nature occupy a significant place in the system of spiritual values of individuals and the society, and their inappropriate use demeans them [and] is contrary to universally accepted moral and ethical norms. The form of advertising [chosen by the applicant company] does not conform to good morals and to the principles of respecting the values of the Christian faith and its sacred symbols, and [the advertisements] therefore breach Article 4 § 2 (1) of the Law on Advertising.
>
> ...
>
> In its appeal [the applicant company] alleges that there are no objective grounds to find that the advertisements offended the feelings of religious people ... It must be noted that the case file includes a letter by almost one hundred religious individuals, sent to the Lithuanian Bishops Conference, expressing dissatisfaction with the advertisements in question. This refutes [the applicant company's] arguments and they are thereby dismissed as unfounded."

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

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

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

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

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

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

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional and statutory provisions

1. Constitution of the Republic of Lithuania

31. The relevant provisions of the Constitution read:

Article 25

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

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

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

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

..."

Article 26

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

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

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

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

..."

Article 27

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

Article 28

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

Article 43

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

...

There shall be no State religion in Lithuania."

2. Law on Advertising

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

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

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

"2. Advertising shall be banned if:

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

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

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

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

3. Code of Advertising Ethics

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

General principles

"Advertising must be lawful, accurate and fair.

Advertising must not breach or ignore laws which are in force.

Advertising must not include statements or visuals degrading human dignity, offending religious feelings or political convictions, or promoting behaviour which is dangerous to health and/or the environment.

All advertising must be prepared with social responsibility and conform to the general requirements of fair competition, applicable to any business.

Advertising must not mislead or harm the consumer or abuse consumers' trust or their lack of experience and/or knowledge. Advertising must not erode consumers' trust in advertising in general.

Advertising must be clearly recognisable and distinguished from other information."

1. Decency

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

13. Religion

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

4. Law on Religious Communities and Associations

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

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

5. Law on Administrative Proceedings

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

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

B. Rulings of the Constitutional Court

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

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

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

"Conflicts and contradictions sometimes arise between the rights and freedoms of individuals on the one hand and the interests of the society on the other. In a democratic society such contradictions are solved by balancing different interests and seeking not to upset this balance. One of the ways to balance different interests is by limiting the rights and freedoms of individuals. The Convention for the Protection of Human Rights and Fundamental Freedoms provides for such a possibility. According to the Convention and the case-law of the European Court of Human Rights, such limitations are justified if ... they are lawful and ... necessary in a democratic society. The requirement of lawfulness means

that the limitations have to be set only by means of a law that is publicly declared; the provisions of the law must be formulated clearly enough. When defining in law the limitations on individual rights, it is necessary to take account of the purpose and meaning of a corresponding right (or freedom) and the conditions of its limitation established in the Constitution. As to whether a concrete limitation is necessary in a democratic society, firstly, one must find out the aims of the limitation, and, secondly, find out whether the limitation is proportionate to the legitimate aim sought.

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

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

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

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

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

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

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

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

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

...

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

...

Article 43 § 7 of the Constitution establishes the principle of the absence of a State religion in Lithuania. This constitutional norm and the norm providing that there

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

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

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

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

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

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

III. RELEVANT INTERNATIONAL MATERIALS

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

Article 19

"1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

Article 20

"...

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

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

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

...

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

...

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

49. At its 76th Plenary Session, held on 17 and 18 October 2008, the European Commission for Democracy

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

> "76. The Venice Commission underlines ... that it must be possible to criticise religious ideas, even if such criticism may be perceived by some as hurting their religious feelings. Awards of damages should be carefully and strictly justified and motivated and should be proportional, lest they should have a chilling effect on freedom of expression.
> ...
> 78. A legitimate concern which arises in this respect is that only the religious beliefs or convictions of some would be given protection. It might be so on account of their belonging to the religious majority or to a powerful religious minority; of their being recognised as a religious group. It might also be the case on account of the vehemence of their reactions to insults ...
> ...
> 81. It must be stressed, however, that democratic societies must not become hostage to these sensitivities and freedom of expression must not indiscriminately retreat when facing violent reactions. The threshold of sensitivity of certain individuals may be too low in certain specific circumstances ... and this should not become of itself a reason to prevent any form of discussion on religious matters involving that particular religion: the right to freedom of expression in a democratic society would otherwise be jeopardised.
> 82. The Commission considers that any difference in the application of restrictions to freedom of expression with a view to protecting specific religious beliefs or convictions (including as regards the position of a religious group as victim as opposed to perpetrator) should either be avoided or duly justified."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

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

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

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The Government

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

53. They firstly argued that the interference had been in accordance with the law – namely, Article 4 § 2 (1) of the Law on Advertising (see paragraph 34 above) – and that the requirements of that provision had been sufficiently accessible and foreseeable to the applicant company. They submitted that the concept of "public morals" was necessarily broad and its contents could change over time, so it was impossible to provide a precise definition of public morals in law. The Government acknowledged that Article 4 § 2 (1) did not prohibit the use of religious symbols or motifs in advertising *per se*, as that would be contrary to the principles of pluralism, tolerance and broadmindedness. However, they argued that morals could be based on religious views, especially taking into account the historic importance of Christianity in Lithuania and the number of Christians among the population (see paragraph 56 below). The Government thus argued that it should have been sufficiently clear to the applicant company that advertisements which insulted the feelings of religious people were contrary to Article 4 § 2 (1) of the Law on Advertising. The Government also submitted that the subsequent amendment of that provision, establishing an explicit prohibition of expressing contempt for religious symbols in advertising (see paragraph 35 above), had been initiated by the Lithuanian Bishops Conference and had been necessary to make the Law stricter and to serve "a preventive function".

54. As for the aim pursued by the interference, the Government submitted that it had been twofold – protection

of morals (the morals arising from the Christian faith and shared by a substantial part of the Lithuanian population) and protection of the rights of others (the right of religious people not to be insulted on the grounds of their beliefs).

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

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

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

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

(b) The applicant company

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

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

61. The applicant company also argued that, in the absence of a State religion in Lithuania, no single faith could claim to be the source of public morals, and that public morals could not be equated to religious morals. It submitted that Article 43 of the Constitution clearly distinguished between religious teachings and public morals, and gave primacy to the latter (see paragraph 31 above). It argued that the Government's submission that the moral choices of a large part of Lithuanian society were influenced by religion (see paragraph 56 above) had not been substantiated by any empirical evidence – to the contrary, one of the studies referred to by the Government had concluded that many Lithuanians considered themselves members of the Roman Catholic Church only in a "formal manner" and that religious tradition had limited impact on their lives.

The applicant company submitted that approximately a hundred individuals who had complained about the advertisements (see paragraphs 10, 12 and 17 above) could not be considered representative of the approximately 77% of the Lithuanian population who considered themselves Catholic; furthermore, the public reaction to the advertisements had not been uniform – several public figures and scholars had expressed their support to the advertisements and disappointment with the domestic court decisions. The applicant company thus argued that the small number of complaints had not been indicative of the overall sentiment of the population, and thus the interference with its right to freedom of expression could not be justified by the need to protect public morals. It lastly submitted that even if some believers had been offended, freedom of expression also extended to ideas which shock, offend or disturb. Accordingly, the applicant company contended that the national authorities had overstepped their margin of appreciation.

2. The Court's assessment

(a) Whether there was an interference

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

(b) Whether the interference was prescribed by law

(i) Relevant general principles

63. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among many other authorities, *Delfi AS v. Estonia* [GC], no. 64569/09, § 120, ECHR 2015, and the cases cited therein).

64. As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 131-33, ECHR 2015 (extracts), and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 143, ECHR 2017 (extracts)).

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

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

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

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

established in Article 4 § 2 (1) with sufficient foreseeability (see paragraph 59 above).

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

(c) Whether the interference pursued a legitimate aim

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

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

(i) Relevant general principles

70. The Court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 101, ECHR 2012; *Bédat v. Switzerland* [GC], no. 56925/08, § 48, ECHR 2016; and *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 124).

71. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012 (extracts); *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 100, ECHR 2013 (extracts); and *Bédat*, cited above, § 8).

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

73. The Court further reiterates that the breadth of the Contracting States' margin of appreciation varies depending on a number of factors, among which the type of speech at issue is of particular importance. It has consistently held that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see *Baka v. Hungary* [GC], no. 20261/12, § 159, ECHR 2016, and *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 167). However, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (see *Wingrove*, cited above, § 58, and *Murphy v. Ireland*,no. 44179/98, § 67, ECHR 2003-IX (extracts)). Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 33, Series A no. 165; *Hertel*, cited above, § 47; and *Mouvement raëlien Suisse*, cited above, § 61).

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

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

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

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

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

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

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

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

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

even though the advertisements had a commercial purpose and cannot be said to constitute "criticism" of religious ideas (see paragraph 76 above), the applicable principles are nonetheless similar (in this connection see in particular the findings of the domestic authorities that the advertisements "encourage[d] a frivolous attitude towards the ethical values of the Christian faith" in paragraph 18 above).

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

83. Accordingly, the Court concludes that the domestic authorities failed to strike a fair balance between, on the one hand, the protection of public morals and the rights of religious people, and, on the other hand, the applicant company's right to freedom of expression. The wording of their decisions – such as "in this case the game has gone too far" (see paragraph 11 above), "the basic respect for spirituality is disappearing" (see paragraph 15 above), "inappropriate use [of religious symbols] demeans them [and] is contrary to universally accepted moral and ethical norms" (see paragraph 25 above) and "religious people react very sensitively to any use of religious symbols or religious persons in advertising" (see paragraphs 11, 13, 15 and 18 above) – demonstrate that the authorities gave absolute primacy to protecting the feelings of religious people, without adequately taking into account the applicant company's right to freedom of expression.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

[…]

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. [Kostenveroordeling, bew.]

Concurring Opinion van rechter De Gaetano

1. While I agree that in this case there has been a violation of Article 10 of the Convention, it is pertinent to underscore the very narrow ground on which this violation is based. It should be clear from paragraphs 79 to 83 of the judgment that the problem in this case was the insufficiency of the reasons provided by the domestic courts in their considerations upholding the SCRPA's decision. This judgment does not give *carte blanche* to the use of religious symbols, whatever the medium, context or message intended or tending to be conveyed, whether directly or otherwise. As was stated in § 26 of *İ.A. v. Turkey* (no. 42571/98, § 26, ECHR 2005-VIII), a "State may ... legitimately consider it necessary to take measures aimed at repressing certain form of conduct, including the imparting of information and ideas, judged incompatible with respect for the freedom of thought, conscience and religion of others...". In the instant case, however, there was nothing in the three adverts in question (which, incidentally, can still be viewed online) which could, by any stretch of the imagination, be considered as either offensive, much less as amounting to any form of vilification of religion or religious symbols, and which could be construed as justifying an interference "for the protection of ... the rights of others". The fact that the head of the male figure bore some resemblance to the way in which the image of Christ is depicted in classical art, and the use of the words "Jesus" and "Mary" (see paragraphs 7-9 of the judgment) cannot conceivably, by or of themselves, or in combination, be regarded as violating "public morals". Moreover, the very fact that both the male and the female figure in the adverts displayed tattoos should have been indicative that those figures could not be considered as representations of the historical Jesus Christ or the Virgin Mary – see Leviticus 19:28. This point does not appear to have been given appropriate weight by anyone.

2. In short, this is a case which should not even have been brought to the attention of the SCRPA. What is even more surprising is that the "warning", as it were, by the President of the Supreme Administrative Court (see paragraph 26) was dismissed for reasons which appear to be totally detached from reality (see paragraphs 28 and 29).

3. Finally, if the adverts were considered as somehow inappropriate, one wonders whether it would have been more effective to advise the faithful to boycott the firm using the adverts, rather than to provoke court litigation which twice ended up before the Supreme Administrative Court.

Noot

Vrijheid van meningsuiting, godsdienst en goede zeden

1. In de Verenigde Staten wordt al sinds jaar en dag gedebatteerd en geprocedeerd over de verhouding tussen kerk en staat en, in het verlengde daarvan, tussen de bescherming van godsdienst en de vrijheid

van meningsuiting.[1] In Europa was het echter lange tijd rustig op dat gebied. Met de groei van de Islam in Europa en de groeiende plek die identitaire onderwerpen naast economische onderwerpen in het Europese politieke debat innemen, is dat veranderd. De gevoeligheden tussen het seculiere en het gelovige deel van de samenleving is toegenomen, net als die tussen godsdiensten onderling. En ook hier vindt men ondertussen de weg naar de rechtszaal, met als hoofdonderwerpen enerzijds het kruisbeeld in de openbare ruimte (in klaslokalen,[2] in gerechtsgebouwen[3] en voor presidentiële paleizen)[4] en anderzijds het dragen van sluiers.[5]

2. In het kader van het EVRM gaat het bij die zaken om toepassing van artikel 9 (vrijheid van gedachte, geweten en godsdienst), artikel 10 (vrijheid van meningsuiting) of een combinatie van die twee. Het moederarrest in artikel 10-zaken is het arrest *Handyside/VK*,[6] met betrekking tot de beoordeling van de beperking van de vrijheid van meningsuiting krachtens het tweede lid van die bepaling, de zogeheten lid 2-analyse: (i) voorzien bij wet; (ii) voor een legitiem doel; en (iii) noodzakelijk in een democratische samenleving. Daarbij leidt artikel 10 lid 2 EVRM de mogelijkheid om meningsuitingen te beperken uitdrukkelijk in met de vaststelling dat "de uitoefening van [de vrijheden van meningsuiting, ann.] plichten en verantwoordelijkheden met zich brengt" en worden "de bescherming van de goede zeden" en "de bescherming van de goede naam of de rechten van anderen" als legitieme doelstellingen aangemerkt voor de toets onder (ii).

Het arrest is hier om drie redenen noemenswaardig, die alle verband houden met deze laatste toets, de evenredigheidstoets:

- de centrale plaats die de vrijheid van meningsuiting inneemt binnen een democratische samenleving;
- de bekende riedel "offend, shock or disturb"/"heurtent, choquent ou inquiètent"; en
- de beoordelingsmarge van de lidstaten bij het beperken van de vrijheid van meningsuiting, onder toezicht van het EHRM.

In verband met deze laatste twee punten, die ook in de onderhavige zaak een rol spelen, citeren wij delen van de punten 48 en 49:

> "48. *The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. […]*
> *These observations apply, notably, to Article 10 para. 2. In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. […] [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.*
> *Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.*

1 Zie o.a. *Engel v. Vitale*, 370 U.S. 421 (1962, Schoolgebed aan het begin van elke schooldag); *Abington School District v. Schempp*, 374 U.S. 203 (1963, Idem); *Lemon v. Kurtzman*, 403 U.S. 602 (1971, Subsidiëring van niet-godsdienstige scholen); *Stone v. Graham*, 449 U.S. 39 (1980, Verplichte ophanging van de tien geboden in openbare scholen in Kentucky); *Lynch v. Donnelly*, 465 U.S. 668 (1984, Kerststal in stadspark), County of Allegheny v. ACLU, 492 U.S. 573 (1989, Kerststal in gerechtsgebouw en menorah in stadhuis), *Van Orden v. Perry*, 545 U.S. 677 (2005, Tien geboden in een park voor het parlementsgebouw van Texas) en *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005, Tien geboden in gerechtsgebouwen in Kentucky).

2 Zie o.a.: Bundesverfassungsgericht 16 mei 1995, zaak 93, 1 en EHRM (Grote Kamer) 18 maart 2011, ECLI:NL:XX:2011:BQ2811, nr. 30814/06, *NJ* 2011/588, m.nt. E.A. Alkema, *EHRC* 2011/86 (*Lautsi/Italië*).

3 Corte di Cassazione 14 maart 2011, zaak 2011/5924 (*Tosti/Consiglio Superiore della Magistratura*). De zaak had betrekking op het strafontslag van rechter Tosti, die had geweigerd zitting te voeren in een zaal met een kruisteken en bij zijn weigering was gebleven nadat de gerechtspresident hem een zittingszaal zonder kruisteken ter beschikking had gesteld. Zie ook "A Metz le Christ sur la croix, de la Cour d'assisse au Musée", *Le Monde* van 1 augustus 2006. Metz is de hoofdstad van Lotringen, dat samen met de Elzas nog deel uitmaakte van Duitsland toen in Frankrijk de organieke wet van 1905 inzake de scheiding van kerk en staat werd aangenomen. Daardoor geldt die wet in Elzas en Lotringen niet en geldt daar nog een Concordaat met het Vaticaan, dat in een minder strenge scheiding van kerk en staat voorziet.

4 Zie bijvoorbeeld 'In Polen woedt een beeldenstorm', *NRC Handelsblad* van 30 oktober 2010.

5 Zie o.a. EHRM 10 november 2005 (Grote Kamer), *NJ* 2006/170, m.nt. E.A. Alkema, bespreking M.L.P. Loenen en A. Terlouw in *NJCM Bulletin* 2006, p. 213 (*Sahin/Turkije*, Verbod op hoofddoeken in het openbaar onderwijs), Conseil Constitutionnel (Frankrijk) 7 oktober 2010, ECLI:FR:CC:2010:2010.613.DC, zaak 2010-613 (Frans verbod op het dragen van gezichtbedekkende kleding in de openbare ruimte); EHRM 26 november 2015, ECLI:CE:ECHR:2015:1126JUDOO6484611, nr. 6484/11, *JAR* 2015/319 (*Ebrahimiam/Frankrijk*, Niet verlengen arbeidsovereenkomst van sociaal werker met hoofddoek in openbaar ziekenhuis); HvJ EU (Grote kamer) 14 maart 2017, ECLI:EU:C:2017:203, C-157/15, *AB* 2017/162, m.nt. M.L.P. Loenen, *JAR* 2017/96, m.nt. E. Cremers-Hartman, *TRA* 2017/66, m.nt. N. Gundt (*Achbita/G4S*, Arbeidsrechtelijk reglement met verbod op het dragen van godsdienstige tekens); HvJ EU (Grote kamer) 14 maart 2017, ECLI:EU:C:2017:204, C-188/15, *AB* 2017/163, m.nt. M.L.P. Loenen, *JAR* 2017/97, m.nt. E. Cremers-Hartman (*Bougnaoui*, Ad hoc verbod op het dragen van een hoofddoek); EHRM 11 juli 2017, ECLI:CE:ECHR:2017:0711JUD003779813, nr. 37798/13, *EHRC* 2017/188, m.nt. P.B.C.D.F. van Sasse van Ysselt (*Belcacemi en Oussar/België*, Belgisch verbod op het dragen van gezichtbedekkende kleding in de openbare ruimte). Zie, voor Nederland, inzake de verlaging van bijstand wegens het dragen van een nikaab qab: CRvB 9 mei 2017 ECLI:NL:CRVB:2017:1639 *Gst*. 2018/16, m.nt. Terpstra.

6 EHRM (Plenair) 7 december 1976, ECLI:NL:XX:1976:AC0070, nr. 5493/72, *NJ* 1978/236, R.A. Lawson & H.G. Schermers, *Leading Cases of the European Court of Human Rights*: Nijmegen: Ars Aequi Libri 1997, p. 28 (*Handyside/VK*). De casus had betrekking op een voor Britse scholieren bedoeld handboek op het gebied van seksuele voorlichting, *The Little Red Schoolbook*. Geen inbreuk, 16 tegen 1.

> 49. *[…] Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". […]"*

In zijn latere rechtspraak zal het EHRM in het kader van de evenredigheidstoets deze beoordelingsruimte nader bepalen: (i) minder breed in het politieke discours of bij bijdragen aan een debat over onderwerpen van algemeen belang; en (ii) breder bij zedelijke of godsdienstige onderwerpen, commerciële uitingen en/of grievende, haatzaaiende of tot geweld oproepende uitingen (zie hierna).

3. Als het gaat om het beperken van uitingen die kritisch of negatief zijn jegens een godsdienst zijn de relevante precedenten de arresten *Kokkinakis/Griekenland*,[7] *Otto-Preminger-Institut/Oostenrijk*,[8] *Wingrove/VK*,[9] *Murphy/Ierland*,[10] *İ.A./Turkije*[11] en *Giniewski/Frankrijk*[12] en *Klein/Slowakije*.[13]

Op het gebied van de bescherming van de goede zeden kan naast het reeds genoemde arrest *Handyside* worden gewezen op de zaken *Müller/Zwitserland*[14] en *VgT Verein gegen Tierfabriken/Zwitserland*.[15]

Uit deze arresten kunnen de volgende punten worden gedestilleerd.

a. *Gerechtvaardigde doelstelling*

– De godsdienstvrijheid kan ertoe dwingen om bepaald gedrag, met inbegrip van het overdragen van informatie en gedachten, dat onverenigbaar wordt geacht met de eerbiediging van de vrijheid van gedachte, geweten en godsdienst, te beperken.[16] Daarmee is sprake van de "rechten en vrijheden van anderen" in de zin van artikel 10 lid 2 EVRM.[17]
– Ook de bescherming van de goede zeden, uitdrukkelijk genoemd in artikel 10 lid 2 EVRM, is een legitieme doelstelling.[18]

b. *Noodzakelijk in een democratische samenleving*

– Dat de beperking "noodzakelijk" is houdt in dat sprake moet zijn van een dringende maatschappelijke behoefte ("pressing social need", "besoin social impérieux").[19]
– Daarbij moet, in het geval van de bescherming van godsdienst, de vrijheid om kritische gedachten over godsdienst te uiten worden afgewogen tegen het recht op eerbied voor de vrijheid van gedachte, geweten en godsdienst.[20]
– Diegenen die ervoor kiezen hun recht uit te oefenen hun geloof te belijden, ongeacht of zij dit doen als deel van een godsdienstige meerderheid of minderheid, kunnen niet redelijkerwijs verwachten gevrijwaard te blijven van alle kritiek. Zij hebben te gedogen en te aanvaarden dat anderen hun geloofsovertuigingen ontkennen en zelfs gedachtengoed verspreiden dat vijandig is jegens hun geloof.[21]
– De manier waarop dat gebeurt kan echter leiden tot een positieve verplichting van de lidstaten als het gaat om het waarborgen van een vreedzaam genot van het recht van artikel 9 EVRM door mensen met godsdienstige overtuigingen of doctrines. De eerbied voor de godsdienstige gevoelens van gelovigen zoals gewaarborgd door artikel 9 EVRM kan op legitieme wijze geacht te zijn geschonden door provocerende afbeeldingen van voorwerpen van godsdienstige aanbidding ("*provocative objects of religious veneration*", "*représentations provocatrices d'objets de vénération religieuse*").[22]
– De vrijheid van meningsuiting neemt een centrale plaats in in de democratische samenleving, en heeft mede betrekking op de uiting van gegevens of gedachten die aanstoot geven, schokken of verontrusten.[23]
– Artikel 10 lid 2 EVRM bepaalt echter dat de uitoefening van die vrijheid gepaard gaat met "plichten en verantwoordelijkheden".[24] Daaronder kan, in de context van godsdienstige meningen en overtuigingen, op legitieme wijze een plicht worden begrepen om, voor zover mogelijk, uitingen te vermijden die onnodig grievend ("*gratuitously offensive*", "*gratuitement offensantes*") zijn voor anderen, en daardoor niet geacht kunnen

7 EHRM 25 mei 1993, nr. 14307/88, *NJCM Bulletin* 1994, p. 699, m.nt. B. Labuschagne (*Kokkinakis/Griekenland*). Vervolging van een jehova-getuige wegens proselitisme. Schending, zes tegen drie.

8 EHRM 20 september 1994, ECLI:NL:XX:1993:AD2150, nr. 13470/87, *NJ* 1995/366, m.nt. E.J. Dommering, *NJCM Bulletin* 1995, p. 188, m.nt. R. de Winter (*Otto-Preminger Institut/Oostenrijk*).

9 EHRM 25 november 1996, ECLI:NL:XX:1996:AD4445, nr. 17419/90, *NJ* 1998/359, m.nt. E.J. Dommering, *NJCM Bulletin* 1998, p. 51, m.nt. E.H.M. Hirsch Ballin, *Mediaforum* 1997, p. B17, m.nt. T. Schiphof (*Wingrove/VK*).

10 EHRM 10 juli 2003, ECLI:NL:XX:2003:AP0922, nr. 44179/98, *NJ* 2005/177, m.nt. E.J. Dommering, *Mediaforum* 2003, p. 335, m.nt. A.E. Nieuwenhuis (*Murphy/Ierland*).

11 EHRM 13 september 2005, ECLI:NL:XX:2005:AU4048, nr. 42571/98, *NJ* 2007/199, m.nt. E.J. Dommering onder *NJ* 2007/200, *EHRC* 2005/104 (*İ.A./Turkije*).

12 EHRM 31 januari 2006, ECLI:NL:XX:2006:AV3569, nr. 64016/00, *NJ* 2007/200, m.nt. E.J. Dommering, *EHRC* 2006/36, m.nt. H.L. Janssen (*Giniewski/Frankrijk*).

13 EHRM 31 oktober 2006, ECLI:NL:XX:2006:AZ8324, nr. 72208/01, *NJCM Bulletin* 2007, p. 687, m.nt. P.B.C.D.F. van Sasse van Ysselt (*Klein/Slowakije*).

14 EHRM 24 mei 1988, ECLI:NL:XX:1988:AD0333, nr. 10737/84, *NJ* 1991/685, m.nt. E.A. Alkema, *NJCM Bulletin* 1988, p. 675, m.nt. L. Zwaak (*Müller/Zwitserland*).

15 EHRM 28 juni 2001, ECLI:NL:XX:2001:AE2215, nr. 24699/94, *NJ* 2002/181, m.nt. E.J. Dommering, *EHRC* 2001/55, m.nt. L. Verhey (*VgT Verein gegen Tierfabriken/Zwitserland*).

16 *Otto-Preminger-Institut*, punt 47, *İ.A.*, punt 26.

17 *Otto-Preminger-Institut*, punt 48, *Wingrove*, punt 48, *Murphy*, punt 64, *Giniewski*, punt 40.

18 *Handyside*, punt 46, *Müller*, punt 30.

19 *Handyside*, punt 48, *Müller*, punt 32, *Verein gegen Tierfabriken*, punt 67.

20 *Otto-Preminger-Institut*, punt 55, *İ.A.*, punt 27.

21 *Otto-Preminger-Institut*, punt 47, *Murphy*, punt 72, *İ.A.*, punt 28.

22 *Otto-Preminger-Institut*, punt 47, *Wingrove*, punt 52.

23 *Handyside*, punt 49, *Müller*, punten 33 en 34, *Verein gegen Tierfabriken*, punt 66.

24 *Handyside*, punt 49, *Müller*, punten 33 en 34.

worden op enige wijze een bijdrage te leveren aan een openbaar debat ter bevordering van menselijke aangelegenheden. Het kan daarom in sommige democratische samenlevingen noodzakelijk blijken om beledigende aanvallen op voorwerpen van godsdienstige aanbidding ("*improper attacks on objects of religious veneration*", "*attaques injurieuses contre des objets de vénération religieuse*") of heiligschennis te bestraffen, of zelfs te voorkomen, mits de betrokken beperking evenredig is aan het beoogde doel.[25]

- Bij de beoordeling of sprake is van een dringende maatschappelijke behoefte komt aan de lidstaat een zekere beoordelingsruimte toe, zowel als het gaat om de wetgever als wanneer het gaat om de toezichthouders en rechters die de wet moeten toepassen.[26]
- Waar die ruimte smaller is bij beperkingen met betrekking tot het politieke discours of bij debatten over vragen van algemeen belang, is zij weer wat breder als het gaat om zaken die geacht kunnen worden beledigend te zijn voor intieme persoonlijke overtuigingen op het gebied van de zeden of, vooral, godsdienst.[27] Die ruimte is ook smaller bij kunstuitingen.[28]
- Bij godsdienst en de goede zeden is het niet mogelijk om in Europa, of soms zelfs in een enkel land, eenvormige opvattingen in de samenleving te ontwaren. Die opvattingen kunnen naar tijd en plaats veranderen. De nationale autoriteiten zijn daarom in beginsel beter dan de internationale rechter geplaatst om te beoordelen welke beperking noodzakelijk is en hen komt daarbij een betrekkelijk brede, maar niet onbeperkte beoordelingsruimte toe, onder toezicht van het EHRM.[29]
- Dat toezicht heeft zowel betrekking op de wet als op individuele beslissingen waarin deze wordt toegepast, ook van de rechter.[30] Het moet, met het oog op het belang van de betrokken vrijheden, strikt zijn, en de noodzaak van enige beperking moet overtuigend zijn aangetoond.[31]
- De taak van het EHRM is daarbij om te beoordelen of sprake is van een dringende maatschappelijke behoefte en of de maatregel evenredig was.[32] Dat toezicht is des te noodzakelijker met het oog op de open norm "eerbied voor de godsdienstige overtuigingen van anderen" en het risico van excessieve beperkingen van de vrijheid van meningsuiting onder de noemer van stappen die moeten worden genomen tegen beweerdelijk beledigend materiaal.[33]
- Het Hof moet daarom vaststellen of de gronden die de nationale autoriteiten hebben ingeroepen ter rechtvaardiging van hun beperkende maatregelen relevant en voldoende zijn.[34] Het moet daarnaast beoordelen of de nationale autoriteiten toetsingscriteria hebben gehanteerd die in overeenstemming zijn met de beginsel die in artikel 10 EVRM zijn belichaamd en, daarnaast, dat zij zich gebaseerd hebben op een aanvaardbare beoordeling van de relevante feiten.[35]
- Daarbij moet worden gelet op de casus in zijn geheel, waaronder de situatie van de persoon die een mening uit, de context waarin die mening is geuit en de gebruikte openbaarmakingsmiddelen.[36] Zo hebben audiovisuele media een meer rechtstreekse en krachtige werking dan de gedrukte media.[37]

Wij merken hier alvast op dat een belangrijke rol in deze is weggelegd voor de vraag of sprake is van een nodeloos aanstootgevende of beledigende aanval op voorwerpen van godsdienstige aanbidding: is dat het geval, dan is de beperking meestal gerechtvaardigd (*Preminger*, *Wingrove*, *I.A.*), en is dat niet het geval, dan is eerder sprake van een bijdrage aan een debat over zaken van algemeen belang en is die beperking meestal niet gerechtvaardigd (*Giniewski*). Een geval apart is het proselitisme (*Kokkinakis* en *Murphy*).

In een andere lijn van rechtspraak heeft het Hof geoordeeld dat de vrijheid van meningsuiting in het geheel niet, of slechts met een ruime marge voor beperkingen, toekomt aan (i) het gebruik van krachttermen en scheldwoorden met het enkele doel om te beledigen;[38] en (ii) uitingen die haat zaaien of tot geweld oproepen in verband met nationaliteit, afkomst of godsdienst.[39]

4. De zaak *Müller* had betrekking op aanstootgevend geachte schilderijen die op een tentoonstelling voor moderne kunst in Fribourg waren gemaakt en tentoongesteld. Zij bevatten afbeeldingen van geslachtsverkeer, onder andere tussen mens en dier. Na een klacht van een bezoeker met een minderjarig kind werden de kunstewerken in beslag genomen en verwijderd. De betrokken kunstenaars werden ieder strafrechtelijk veoordeeld tot een boete van CHF 300 wegens het openbaarmaken van obsceen materiaal. Volgens het Hof, dat de schilderijen heeft bekeken, konden de Zwitserse rechters op goede gronden oordelen dat de schilderijen "aanstoot konden geven aan het gevoel van seksuele zedelijkheid van normaal gevoelige personen". Het oordeelt met zes tegen één dat artikel 10 EVRM niet is geschonden.

25 *Otto-Preminger-Institut*, punt 49, *Wingrove*, punt 52, *Murphy*, punt 65, *İ.A.*, punt 24, *Giniewski*, punt 43.
26 *Handyside*, punt 48, *Müller*, punt 32, *Verein gegen Tierfabriken*, punt 67.
27 *Wingrove*, punt 58, *Murphy*, punt 67.
28 *Müller*, punt 33.
29 Zie, voor de godsdienst, *Otto-Preminger-Institut*, punt 50, *Wingrove*, punten 53 en 58, *Murphy*, punten 66 en 67, *İ.A.*, punt 25, *Giniewski*, punt 44, en voor de bescherming van de goede zeden: *Handyside*, punt 48, *Müller*, punt 35.
30 *Handyside*, punt 49, *Verein gegen Tierfabriken*, punt 67.
31 *Otto-Preminger-Institut*, punt 50, *Verein gegen Tierfabriken*, punt 66.
32 *Handyside*, punten 48 en 49, *Wingrove*, punten 53, *Verein gegen Tierfabriken*, punt 68, *Murphy*, punt 68, *İ.A.*, punt 26, *Giniewski*, punt 44.
33 *Murphy*, punt 68.
34 *Handyside*, punt 50, *Wingrove*, punt 59, *Verein gegen Tierfabriken*, punt 68, *Murphy*, punt 68.
35 *Verein gegen Tierfabriken*, punt 68. Zie o.a. ook EHRM (Grote Kamer) 13 juli 2012, ECLI:NL:XX:2012:BX9103, *NJ* 2014/319, m.nt. E.J. Dommering (*Mouvement raëlien suisse/Zwitserland*), punt 48.
36 *Handyside*, punt 49, *Müller*, punt 32.
37 *Murphy*, punt 69.
38 Zie bijv. EHRM 2 oktober 2012 (ontv.), nr. 57942/10, *EHRC* 2013/21 m.nt. A.E. Nieuwenhuis (*Rujak/Kroatië*).
39 Zie o.a. EHRM 23 september 1994, ECLI:NL:XX:1994:AD2162, nr. 15890/89, *NJ* 1995/387, m.nt. G. Knigge & E.J. Dommering (*Jersild/Denemarken*); EHRM 4 december 2003, ECLI:NL:XX:2003:AO5410, nr. 35071/97, *EHRC* 2004/5, *NJ* 2005/176, m.nt. E.J. Dommering, *EHRC* 2004/5 (*Gündüz/Turkije*); EHRM (Grote Kamer) 8 juli 1999, nr. 26682/95 (*Sürek/Turkije nr. 1*).

In *Otto-Preminger-Institut* ging het om de inbeslagname en het verbod op vertoning in een filmhuis in Innsbruck van de film *Das Liebeskonzil*, met een vertelling over het hof van de Borgia-paus Alexander IV en satirische afbeeldingen van God, Jezus Christus en Maria. Beide maatregelen waren door de lokale autoriteiten opgelegd na een klacht van het bisdom Innsbruck, dat was afgegaan op een publieke aankondiging van de vertoning. Het Hof oordeelde met zes tegen drie dat geen sprake was van schending van artikel 10 EVRM. Volgens het Hof konden de nationale autoriteiten op goede gronden oordelen dat de film een provocerende afbeelding van God, Jezus Christus en Maria bevatte en dat het Rooms Katholieke geloof het geloof is van de overgrote meerderheid van de inwoners van het betrokken land Tirol.[40] Het Hof gaat daarbij niet in op de omstandigheid dat voor de film een leeftijdsdrempel van 17 jaar gold en dat de inhoud van de film duidelijk van tevoren bekend was gemaakt aan het publiek van het betrokken filmhuis.[41] Ook de *exceptio artis*, die in de zaak *Müller* een bescheiden rol had gespeeld, komt niet aan de orde.

De zaak *Wingrove* had betrekking op de weigering van de Britse *Board of Film Classification* om een voorafgaande typegoedkeuring af te geven voor een videobanduitgave van de film *Visions of Extasy*,met erotische scènes over de extase van de heilige Theresa van Avila. Het Hof oordeelde met zeven tegen twee dat artikel 10 EVRM niet was geschonden. Het oordeelde dat de Britse autoriteiten, na een debat met hoor en wederhoor en in twee instanties, op goede gronden en gemotiveerd hebben kunnen oordelen dat de betrokken film godslasterlijk was, en aanstootgevend voor een christelijk publiek. Gelet op de omstandigheden was de onthouding van goedkeuring noodzakelijk en evenredig, mede gelet op het feit dat videobanden zich na verspreiding onttrekken aan enig toezicht van de staat.[42]

In de zaak *Verein gegen Tierfabriken* wilde de betrokken vereniging een televisiereclame laten uitzenden, gericht tegen het massaal houden van varkens voor de voedselindustrie. De Zwitserse staatsomroep weigerde op grond van zijn commerciële belangen en redactionele vrijheid, de toezichthouder greep niet in en de rechter aanvaardde die weigering tegen het licht van een bepaling in de Federale Radio- en Televisiewet die politieke en godsdienstige radio- en televisiereclame verbood. Dat verbod was door de Zwitserse wetgever ingegeven door de wens om het publieke debat te beïnvloeden tegen ongerechtvaardigde beïnvloeding door groepen met sterke financiële middelen. Het Hof oordeelde dat weliswaar sprake was van een advertentie, maar dat deze juist niet van commerciële aard was: er was juist veeleer sprake van een maatschappelijke boodschap. Daarnaast was niet uit het dossier gebleken dat Verein gegen Tierfabriken een sterk bemiddelde entiteit was die er op uit was om het publieke debat oneigenlijk te beïnvloeden. In die omstandigheden hadden de autoriteiten uitdrukkelijk moeten aangeven waarom het verbod toch gerechtvaardigd was. Bovendien was de advertentie niet onnodig grievend. Het Hof oordeelt unaniem dat artikel 10 EVRM is geschonden.[43]

In *Murphy* was aan de orde het verbod door een Iers overheidsorgaan op de uitzending, op een commercieel radiostation, van een advertentie van een christelijke evangeliegemeente. Dat verbod was gebaseerd op een wettelijk verbod op dergelijke uitzendingen, ter bewaring van de openbare rust. Het Hof oordeelde eenstemmig dat geen sprake was van een schending. Het baseerde dat oordeel op de motivering voor het wettelijk verbod door de Ierse wetgever, die erop had gewezen dat godsdienst in Ierland, en met name in Noord Ierland, een hoogst verdelende en gevoelige factor is, op het feit dat het verbod beperkt was tot uitingen in de audiovisuele media en op de daarna ingetreden evaluatie en aanpassing van dat verbod door diezelfde wetgever.[44]

In *İ.A.*was een Turkse uitgever met een zeer laag bedrag (volgens het Hof het equivalent van $ 12) beboet na publicatie van een boek met beledigende passages over de profeet Mohamed. Het boek zelf was niet in beslag genomen. Het Hof oordeelde met de kleinst mogelijke meerderheid van vier tegen drie dat artikel 10 EVRM niet was geschonden. Het oordeelde dat het betrokken boek verderging dan het aanstoot geven, schokken of provoceren, maar een beledigende aanval was op de persoon van de profeet van de Islam. Gelovigen konden zich daarom op legitieme wijze aangevallen voelen omdat de omstreden passages uit het boek ongerechtvaardigd en beledigend zijn. De Turkse autoriteiten konden daarom op goede gronden menen dat sprake was van een dringende maatschappelijke behoefte. Bovendien was de opgelegde boete gering en waren de Turkse autoriteiten niet overgegaan tot het in beslag nemen van het boek.[45]

In *Giniewski* had een Franse journalist in een opiniërend stuk een pauselijke encycliek besproken en daarbij een verband gelegd tussen het anti-judaïsme in het christelijke geloof, het Europese antisemitisme en de holocaust. De belangenvereniging *Alliance générale contre le racisme et pour le respect de l'identité française et chrétienne* deed aangifte en stelde ook een civiele vordering in tot betaling van een symbolisch bedrag van € 1 wegens discriminatie op grond van geloof, met de verplichting om een eventueel veroordelend vonnis op kosten van de gedaagde te publiceren in een landelijk blad. In de strafzaak werd de journalist vrijgesproken, maar in de civiele zaak veroordeeld. Het Hof oordeelde eenstemmig dat de vrijheid van meningsuiting was geschonden. Het betrokken artikel was volgens het Hof niet onnodig beledigend, was zorgvuldig geschreven en leverde een bijdrage aan een breed algemeen debat over de ontwikkeling, in de katholieke kerk en de pauselijke leer, van de denkbeelden over het jodendom, en van de invloeden daarvan op het ontstaan van de holocaust.[46]

40 *Otto-Preminger-Institut*, punt 56.
41 Zie, zeer kritisch, de dissenting opinion van rechters Palm, Pekkanen en Makarczyk, en Dommering in zijn noot onder dat arrest in *NJ* 1995/366.
42 *Wingrove*, punten 61-64.
43 *Verein gegen Tierfabriken*, punten 70-79.
44 *Murphy*, punten 70-82.
45 *İ.A.*, punten 29-32.
46 *Giniewski*, punten 45-56.

Vrijheid van meningsuiting en reclame

5. Reclame is het ondergeschoven kindje van de uitingsvrijheid. Reclame valt weliswaar onder het toepassingsbereik van de vrijheid van meningsuiting,[47] die zowel door natuurlijke personen als door ondernemingen kan worden ingeroepen,[48] maar de commerciële vrijheid van meningsuiting legt relatief minder gewicht in de schaal. De beoordelingsruimte om de commerciële uitingsvrijheid aan banden te leggen is volgens vaste rechtspraak van het EHRM immers groter dan wanneer het gaat om politieke uitingen of bijdragen aan een debat over onderwerpen van publiek belang.[49] Van die ruimte wordt flink gebruikgemaakt, ook door de Reclame Code Commissie (RCC) en haar College van Beroep (CvB).

6. Artikel 2 NRC bepaalt onder andere dat reclame in overeenstemming moet zijn met de goede smaak en het fatsoen. Volgens het CvB moeten de RCC en het CvB bij de toepassing van deze bepaling de vrijheid van meningsuiting van de adverteerder in acht nemen. Het CvB erkent daarom dat een aanbeveling om niet langer op een bepaalde wijze reclame te maken op de grond dat die reclame niet in overeenstemming is met de goede smaak en het fatsoen in een democratische samenleving noodzakelijk moet zijn in verband met de bescherming van de gezondheid of de goede zeden en de bescherming van de rechten van anderen.[50] De uitingsvrijheid van de reclamemaker wordt in recente beslissingen van de RCC en het CvB echter sterk gerelativeerd, onder verwijzing naar het in voetnoot 25 genoemde EHRM-arrest *Mouvement raëlien suisse*.[51]

Reclame, godsdienst en goede zeden in Sekmadienis

7. Beide onderwerpen komen voor het eerst voor het EHRM bij elkaar in de besproken zaak. In de eerdere zaken over de bescherming van geloofsovertuiging ging het immers eerder om uitingen die een beroep konden doen op de bescherming uit hoofde van het publieke debat (het krantenartikel uit *Giniewski*), de artistieke vrijheid (de films uit *Preminger* en *Wingrove* en het boek uit *I.A*) of de eigen geloofsovertuiging (het proselitisme uit *Kokkinakis* en de radioadvertentie voor een evangeliegemeente in *Murphy*).

8. Zie Deel I van het besproken arrest voor een overzicht van de feiten, die hier slechts zeer summier worden weergegeven.

De Litouwse vennootschap Sekmadienis ("zondag") voert twee weken lang een reclamecampagne met drie posters waarin zij haar nieuwe kledinglijn aanprijst. Op die posters figureren een getatoeëerde jonge man met lang haar, in een spijkerbroek van Sekmadienis, en een jonge vrouw met bloemen in haar haar en een rozenkrans, in een witte jurk van dat merk. Beiden hebben een stralenkrans. Op één poster is de man te zien, met de tekst "Jezus, wat een broek!"; op de tweede de vrouw, met de tekst "Lieve Maria, wat een jurk"; en op de derde man en vrouw samen, met de tekst "Jezus Maria, wat draag jij!". Later zal de Litouwse bisschoppenconferentie het standpunt innemen dat de derde poster, waarop de vrouw naast de liggende man staat, hem aanrakend en op hem neerkijkend, doet denken aan het christelijke motief van de *pietà*, Maria die haar zoon beweent nadat deze van het kruis is afgenomen (zie hierna).

Na vier telefonische klachten te hebben ontvangen, stelt de Litouwse Consumentenautoriteit SCRPA een onderzoek in. Zij vraagt eerst aan de LAA, een zelfreguleringslichaam om advies. De LAA oordeelt met vijf tegen twee dat de campagne in strijd is met de artikelen 1 (Gepastheid) en 13 (Godsdienst) van de Code voor Advertentie-ethiek. Het oordeelt onder andere:

> *"The advertisements might be seen as humiliating and degrading people because of their faith, convictions or opinions. Religious people always react very sensitively to any use of religious symbols or religious personalities in advertising, so we suggest avoiding the possibility of offending their dignity.*
> *In this case the game has gone too far.*
> *Humour is understandable but it can really offend religious people. We suggest finding other characters for communicating the uniqueness of the product.*
> *It is recommended to have regard for the feelings of religious people, to take a more responsible attitude towards religion-related topics in advertising, and to stop the dissemination of the advertisements."*[52]

Na een andere klacht te hebben ontvangen stuurt de SCRPA deze klachten en het advies van de LAA door aan een andere

47 Zie o.a. EHRM 25 maart 1985, ECLI:NL:XX:1985:AC8812, *NJ* 1987/900, m.nt. E.A. Alkema (*Barthold/Duitsland*); EHRM 20 november 1989, ECLI:NL:XX:1989:AD0950, *NJ* 1991/738, m.nt. E.A. Alkema, *BIE* 1992/72 (*Markt intern Verlag GmbH en Klaus Beerman/Duitsland*); EHRM 24 februari 1994, ECLI:NL:XX:1994:AD2048, *NJ* 1994/518, m.nt. E.J. Dommering (*Casado Coca/Spanje*) en EHRM 25 augustus 1998, ECLI:NL:XX:1998:AD4554, *NJ* 1999/712, m.nt. E.J. Dommering, *IER* 1998/43, m.nt. A. Kamperman Sanders (*Hertel/Zwitserland*). Zie voor Nederland HR 2 mei 1997, ECLI:NL:HR:1997:ZC2364, *NJ* 1997/661, m.nt. D.W.F. Verkade (*Discodanser*), r.o. 3.3 *in fine*.

48 Zie EHRM 22 mei 1990, ECLI:NL:XX:1990:AD1123, nr. 12726/87, *NJ* 1991/740, m.nt. E.A. Alkema (*Autronic AG/Zwitserland*), punt 72.

49 Zie *Markt intern Verlag*, punt 33, *Casado Coca*, punt 36, Hertel, punt 47, *Verein gegen Tierfabriken*, punt 69, en *Mouvement raëlien suisse*, punt 61.

50 CvB RCC 18 juni 2015, doss. 2015/00171 (*Suitsupply Into the blue*), punt 6. Enerzijds is dit oordeel niet vanzelfsprekend, omdat het EHRM bij zaken over de vrijheid van meningsuiting steeds uitgaat van de verticale werking van artikel 10 en dus een verband zoekt met de staatsaansprakelijkheid van artikel 1 EVRM. Dit doet het Hof hetzij direct, wanneer een beperking wordt opgelegd door een overheid, hetzij indirect, wanneer twee particulieren een geschil voorleggen aan de civiele rechter, die vervolgens op grond van de wet een beperking oplegt. Zie bijv. *Verein gegen Tierfabriken*, punt 47, en EHRM 16 december 2008, ECLI:NL:XX:2008:BH1809, nr. 23883/06, *AB* 2009/286, m.nt. T. Barkhuysen & M.L. van Emmerik, *EHRC* 2009/17, m.nt. J.H. Gerards (*Khurshid Mustafa & Tarzibachi/Zweden*). Anderzijds is het toezicht op reclame in Nederland, anders dan bijvoorbeeld in Litouwen, gebaseerd op collectieve zelfregulering, en is het logisch dat CvB en RCC zich als organen van die zelfregulering gebonden achten aan het EVRM.

51 Zie bijvoorbeeld RCC 5 juni 2015, doss. 2015/00568/A (*Jihadgezinnen*), CvB RCC 18 juni 2015, doss. 2015/00171 (*Suitsupply Into the blue*), punt 10, CvB RCC 18 mei 2016, doss. 2016/00193 (*Suitsupply Toy boys*), CvB RCC 21 december 2017, doss. 2017/00640 (*Second love*).

52 Hier en in alle hierna volgende citaten hebben wij ten behoeve van de leesbaarheid alle door het Hof gebruikte redactietekens weggelaten.

toezichthouder, het Inspectoraat niet-levensmiddel producten.
Het Inspectoraat neemt het voorlopig standpunt in dat de campagne in strijd is met de goede zeden, en daarmee met artikel 4 lid 2 onder 1 van de Reclamewet:

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

Sekmadienis wijst er op dat de woorden "Jezus" en "Maria" in haar campagne niet verwijzen naar godsdienstige persoonlijkheden, maar, zoals in het Litouws gebruikelijk, als uitroep worden gebruikt, en dat de personen niet op een oneerbiedige wijze zijn afgebeeld.
Nadat het Inspectoraat een voornemen tot beboeting heeft opgesteld, waarin het zijn eerdere motivering heeft aangevuld met de opmerking "the basic respect for spirituality is disappearing", vraagt de SCRPA om advies van de Litouwse bischoppenconferentie, als lokaal gezag van de Rooms Katholieke kerk in Litouwen. Die conferentie oordeelt negatief.[53]
Een paar weken later houdt de SCRPA een bespreking met Sekmadienis, het Inspectoraat en de Litouwse bischoppenconferentie. Nadat Sekmadienis haar standpunten herhaalt stelt de SCRPA dezelfde dag nog een verbods- en boetebesluit vast. In de motivering van dat besluit herhaalt de SCRPA eerst de motiveringen van de LAA en het Inspectoraat, en neemt daarna de volgende passage rechtstreeks over uit het negatieve advies van de Litouwse bischoppenconferentie:

> *"The SCRPA notes that the inappropriate depiction of Christ and Mary in the advertisements in question encourages a frivolous attitude towards the ethical values of the Christian faith, promotes a lifestyle which is incompatible with the principles of a religious person, and that way the persons of Christ and Mary are degraded as the sacred symbols of Christianity."*

Ten slotte verwijst de SCRPA naar het feit dat de bischoppenconferentie een honderttal klachten heeft ontvangen over de campagne. De campagne is daarom in strijd met de goede zeden. Enerzijds zijn de posters in de openbare ruimte geplaatst en is erover geklaagd, maar anderzijds heeft de campagne slechts een paar weken geduurd, zijn de posters alleen in Vilnius geplaatst, heeft Sekmadienis de posters op eerste verzoek laten verwijderen en is dit haar eerste overtreding. De SCRPA legt daarom een boete op van omgerekend ongeveer € 580.

De Regionale Bestuursrechtbank Vilnius verwerpt het beroep van Sekmadienis in eerste aanleg. Zij oordeelt onder andere:

> *"The form of advertising used by Sekmadienis was prohibited because it distorted the main purpose of a religious symbol (an object of religion) respected by a religious community – that purpose being to refer to a deity or to holiness."*

Het Hoge Bestuurshof verwerpt ook het hoger beroep, in tweede en laatste aanleg. Het oordeelt onder andere:

> *"Religion, as a certain type of world view, unavoidably contributes to the moral development of the society; symbols of a religious nature occupy a significant place in the system of spiritual values of individuals and the society, and their inappropriate use demeans them [and] is contrary to universally accepted moral and ethical norms."*

De president van het Hoge Bestuurshof, die bevoegd is om aan het Hof een verzoek te doen om heropening van de zaak wanneer, in uitzonderlijke omstandigheden, sprake is van een ernstige fout bij de toepassing van het materiële recht of van een belang bij de eenvormige toepassing van het recht, verzoekt om heropening, mede in het licht van de rechtspraak van het EHRM over de evenredigheid van beperkingen van de vrijheid van meningsuiting.
Dat verzoek wordt door een andere formatie van het Hoge Bestuurshof afgewezen.
9. Het EHRM geeft de commerciële uitingsvrijheid in het besproken arrest meer gewicht dan in eerdere arresten. Wij gaan voorbij aan de toetsing van de criteria "voorzien bij wet" (punten 63-68) en "beoogt een legitiem doel" (punt 69) en concentreren ons op de evenredigheidstoets van "noodzakelijk in een democratische samenleving".
10. Het Hof begint in de punten 70-74 met een opsomming van de beginselen die in eerdere rechtspraak op dit vlak zijn ontwikkeld en die hiervoor zijn beschreven onder 3.b.
Bij de beoordeling van de omstandigheden van het geval stelt het vervolgens vast dat:
(i) de klager niet betwist dat de gewraakte reclame-uitingen personen bevatten met een gelijkenis met godsdienstige figuren en dat die gelijkenis er ook was (punt 75); en
(ii) die reclame-uitingen een commercieel doel dienden zonder een bijdrage te willen leveren aan enig maatschappelijk debat over godsdienst of andere zaken van openbaar belang, waardoor sprake was van een ruime, maar niet onbeperkte beoordelingsruimte (punt 76).

Uit het hiervoor onder 3.b beschreven kader blijkt dat, als het gaat om de bescherming van een geloofsovertuiging, de eerstvolgende stap is om te beoordelen of sprake is van onnodig grievende of godslasterlijke uitingen, haat zaaien op grond van geloofsovertuiging of ongepaste aanvallen op een godsdienst (punt 77). Het heeft de advertenties zelf bekeken en stelt vast dat zij niet over de schreef lijken te gaan (idem).

53 Zie punt 16 voor een weergave van dat advies.

In die omstandigheden lag het op de weg van de nationale autoriteiten om relevante en voldoende redenen aan te voeren waarom de gewraakte reclame-uitingen, hoewel zij niet klaarblijkelijk aanstootgevend waren, niettemin strijdig waren met de openbare zeden (punt 78). Het Hof verwijst daarbij overeenkomstig naar de punten 75 en 76 van het arrest *Verein gegen Tierfabriken*, waar het, verwijzend naar de doelstelling om te vermijden dat financieel sterk bemiddelde entiteiten het publieke debat oneigenlijk zouden beïnvloeden door middel van radio- of televisiereclame, had geoordeeld dat, waar een entiteit niet over dergelijke middelen lijkt te beschikken en er niet op uit lijkt te zijn het publieke debat oneigenlijk te beïnvloeden, het aan de autoriteiten is om aan te voeren dat en waarom er desondanks een concrete noodzaak tot beperking bestaat.

Dat hebben zij echter niet gedaan: daarvoor blijven de kwalificaties dat godsdienstige symbolen "om oppervlakkige redenen" waren gebruikt, dat de uitingen "het hoofddoel van deze symbolen hadden verdraaid", of dat zij "ongepast" waren, te declaratoir en te vaag. In feite komen deze verklaringen er immers op neer, dat elk gebruik van godsdienstige figuren voor niet-godsdienstige doeleinden ongepast zou zijn (punt 79).

Daarna hekelt het Hof ("*takes particular issue with*") de motivering van de SCRPA, die de SCRPA had ontleend aan het advies van de bisschoppenconferentie, dat de campagne "*promoted a lifestyle which was incompatible with the principles of a religious person*": de SCRPA legt niet uit wat die levensstijl zou zijn, hoe de advertenties die stijl zouden bevorderen en waarom een levensstijl dat onverenigbaar is met de beginselen van een godsdienstig persoon daarmee noodzakelijkerwijs ook onverenigbaar zou zijn met de goede zeden (punt 80). Daarbij wijst het Hof er met name op dat de SCRPA verwijst naar godsdienstige personen, maar tijdens de procedure uitsluitend de Rooms Katholieke kerk heeft geraadpleegd, terwijl in Litouwen ook verschillende andere christelijke en niet-christelijke geloofsgemeenschappen aanwezig zijn (idem). De beperking van rechten ter bescherming van de goede zeden kan niet gebaseerd worden op beginselen die tot één enkele traditie teruggevoerd kunnen worden (idem).

Dat personen hebben geklaagd kan evenmin doorslaggevend zijn. De vrijheid van meningsuiting omvat immers mede gedachten die beledigen, schokken of verontrusten, en godsdienstige personen moeten immers dulden en aanvaarden dat anderen hun geloofsovertuiging ontkennen of zelfs tegenovergestelde leerstukken verspreiden (punt 81).

Dat een honderdtal personen bij de bisschoppenconferentie heeft geklaagd betekent nog niet dat iedere christen de campagne beledigend zou vinden, en zelfs als een meerderheid die campagne wel beledigend zou vinden, zou het in strijd met het EVRM zijn om de uitoefening van de vrijheid van meningsuiting door een minderheid afhankelijk te stellen van goedkeuring door een meerderheid, omdat anders de rechten van de minderheid zuiver theoretisch zouden zijn (punt 82).

De door de nationale autoriteiten en rechters gebruikte bewoordingen ("*in this case the game has gone too far*"; "*the basic respect for spirituality is disappearing*"; "*inappropriate use of religious symbols demeans them and is contrary to universally accepted moral and ethical norms*" en "*religious people react very sensitively to any use of religious symbols or religious persons in advertising*") laten zien dat zij absolute voorrang hebben verleend aan de bescherming van de gevoelens van gelovigen, zonder op gepaste wijze rekening te houden met de vrijheid van meningsuiting van Sekmadienis (punt 83).

Het Hof oordeelt eenstemmig dat artikel 10 EVRM is geschonden.

In zijn *concurring opinion* verduidelijkt de Maltese rechter De Gaetano dat het arrest niet moet worden gezien als een *carte blanche* om, ongeacht op welke wijze, godsdienstige symbolen te gebruiken. Hij benadrukt dat het oordeel van het Hof berust op een nauwgezette combinatie van twee factoren:

(i) het feit dat de betrokken afbeeldingen in de verste verte niet konden worden aangemerkt als onnodig grievende afbeeldingen van voorwerpen van godsdienstige aanbidding; en

(ii) het onbreken van een gepaste motivering door de nationale rechters.

11. Dit arrest is om aantal redenen belangwekkend.

Het maakt ten eerste duidelijk dat een beperking van de uitingsvrijheid ook bij commerciële uitingen logisch en begrijpelijk moet worden gemotiveerd, en dat niet kan worden volstaan met algemeenheden. Een extra stimulans voor rechters, toezichthouders en de RCC om een oordeel dat een reclame-uiting de grenzen van het toelaatbare overschrijdt zorgvuldig te onderbouwen.

Ten tweede blijkt uit het arrest dat, wanneer geen sprake is van uitingen die op het eerste gezicht onnodig grievend of godslasterlijk zijn, haat zaaien op grond van geloofsovertuiging of een godsdienst op ongepaste wijze aanvallen, de lat voor beperkingen betrekkelijk hoog ligt, ook voor commerciële uitingen. Het Hof brengt daarbij drie stromingen uit de rechtspraak bij elkaar: het onnodig grievend of godslasterlijk zijn uit *Otto-Preminger-Institut* en de daarop volgende arresten; het haat zaaien op grond van geloofsovertuiging uit *Jersild* en *Sürek;* en het een godsdienst op ongepaste wijze aanvallen uit *Otto-Preminger-Institut, Giniewski* en *Klein*. Voor commerciële reclame, die er in principe niet op uit is om een van deze drie effecten te sorteren, moet er dus ruimte zijn om op originele wijze godsdienstige motieven te gebruiken. Dat is wel anders dan de opvatting van de Litouwse autoriteiten en rechters, die het (in hun ogen oneigenlijk) gebruik van religieuze motieven voor commerciële reclame reeds als zodanig in strijd achtten met de goede zeden, en dus beperkbaar. Ook in Nederland, waar het debat over godsdienstige onderwerpen verkrampt, zou dit een rol kunnen spelen.

Ten derde geeft dit arrest een zeer belangrijke kentering van het Hof weer in het omgaan met dominante geloofsovertuigingen. In *Otto-Preminger-Institut* had het Hof zijn concrete validering van de Oostenrijkse censuurmaatregelen vrijwel uitsluitend gestoeld op de volgende overwegingen in punt 56:

> *"The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities ac-*

ted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner."

Hoewel hier geen sprake is van het een godsdienst op ongepaste wijze aanvallen is de benadering hier een resoluut andere: een beperking van rechten ter bescherming van de goede zeden kan niet gebaseerd worden op beginselen die tot slechts één enkele traditie teruggevoerd kunnen worden (punt 81) en de uitoefening van de vrijheid van meningsuiting door een minderheid kan niet afhankelijk worden gesteld van goedkeuring door een meerderheid (punt 82). Ook hekelt het Hof uitdrukkelijk de betrokkenheid van (alleen) de Litouwse bisschoppenconferentie, terwijl in Litouwen ook andere geloofsgemeenschappen bestaan (punt 80). Dat rechter De Gaetano het oordeel van het Hof herleidt tot alleen een motiveringsgebrek lijkt daarom niet helemaal juist: ook materieel kleefde er een gebrek aan het beperken van een uiting die alleen door één godsdienstige stroming als problematisch werd ervaren. Ook dit derde aspect zou in Nederland een rol kunnen spelen. Enerzijds bestaat er in Nederland geen zeer strenge norm van scheiding van kerk en staat.[54] Anderzijds houdt de overheid zich in Nederland van oudsher, in navolging van de lang dominante, door Abraham Kuyper ontwikkelde leer van "soevereiniteit in eigen kring", buiten maatschappelijke onderwerpen, die in de zuilen werden geregeld. Maar met de opkomst van de Islam is ook in Nederland de discussie opgelaaid, met de neiging van een deel van de bevolking om de nadruk te leggen op een christelijke traditie. Desalniettemin is het in Nederland hopelijk nog ondenkbaar dat het bestuur van PKN of de Nederlandse bisschoppenconferentie door een toezichthouder zouden worden geraadpleegd over de toelaatbaarheid van een uiting in het publieke domein.

D. Haije & H.M.H. Speyart[55]