

## Appendix D – Legal Opinion by Alex de Santos, Human Rights Lawyer

It is submitted that Article 3(2) of EC Directive 80/181, purporting to prohibit expression of measurement in non-metric terms, is a contravention of Article 10 of the European Convention on Human Rights.

### 1) Article 10 of the Convention provides:

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

2) The European Court of Human Rights has clearly stated that it considers freedom of expression to be essential to a democratic society. In *Zana v Turkey*<sup>1</sup> the Court said:

“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 Article 10(2), 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”. As set forth in Article 10, this freedom is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly”.<sup>2</sup>

### Article 10 (1) of the Convention

3) Article 10 operates in a multitude of spheres including **commercial expression** and has been held to cover commercial advertising such as advertising by veterinarians<sup>3</sup> and

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<sup>1</sup> (1999) 27 EHRR 667, Judgment of November 25<sup>th</sup> 1997, R.J.D. 1997 - VII at para 51

<sup>2</sup> See also *Handyside and Others v United Kingdom* (1976) 1 EHRR 737, para 49, p754; *Sunday Times v United Kingdom (No. 1)* (1979) 2 EHRR 245, para 65, p.280; *Sunday Times v United Kingdom (No. 2)* (1991) 14 EHRR 229, para 50, p.241; *Lingens v Austria* (1986) 8 EHRR 103 para 31; *Oberschlick v Austria* (1991) 19 EHRR 389; *Castells v Spain* (1992) 14 EHRR 445; *Jersild v Denmark* (1994) 19 EHRR 1 para 37; and, *Goodwin v United Kingdom* (1996) 22 EHRR 123

<sup>3</sup> *Barthold v Germany* (1985) 7 EHRR 383

doctors.<sup>4</sup> Indeed, as Feldman states in his scholarly discussion of freedom of expression as embodied in Article 10:

"The market-place-of-ideas model has implications for commercial speech. In a market economy, commercial speech, including advertising, may be useful in order to permit information about products and the relative merits of commercial competitors to be promulgated, facilitating informed choices by customers. Thus in a liberal society with a market economy, freedom of expression could be thought to support an important aspect of collective economic life".<sup>5</sup>

4) In *Markt Intern Verlag GmbH & Klaus Beerman v Germany*<sup>6</sup> the publication in question conveyed information with commercial content to a limited group of tradespersons, but not the general public. The Court rejected the Government's assertion that Article 10 **did not apply when dealing with commercial interests**. The Court found that:

"... such information cannot be excluded from the scope of Article 10 para 1 which does not apply solely to certain types of information or ideas or forms of expression".<sup>7</sup>

5) Expression has been interpreted **broadly** by the Court and has been held to include spoken or written words, television programmes<sup>8</sup> and broadcasting<sup>9</sup>, film<sup>10</sup>, video<sup>11</sup>, pictures<sup>12</sup>, dress<sup>13</sup>, images<sup>14</sup> and conduct such as acts of protest<sup>15</sup> or expressions of physical feeling<sup>16</sup>.

6) The Court refused in *Groppera Radio AG and Others v Switzerland*<sup>17</sup> to give a **definition** of the terms "freedom to impart and receive information and ideas", but it is clear from the wording of Article 10(1) that it affords a broad protection.

7) The freedom to receive information and the freedom to impart information are separate, independent rights<sup>18</sup>. The State is not permitted, save when having satisfied Article 10(2), to **stand between the speaker and the audience**. To do so would be contrary to the purpose of the Article 10 guarantee.<sup>19</sup>

<sup>4</sup> *Colman v United Kingdom* (1993) 18 EHRR 119

<sup>5</sup> David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Clarendon Press, 1993), p. 550.

<sup>6</sup> (1989) 12 EHRR 161.

<sup>7</sup> *Ibid* at para 26

<sup>8</sup> See eg *Hodgson v United Kingdom* (1987) 51 DR 136

<sup>9</sup> See eg *Autronic AG v Switzerland* (1990) 12 EHRR 485 where the Court acknowledged that the public have a right to receive broadcasts.

<sup>10</sup> See eg *Otto-Preminger-Institute v Austria* (1994) 19 EHRR 34

<sup>11</sup> See eg *Wingrove v United Kingdom* (1996) 24 EHRR 1

<sup>12</sup> See eg *Müller v Switzerland* (1988) 13 EHRR 212

<sup>13</sup> See eg *Stevens v United Kingdom* (1986) 46 DR 245

<sup>14</sup> See eg *Chorherr v Austria* (1993) 17 EHRR 358

<sup>15</sup> See eg *Steel v United Kingdom* [1999] EHRLR 109, judgment of 28<sup>th</sup> September 1998

<sup>16</sup> See eg *X v United Kingdom* (1978) EHR 63 (homosexual activity)

<sup>17</sup> (1990) 12 EHRR 321 at para 55

<sup>18</sup> *Sunday Times v United Kingdom (No. 1)* (1979) 2 EHRR 245 paras 65-6

<sup>19</sup> *Groppera Radio AG and Others v Switzerland* (1990) 12 EHRR 321 para 53; *Casado Coca v Spain* (1994) 18 EHRR 1 para 59

8) It is submitted that the expression of measurement constitutes communication. Preventing communication in non-metric terms creates barriers, such as between businesses and customers, or potential customers. The rights of such parties are infringed by the withdrawal of the freedom to display measurements in units of their choosing.

#### Article 10(2) of the Convention

9) In *Klass v Germany*<sup>20</sup> the Court endorsed the view that individual liberties as set out in Articles 8-11 need a broad interpretation, whereas restrictions on these liberties require a **narrow interpretation**.

10) In *Buckley v UK*<sup>21</sup>, the Court said that the Margin of Appreciation "goes hand in hand with European supervision". The Court went on to say that when looking at the Margin of Appreciation, the attitude of the Court:

"...will vary according to the context. Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned".

11) It was held in *Handyside v United Kingdom*<sup>22</sup> that "necessary in a democratic society" means made in response to a "pressing social need" and is **not synonymous** with "admissible", "ordinary", "useful", "reasonable" or "desirable".<sup>23</sup>

12) Means to achieving legitimate aims also need to be **proportional**.<sup>24</sup> The proportionality principle requires, in particular, that the extent of deviation from the right to expression is not excessive in relation to legitimate needs and interests which have occasioned it. The Court has held that a means "prescribed by law" and that has "pursued a legitimate aim", will contravene the Convention if disproportionate.

13) The Court's approach was summarized in the case of *Zana v Turkey*<sup>25</sup>:

"[T]his freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established *convincingly*... The adjective "necessary", within the meaning of Article 10 para 2, implies the existence of a *pressing social need*...

[T]he Court must look at the impugned interference in the light of the case as a whole, including the context of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims 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 based themselves on an acceptable assessment of the relevant facts.

<sup>20</sup> (1978) 2 EHRR 214

<sup>21</sup> (1996) 23 EHRR 101

<sup>22</sup> (1976) 1 EHRR 737

<sup>23</sup> See also *Sunday Times v United Kingdom (No. 2)* (1991) 14 EHRR 229 para 50, p 241

<sup>24</sup> *Goodwin v United Kingdom* (1996) 22 EHRR 123

<sup>25</sup> (1999) 27 EHRR 667, Judgment of November 25<sup>th</sup> 1997, R.J.D. 1997 – VII at para 51

14) The “search for a **fair balance** between the demands of the community and the requirements of the individual's fundamental rights” is, in the words of the Court, “inherent” in the Convention system.<sup>26</sup>

15) On the assumption there has been an infringement of Article 10, the court must be persuaded that the case for the justification of the infringement has been convincingly established. The burden lies **on the State** to demonstrate that there is a legitimate aim within the categories listed in Article 10(2).

16) It is submitted that banning supplementation indications of quantity **does not fall within the ambit of Article 10(2)**; it does not further the interests of public health or morals or any of the other exceptions listed - in fact quite the contrary. Supplementary non-metric indications are necessary to ensure public protection and safety for products and services where metric is not customary or understood.

17) The use of pounds, inches and other non-metric expressions to describe quantity is **neither untruthful nor misleading**.

18) Should the Respondent State demonstrate that a legitimate aim is being pursued, “metrication”, then it is submitted that **the regulations are a disproportionate and unnecessary** in attaining those ends and therefore not “necessary in a democratic society”. The purpose of EC directive 80/181 is to harmonise legislation within EU member states:

“The laws which regulate the use of units of measurement in the Member States differ from one Member State to another and as a result hinder trade... in these circumstances, it is necessary to harmonize laws, regulations and administrative provisions in order to overcome such obstacles” (paragraph 8, EC/80/181).

The disproportionality lies in the fact that the single system of measurement so required has *already been achieved* by the fact that only units authorised by Directive 80/181 are recognised for economic purposes (ie metric). This has been the case since January 1<sup>st</sup>, 2000. Banning indications that are supplementary and additional does not bear on the attainment of a single system of measurement, and represents only intolerance of people's right to express themselves privately, using measures, effectively language, of their choosing.

19) It is submitted that freedom of expression is protected only if use of **language is free**.

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<sup>26</sup> See *Brogan & Others*, Series A. 145-B, p.27, judgment of 29<sup>th</sup> November 1988; and, *Soering v United Kingdom*, A. 161, p.35