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Comparative analysis of the EU and the USA

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Abstract

The objective of this study is to explore to what extent freedom of expression should protect food businesses against government intervention with corporate communications on food labels. A functional comparative method was used to analyse the objective. It was found that expression on food labels should be considered primarily commercial in nature. In the USA some food labelling regulations are considered inconsistent with the freedom of commercial expression. EU courts seem to uphold government restrictions to commercial expression in all cases, especially when restrictions are based on protection of human health. It can be concluded that food businesses should only be able to claim free speech rights on food labels when it is of importance to the public or consumers.

Key words: Freedom of expression, free speech, food labelling, corporate, constitutional rights

1. Introduction

Practice in the USA shows that some food labelling regulations could be considered inconsistent with the freedom of expression of food businesses.[1] Recent trends in the EU[2] require investigation whether the right to freedom of expression of food businesses could limit the government need to regulate food information.

The objective of this study was to explore to what extent freedom of expression[3] should protect food businesses against government intervention with communications on food labels. A functional comparative

[1] See for example, International Dairy Foods Association v. Amestoy, 92 F.3d 67 (2nd Cir. 1996); *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), *rehearing den.*, 172 F.3d 72 (D.C. Cir. 1999) ("*Pearson I*"); Whitaker v. Thompson 248 F. Supp. 2d 1 (D.D.C. 2002); International Dairy Foods Association and Organic Trade Association v. Boggs, 622 F.3d 628 (6th Cir. 2010).

[2] In Recital 44 of *Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control* it is stated that "[t]his Regulation does not affect the obligation to respect fundamental rights and fundamental legal principles, including the freedom of expression, as enshrined in Article 11, in conjunction with Article 52, of the Charter of Fundamental Rights of the European Union, and in other relevant provisions." Furthermore, ECJ 6 September 2012 Case C-544/10 Weintor (hereinafter: Weintor) was the first, and so far only, ECJ-case concerning a fundamental rights challenge against a food labelling law.

[3] There seems to be no difference between the term 'freedom of expression' used by civil law systems and 'freedom of speech' used by common law systems. The two terms will, therefore, be used interchangeably throughout this article. *See* Eric Barendt (2011), *Freedom of Expression*, in: Michel Rosenfeld & Adrás Sajó (2011), 'The Oxford Handbook of Comparative Constitutional Law', Oxford: Oxford University Press, p. 893.

method was used to analyse this objective.[4] To achieve this objective, first (1) the different tools used by the examined legal systems to ensure free speech protection were considered. In order to do this, it was first considered whether fundamental rights in general and free speech in particular, are protected in the legal system at issue. If this was the case, it was then considered whether and why this protection includes food businesses. It was furthermore considered whether this protection is extended to food labels. When freedom of expression applies to communications on food labels it was considered which limitations can be set to such free speech protection. Second (2), the different approaches to free speech protection on food labels in the USA and the EU were compared. Finally (3), it was discussed to what extent the functions of free speech allow free speech protection of communications on food labels.

The analysis is centred on five situations in which government regulation could potentially be considered inconsistent with the freedom of expression:

1. *Cooked-up* is a food business producing canned dinners, such as *Mac'n'Cheese* (a canned macaroni and cheese dinner). *Cooked-up* wants to label *Mac'n'Cheese* with the statement that it 'contains all the nutrients needed for a long and healthy life'. The government bans this information as it is considered to be false.

[4] J. Gordley (2012), 'The Functional Method', in: P.G. Monetari, *Methods of Comparative Law*, Cheltenham: Edward Elgar Publishing, p. 113.

2. *Corn Rebel* is a food businesses producing GM-free sweet corn. According to *Corn Rebel* genetically engineered crops and food products are unsafe for human consumption and hazardous for the environment. *Corn Rebel* wants to disclose on its food label that its sweet corn is 'GM-free' to strengthen the political debate against GM foods. The government prohibits the claim, because it finds that the claim confuses consumers, as there is no sufficient scientific evidence that GM products differ compositionally from non-GM products.

3. *True-blue* is a food business producing *Blueberrylicious* (blueberry flavoured jelly beans with added Vitamin C). They want to disclose on the food label of *Blueberrylicious* that it contains 'added Vitamin C'. Although the government considers it truthful information, it is nonetheless prohibited because the government found that the statement will contribute to the problem of obesity as it will encourage consumers to eat unhealthy food products.

4. *My Goodness* is a food business producing dairy products containing bifidus. Based on minority scientific opinion *My Goodness* wants to disclose on the food label that 'the consumption of bifidus eases the digestive system'. The government prohibits the claim because there is no significant scientific evidence supporting the claim.

5. *Humble Honey* is a food business producing honey. Their honey might be inadvertently contaminated with genetically modified pollen. The government compels *Humble Honey* to label its honey as being 'contaminated with genetically modified pollen' to enable consumers to make an informed choice. *Humble Honey* does not want to disclose such information as they worry it may negatively affect their sales.

The legal systems of the EU and the USA were subject to the comparison. These cases encompass legal systems from (common and civil) legal cultures at comparable stages of cultural, political and economic development,[5] but have fundamentally different labelling requirements for food products.

The challenges involved with conducting comparative legal research were controlled by extensively consulting experts in constitutional law and food law in each of the two legal systems. This will prevent systematic differences in interpretation and missing out on certain rules and considerations in the foreign system.

The study was restricted to freedom of expression on the physical label on the food product. All other types of expression concerned with the food product, such as online information, were excluded. Future research may aim at more comprehensive study concerning how online food information is, could, and should be regulated in accordance with freedom of expression.

[5] I have selected the cases based on the "most similar cases" logic, described in Ran Hirschl (2005), 'The Question of Case Selection in Comparative Constitutional Law, 53 *American Journal of Comparative Law* 125, pp. 133-9.

Government regulations comparable to food labelling regulations were included when these regulations touch upon similar legal dilemmas. Examples of such government regulation include case law concerning regulation prohibiting or limiting advertisement, sponsorship and/or labelling of tobacco products, case law considering labelling of diet supplements, and case law concerning labelling of alcoholic beverages.[6]

2. Free Speech Protection in the European Union

The right to freedom of expression in the EU is enshrined in Article 11 of the Charter of Fundamental Rights of the European Union (hereinafter: EU Charter). The EU Charter was proclaimed in December 2000, but did not acquire legally binding status[7] until an amendment of Article 6 TEU in 2009.[8]

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[6] In the EU, alcoholic beverages are considered to be food products. In the US, however, alcoholic beverages are regulated primarily by the Bureau of Alcohol Tobacco and Firearms, and not by the Food and Drug Authority.

[7] Although the ECJ already cited the EU Charter before, see e.g. Parliament v. Council, C-540/03, 27 June 2006. Also advocates general already discussed the EU Charter (See e.g. Opinion of A.G. Alber in Case C-340/99, *TNTTraco*, [2001] ECR I-4109; Opinion of A.G. Tizzano in Case C-173/99, *BECTU*, [2001] ECR I-4881; Opinion of A.G. Mischo in Case C-122 & 125/99 P, *D and Sweden* v. *Council*, [2001] ECR I-4319; Opinion of A.G. Jacobs in Case C-270/99 P, *Z* v. *Parliament,* [2001] ECR I-9197; Opinion of A.G. Stix-Hackl in Case C-49/00, *Commission* v. *Italy*, [2001] ECR I-8575; Opinion of A.G. Jacobs in Case C-377/98, *The Netherlands* v. *Council*, [2001] ECR I-7079; Opinion of A.G. Léger in Case C-353/99 P, *Council* v. *Hautala*, [2001] ECR I-9565; Opinion ofA.G. Mischo in Case C-20&64/00, *Booker Aquaculture Ltd* v. *Scottish Ministers*, [2003] ECR I-7411; Opinion of A.G Ruiz-Jarabo in Case C-208/00, *Überseering*, [2002] ECR I-9919; Opinion of A.G. Ruiz-Jarabo in

Article 11 EU Charter stipulates that:

"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."

The meaning and scope of the EU Charter rights are determined by case law of the European Court of Justice (ECJ), and may also be determined by case law of the European Court of Human Rights (ECtHR)[9] without thereby

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Case C-466/00, *Arben Kaba* v. *Secretary of State for the Home Department*, [2003] ECR I-2219. Opinion of A.G. Alber in Case C-63/01 in *Evans,* [2003] ECR I-14447; Opinion of A.G. Stix-Hackl in Case C-36/02, *Omega*, [2004] ECR I-9609; Opinion of A.G. Poiares Maduro in Case C-181/03 P, *Nardone*, [2005] ECR I-199; Opinion of A.G. Kokott in Case C-387/02, *Berlusconi and Others,* [2005] ECR I-3565; Opinion of A.G. Jacobs in Case C-347/03, *Regione autonoma Friuli-Venezia Giulia and ERSA*, [2005] ECR I-3785); Furthermore, the EU Charter gained momentum in secondary law (E.g. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, recital 2; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, recital 4).

[8] The amended Article 6(1) TEU states that the EU 'recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (...) which shall have the same legal value as the Treaties'.

[9] The ECtHR is a supranational or international court established by the European Convention on Human Rights (ECHR). The ECHR is an international treaty, drafted within the Council of Europe, now including 47 members that was formed after the Second World War in an attempt to unify Europe. Ten countries founded the Council of Europe on 5 May 1949: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway,

adversely affecting the autonomy of Union law and of that of the ECJ.[10] Furthermore, in so far as the EU Charter contains rights which correspond[11] to rights guaranteed by the European Convention on Human Rights (ECHR), the meaning and scope of those rights shall be the same as those laid down by the ECHR.[12] Whether a right has the

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Sweden, the United Kingdom and The Netherlands. Today, the Council of Europe covers almost the entire European continent, with its 47 member countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Macedonia, Turkey, Ukraine and the United Kingdom. The Council of Europe remains entirely independent and separate from the EU, and has no powers in prescribing law to its members. The EU is not a member to the ECHR.

[10] 5th recital of the EU Charter Preamble; Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17; concerning explanation to Article 52(3), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF; In Opinion Pursuant to Article 218(11) TFEU - Draft International Agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the Draft Agreement with the EU and FEU Treaties, Opinion 2/13 (Opinion of the Full Court, Dec. 18, 2014) restated the autonomy of Union law and the ECJ.

[11] The Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17; concerning explanation to Article 52(3), explain which EU Charter rights correspond to ECHR rights.

[12] Article 52(3) EU Charter. The reference to the ECHR also includes the Protocols to the ECHR. See, Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17; concerning explanation to Article 52(3), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035

same meaning and scope to those guaranteed by the ECHR is elaborated upon in the explanations relating to the EU Charter.[13] According to the explanations Article 11 EU Charter has the same meaning and scope as Article 10 ECHR.[14] Although the explanations do not have the status of law, "they are a valuable tool of interpretation intended to clarify the provisions of the Charter".[15] Furthermore, three

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:EN:PDF. The EU Charter also includes a large number of social and economic rights derived from the European Social Charter (ESC). The ESC is a treaty drafted by the Council of Europe in 1961 and it was revised in 1996. The ESC only asks from the State Parties to submit reports indicating how they implement the provisions of the ESC to the European Committee of Social Rights (Article 21 and 22 ECR as amended by the 1991 Turin Protocol). Any decision the ESC takes based on these reports are not binding on the State Parties (Article 28 ECR as amended by the 1991 Turin Protocol; Article 8 and 9 Additional Protocol to the European Social Charter (1995)). The ECtHR has had, due to the binding nature of its judgments, a much greater impact on the rights enshrined in the ECHR, than the ESC has had on the rights enshrined in the ESC. The rights enshrined in the ECHR are, therefore, more developed than the rights enshrined in the ESC.

[13] Articles 2, 4, 5(1)+(2), 6, 7, 9, 10(1), 11, 12(1), 14(1)+(3), 17, 19(1)+(2), 47(2)+(3), 48, 49(1) and 50 all correspond to the ECHR or its protocols. See Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation on Article 11- Freedom of expression and information, pp. 17-18, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF

[14] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17; p. 18 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF.

[15] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF

references in EU primary law can be found that confirm that the EU Charter has to be interpreted with due regard to the explanations (Article 52(7) EU Charter; fifth recital to the preamble of the EU Charter; Article 6(1) TEU).[16] The ECJ indeed also appears to follow the explanations.[17]

According to the explanations the level of protection afforded by the EU Charter to rights that have the same meaning and scope to those guaranteed by the ECHR may not be lower than guaranteed by the ECHR.[18] EU law may, however, provide "more extensive protection".[19] This suggests that the EU Charter interprets the ECHR as a minimum standard of protection, but not necessarily as a maximum.[20]

[16] Weiβ, W. (2012), 'EU Human Rights Protection After Lisbon', in: Trybus, M. & Rubini, L. (eds.), *The Treaty of Lisbon and the Future of European Law* Policy, Cheltenham: Edward Elgar Publishing, p. 224.

[17] ECJ Case C-279-09, DEB, judgment of 22 December 2010, paras 32, 35-6; ECJ Case C-283/11, judgment of the Court (Grand Chamber) of 22 January 2013, para. 42; ECJ Case C-334/12, Judgment of the Court (Fourth Chamber) of 28 February 2013, para 42; ECJ Case C-617/10, Judgment of the Court (Grand Chamber) of 26 February 2013, para. 20.

[18] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17; p. 17, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF

[19] Article 52(3) EU Charter. This was reconfirmed by CONV 354/02, Final Report of Working Group II, 22 October 2002, p. 7.

[20] Biondi, A., Eeckhout, P., & Ripley, S. (2012). *EU Law after Lisbon*. Oxford: Oxford University Press, p. 163.

2.1. Scope of Free Speech Protection of Food Businesses in the EU

There is no dispute that companies and corporate entities enjoy fundamental rights protection in the EU.[21] It is not clear, however, whether companies are excluded from fundamental right protection of strictly personal fundamental rights, such as the right to life (Article 2 EU Charter) or personal integrity (Article 3 EU Charter) might be excluded, and arguably freedom of expression.[22] It would be practical if for strictly personal fundamental rights only natural persons could be beneficiaries. The ECJ, however, does not rely on this test.[23]

The proceedings of the legitimacy of the Tobacco Advertising Directive[24] in 2000 provided an opportunity for the ECJ to comment on the scope of free speech protection

[21] Opinion of Advocate General Geelhoed in Case C-301/04 P Commission v SGLCarbon [2006] ECR I-5915, para 64; Case C-249/09 Novo Nordisk AS v Ravimiamet, (Advocate General's opinion 19 October 2010), para. 44; (ECJ Internationale Handelsgesellschaft [1970] ECR 1125, paras 4 ff; National Panasonic [1980] ECR 2033, paras 17 ff; Schrader [1989] ECR 2237, para 15.

[22] See also Rengeling, H.W. & Szczekalla, P. (2004), *Grundrechte in der Europäischen Union: Charta der Grundrechte und allgemeine Rechtsgrundsätze*, Koln: Heymanns, para 344; Ehlers, D. (2007), *European Fundamental Rights and Freedoms*, Berlin: De Gruyter Recht, p. 385). According Rengeling, H.W. & Szczekalla, P. (2004), *Grundrechte in der Europäischen Union: Charta der Grundrechte und allgemeine Rechtsgrundsätze*, Koln: Heymanns, para 390.

[23] See Ehlers, D. (2007), *European Fundamental Rights and Freedoms*, Berlin: De Gruyter Recht, p. 385-6.

[24] Directive 98/43/EC of the European Parliament and of the Council, issued on 6 July 1998, on the approximation of the laws, regulations, and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.

for companies. In this case, Germany sought annulment of the Tobacco Advertisement Directive. The legal challenge raised seven different possible grounds for the annulment of the Directive.[25] One of the grounds was the violation of the right to freedom of commercial expression. The judgment did not address the issue of compatibility with the right to freedom of expression, because the ECJ accepted the lack of a proper legal basis as ground for annulment of the Directive. Advocate General Fennelly, however, assessed the compatibility of the Directive limiting advertising and sponsorship of tobacco products[26] with the right to freedom of expression. He argues that:

> "Personal rights are recognized as being fundamental in character, not merely because of their instrumental, social functions, but also because they are necessary for the autonomy, dignity and personal development of individuals. Thus, individuals' freedom to promote commercial activities derives not only from their right to engage in economic activities and the general commitment, in the Community context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on *any* topic, including the

[25] See for more information S. Weatherill (2011), 'The limits of legislative harmonisation ten years after tobacco advertising: how the Court's case law has become a "drafting guide"', 12 *German Law Journal* 821.

[26] Directive 98/43/EC of the European Parliament and of the Council, issued on 6 July 1998, on the approximation of the laws, regulations, and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.

> merits of the goods or services which they market or purchase."[27]

Although he does not directly address whether companies as such should be beneficiaries of free speech protection, it follows from his submissions that he finds that in this case the companies which manufacture tobacco products are subject to free speech protection, even though he considers it to be a personal right.

The ECtHR elaborated extensively on free speech protection. Whether corporate persons are beneficiaries to the right to freedom of expression as enshrined in Article 10 ECHR was discussed for the first time by the ECtHR in Autronic AG v Switzerland in 1990. This interpretation has become settled case law of the ECtHR.[28] The ECtHR held that:

> "In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (…) The Article (…) applies to 'everyone', whether natural or legal persons."[29]

Food businesses would, thus, probably be considered beneficiaries to Article 11 EU Charter.

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[27] Germany v parliament and council, Case C-376/98 (Advocate General's opinion 15 June 2000), para. 154.

[28] Casado Coca v Spain Ser A 285-A (1994) (Court), para 35; See Emberland, M. (2006). *The Human Rights of Companies. Exploring the Structure of ECHR Protection.* Oxford: Oxford University Press, p. 130.

[29] Autronic AG v Switzerland (1990), Series A, No. 178, para. 47.

2.2. Scope of Free Speech Protection of Communications on Food Labels in the EU

Although food businesses most likely will be considered beneficiaries to the right to freedom of expression enshrined in Article 11 EU Charter, it should still be examined whether communications on the food label could also be considered 'expression' under these articles, especially since in 2013 the EU included freedom of expression in a food labelling regulation.[30]

There is not yet a clear ECJ judgment that would be relevant for expressions on the food label. Resource could be had to the case law of the ECtHR. 'Expression' in the context of the ECHR is, at least, an expressive statement represented in written or spoken words, pictures, images and expressive conduct, which has an element of public outreach.[31] Besides the expression itself, also the means for its production and for its communication, such as print,[32] radio[33] and television broadcasting,[34] artistic creations,[35]

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[30] In Recital 44 of *Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control* it is stated that "[t]his Regulation does not affect the obligation to respect fundamental rights and fundamental legal principles, including the freedom of expression, as enshrined in Article 11, in conjunction with Article 52, of the Charter of Fundamental Rights of the European Union, and in other relevant provisions."

[31] Emberland, M. (2006). *The Human Rights of Companies. Exploring the Structure of ECHR Protection.* Oxford: Oxford University Press, p. 117.

[32] Handyside v UK A 24 (1976).

[33] Groppera Radio AG v Switzerland A 173 (1990).

[34] Autronic v Switzerland A 178 (1983).

film[36] and electronic information systems, is protected.[37] Furthermore, the ECtHR stated in Markt Intern Verlag v Germany that "Article 10(1) (…) does not apply solely to certain types of information or ideas or forms of expression".[38] All[39] forms of expression are, thus, protected by Article 10(1) ECHR.

From this it could be concluded that corporate communications on the food label, i.e. the statements by *Cooked-up*, *Corn Rebel*, *True-blue*, and *My Goodness* on their food labels should thus also be protected by Article 10(1) ECHR, and may, therefore, also be protected by Article 11 EU Charter.

Whether *Humble Honey*, who is compelled to label its honey as being 'contaminated with genetically modified pollen' to enable consumers to make an informed choice, would enjoy free speech protection in the EU is less clear. The ECJ never discussed such a negative right to freedom of expression. Also the ECtHR have not explicitly taken a position on whether or not the negative right to freedom of

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[35] Müller v Switzerland A 133 (1988).

[36] Otto-Preminger-Institut v Austria A 295-A (1994).

[37] Harris, D., O'Boyle, M., & Warbick, C. (1995). Law of the European Convention on Human Rights. London: Butterworths, p. 378-9.

[38] Markt Intern Verlag v Germany Ser A 195 (1989) (Court), para. 26.

[39] Hate speech might, however, be excluded from protection. *See* Keane, David, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights', Netherlands Quarterly of Human Rights, Vol. 25, No. 4, 2007, pp. 641–663 for arguments in favour of excluding hate speech from free speech protection; Cannie, H. & Voorhoof, D, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection', Netherlands Quarterly of Human Rights, Vol. 29, No. 1, 2011, pp. 54-83 for arguments against excluding hate speech from free speech protection.

expression is protected by Article 10 ECHR. However, the European Commission on Human Rights (ECmHR)[40] asserted in Goodwin v. United Kingdom that:

> "There are circumstances in which a "negative right" is to be implied in Article 10 (Art. 10) not to be compelled to give information or to state an opinion."[41]

Goodwin v. United Kingdom, however, concerned the compulsion of a journalist to disclose its sources. The ECtHR has frequently stressed the importance of the press as 'public watchdog' to impart information and ideas of public interest.[42] It is, therefore, not self-evident that disclosure requirements on food labels would also enjoy negative free speech protection.

2.3. Limitations to the Free Speech Rights of Food Businesses on Food Labels in the EU

Article 52(1) EU Charter is the overarching limitation clause of the EU Charter, and closely follows the case-law of the ECJ. When applying Article 52(1) EU Charter to Article 11 EU Charter, the explanations relating to the EU Charter indicate

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[40] Initially the ECtHR and the ECmHR where part of the international judicial mechanism with jurisdiction to find against States that breach the rights enshrined in the ECHR. The task of the ECmHR was to screen the incoming cases for admissibility (see former Article 28 ECHR) until it was made defunct in 1998 and its tasks then were taken over by the ECtHR. *See* Emberland, M. (2006). The Human Rights of Companies. Exploring the Structure of ECHR Protection. Oxford: Oxford University Press, p. 9.

[41] Paragraph 48 Application No. 17488/90, Goodwin v. United Kingdom, report of 1 March 1994.

[42] Eric Barendt (2005) *Freedom of Speech*, Oxford: Oxford University Press, p. 66, refers to Observer and Guardian v UK (1992) 14 EHRR 153, para. 59; Jersild v. Denmark (1995) 19 EHRR 1.

that due regard should be given to the limitation clause of the freedom of expression of the ECHR, Article 10(2) ECHR[43] and that government limitations imposed on the right to freedom of expression of Article 11 EU Charter may "not exceed those provided for in Article 10(2) [ECHR]".[44] Article 10(2) ECHR could, therefore, be taken into account when assessing the limits to free speech protection in the EU. A side-by-side comparison of key phrases from Article 52(1) EU Charter and Article 10(2) ECHR shows that the articles are very similar. The EU charter, however, seems to provide a little more protection than the ECHR (table 1).

Table 1. Limitation Clauses in the EU

Article	**Article 52(1) EU Charter: general limitation clause**	**Article 10(2) ECHR: specific limitation clause for the freedom of expression**
Content	• provided for by law • respect the essence of those rights and freedoms. • Subject to the principle of proportionality	• prescribed by law

[43] The rights and freedoms enshrined in the ECHR each have their own limitation clause, instead of one overarching limitation clause as in the EU Charter.

[44] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation on Article 11- Freedom of expression and information, para 1, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF.

	• necessary • genuinely meet objectives of general interest OR need to protect the rights and freedoms of others	• necessary • legitimate public aim (exhaustively listed)

So far companies have not challenged a government regulation limiting content on product labels based on the right to freedom of expression before the ECtHR or the ECJ. Nonetheless, the limiting clauses for protection following ECJ case-law and Article 52(1) EU Charter could play out as follows.

(1) Limitation must be provided for by law

In cases where it involves food labelling law this condition is met by definition. Within the European Union many legally binding rules, mainly Regulations but also Directives,[45] relate to the food label.[46] This requirement is similarly

[45] Regulations are defined in the Treaty on the Functioning of the European Union as having general application and 'binding in its entirety and directly applicable in Member States' (Article 288 TEU).

[46] Examples are Regulation 1169/2011 on the provision of food information to consumers; Regulation 834/2007 on organic production and labelling of organic products; Regulation 1829/2003 on genetically modified food and feed; Regulation 1830/2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms; Regulation 1924/2006 on the nutrition and health claims made on foods; and Regulation 1760/2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products.

stipulated in Article 10(2) ECHR which specifies that the government interference must be prescribed by law, meaning that, at a minimum, the interference should be authorized by a specific national, European or international legal rule or regime.[47]

(2) Limitation must respect the essence of the rights and freedoms at issue

Case-law of the ECJ indicates that interferences with the fundamental rights of the EU may not impair the very essence of those rights.[48] The wording of Article 52(1) EU Charter is based on the case-law of the ECJ, which holds that "restrictions may be imposed on the exercise of fundamental rights (...) provided that those restrictions (...) do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very *substance* of those rights".[49] Adherence to the essence of a fundamental right, however, "does not require more than the preservation of all basic guarantees which emanate from the right in question".[50] It could be argued, therefore, that some food labelling regulations affects the essence of the right to freedom of expression (Article 11 EU Charter) by prohibiting a form of expression. The exact essence of free speech according to the ECJ is, however, yet unclear.

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[47] Harris, D., O'Boyle, M., & Warbick, C. (2007). *Law of the European Convention on Human Rights* (2 ed.). London: Butterworths, p. 345, Silver v UK A 61 (1983); 5 EHRR 347, para 86.

[48] ECJ Wachauf [1989] ECR 2609, para 18.

[49] Case C-292/97, 13 April 2000, para. 53.

[50] Dirk Ehlers (2007), "General Principles" in: Dirk Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin: De Gruyter Recht, p. 393.

(3) Subject to the principle of proportionality

The principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. As such the limitation should be necessary (see 3.1. below), and genuinely meet objectives of general interests or the need to protect the rights and freedom of others (see 3.2. below).

(3.1) The limitation must be necessary

According to the ECJ the necessity-requirement implies that the limitation should be the least onerous option of the available options. [51] The ECJ had not yet elaborated on this requirement, although Advocate General Fennelly argues that when an EU measure restricts freedom of commercial expression the EU legislator should:

> "be obliged to satisfy the Court that it had reasonable grounds for adopting the measure in question in the public interest. In concrete terms, it should supply coherent evidence that the measure will be effective in achieving the public interest objective invoked (...) and that less restrictive measures would not have been equally effective".[52]

[51] See ECJ Case C-283/11, judgment of the Court (Grand Chamber) of 22 January 2013, para. 50.

[52] Germany v parliament and council, Case C-376/98 (Advocate General's opinion 15 June 2000), para. 159.

Advocate General Jääskinen argued that in commercial matters the EU legislator has a wide discretion in assessing the level of public health protection and is not required to restrict itself to a minimum necessity to protect freedom of expression.[53] Fennelly adds nuance by stating that "[t]he more restrictive the effects, the greater is the onus on the legislator to show that a less burdensome measure would not have sufficed". Fennelly suggests that the "evidence required to justify a restriction will depend on the nature of the claim made,"[54] because "[e]videntiary requirements may be less strict where public health is at stake"[55], implying that public health by definition gives strong support for any type of restriction. This is in line with the ECtHR which held in two cases concerning tobacco advertising that "overriding considerations of public health, on which the State and the European Union have, moreover, legislated, may take precedence over economic concerns, and even over certain fundamental rights such as freedom of expression".[56]

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[53] Case C-249/09 Novo Nordisk AS v Ravimiamet, (Advocate General's opinion 19 October 2010), para 50. He refers to Robert Alexy: 'On Balancing and Subsumption. A Structural Comparison', *Ratio Juris* Vol.16 No 4. 2003 (433-449), p. 440.

[54] Germany v parliament and council, Case C-376/98 (Advocate General's opinion 15 June 2000), para. 160.

[55] Germany v parliament and council, Case C-376/98 (Advocate General's opinion 15 June 2000), para. 161.

[56] Translation from Case C-249/09 Novo Nordisk AS v Ravimiamet, (Advocate General's opinion 19 October 2010), para 46. The cases are only accessible in French. See Société de Conception de Presse et d'Edition et Ponson c. France, March 6, 2009, ECHR; and Hachette Filipacchi Presse Automobile et Dupuy c. France, March 5, 2009, ECHR: "Ainsi, des considérations primordiales de santé publique, sur lesquelles l'Etat et l'Union européenne ont d'ailleurs légiféré, peuvent primer sur

Limiting false commercial speech, such as *Cooked-up*'s false claim that its canned macaroni and cheese dinner 'contains all the nutrients needed for a long and healthy life', will most likely be considered necessary. It may be different for *Corn Rebel*'s claim that its sweet corn is being 'GM-free', *True-blue*'s claim that Vitamin C is added to its *Blueberrylicious* treats, or *My Goodness*'s claim that 'the consumption of bifidus eases the digestive system'. It could well be that adding disclaimers (for example for *Corn Rebel*: 'No significant difference has been shown GM corn and non-GM corn'; for *True-blue*: 'Although the treats contain Vitamin C they should still be eaten in moderation'; and for *My Goodness*: 'This claim is based on minority scientific evidence') would be preferred, being the least onerous option of the available options, as long as it is equally effective as banning the information altogether.

The ECJ did already prefer disclaimers over a prohibition with respect to the free movement of goods. In the Cassis de Dijon ruling[57] and the Beer Purity-case[58] the governments invoked consumer protection to restrict trade of certain products.[59] The ECJ found that disclaimers to the product in question were preferred, because they were less restrictive to trade and had the same effectiveness as prohibiting trade of the product altogether.[60] It is likely that

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des impératifs économiques, et même certains droits fondamentaux comme la liberté d'expression."

[57] Case 120/78 [1979] ECR 649.

[58] Case 178/84 [1987] ECR 1227.

[59] Case 178/84 [1987] ECR 1227.

[60] See further on this information paradigm Kai Purnhagen (2014), "The Virtue of Cassis de Dijon 25 Years Later—It Is Not Dead, It Just Smells Funny", in: Purnhagen/Rott, *Varieties of European Economic Law and Regulation*, New York et al: Springer, p. 329-332.

the ECJ would adopt a similar approach when the fundamental right to freedom of expression is limited.

The necessity requirement can also be found in Article 10(2) ECHR which holds that any interference to freedom of expression must be 'necessary in a democratic society'. According to the ECtHR interference would be 'necessary in a democratic society' when the interference corresponds to a pressing social need and that the interference is proportionate to the legitimate aim pursued.[61] Furthermore, the reasons for the interference must be relevant and sufficient. In assessing whether and to what extent government interference is necessary the governmental authorities have the 'margin of appreciation'.[62] The margin of appreciation is not unlimited and could even be reduced to zero. The ECtHR can give a final ruling on whether government interference is reconcilable with freedom of expression.[63] Relevant for the purpose of this study is that the width of the margin of appreciation is wider when the expression is considered to be commercial in nature rather than political. Thus, when the statements by *Corn Rebel* are considered political in nature, the width of the margin of appreciation is wider than the overtly commercial statements by *Cooked-up*, *True-blue*, and *My Goodness*

The ECtHR defines commercial expression as "inciting the public to purchase a particular product".[64] Commercial expression is aimed at enhancing economic interests of

[61] Olsson v Sweden (A 130 (1988); 11 EHRR 259 para 67 PC.

[62] Handyside v UK (A 24 (1976); 1 EHRR 737 paras 48-9 PC.

[63] Handyside, para. 49.

[64] Verein gegen Tierfabrieken v Switzerland (24699/94) (2001) (ECtHR)

individuals and businesses.[65] According to the ECtHR political expression concerns the speaker's "participation in a debate affecting the general interest"[66] or reflects "controversial opinions pertaining to modern society in general".[67] For example, expression that is considered to contribute to public debate, even when it boosts the businesses of the speaker, should not be classified as commercial expression.[68]

The ECtHR, furthermore, made a distinction between 'pure' commercial expression and commercial expression with 'political overtones'[69] 'Purely' commercial expression has no political overtones and is subject to the lenient Markt Intern Standard.[70] The Markt Intern Standard implies that the ECtHR must "confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate".[71] To establish whether such interference would be proportionate the ECtHR must "weigh the requirements of the protection of the reputation and the rights of others against the publication of the information".[72] When commercial expression concerns an ongoing political debate commercial expression may be considered to have

[65] Harris, D., O'Boyle, M., & Warbick, C. (2007). *Law of the European Convention on Human Rights* (2 ed.). London: Butterworths, p. 461.

[66] *Hertel v Switzerland Reports* 1998-VI (1999) 28 EHRR534 § 47

[67] *VGT Vereingegen Tierfobriken* (n47) § 70.

[68] Barthold v. Germany (1985) 7 EHRR 383.

[69] See also Emberland, M. (2006). *The Human Rights of Companies. Exploring the Structure of ECHR Protection.* Oxford: Oxford University Press, p. 165 and 171.

[70] See also Emberland, M. (2006). *The Human Rights of Companies. Exploring the Structure of ECHR Protection.* Oxford: Oxford University Press, pp. 164-171.

[71] Markt Intern Verlag v Germany Ser A 195 (1989) (Court), para 33.

[72] Markt Intern Verlag v Germany Ser A 195 (1989) (Court), para 34.

'political overtones'.[73] Such was the case in Hertel V Switzerland where the appropriateness under Article 10(2) ECHR of court sanctioned injunctions sought by an association of manufactures against the applicant, who had violated domestic competition laws by publishing statements of the alleged hazards involved in the use of microwave ovens, was considered by the ECtHR. Since the statements concerned an ongoing debate of the effects of microwaves on human health, the Hertel claim was "substantially different from... markt intern" and it was therefore "necessary to reduce the extent of the margin of application" implied in that judgment.

Commercial expression with 'political overtones' will be subject to a more rigorous scrutiny:[74] the ECtHR could also review whether the interference corresponds to a pressing social need and whether the interference is proportionate to the legitimate aim pursued.[75]

Thus, the claims put forward by *Cooked-up*, *True-blue*, and *My Goodness* may be considered purely commercial. Also *Corn Rebel*'s claim that its sweet corn is being 'GM-free' should be considered purely commercial, because *Corn Rebel* does not participate in a political debate by labelling their corn as 'GM-free' as such label does not make a statement about the hazards of GM-food for human health or the environment.

(3.2a) The limitation must genuinely meet either objectives of general interest recognized by the EU

[73]Hertel V Switzerland Reports 1998-VI (1999) 28 EHRR 534, para 47.

[74] Emberland, M. (2006). *The Human Rights of Companies. Exploring the Structure of ECHR Protection.* Oxford: Oxford University Press, p. 170.

[75] Olsson v Sweden (A 130 (1988); 11 EHRR 259 para 67 PC.

In settled case-law of the ECJ fundamental rights of the EU may only be restricted for reasons that correspond to "objectives of general interest pursued by the Community".[76] Arguably these general interests are similar to the general interests in the field of free movement of goods, people, services and capital, which include the written grounds of Article 36, 45(4), 52, 62, and 65 TFEU (public morality, policy, or security; protection of health and life of humans, animals, or plants; protection of national treasures possessing artistic, historic or archaeological value; protection of industrial and commercial property) and unwritten grounds in the public interest which are determined in the case law of the ECJ, including, amongst others, protection of public health,[77] the defence of the consumer,[78] and protection of the environment.[79] Furthermore, according to settled ECJ case law purely economic objectives cannot constitute an overriding reason in the public interest.[80] The ECJ has held that the protection of health is an objective of general interest that follows from

[76] ECJ Wachauf [1989] ECR 2609, para 18; Karlsson [2000] ECR I-2737, para 45.

[77] ECJ 6 September 2012 Case C-544/10 Weintor.

[78] Cassis de Dijon (120/78) [1979] E.C.R. 649; [1979] 3 C.M.L.R. 494 at 8.

[79] Aklagaren v Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273; [2009] All E.R. (EC) 842 at 32.

[80] See C-96/09 [2010] 3 C.M.L.R. 21 at 48; C-436/00 [2002 E.C.R. I-10829 at 50; C-35/98 [2000] E.C.R. I-4071; [2002] 1 C.M.L.R. 48 at 48. *See* Verica Trstenjak and Erwin Beysen (2013), "The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the ECJ", European Law Review 38(3), pp. 293-315, footnote 40.

Article 9 TFEU.[81] Other objectives of general interest may include Article 7 to 12 TFEU (consistency between policies; eliminate inequalities/promote equality between men and women; promotion of high level of employment; guaranteeing adequate social protection; fight against social exclusion; promotion of high level of education and training' protection of human health; combatting discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; promoting sustainable development; protecting consumers).

Or (3.2b) the limitation protects the rights and freedoms of others

A food labelling regulation could also limit free speech to protect the rights of others, which could potentially include the right to health protection or the right to receive information. The ECJ seems to recognize a fundamental right to health protection from the second sentence of Article 35 EU Charter, which requires that "a high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities".[82] Advocate General Jääskinen, who assessed for the first time so far commercial expression in the context of Article 11 EU Charter, also derived a fundamental right to health protection from Article 35 EU Charter.[83] He further argued that this fundamental right to health protection must

[81] Article 9 TFEU: "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the (...) protection of human health."

[82] ECJ 6 September 2012 Case C-544/10 Weintor, para 47.

[83] Case C-249/09 Novo Nordisk AS v Ravimiamet, (Advocate General's opinion 19 October 2010), footnote 21.

be safeguarded to guarantee the fundamental rights, human dignity, the right to life and the right to physical and mental integrity.[84] He argued that the right to life, and as such the protection of health, must take precedence over the fundamental right to freedom of action, such as the freedom of expression.[85]

Another fundamental right that may justify a limitation to free speech is the right to receive information as stipulated in Article 11 EU Charter. This right is especially important when free speech protection would also include the right not to speak. However, negative expression on food labels (such as *Humble Honey*'s refusal to disclose that its honey is 'contaminated with genetically modified pollen') will most likely not enjoy free speech protection in the EU (see paragraph 2.2). However, if free speech right would include the right not to speak, it is not clear whether this right to receive information could confer rights on consumers to demand disclosure of information on the food label. Article 169 TFEU recognizes that consumers have a *right* to information.[86] This treaty provision does, however, not confer rights on consumers as such but it imposes an obligation on EU bodies to ensure a high level of consumer

[84] Case C-249/09 Novo Nordisk AS v Ravimiamet, (Advocate General's opinion 19 October 2010), para 49.

[85] Case C-249/09 Novo Nordisk AS v Ravimiamet, (Advocate General's opinion 19 October 2010), para 50. He refers to Robert Alexy: 'On Balancing and Subsumption. A Structural Comparison', *Ratio Juris* Vol.16 No 4. 2003 (433-449), p. 440.

[86] Article 169 TFEU: "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their *right to information*, education and to organise themselves in order to safeguard their interests."

protection.[87] Consumer protection, however, does seem to be acknowledged as a fundamental right of consumers in the EU, because Article 38 EU Charter stipulates that 'Union policies must ensure a high level of consumer protection'.[88] However, Ehlers argues that besides the right of access to data "within the field of the Union's fundamental rights, no room should be given to further increase the subjectivity of the idea of transparency."[89]

As a whole, the principle of proportionality seems similar to the requirement of Article 10(2) ECHR that the interference to freedom of expression must serve a legitimate aim. Unlike Article 52(1) EU Charter, that does not exhaustively lists the applicable general interests, Article 10(2) ECHR indicates what constitutes a legitimate aim, i.e. the interference must be 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. [90]

According to the explanations limitations to the right to freedom of expression allowed by Article 52(1) EU Charter may not exceed those provided for in Article 10(2)

[87] Devenney, J. & Kenny. M (2012). European Consumer Protection: Theory and Practice. Cambridge: Cambridge University Press, p. 349-50.

[88] Devenney, J. & Kenny. M (2012). European Consumer Protection: Theory and Practice. Cambridge: Cambridge University Press, p. 350.

[89] Frank Schorkopf (2007), "Human Dignity, Fundamental Rights of Personality and Communication", in: Dirk Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin: De Gruyter Recht, p. 425.

[90] Article 10(2) ECHR.

ECHR.[91] Government regulations that interfere with the freedom of expression must, therefore, at least meet one of the legitimate aims stipulated in Article 10(2) ECHR.[92] Most government interferences could probably be placed under one of the legitimate aims mentioned in Article 10(2) ECHR as the grounds for interference are broad.[93] It is, therefore, likely that when a food labelling regulation aims at protecting health it could be considered to be a legitimate aim under the ECHR.

2.4. Conclusion

In theory, the fundamental right to freedom of expression seems open to food businesses and applies to all types of expression, arguably including expression on food labels. In practice, the fundamental rights protection of food businesses for communications on the food label to be limited.

Government limitations to *Cooked-up* utterly false claim, that its canned macaroni and cheese dinners are healthy, will likely be considered necessary. It will be more difficult for the government to justify limitations to *Corn*

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[91] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation on Article 11- Freedom of expression and information, para 1, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF.

[92] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation on Article 11- Freedom of expression and information, para 1, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF.

[93] Harris, D., O'Boyle, M., & Warbick, C. (2007). *Law of the European Convention on Human Rights* (2 ed.). London: Butterworths, p. 348.

Rebel's, *True-blue*'s or *My Goodness*'s claim. In these cases, disclaimers may be preferred as long as the disclaimer has the same effectiveness as a complete ban of the information. Limitations should, however, be placed under one of the legitimate aims stipulated in Article 10(2) ECHR. Limitations based on health protection could probably easily be placed under Article 10(2) ECHR. This will, however, be more difficult when the limitation is based on protecting the consumer right to information. However, it seems that such a right will not be relevant in the context of free speech in the EU, as it is most likely that businesses that refuses to disclose government mandated information on its label, such as *Humble Honey*'s refusal to label its honey as 'contaminated with genetically modified pollen', will not enjoy free speech protection.

3. Free Speech Protection in the United States of America

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . ."[94] Corporate entities are afforded, subject to the limits discussed below, First Amendment protection.[95]

3.1 *Scope of Free Speech Protection of Communications on Food Labels* in the USA

The degree to which content on food labels may enjoy First Amendment protection depends on whether the speech can

[94] U.S. CONST., AMEND. 1 (1791).

[95] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 (1978).

be categorized as commercial speech, because commercial speech receives limited protection.[96]

Commercial speech was carved out by the Supreme Court in 1976 in *Virginia State Pharmacy Board v.* Virginia *Citizens Consumer Council*,[97] and in 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[98] The Court defined commercial speech as "speech with does no more than propose a commercial transaction"[99] or is "related solely to the economic interest of the speaker and its audience."[100] This implies that both parties should have an economic interest in the speech,[101] which excludes books, newspapers, and magazines, read for its political, literary, or other public interest content, from the scope of commercial expression.[102]

The First Amendment also restricts the ability of the government to compel individuals to engage in certain

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[96] Central Hudson Gas & Electric v. Public Service Comm'n of New York, 447 U.S. 557, 561 (1980).

[97] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

[98] Central Hudson Gas & Electric v. Public Service Comm'n of New York, 447 U.S. 557 (1980). It is interesting to note that in 1942, the Court in Valentine v. Chrestenen, 316 U.S. 52 (1942), held that commercial speech was not protected by the First Amendment. "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." Valentine, 316 U.S. at 54.

[99] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

[100] Central Hudson Gas & Electric v. Public Service Comm'n of New York, 447 U.S. 557, 561 (1980).

[101] Eric Barendt (2005), *Freedom of Speech*, Oxford: Oxford University Press, p. 396

[102] Eric Barendt (2005), *Freedom of Speech*, Oxford: Oxford University Press, p. 396

expressive activities, as such free speech protection also includes the right not to speak.[103] With respect to disclosure requirements in the realm of commercial speech, such as *Humble Honey*'s compelled claim that its honey 'contaminated with genetically modified pollen', the Supreme Court made clear that such negative commercial speech does also enjoy First Amendment protection.[104]

Most importantly, the commercial expression relates *solely* to the economic interests. As such, *Cooked-up*'s false claim that its canned macaroni and cheese dinner 'contains all the nutrients needed for a long and healthy life', *True-blue*'s claim that Vitamin C is added to its *Blueberrylicious* treats, *My Goodness* claim that 'the consumption of bifidus eases the digestive system', and *Humble Honey*'s refusal to label its honey as being 'contaminated with genetically modified pollen' will thus likely be considered commercial speech.

This may be different for *Corn Rebel*'s political claim that its sweet corn is being 'GM-free'[105] as such information may not be provided solely for economic reasons, but takes a line on political questions or makes a contribution to the formation of public opinion.[106] It seems, however, that the

[103] West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 642 (1943); Wooley v. Maynard, 430 U.S. 795 (1977).

[104] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).

[105] Another issue with 'GM-free' claims on corn is that it is difficult to guarantee that there would be no contamination with GM corns. If there is contamination the claim of GM-free would be false and thus not protected unless political speech.

[106] Eric Barendt (2005), *Freedom of Speech*, Oxford: Oxford University Press, p. 396-7. Barendt refers to the German Supreme Constitutional Court 102 BverfGE 347, 359-60 (2001) who held that the civil courts

courts may not want to take it that far. A Circuit Court of Appeals held that press releases by the National Commission on Egg Nutrition, a producers' consortium, on a matter of current controversy, that there was no scientific evidence that egg consumption increased heart diseases, were considered commercial speech,[107] even though it was not clear whether these press releases related solely to the economic interest. [108] Furthermore, in *Nike, Inc. v. Kasky*[109] the question was whether Nike's response, in the form of press releases and letters to newspapers, university presidents, and athletics directors regarding allegations that the company was mistreating and underpaying workers outside the USA could be classified commercial speech. The Supreme Court of California did categorize the speech as commercial and, therefore, the response would not enjoy First Amendment protection if found false or misleading. The majority of the Supreme Court, however, held that the case was not yet ripe for full consideration. In his dissent, Judge Breyer argued that the responses were in form and content public, rather than commercial speech, because the responses by Nike were not made in an advertising format, did not propose sales, and concerned an important matter of public controversy—the criticism of its employment

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were wrong to interpret Benetton pictorial advertisements protesting against environmental damage, the employment of children, and the spread of AIDS as solely intended to promote the company's economic interest.

[107] FTC v National Commission on Egg Nutrition 517 F 2d 485.

[108] See also Eric Barendt (2005), *Freedom of Speech*, Oxford: Oxford University Press, p. 397.

[109] Nike Inc. v Marc Kasky 123 S Ct 2554 (2003).

practices.[110] He added that the form and content distinguishes the speech at issue from purely commercial speech such as "speech—say, the words "dolphin-safe tuna"—that commonly appears in more traditional advertising or labelling contexts." In a Petitioners' brief it was also argued that

> "If the asserted tie-in between a state's regulatory power and the moral conclusions of consumers ever suffices to convert discussion of public issues into lesser protected "commercial speech," that can only be in the context of direct product advertising and product labels, which are least likely to generate reasoned discussion and which are targeted at consumers and affect purchasing decisions in the first instance and shape broader moral judgments only secondarily."[111]

Although, the Supreme Court has not yet decided on the issue whether commercial expression needs to relate *solely* to the economic interest, it is likely that *Corn Rebel's* claim that their sweet corn is being 'GM-free', will be categorized as commercial speech.

3.2. Limitations to the Free Speech Rights of Food Businesses on Food Labels in the USA

To determine whether commercial speech would enjoy First Amendment protection, the Supreme Court articulated in *Central Hudson*, a four-part test. First (1), the speech must

[110] Nike Inc. v Marc Kasky 123 S Ct 2554 (2003). See also Eric Barendt (2005), *Freedom of Speech*, Oxford: Oxford University Press, p. 398.

[111] Brief for the petitioners, No. 02-575, at 36.

concern lawful activity and not be misleading.[112] The Court has long held that expression likely to deceive[113] or related to illegal activity[114] is not protected speech. Second (2), the Court will inquire whether the government has asserted a substantial interest in regulating the commercial speech at issue.[115] Common examples of a substantial government interest include preventing consumer confusion,[116] protecting national security,[117] life, health and safety.[118] The government bears the burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree".[119] However, the Supreme Court held that when the government restricts truthful, non-misleading commercial speech for reasons "unrelated to the preservation of a fair bargaining process" strict scrutiny should apply.[120] Although strict scrutiny is almost always fatal to the challenged government restriction, a Court will uphold the constraint on speech if it

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[112] *Id*. At 566.

[113] Friedman v. Rogers, 440 U.S. 1, 15-16 (1979) (restricting misleading use of trade names).

[114] Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973) (restricting sexually discriminatory advertisement for employment).

[115] Central Hudson Gas & Electric v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980).

[116] Central Hudson Gas & Electric v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980).

[117] Haig v. Agee, 453 U.S. 280 (1981).

[118] *See* U.S. Const. preamble & amend V. *See also*, Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U.L. REV. 917, 948 (1988) (discussing compelling government interest in life, health and safety).

[119] Edenfield v. Fane 507 U.S. 761 (1993).

[120] 44 Liquormart, Inc. v. Rhode Island 17 U.S. 484 (1996).

is "necessary, and narrowly drawn, to serve a compelling state interest."[121]

If the answer to the first two questions is yes, the Court will then (3) determine "whether the regulation directly advances the governmental interest asserted" [122] and (4) "whether it is not more extensive than necessary to serve that interest."[123] The government needs to establish that the regulation on speech is "narrowly tailored to achieve the desired objective."[124] The government may prohibit inherently misleading advertising, but cannot place an absolute prohibition on *potentially* misleading information, if the information may be presented in a way, such as the use of a disclaimer, that is not deceptive.[125]

Whether information may be considered potentially misleading and, therefore, require a disclaimer was discussed by Court of Appeals with respect to health claims[126] that have some scientific support, such as *My Goodness*'s claim that 'the consumption of bifidus eases the digestive system', but do not satisfy the Food and Drug Administration's (FDA) "significant scientific agreement"

[121] Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995); Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Carey v. Brown, 447 U.S. 455, 461 (1980).

[122] Central Hudson Gas & Electric v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980).

[123] Central Hudson Gas & Electric v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980).

[124] Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

[125] In re R.M.J. 455 U.S. 191, 203 (1982).

[126] Health claims describe a relationship between a nutrient, such as calcium, and a disease or health-related condition, such as osteoporosis. 21 U.S.C. § 343(r)(1)(B).

standard.[127] In *Pearson I*, a Court of Appeals noted that in cases of incomplete advertising, the message is not inherently misleading (and thus properly restricted) but rather potentially misleading, and that the preferred remedy is more disclosure rather than an outright prohibition.[128] The Court of Appeals held, however, that a disclaimer would not have been necessary when (1) evidence in support of the claim is qualitatively weaker than evidence against the claim; or (2) evidence in support of the claim is outweighed by evidence against the claim.[129] In *Pearson II*, a Court of Appeals added that although there was an absence of significant evidence in support of the claim, this does not mean that it is negative evidence against the claim.[130] The Court of Appeals added in *Pearson II* that disclaimers are not necessary when the government demonstrates "with empirical evidence that disclaimers would bewilder consumers and fail to correct for deceptiveness".[131] In *Whitaker*, the Court of Appeals found that health claims on dietary supplements considering *treating* of a disease instead of *reducing* disease *risk* is unlawful, and therefore fail the first part of the *Central Hudson* test.[132]

Thus, when food businesses want to put content on their food label, such as *Cooked-up*, *Corn Rebel*, *True-blue*, and *My Goodness*, the *Central Hudson* test most likely would

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[127] The FDA implemented a rule that required "significant scientific agreement" regarding the link between the claimed nutrient and health impact before allowing use of the claim on a food or supplement label. *See* 21 C.F.R. § 101.14; 21 C.F.R. § 101.70.

[128] Pearson v. Shalala, 164 F.3d 650, 657 (D.C. Cir. 1999).

[129] Pearson v. Shalala, 164 F.3d 650, 657 (D.C. Cir. 1999).

[130] Pearson v. Shalala, 130 F. Supp. 2d 105 (D.D.C. 2001).

[131] Pearson v. Thompson, 141 F. Supp. 2d 105 (D.D.C. 2001).

[132] Whitaker, 239 F. Supp. 2d at 54.

apply. This may be different for *Humble Honey*'s refusal to label its honey as being 'contaminated with genetically modified pollen'. Although the government may require food businesses to place labels on their products to regulate commerce[133] or protect the liberty interests of other members of society[134] some examples of challenges to government compelled speech through disclaimers exist mainly in the biotechnology context (*Amestoy* case and *Boggs* case) and tobacco warning labels (*Discount Tobacco* case and *R.J. Reynolds* case).

In the *Amestoy* case a Court of Appeals invalidated Vermont's mandatory disclosure requirements for dairy products derived from cows treated with a genetically engineered version of bovine somatotropin,[135] commonly referred to as rBST.[136] The Court of Appeals applied the *Central Hudson* test and held that Vermont has failed to establish that its interests are substantial.[137] The Court held that the dairy producers and retailers had a First Amendment right not to speak unless the state could establish a substantial interest for labelling rBST derived

[133] *See e.g.,* U.S. v. 40 Cases, More or Less, Pinocchio Brand 75% Corn, Peanut Oil and Soya Bean Oil Blended with 25% Pure Olive Oil, 289 F.2d 343, 345 (2d Cir. 1961) ("The interest of the federal government in ensuring that such food meets minimum standards of purity and is not misbranded arises out of its supervisory function over interstate commerce.").

[134] Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

[135] Recombinant Bovine Somatotropin, also known as recombinant Bovine Growth Hormone (rGBH), is a synthetic growth hormone that increases milk production by cows.

[136] VT. STAT. ANN. tit. 6, § 2754 (terminated by 1993, Adj. Sess., No. 127, § 4, as amended by 1997, No. 61 § 272i, eff. Mar. 30, 1998).

[137] International Dairy Foods Association v. Amestoy, 92 F.3d 67 (2nd Cir. 1996) at 73.

products.[138] Vermont argued that its statute supported a "strong consumer interest and the public's 'right to know'."[139] The Court, however, held that a "substantial state interest" cannot be established based merely on consumer curiosity.[140]

In *Boggs*, the Court of Appeals did not invalidate Ohio's mandatory disclosure requirements; albeit that this time the mandatory disclosure requirements considered dairy products derived from cows *not* treated with rBST. In Ohio such products should be accompanied by a disclaimer stating that "The FDA had determined that no significant difference has been shown between milk derived from rBST-supplemented and non-rBST-supplemented cows".[141] The Court of Appeals used the *Zauderer* test to assess whether the rule was in conflict with the First Amendment.[142] In

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[138] *Id.* at 71.

[139] *Id.* at 73.

[140] *Id.* The *Amestoy* opinion included a vigorous dissent asserting that the state interest was not limited to consumer curiosity, but also substantive concerns regarding rBST's impact on the heath of humans and cows, the financial sustainability of small farms, and general concerns regarding the manipulation of nature using biotechnology. *Id*. at 74. The proper question, in the dissent's view, is whether the Constitution prohibits government from mandating disclosure of truthful, relevant information to promote informed consumer choice. *Id*. Although the Second Circuit opinion certainly leaves open the possibility that mandatory labelling could pass constitutional muster if the state advanced a more substantive interest, a generalized interest in satisfying consumer curiosity appears to be a losing argument for states attempting to mandate labelling of otherwise scientifically indistinguishable products. Rather, the court relegated process-based labelling decisions to market forces.

[141] 60 OHIO ADMIN. CODE § 901:11-8 (2008).

[142] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).

Zauderer, the Supreme Court expressed a lighter standard than the Central Hudson test, applying only to disclosure requirements. In *Zauderer* the Supreme Court held that the government may compel disclosure requirements associated with product marketing, so long as the disclosure is (1) purely factual and uncontroversial; (2) reasonably related to the State's interest in preventing deception of consumers; and (3) not unjustified or unduly burdensome.[143] Accordingly, in *Boggs* the Court concluded that the use of a disclaimer accompanying the production claim could eliminate any consumer confusion and was, therefore, considered not to violate the First Amendment even though it compelled food businesses to speak.[144]

Cases in the context of tobacco warning labels illustrate the difficulty in determining whether the compelled commercial speech at issue is purely factual and uncontroversial. The *Discount Tobacco* case concerned labelling restrictions on tobacco products —specifically the use of colour graphics depicting the negative health consequences of smoking along with textual warning labels.[145] The Court of Appeals for the Sixth Circuit also based its decision on *Zauderer* and upheld the graphic-warning requirement because the factual information (i.e., colour graphics) regarding the health risks of using tobacco

[143] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).

[144] Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628 (6th Cir. 2010).

[145] *See* Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012), *cert denied* American Snuff Company, LLC v. United States, 133 S.Ct. 1996 (2013) (facial challenge to the statute); R.J. Reynolds Tobacco Co. v. Food and Drug Administration, 696 F.3d 1205 (D.C. Cir. 2012) (applied challenge to the actual graphics selected by the FDA).

are reasonably related to the alleviation of potential consumer confusion.[146] In contrast, the Second Circuit Court of Appeals in *R.J. Reynolds*, held that the graphic warnings required under the Act went beyond a full disclosure requirement as in *Zauderer*, to prevent consumer deception, but rather required a general disclosure about the negative health effects of smoking—thus amounting to a warning and discouragement to consumers to purchase products rather than rectify specific deceptive statements.[147] Accordingly, the Court applied the more restrictive *Central Hudson* test—finding that the government failed to present any evidence that the proposed graphics would accomplish the stated goal of reducing smoking rates.

Whether the rational basis test outlined in *Zauderer* and applied in *Discount Tobacco* and *Boggs*, would apply to *Humble Honey*'s refusal to label its honey as being 'contaminated with genetically modified pollen', or whether the intermediate scrutiny test established in *Central Hudson* and applied in *R.J. Reynolds* and *Amestoy* would apply may depend on whether the compelled commercial speech solely aims at informing consumers (and is thus purely factual and uncontroversial) or whether the compelled commercial speech aims at altering consumer choice (and is, therefore, not purely factual and uncontroversial).[148]

[146] Discount Tobacco, 674 F. 3d at 569.

[147] R.J. Reynolds, 696 F.3d at 1216.

[148] See for a more detailed analysis *Jennifer M. Keighley, "Can You Handle the Truth? Compelled Commercial Speech* and the *First Amendment",* 15 *University of Pennsylvania Journal of Constitutional Law* 539 (2012).

3.3 Conclusion

The Supreme Court had not yet clarified the meaning of commercial speech, but it is likely that corporate communications on food labels will be categorized as commercial speech. This opens the way for food businesses to challenge government regulations limiting corporate communications on food labels.

Cooked-up, *Corn Rebel*, *True-blue*, *My Goodness* and *Humble Honey* will likely be considered commercial speech. *Cooked-up* will probably not enjoy First Amendment protection as its claim that its canned macaroni and cheese dinner 'contains all the nutrients needed for a long and healthy life' is likely inherently misleading. The claims made by *Corn Rebel, True-blue, My Goodness*, and *Humble Honey*'s refusal to label its honey as being 'contaminated with genetically modified pollen' may be considered potentially misleading, provided the government can demonstrate a substantial interest, and may, therefore, require a disclaimer.

4. Comparing the different approaches to free speech protection on food labels in the USA and the EU.

I will compare the different approaches towards free speech protection on food labels in the EU and the US. First (1) I will compare the different approaches to whether corporate entities enjoy free speech protection. Second (2), I will compare whether food labels fall within the scope of free speech protection. Third (3), I will compare whether compelled expression enjoys free speech protection. Although food labels may enjoy free speech protection, this

right may still be limited. I will, therefore, (4) assess the different approach towards which limits can be set to free speech.

4.1. To speak or not to speak: the freedom of companies to express themselves

Initially, in the USA the Amendments to the Constitution were seen as human rights, understood to apply to natural persons only. Over time, case law expanded the scope of the First, Fourth, Fifth, Sixth and Fourteenth Amendments to include corporate entities.[149] Within the EU certain fundamental rights, arguably including the freedom of expression, also extend to corporate entities.

4.2. Expression on the food label. Does the food label have what it takes?

In the EU and the USA expressions on food labels seem to enjoy free speech protection.

4.3. Can *Humble Honey* stay humble? Whether free speech includes the right not to speak

The extent to which free speech includes the right not to speak, such as Humble Honey's refusal to label its honey as being 'contaminated with genetically modified pollen', differed per jurisdiction. In the USA compelled expression on food labels does enjoy free speech protection. However,

[149] See, Anne Tucker, Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporative Personhood in *Citizens United,* Case Western Reserve Law Review [Vol. 61:2 2001], p. 495–548 (and sources quoted there).

purely factual and uncontroversial compelled expression on food labels aimed at informing consumers may be subject to a lighter review than compelled expression on food labels aiming at altering consumer choice. In the EU it is less clear whether free speech includes the right not to disclose information on food labels. Although the ECtHR found that journalists have a right not to speak, it is not self-evident that the same would apply to information on food labels as that type of information serves a fundamentally different purpose. Furthermore, the approach of the ECJ towards whether free speech includes a right not to speak is yet unclear.

4.4. Put the lid on: how free speech on food labels can be limited

To determine whether expressions can be limited, USA courts differentiate between types of expression: commercial speech has a limited First Amendment protection than political speech. The claims made by *Cooked-up*, *Corn Rebel*, *True-blue*, *Blueberrylicious, My Goodness,* and *Humble Honey*'s refusal to add a disclaimer will most likely be considered commercial speech. Which test will most likely will be applied may depend on the type of commercial speech, mainly whether it concerns voluntary speech or compelled speech through disclaimers. *Central Hudson* test will likely be applied to *Cooked-up*, *Corn Rebel*, *True-blue*, *Blueberrylicious,* and *My Goodness.* This implies that commercial speech that is not misleading or unlawful may be limited when the government has a substantial interest to regulate the speech; when the limitation is necessary; and when the limitation is narrowly tailored to

achieve the desired objective.[150] A lighter *Zauderer* test may be applied to disclosure requirements, such as that the government compels *Humble Honey's* to label its honey as being 'contaminated with genetically modified pollen'. The *Zauderer* test implies that he government may compel disclosure requirements associated with product marketing, so long as the disclosure is (1) purely factual and uncontroversial; (2) reasonably related to the State's interest in preventing deception of consumers; and (3) not unjustified or unduly burdensome.[151]

In the EU an overarching limitations clause applies to all types of expression. From the EU Charter, ECJ case-law, and ECtHR case-law it can be derived that limitations to free speech in the EU have to be provided for by law, must respect the essence of the fundamental right at issue, must serve a legitimate aim, and must be necessary.[152] The case law of the ECtHR, which may be taken into account by the ECJ when assessing freedom of expression, differentiated commercial expression from other types of expression when it assessed the necessity of the limitation. Basically the ECtHR granted the governmental authorities a wider margin of appreciation when assessing the necessity of a limitation to commercial expression compared to political expression. This margin may become narrower when the commercial expression has 'political overtones'. It seems reasonable to expect that a similar approach as to the ECtHR will be used by the ECJ. Theoretically, it would also be conceivable that the ECJ as court of a union rooted in economic

[150] Although this latest step seems to be eroding.

[151] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).

[152] So-called principle of proportionality.

considerations, would value commercial expression higher than the ECtHR does. At present, however, there is no evidence pointing in this direction.

Food labelling regulations limiting free speech with a view to protect public health seems to be generally regarded as legitimate to limit food labels in the analysed legal systems. Disclosure requirements seem to be always preferred in the USA and the EU over an outright prohibition as long as such a disclaimer has the same effectiveness as a prohibition.

5. Food businesses as guardians of food information? To what extent do functions of free speech allow free speech protection of communications on food labels

The degree to which free speech may be protected may differ depending on (1) whether the corporate nature of the speaker justifies free speech protection on food labels, or (2) whether it is the interest of the consumer, or (3) a public interest.[153] Practice in the EU and the USA shows that commercial statements enjoy limited protection compared to political statements. It is, therefore, important to consider (4) to what extent the nature of corporate communications on food labels may be considered political

[153] See for a more general discussion on free speech protection Thomas I. Emerson (1963), "Toward a General Theory of the First Amendment", 72 *Yale Law Journal*, pp. 877-956; and Eric Barendt (2005) *Freedom of Speech*, Oxford: Oxford University Press; For a more detailed discussion on corporate commercial free speech protection see Roger A. Shiner (2003), *Freedom of Commercial Expression*, Oxford: Oxford University Press; and Tamara R. Piety (2007-2008), "Against Freedom of Commercial Expression", 29(6) *Cardozo Law Review*, pp 2583-2684.

or commercial. Finally, I will consider (5) whether corporate free speech protection on food labels should include the right not to speak.

5.1. I think, therefore I am: the corporate nature of the speaker as justification for corporate free speech.

Most of the purposes and interests of free speech protection do not justify the protection of corporate speech on food labels based on the corporate nature of the speaker.[154] Freedom of expression as a function of self-fulfilment and citizen participation in democracy seems to be a personal right that should only be applicable to human beings, as companies have no human dignity nor are capable of self-fulfilment. When corporate speech is political in nature, however, it can be argued that the tendency of governments to suppress radical or subversive ideas might justify corporate free speech protection on food labels.

5.2. Give me more: consumer interest to receive information as justification for corporate free speech

The corporate right to free speech could also be justified based on the consumer interest to receive the information.

[154] See for a more general discussion on free speech protection Thomas I. Emerson (1963), "Toward a General Theory of the First Amendment", 72 *Yale Law Journal*, pp. 877-956; and Eric Barendt (2005) *Freedom of Speech*, Oxford: Oxford University Press; For a more detailed discussion on corporate commercial free speech protection see Roger A. Shiner (2003), *Freedom of Commercial Expression*, Oxford: Oxford University Press; and Tamara R. Piety (2007-2008), "Against Freedom of Commercial Expression", 29(6) *Cardozo Law Review*, pp 2583-2684.

[155] If the food business is not allowed to give the information the consumer interest to receive the information is not met. It could be argued that the consumer interest to receive information demands that governments should not restrict corporate communication on food labels to protect the consumer right to make fundamental choices concerning their life, an important aspect of self-fulfilment.[156] This argument would only apply when consumers demand information, which the food business is not legally allowed to provide. Especially *Corn Rebel*'s claim that its sweet corn is being 'GM-free' enables consumers to only consume food products that fit within their lifestyle, i.e. foods that are not genetically modified. A similar argument would be more difficult to make for *True-blue*'s claim that Vitamin C has been added to its *Blueberrylicious* or *My Goodness*'s claim that 'the consumption of bifidus eases the digestive system'. Furthermore, consumer interests to receive the information cannot justify a corporate right not to speak, such as *Humble Honey*'s honey compelled disclosure that its honey is 'contaminated with genetically modified pollen'.

5.3. The truth, the whole truth, and nothing but the truth: public interest in the free flow of information as justification for corporate free speech

The value of truth can be supported "by utilitarian considerations concerning progress and the development of

[155] Eric Barendt (2005) *Freedom of Speech*, Oxford: Oxford University Press, p. 25.

[156] Eric Barendt (2005) *Freedom of Speech*, Oxford: Oxford University Press, p. 401-2 who refers to the Canadian Supreme Court decision Ford v. A-G of Quebec [1988[2 SCR 712, 767.

society".[157] From this it follows that the government should not regulate expression as this constitutes an interruption of the free flow of information. Interruption of the free flow of information has the potential that false information cannot be rebutted, which is harmful to society as a whole.

The free flow of false information, such as *Cooked-up*'s false claim that its canned macaroni and cheese dinner 'contains all the nutrients needed for a long and healthy life', is harmful to society: (1) false information increases the search costs for consumers to find good-quality goods; (2) the public might be incentivized to consume more canned macaroni and cheese dinners which is harmful to public health; and (3) food businesses will not be incentivized to innovate or improve their products in order to make truthful, non-misleading claims that appeal to consumers, because every competitor can make similar claims without it even being true.

This is different for claims that are in itself not false, such as *Corn Rebel*'s claim that its sweet corn is being 'GM-free', *True-blue*'s claim that Vitamin C has been added to its treats, and *My Goodness*'s claim that 'the consumption of bifidus eases the digestive system'. All seem to serve the public interest in the free flow of information i.e. lowering consumer search costs to make an optimal decision and promoting competition by stimulating the innovation and improvement of food products. In such a way both should also fall within the scope of free speech. Whether corporate information lowers consumer search costs to make an optimal decision can, however, be questioned as the amount of information consumers are exposed to is increased. This

[157] Eric Barendt (2005) *Freedom of Speech*, Oxford: Oxford University Press, p. 7.

may result in information overload. Information overload actually increases search costs and could make it more difficult for consumers to process the information on the food label to make an informed choice of sufficient quality.[158] Consumer search costs to make an optimal decision might, therefore, be lowered with the limitation of the amount of information on food labels. If the government is not able to prove that consumers will be better enabled to make an optimal decision by withholding the information from the food label, the corporate information should fall within the scope of free speech protection.

5.4. Commercial or political? The nature of corporate communication on food labels

Some food businesses, such as *Corn Rebel*, might address topics through their food labels that are part of public debate, e.g. GMO/child labour/animal cruelty is bad, by informing the consumer that their food product is free from these qualities (e.g. *Corn Rebel*'s claim that its sweet corn is being 'GM-free'). It can be argued that the single statement that a product is free from qualities that might be considered bad by part of the public contributes as such to the public debate. There are much more obvious and more effective ways, however, to communicate political standpoints that certain qualities are bad than stating on food labels that the product does not contain that quality. This makes it difficult to argue that the main purpose of the corporate communication on the food label is political. Most

[158] Verbeke, W (2005). Agriculture and the Food Industry in the Information Age. *European Review of Agricultural Economics* Vol 32(3), pp. 347-368, p. 348. Salaün and Flores, 2001

food labels are, therefore, mainly commercial in nature as they are primarily targeted at affecting consumer purchasing decisions.

5.5. Has *Humble Honey* a free speech right not to speak?

The right not to speak is "closely linked with freedom of belief and conscience and with underlying rights to human dignity, which would be seriously compromised by a legal requirement to enunciate opinions which are not in truth held by the individual."[159] As food businesses have no 'human dignity' it is hard to justify that food businesses have a free speech right not to disclose information. Furthermore, the consumer interest to receive information does not justify a corporate right not to disclose information on food labels. The public interest in the free flow of commercial information could, however, justify a corporate right not to disclose information when the food business can prove that the compelled information will increase consumer search cost to make an informed choice of sufficient quality.[160] If the food business can prove this, the compelled claim should fall within the scope of free speech.

6. Conclusion

The communications made by *Cooked-up*, *Corn Rebel*, *True-Blue*, and *My Goodness* on their food labels will most likely

[159] Eric Barendt (2005) *Freedom of Speech*, Oxford: Oxford University Press, p. 94.

[160] Verbeke, W (2005). Agriculture and the Food Industry in the Information Age. *European Review of Agricultural Economics* Vol 32(3), pp. 347-368, p. 348. Salaün and Flores, 2001

enjoy, subject to limitations, free speech protection in the EU and the US. Such right can only be justified from the perspective of consumer or public interest. *Humble Honey* will most likely not enjoy a right to free speech in the EU, while this seems to be different in the US. Withholding information from consumers should, however, in general not fall within the scope of commercial speech protection because it generally does not serve the consumer or public interest in receiving information. This implies that *Humble Honey* has to speak up; at least as far as its free speech rights are concerned, except when *Humble Honey* can prove that the compelled information will increase consumer search costs to make an optimal decision.

Despite the right of free speech, the communications of *Cooked-up* can be banned in the USA and the EU because the government has a substantial interest in doing so. A complete ban of information may be necessary for utterly false claims, however, the claims made by *Corn Rebel*, *True-blue*, and *My Goodness* are not utterly false. Subject to substantial government interest, e.g. protecting public health, such claims can be prohibited, although it is most likely that a disclaimer will be required in the USA and the EU for these types of expressions as long as such a disclaimer will not increase consumer search costs to make an optimal decision.

In sum, food businesses should not be the guardians of information on food labels; their free speech rights on food labels should only be based on public and consumer interests. Only when the information serves the public or consumer interests, free speech protection should step in.