[GB] Self-Regulation “Prescribed by Law” under Article 10(2) of the European Convention

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In the United Kingdom, non-broadcast advertising (such as press, leaflet and cinema advertising) is subject to the code of the Advertising Standards Authority, a self-regulatory body established by the advertising industry itself. The code does not have a direct basis in statute. The Authority published an adjudication under the code, having received a complaint from a health authority, to the effect that a leaflet promoting health products, published by Matthias Rath BV, was in breach of the code. The company applied for judicial review on the basis that this breached the European Convention on Human Rights, incorporated directly into UK law by the Human Rights Act 1998. It was alleged that such an adjudication made under the non-statutory code was not "prescribed by law", as required by Article 10(2) of the Convention.

The High Court rejected the application for judicial review. The judge noted that under the Control of Misleading Advertisements Regulations (SI 1988/915), provision was made for the statutory recognition of established means of dealing with complaints, and the major consumer protection agency, the Director General of Fair Trading, was required to have regard to the desirability of the control of advertisements by self-regulatory bodies. This provides a legislative underpinning for self-regulation. The code is easily accessible and its provisions are clear and precise. This fulfils the criteria set out in case-law of the European Court of Human Rights (Barthold v Germany, 25 March 1985, Series A, no. 90, paras. 45-48). Therefore, the code met the purposive intention of Article 10(2). The adjudication, whilst an infringement of freedom of expression, was necessary "for the protection of health". The company had not argued that the provisions of the code were not "necessary in a democratic society".

It should be noted that broadcast advertising is subject to a different regime, administered by the Independent Television Commission. The Commission has stronger statutory underpinning for its codes by virtue of the Broadcasting Act 1990, Section 9 of which requires the publication and enforcement of a code on advertising standards and practice. Such a legal challenge is thus even less likely to succeed in relation to broadcast advertising.

Ex parte Matthias Rath BV and R v Advertising Standards Authority Ltd. and Another, Another, The Times, 10 January 2001, Queen's Bench

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