# Lawyer's Ranking From A Constitutional Perspective: The Federal Constitutional Court's *JUVE-Handbook* Decision*

*By Kristofer Bott*

In November, 2000, the *Bundesverfassungsgericht* (Federal Constitutional Court) surprised the public by holding that the publisher's freedom of expression and press secured by Article 5 of the *Grundgesetz* (Basic Law) could be violated if the publication of advertisements was prohibited, provided the advertisement is included in the scope of protection itself.[1] At that time shocking advertisements were being heavily discussed in the public. This public debate had been sparked, in part, by the *Bundesgerichtshof* (Federal Court of Justice) decision prohibiting *Stern Magazine's* publication of advertisements containing repulsive pictures on behalf of the fashion and lifestyle brand Benetton.[2] The magazine complained to the Federal Court of Justice against this judgment, an appeal that generated the dictum quoted above.[3] In November, 2002, the Federal Constitutional Court had another opportunity to characterize the importance of the freedom of expression and the press in competition law, particularly in the context of the publishing industry.[4]

The Munich *Oberlandesgericht* (OLG – Higher Regional Court) found the publication of rankings for law firms specialized in commercial law in the *JUVE Handbook*[5] to

* Translated by Dirk Hartmann, Florian Hoffmann, Lars Schmidt, Sascha Ziemann and Russell Miller.

1 *Benetton I* case, BVerfGE 102, 347. *See*, *Ban on Benetton "Shock Ads" Argued Before Federal Constitutional Court*, 1 GERMAN LAW JOURNAL No. 3 (15 November 2000), http://www.germanlawjournal.com; *Federal Constitutional Court Rejects Ban on Benetton "Shock" Ads: Free Expression, Fair Competition and the Opaque Boundaries Between Political Message and Social Moral Standards*, 2 GERMAN LAW JOURNAL No. 1 (15 January 2001), http://www.germanlawjournal.com.

2 *Benetton I* case, decisions of the *Bundesgerichtshof* (BGH – Federal Court of Justice), I ZR 180/94 and I ZR 110/93 from 6 July 1995.

3 *See*, note 1, *infra*.

4 *JUVE Handbook* case, decision of the *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court), 1 BvR 580/02 from 7 November 2002, http://www.bverfg.de.

5 Information about the *JUVE Handbook* is available at the publisher's website: http://www.juve.de/html/us.html.

https://doi.org/10.1017/S2071832200015911 Published online by Cambridge University Press

constitute "unfair competition" pursuant to Section 1 of the *Gesetz über den unlauteren Wettbewerb* (UWG – Unfair Competition Act) and prohibited the practice.[6] This manual delivers information about the legal market. Following this judgment the Federal Court of Justice refused the appeal on points of law.[7] Thereupon the JUVE publishing company (situated in Cologne) and two of its editors acting individually, filed a complaint with the Federal Constitutional Court based on the alleged violation of their freedom of expression and press pursuant to Art. 5 of the Basic Law.

For decades several specialized publishing companies have been providing the German legal market with an unmanageable abundance of professional law journals. Having no deficiency of law journals, organizations of lawyers traditionally reported on their activities and legal questions concerning legal practice. However, a journal, reporting on practicing lawyers, law offices and their business, did not exist until quite recently. The JUVE publishing company discovered and filled this gap in the market. Appearing monthly since 1998, the journal named *JUVE-Rechtsmarkt*[8] reports on, *inter alia*: large transactions and the law firms involved in them, formations and closures of chambers and firms, professional development of well-known advocates, and other news concerning the "lawyers market" that is of interest to the journal's targeted readers. The journal essentially takes its clues from the Anglo-American market where such publications as *Legal Week*[9] and *The American Lawyer*[10] have existed for a long time, and it is explicitly addressed to both "lawyers and clients." In addition, a *JUVE Handbook* of commercial law firms is published once a year. This handbook offers space to the law firms for in-house advertisements. Making up roughly twenty-five percent of the handbook, this part is distinct from the edited part, and is offered on a for-pay basis. The edited part includes several different rankings of law firms, which are presented in alphabetical order. A standard editorial disclaimer states that the ranking is subjective, and depends on the particular evaluation of the law firm surveys on which they are based. The publishers further qualify the rankings by publishing the declaration

---

[6] Decision of the *Oberlandesgericht* (Higher Regional Court) München, 29 U 4292/00 from 8 February 2001. Also published at 2001 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) p. 1950.

[7] Decision of the *Bundesgerichtshof* (BGH – Federal Court of Justice), I ZR 155/01 from 21 February 2002.

[8] Information about JUVE's *Rechtsmarkt* journal is available at the publisher's website: http://www.juve.de/html/ze_rm.html.

[9] *See*, http://www.legalweek.net/.

[10] *See*, http://www.americanlawyer.com/.

that exclusion from the handbook ranking should not be taken to reflect negatively on any firm.

Two lawyers from Munich, who are partners in a law firm operating throughout Germany which had been excluded from the handbook's ranking, brought suit before the court of first instance, alleging that it was far from clear that their colleagues and clients interpreted their absence from the rankings in conformity with the publishers' disclaimer. They asked the court for an injunction on the basis that the publication of the rankings constituted a violation of Section 1 UWG; the data on which the rankings were based, and the criteria of their evaluation did not justify the published rankings.

Section 1 UWG reads: "Whoever takes action in business dealings for competitive purposes, which contravenes the good morals, can be sued for injunction and damages."

The *Landgericht* (Regional Court) dismissed the claim, interpreting the rankings as an expression of opinion, protected by the freedom of opinion and press pursuant to Article 5.1 of the Basic Law.[11]

The Higher Regional Court quashed the judgment of the lower court, concluding that the ranking lists were able to influence competition in the legal market.[12] The publication of rankings, the OLG held, pursued the aim of promoting both the publisher's own, as well as the ranked law firms' competitiveness.

According to the Higher Regional Court and the precedent upon which it relied,[13] anti-competitive conduct could not, *prima facie*, be assumed in the case of organs of the press. This basic principle, the Higher Regional Court concluded, finds its exception when the primary purpose of press publications, namely the provision of information, has been sidelined by a clear intention to promote the organ's own or a third party's competitiveness.[14] The Higher Regional Court assumed the latter to be the case with the law firm rankings published in the *JUVE Handbook*. The Higher Regional Court explained that the assemblage of press research in the form

[11] Decision of the *Landgericht* (Regional Court) Muenchen from 20 June 2000. Published at 2000 ZEITSCHRIFT FUER WIRTSCHAFTSRECHT (ZIP) p. 1593.

[12] *See*, note 5, *infra*.

[13] *Id*.

[14] *Id*.

of rankings was, unlike the presentation of information in the form of reports, not covered by the protection reserved for the general provision of information.[15] This is especially true, the Higher Regional Court noted, since it was in the interest of the publishers, who financed themselves predominantly through advertisements, to place among the ranked law firms precisely those that had also paid for advertising in the *Handbook* itself.[16] The publication of the rankings was dubious, because the criteria used for the ranking were not sufficient to justify them. With neither an adequate data set nor verifiable criteria for ordering and evaluating the rankings, the Higher Regional Court concluded that the rankings were nothing more than commercial advertising in the guise of press reporting, a form of expression for which Article 5 of the Basic Law did not provide any protection.[17] Finally, the Higher Regional Court held that this limitation on fundamental rights in accordance with § 1 UWG was not disproportionate since the publishers retained all rights to continue compiling reports and even to publish rankings, though on a different legal basis.[18]

The First Civil Chamber of the Federal Court of Justice, which deals with competition matters, refused to grant an appeal on points of law raised with respect to the Higher Regional Court's decision.[19] In two key judgments it had earlier laid out the criteria for determining whether editorial reporting was in conformity with competition law.[20] The Higher Regional Court had explicitly referred to this precedent in its judgment.[21]

The Federal Constitutional Court quashed both decisions in its decision of 7 November 2002, and referred the matter back to the Higher Regional Court for a deci-

---

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *See*, note 6, *infra*.

[20] *See*, *Best I (Physicians)* case, decision of the *Bundesgerichtshof* (BGH – Federal Court of Justice), I ZR 154/95 from 30 April 1997; *Best II (Lawyers)* case, decision of the *Bundesgerichtshof* (BGH – Federal Court of Justice), I ZR 196/94 from 30 April 1997. In German the cases are known as "Die Besten I" and "Die Besten II." Also published at 1997 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR) pp. 912 and 914.

[21] *See*, note 6, *infra*.

sion in accordance with the principles it set out for the case. [22] The judgment was rendered by a three-judge Chamber possessed of jurisdiction over the case pursuant to Article 93c para. 1 of the *Bundesverfassungsgerichtgesetz* (BverfGG – Federal Constitutional Court Act) because the legal question relevant to the assessment of the constitutional complaint had already been decided. The lead decision in the field is the *Benetton* case,[23] which is not, however, the last case bearing this name. In the Benetton proceedings the First Civil Chamber of the Federal Court of Justice reconsidered the matter on remand from the Federal Constitutional Court, following the guidelines that had been laid down by the Federal Constitutional Court's decision. Nonetheless, the Federal Court of Justice came to the substantially identical judgment as it had in its first consideration of the case.[24] It remains to be seen whether and how this divergence between the two highest courts will sort itself out.

In its *JUVE Handbook* judgment the Federal Constitutional Court initially observed that the rankings were value judgments and not facts, as the Higher Regional Court had also implicitly assumed.[25] It then turned to the question: in which way ought the constitutional right of freedom of opinion and the press be considered in determining the legality of market-related press publications under competition law. The point of departure was the text of the relevant constitutional stipulation, namely, that the freedom of opinion and the press may be regulated through rules set out in "ordinary" or parliamentary (as opposed to constitutional) laws.[26] Section 1 of the UWG constitutes such an "ordinary" law, regardless of the indeterminacy of its general clause.[27] The Court in the *Benetton I* judgement had already established the limiting effect of the UWG on the protections provided by Article 5.[28] However, on that occasion, the Federal Constitutional Court explained that when the courts concretized the general clause by reference to case groups, they were obligated, within the ambit of the Article 5 protections, to: (a) verify whether the

---

[22] *See*, note 4, *infra*.

[23] *See*, note 1, *infra*.

[24] *Benetton II* case, decision of the Bundesgerichtshof (BGH – Federal Court of Justice), I ZR 284/00 from 6 December December 2001. Also published at 2002 NJW p. 1200.

[25] *See*, note 4, *infra*.

[26] Art. 5, para. 2 of the Basic Law.

[27] For current reform efforts by the Federal Ministry of Justice, see the internal draft of 1 January 2003 at http://www.bmj.bund.de/images/11548.pdf.

[28] *See*, note 1, *infra*.

specific evaluation criteria used for each case group was in correspondence with competition law; and (b) determine whether they adequately reflected the relevant constitutional protections.[29] In the *JUVE Handbook* case the Court refined its previous decision, concluding that although the criteria developed in the case law of the higher courts could serve as strong indicators of a danger of a violation of competition law, based on accumulated practical experience, the protection of the freedom of opinion and the press nonetheless mandated that a determination of whether the limitation of a constitutional right was justified had to be made on a case by case basis.[30] In the case group "disguised advertising," to which the Higher Regional Court had referred, the judgment of *Sittenwiedrigkeit* ("unfairness" in terms of Section 1 UWG) was based, in particular, on a prognosis of the effects that such advertising would have on competition. A concrete threat to competition was identified by the challenged decision of Higher Regional Court.[31] A *probability* alone, the Federal Constitutional Court explained, cannot serve as the justification for the limitation of constitutional rights.[32] The Court explained that the fact that the basis and criteria for the rankings were not made public (the issue with which the Higher Regional Court had taken exception) would be innocuous if the target readership considered the information provided as sufficient to form the basis of an independent judgment.[33] Neither could the mere *speculation* that the publishers tended to rank potential advertising customers higher than others because their income derived from advertising justify a limitation of constitutional rights.[34] Finally, the Constitutional Court concluded that the principle of proportionality also required the courts to determine whether a regulation of the conduct, taking the form of something less than complete prohibition such as the requirement to add explanatory notes to the rankings, would not be as effective.[35]

The Higher Regional Court finds the expression of "badly" justified or supported opinion as not worthy of constitutional protection, if uttered with the aim of gain-

[29] *Id*.

[30] *See*, note 4, *infra*.

[31] *See*, note 4, *infra*. *See*, *also*, note 6, *infra*.

[32] *See*, note 4, *infra*.

[33] *See*, note 4, *infra*.

[34] *See*, note 4, *infra*.

[35] *See*, note 4, *infra*.

https://doi.org/10.1017/S2071832200015911 Published online by Cambridge University Press

ing a competitive advantage.[36] To the contrary, the Federal Constitutional Court, in its *JUVE-Handbook* and *Benetton I* decisions, gives priority to the freedom of opinion when its effects on competition are uncertain.

Tables are an attractive form of presentation; they transport much information in little space. Their "charm" is based on the fact that they give often highly complex data an easily graspable form. Tables distinguish between up and down, in and out. Without so much as a word facts are sorted into an image, and are yet subject to differentiation and discrimination. The *JUVE-Handbook* does not even realize the full potential of a table, since it sorts law firms within specific groups not according to "hits" or some other value, but simply alphabetically.

The presentation in table-format makes it even more difficult to distinguish between facts and value judgments. In its *Census* decision the Federal Constitutional Court did not consider data derived from statistical research to constitute an opinion.[37] But this surely is only half true: any taxonomy of facts is always an accumulation of facts, and always contains value judgments because there are always alternatives to the specific facts chosen and they way they are ordered. In the *JUVE-Handbook* decision the Federal Constitutional Court was of the view that the Higher Regional Court had considered the rankings as expressions of fact.[38] Yet this is not necessarily the case. Several formulations in the Higher Regional Court's judgment support the view that it did, in fact, consider the rankings to contain value judgments, though based on insufficient and insufficiently verified data and therefore unprotected by Article 5 of the Basic Law.[39]

One might also have doubts as to the orientation of the critique leveled by the Federal Constitutional Court against the case group of "disguised advertising" and the treatment given it by the Higher Regional Court. The latter did, indeed, explicitly refer to that case group.[40] Yet the considerations relevant for the judgment refer rather to those criteria laid down by the Federal Court of Justice in the *Best I* and *Best II* cases. On these, the Federal Court of Justice observed that their application required that the presentation of physicians and lawyers for advertising purposes

---

[36] *See*, note 6, *infra*. *Citing*, *BestI/II* cases, *see*, note 19, *infra* ("The general public has no interest in having such incorrect information [on physicians/lawyers].").

[37] BVerfGE 65, 1 (40 et. seq.)

[38] *See*, note 4, *infra*.

[39] *See*, note 6, *infra*.

[40] *Id*.

had to be treated, in terms of result, similar to the determination of conformity with competition law of press statements that contain overly positive advertising.[41] Based on this comparative analysis the court found that the "disguised advertising" case group applied. Here, it might be possible to perceive a hierarchy in the sphere of protection provided by Article 5. An opinion that is visibly insufficiently justified might deserve a higher level of protection under Article 5 in the context of a distortion of competition than an advertisement which is not even discernible as such because it pretends to be a press statement. The difference relevant in both constitutional and competition law would be between deception on the part of the author of an opinion and, possibly, bad research leading to an opinion.

The requirement of proof of concrete danger to competition is likely to shift not only the burden of proof in competition cases in the context of the freedom of opinion and the press somewhat towards the applicant who complains of press statements that allegedly infringe upon fair competition. A concrete danger is clearly more than an *objective capacity* to substantially influence competition. The latter is, according to Sections 1 und 13 II Nr.1 of the UWG, a precondition for any claim of omission.[42] In the similar case of *Best II* (involving Lawyers), the Federal Court of Justice considered the mere opposition of interest between the listed and the non-listed lawyers as a sufficient indicator to determine that the impugned reporting was capable of distorting competition in the legal market.[43] A specific danger is also distinctly above an intention to gain competitive advantage, around which the reflections of the Higher Regional Court in Munich centered in the context of constitutional protections, and which that court did not really transcend. The view of the Federal Constitutional Court that a verdict of non-conformity with competition law in the case of expressions of opinion in a market context presupposed the finding of a specific danger to competition corresponds to the controlling image of the "average but informed, attentive and comprehensive consumer" which has been used Europe-wide for a number of years in consumer protection matters.[44]

The influence of an expression of opinion on the conduct of market participants does not merely depend on what is said and how it is said, but also on who says it. It would, therefore, perhaps, have been sensible to critically examine the freedom of

---

[41] *See*, note 19, *infra*.

[42] *But see*, Köhler/Piper, UWG-KOMMENTAR, Introduction Margin No. 210 and § 13 Margin No. 15 (3rd Edition 2002).

[43] *See*, note 19, *infra*.

[44] ECJ C-210/96 'Gut Springenheide'.

opinion of JUVE-publishers with regard to the strong position their publication has in the market.

https://doi.org/10.1017/S2071832200015911 Published online by Cambridge University Press