Transborder Advertising and Unfair Competition: Country of Origin vs. Country of Destination?

Clarification of the Resolution of the International League of Competition Law [1]

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INTRODUCTION

In the autumn of 1992 the Commission of the European Communities has decided to prepare a consultative document (Green Paper) on Commercial Communication within the Internal Market. This Green Paper aims to cover all aspects of commercial communication including, inter alia, advertising, sponsoring, direct marketing and public relations. The intention is to provide clear guidelines for future initiatives and proposals, balancing the interests of media, advertisers and consumers. The Green Paper will, to this end, review European and national legislation and see how it operates in terms of transparency and effectiveness within this area. The Commission believes, particularly within the context of the Internal Market programme, that the free flow of market information is essential for the efficient operation of any economy. This free circulation is guaranteed by the application of article 59 of the Treaty of Rome. However, such free circulation of information may be jeopardised where diverging national legislations hamper the simultaneous circulation of product and message. One of these obstacles could be differences regarding choice of law rules in private international law, having as its possible consequence application by a national court of the law of the country where a certain advertisement produces its effects (country of destination control) rather than dealing with advertisements according to the law of the country of its origin (home country control).

A Resolution to the effect of country of destination control has been adopted by the International League of Competition Law (Ligue International du Droit de la Concurrence/LIDC) on its Amsterdam Conference in the autumn of 1992. According to the Commission, however, the objectives of the Internal Market would require removing obstacles to free circulation by adopting also secondary legislation with the aim to harmonize existing national provisions allowing to rely solely on the country of origin principle (the so-called 'one stop option').

This article we will try to give a clarification to the League's approach, in particular by defining the Resolution's scope, its acceptance in law and practise, and the reasons for choosing a country of destination approach rather than a country of origin approach in cases of transborder advertising and unfair competition.

1 LIDC-RESOLUTION ON TRANSBORDER ADVERTISING AND UNFAIR COMPETITION

1.1 Text

At its Amsterdam Congress of October 1992 the International League on Unfair Competition Law has adopted the following Resolution:

"I. a) Confirming the motion adopted in 1967 by the Nice Congress on the law applicable to unfair competition matters, it is necessary to add that in matters concerning advertising, the applicable law should be the law of the country where the advertisement produces its effects, that is to say where it reaches the public and when it produces effects in more than one country, the national law of each country respectively should apply.

b) An advertisement should be deemed to have reached the public in a given country if it is received or available there and if it may be perceived by the public as being directed to it, having regard for instance to its text, language or subject matter.

c) Nevertheless, insofar the grant of compensation is concerned the law of the country of origin of the advertisement should apply if the defendant proves that he could not have reasonably anticipated that his behaviour would cause an injury to the plaintiff in the country where the advertisement is received.

II. The harmonizing efforts of the substantive laws applicable to advertisements should be continued." [3]

1.2 Possible conflicts

At first sight, it seems that the text of this Resolution contains two possible conflicting parts. The first part, sub I.a), holds the applicable law to be the law of the country in which the advertisement has reached a public, that is the law of the country of destination or receipt of the advertisement. In part II., one finds a plea for harmonization in the field of transborder advertising. These two parts seem to lead to conflicting results because, until now, harmonization in the field of advertising has lead to a contrary result, i.e. applicability of the law of the country of origin. So for example the Directive on Television Broadcasting activities is based upon the system that the country of origin of television broadcasts on the one hand, has to control the compliance of these broadcasts with the Directive, whereas on the other hand, the country of receipt may not impede the reception of these broadcasts. We will see below how far this possible conflict represents a real conflict.

2 SCOPE OF THE RESOLUTION

2.1 Survey

It should be noted that the scope of this Resolution is restricted in several aspects. We mention the following:

- it is restricted to the context of private international law, more specific to the

problem of conflict of laws;
- it is restricted to private law and unfair competition;
- it concerns transborder advertising only, that is advertising which may be perceived by the public of the country of destination as being directed to it;
- it is considered not to be written for cases of disparagement;
- it is not pertaining to transborder infringements of Intellectual Property rights, specific Industrial Property rights being included;
- it does not see to forms of advertising which could be regarded as a legally binding contractual offer;
- when claims for compensation are concerned, it's principle is only accepted in cases where the defendant could reasonably have anticipated that his behaviour would cause an injury to the plaintiff in the country of destination;
- it pretends at least to go together with efforts of harmonization in the field of advertising.

2.2 Restricted to private international law

The Resolution is meant to be of international significance for problems of private international law concerning conflict of laws in unfair competition law. Since the rules concerning conflict of laws are probably different for each separate country, the need for an uniform rule seems evident. The Resolution tries to be in line with recent developments in most countries in the field of conflict of laws on tort and unfair competition. These developments could be seen in EC countries, but of course also in other countries. Therefore, the acceptance of an EC-home country rule in cases of unfair competition and advertising cannot provide solutions for cases in which the country of origin is a non EC-country or in cases in which EC-competitors compete with each other in non-EC markets.

2.3 Restricted to unfair competition

Furthermore the Resolution is restricted to acts of unfair competition. At first sight, this seems self evident; one has, however, to keep in mind the consequences of this restriction. Competition law in general (unfair competition law included) contains a broad set of regulations, varying from rules of public order restricting e.g. free gifts, shop closing times, lotteries, product denominations in general and more specific food labelling, sales, the use of broadcasting media, etc., to rules on monopolies and cartels. Unfair competition law on the other hand, refers to competition law in a narrower sense of the term. In this sense, it is mentioned in article 10*bis* of the Paris Treaty on the Protection of Industrial Property as any act of competition contrary to the honest practises in trade and industry. In particular the Paris Treaty obliges its members to prohibit:

- any act which may create confusion with the establishment, the goods, or the industrial or commercial activities of a competitor;
- any false allegation which may discredit the establishment, the goods, or the industrial or commercial activities of a competitor;
- indications or allegations which may mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of goods.

When advertising is concerned, these concepts are closely related to the target groups of

advertising campaigns, hence legal solutions could only be given by taking into account the impression which is made by an advertisement on a specific target group.

2.4 Specific nature of unfair competition

One should keep in mind the specific nature of unfair competition law in most countries. Unfair competition law is not based on intrusion of well defined (intellectual) property rights or statute law, but on a concept of fair play. It could be described as law being mainly based on general clauses which refer to breaches of such rather vague concepts as 'Treu und Glauben' (Switzerland), social carefulness (the Netherlands), 'principles of good faith' (Spain), decent or honest business practises (Italy, Belgium, Luxembourg), action for passing off (UK), etc. The use of these rather vague but flexible concepts is necessitated by the unpredictability of acts of unfair competition, which asks for flexible and judge-made law or case law and for continually processing all these cases in a well ordered but dynamic system by legal science. If one should ever succeed to harmonize an area as complex as that of unfair competition, the nature of this branch of the law as described above will necessarily lead to the use of vague concepts also, which could, and sometimes should, be differently applied in different law systems. That is why, for example, the European Court of Human Rights states that its margin of appreciation is particulary important in commercial matters and in unfair competition, and thus, the Convention organs have to confine their review to the question whether the measures taken on a national level are justifiable in principle and proportionate. [4]

2.5 Rules of public order

Unfair competition does not directly relate to rules of public order. From a private international law point of view, cases of unfair competition differ from cases in which rules of public order are breached. In cases concerning the latter, there is in principle no way to apply foreign law directly - rules of public order being only applicable in the national territory - and therefore the question of conflict of laws does not arise.

Nevertheless rules of public order could bear a relation with acts of unfair competition, albeit, this relation is only an indirect one. This relation exists in cases in which it could be held that breaching this kind of rules could be considered as unfair against one's competitors at the same time, by not following the rules which hold for all parties, consequently getting an unfair advantage in the game of competition if all the other competitors stick to the rules of the game. This is, however, not automatically the case: the plaintiff has to state more circumstantial circumstances in order to succeed, whereas in mere public order cases, the authorities do have a case simply by proving the rules have been breached. It could be considered as nearly impossible to put the test for the aforesaid cinrcumstances into hard and fast rules.

2.6 Global advertising

The scope of the Resolution is further restricted, in sofar, that it does not consider advertising messages which are produced within an international marketing view but, nevertheless, are being broadcast or published independently in various different countries. One may describe this kind of advertising as international or global advertising; there is, however, no legal relevant transborder element in it. The same

holds for 'spill over' advertising which could not be considered to be directed to the public in the country where it could be perceived.

2.7 'Anschwärzung'

Neither does the scope of the Resolution concern cases where the plaintiff seeks redress for personal injuries (like defamation, disparagement or 'Anschwärzung'). This case is commonly regarded as an exception to the rule that in matters concerning advertising, the applicable law should be the law of the country where the advertisement produces its effects, that is to say where it reaches the public. Usually, defamation or disparagement is not directed straightforwardly to the public, but to the attacked business company, thus legitimating the relevance of domicile of the plaintiff in the possible application of the law of another country than the country of destination of the advertising message. [5] One could, however, state this case not to be an exception, bearing in mind that the LIDC's Resolution holds the applicable law to be in first instance the law of the country where the advertisement produces its effects; in cases of disparagement this, of course, could very well be the law of the country of the plaintiff.

2.8 Intellectual property

Furthermore, the Resolution's scope is not pertaining to transborder infringements of Intellectual Property rights, specific Industrial Property rights being included. The principle of territoriality of Intellectual Property rights mandates that the law of the territory, granting the intellectual property right, shall apply likewise if the court, having sole jurisdiction to revoke such a right or to rule on its validity, is competent. In EC-law this is confirmed by article 16 par. 4 of the 1968 Brussels Convention which grants exclusive jurisdiction concerning disputes as to the validity of patents, trade marks and design registrations to the forum of the country from where these rights originated. This rule should of course not to be understood as disallowing a court from ruling upon infringement of intellectual property rights in a foreign country and applying, therefore, foreign intellectual property law. From a practical point of view, however, it would appear that a claim based on an intellectual property right will most often trigger a counterclaim, questioning its validity, so that in the case of registered rights such as patents, trademarks and designs, the case will sooner or later end up in the court of the intellectual property's law forum, which has exclusive jurisdiction upon such matters. [6]

2.9 Contractual affairs

For the sake of completeness it must be noted that the concept of unfair competition does not relate to contractual affairs directly. This restriction is important because of the different rules of private international law which are applicable to, respectively, contractual affairs and affairs of unfair competition. The EC Treaty on Contracts (1980) protects consumers by defining applicable the law of domicile if the contract is a consumer contract which satisfies the conditions of article 5 par. 2; one of these conditions being that the advertising has taken place in the country of domicile of the consumer. These rules are relevant for forms of advertising which could be regarded as a legally binding offer (teleshopping, direct mail and other forms of so-called direct response advertising).

2.10 Claims for compensation

When claims for compensation are concerned, the Resolution's principle is only accepted in cases where defendant could reasonably have anticipated that his behaviour would cause an injury to the plaintiff in the country of destination. This means that the Resolution only affects cases in which prohibitions of a certain advertisement are claimed, rectifications included, dependent of the legal nature which is attributed to this kind of measure (compensation or simply a measure to redress the effects of unfair statements).

2.11 Harmonization

The Resolution does not cause conflicts with the efforts of harmonization. In case the unfair competition law of the country of destination is exceeding the limits set up by the European Court of Justice, this law as a matter of course is not applicable, because the country of destination principle includes applicability of European law. In the absence of harmonization, an advertisement could be broadcast or published otherwise in the receiving country, if, the advertisement being contrary to the receiving country's legislation, this legislation nevertheless is discriminating, not objectively justified or disproportionate with regard to its objectives. In harmonized areas foreign advertisements may not be challenged on grounds that fall within the fields harmonized by a directive.

3 ACCEPTANCE OF THE RESOLUTION'S MAIN PRINCIPLE: THE RULE OF THE RELEVANT MARKET

3.1 Contributions

The Resolution has been supported by most of the national reporters who contributed to the international report for the Amsterdam Congress, by most of the relevant laws of the Member States of the European Community, by relevant jurisprudence and by several codes of conduct concerning transborder publicity.

National reports to the LIDC were received from Austria, Belgium, Canada, France, the United Kingdom, Spain, Italy, Japan, the Netherlands, Norway, Switzerland, the USA and Germany. According to the international reporter, there appears to be a strong and even unanimous tendency towards deciding cases of transborder advertising in accordance with the legal system where the advertisement produces its effects and, thus, in accordance with the law of the country where the plaintiff's and the defendant's interests are in conflict. [7]

3.2 Law

In general, unfair competition law being part of the law of torts, all European rules of conflict of laws accept the 'lex loci delicti commissi' (in case of unfair competition the law of the country of destination) as applicable in the case of torts. Therefore, most

European countries use this general rule to decide which law is applicable. Only Austria, Spain and Switzerland have specific statute law on the law of conflicts, which more explicitly leads to the same result, however. Article 48 par. 3 of the Austrian Act of 15 June 1978 on Private International Law provides that unfair competition disputes should be decided in accordance with the law of the country on the market of which the competition takes place:

"Schadenersatz- und andere Ansprüche aus unlauterem Wettbewerb sind nach dem Recht des Staates zu beurteilen auf dessen Markt sich der Wettbewerb auswirkt."

Art. 136 par. 1 of the Swiss Act of 1 January 1989 on Private International Law provides a similar solution by designating the law of the country on the market of which the unfair act produces its effects:

"Ansprüche aus unlauterem Wettbewerb unterstehen dem Recht des Staates, auf dessen Markt die unlautere Handlung ihre Wirkung entfaltet. Richtet sich die Rechtsverletzung ausschliesslich gegen betriebliche Interessen des Geschädigten, so ist das Recht des Staates anzuwenden, in dem sich die betroffene Niederlassung befindet."

Art. 4 of the Spanish Act on Unfair Competition Law 1991 states that Spanish law shall apply to acts of unfair competition, if they produce or may produce substantial effects on the Spanish market.

In the United Kingdom the basic rule is that, if an English court accepts jurisdiction, it will apply English law, save only in those exceptional cases where the domestic law of a foreign country would provide a more just and convenient solution. The words 'just' and 'convenient' import, inter alia, the principles which are commonly described as 'public order'. The English system corresponds with the so-called lex fori system in private international law. This lex fori system differs from the systems which are used in other EC-Countries in the sense that frequently, if the question of jurisdiction is answered satisfactorily, the question of choice of law does not arise.

The EC-Directive with regard to the professional activities of lawyers [8] obliges lawyers to comply with the publicity rules in the country of receipt (Art. 4 par. 4).

3.3 Cases

Most explicit in this field is the case law of the German Bundesgerichtshof (BGH) which, in a long tradition dating from the early sixties, holds the principle that - and we quote its first, principal decision - :

"Unlauterer Wettbewerb (kann) hiernach in der Regel nur dort begangen werden, wo wettbewerbliche Interessen der Mittbewerber aufeinander stossen; denn nur an dem Ort wettbewerblicher Interessenüberschneidung wird das Anliegen der Verhinderung unlauterer Wettbewerbshandlungen berührt." [9]

This principle generally implies application of the law of the country of destination of the advertisement, or, to quote the later decision in Domgarten-Brand:

"derjenige Markt, auf dem die konkurrierende Produkte oder Dienstleistungen aufeinandertreffen." [10]

It is, however, important to note that the principle permits a more differentiated approach: it does not totally exclude the relevance of the law of the country of origin of a certain advertisement. Like the BGH held in its later *Ferrier*-case, [11] the fact that a certain competition act is lawful according to the law of the country of origin of the advertisement where it is also published, could be a relevant factor to the unfairness of a certain competition act according to the unfair competition law of the country of destination.

Such explicit jurisprudence has not been found in other EC-countries without any statute law on the matter, be it that the German system is defended by Dutch doctrine and confirmed in some cases of lower courts' decisions. [12] Luxembourg courts, no doubt, will bring the same rule into practise. [13]

3.4 Codes of conduct

Codes of conduct in some fields of transborder advertising and unfair competition show a diverging approach. The most recent one, that of the European Advertising Standards 'Alliance', seems to be based on a strict country of origin approach. Alliance, a self regulatory body, provides plaintiffs against transborder advertising with the possibility to file a complaint with the selfregulatory body in their country of domicile, which complaint then is referred to the selfregulatory body in the country of origin of the advertisement. Plaintiffs will be informed of the way in which their complaints have been dealt with by their own selfregulatory body. The latest reported ten cases in the second report of Alliance, however, concern cases which would, in most of the countries of destination of the EC, have been dealt with in the same way as they have in fact been dealt with within the Alliance system. [14] Moreover the Alliance system contains a country of destination rule for print advertising and non-audiovisual advertising in general.

In the field of codes of professional conduct (lawyers, etc.) and in the area of direct marketing, with regard to publicity, many of the existing codes are based on the principle of country of destination control in the sense that advertisers have to comply with the rules of the country of destination. This is the case with for example Art. 2 par. 6 of the Code of Conduct of Lawyers in the European Community, [15] which article prohibits publicity in countries where this publicity is forbidden even if it is allowed in the home country of a lawyer who offers transborder services. Most codes on direct marketing activities contain the same principle. We mention as one example the European Convention on distance selling of the EMOTA (1993) which obliges its members to take into account the law of the country were the sale is offered (Art. 4).

4 COUNTRY OF DESTINATION APPROACH RATHER THAN A COUNTRY OF ORIGIN APPROACH IN CASES OF TRANSBORDER ADVERTISING AND UNFAIR COMPETITION?

4.1 Survey

Home country rule has an appeal of clarity and simplicity. This rule is well suited for transborder trade in goods and for the information which is accompanying these goods. Advertising, direct marketing and public relations - the field of commercial communications which will be the object of the Commission's Green Paper -, in connection with problems of unfair competition, however will appear to give rise to more complex questions which not always in fact are or should be solved by simply applying

home country rule. The question therefore is not if either home country rule or country of destination rule should be followed; a better wording of the question is if home country rule alone could be a solution or if problems are better dealt with by balancing both sets of rules. The reasons for this approach - which in some cases might lead to applicability of the rule of the country of destination - will be set out below. Its main points could be indicated as follows:

- the nature of competition law;
- the necessity of balancing both rules;
- equality of arms in competition;
- the nature of commercial communication;
- the necessity of making differentiations;
- problems in defining country of origin and of destination.

4.2 Explanatory Memorandum of the Broadcasting Directive

At this state of the discussion it is useful to refer to the Explanatory Memorandum to the first draft of the EC-Directive on broadcasting activities. Notwithstanding the harmonization created by an EC-Directive [16] in the field of television advertising, this Explanatory Memorandum holds very explicitly that Member States may keep the possibility to apply their national laws on unfair competition cases, even on those concerning television advertising which originates from other Member States. This view is based upon the argument that possible impediments which follow from this application would not be applicable in a general way but only in certain cases and, moreover, as repressive and not as preventive measures. The same could be said of advertising in the press. The existence and applicability of different national laws has never had any serious consequences for the free trade of newspapers and magazines. Hence there could be no legitimate fear that the application of laws on unfair competition would paralyse the free trade in radio and television broadcasts. If, however, Member States use laws on unfair competition in order to prevent on a systematic basis the transmission of certain foreign broadcasts, this problem should be solved by the harmonization of laws on unfair competition. [17]

4.3 Nature of competition law

The above mentioned approach of the Commission refers to the main argument for applying the country of destination rule in cases of unfair competition which is to be found in the nature of unfair competition law. Competition law could be defined as law of a repressive nature, being not preventive; as law concentrated on individual cases, not by way of general measures; law which is based on general principles, and in principle not politically orientated; as not always predictable; directed to justice and not to public order solutions. In short, unfair competition law is private law, to be applied in individual cases, with a certain necessary flexibility and unpredictability, required to cope with unfairness in competition which is not to be regulated by way of limitative enumerations of unlawful activities because of its 'Proteus' character: every specific prohibition appeals to the creativity of commercial people to develop new ways of competition which circumvent the legal prohibitions. Unfair competition law therefore is not a case for the legislature; it is and will be judge made law.

4.4 Necessity of balancing both rules

If this is true, then even a harmonization on a European level will keep us confronted with flexible concepts like 'misleading' advertising, 'appropriation', 'passing off', 'disparaging', and the like, which only on the surface could give an impression of harmonization. Besides, one has to consider also the doctrine, held in many countries, of competition being under certain circumstances unfair too if rules of public law are breached, to realise that even harmonization of public competition law provides no guarantee for uniformity or even detailed harmonization of substantive unfair competition law. As a consequence there could be no case for a priority of the rules of the home country. Both judge made systems are of equal value. This is confirmed is the jurisprudence of the European Court of Justice in cases of unfair competition.

Indeed, the free flow of (market) information is not hampered by the application of the unfair competition law of the country of destination of the advertisement. In fact, the jurisprudence of the European Court of Justice takes into account the law of the country of destination by balancing it against primary or secondary EC-law while of course reckoning with the lawfulness of a certain advertisement or act of unfair competition in its country of origin also. This approach has sometimes also lead to the possibility of less lenient rule in the country of origin, compared with the respective rule in the country of destination.

As stated above, in case the unfair competition law of the country of destination is exceeding the limits set up by the European Court of Justice, naturally these rules are not applicable. In the absence of harmonization, an advertisement could be broadcast or published otherwise in the receiving country, if, the advertisement being contrary to the receiving country's legislation, this legislation nevertheless is discriminating, not objectively justified or disproportionate with regard to its objectives. [18] So, in the cases mentioned (*Rocher* and *GB-INNO-BM*) German law and Luxembourg law, being the law of the country of destination, were submitted to the test of primary EC-law (Artt. 30-36). Proportional and necessary non discriminating exceptions could be claimed in accordance with *Dassonville* and *Cassis de Dyon* [19] for the protection of consumer interests, [20] the environment, [21] public health [22] and honest trade practice. [23] In the cases mentioned, Dutch, Danish, French and Spanish law, being also the law of the country of destination, were submitted to the test of these exceptions. In harmonized areas, foreign advertisements may not be challenged on grounds that fall within the fields harmonized by a directive. Nevertheless, in cases of harmonization by a horizontal directive, like the directive on misleading advertising, the law of the country of destination was submitted to the test of the European concept of misleading advertising. [24]

The approach of the EC-Court of Justice, balancing the two sets of rules against each other in the frame work of European law, corresponds with the necessity of balancing the different interests at stake in case of unfair competition. We quote from the report of Dr. Marcel Kisseler:

"Eine derartige, an umfassender Interessenabwägung sich ausreichende Beurteilung grenzüberschreitende Werbemassnahmen erscheint somit sachgerechter und binnenmarktverträglicher als die ausschliessliche Anwendung der Herkunftlandsregelungen auf grenzüberschreitende Sachverhalte im Sinne des sogenannten "Herkunftsprinzips". [25]

4.5 Equality of arms in competition

Equality of arms between competitors is one of the most fundamental principles in competition law. This principle is frustrated when competitors from a country with strict rules have to compete with each other in a country with more lenient rules. Applying home country rule makes them less suited to compete with each other and with their foreign competitors. This simple truth - which has been one of the most important reasons for Dutch doctrine to choose for a country of destination approach in private international law -, implies at least that in disputes concerning cases of unfair competition, value has to be attached to the law of the country or of the market on which competitors present their offer to the public, thus competing with each other for the favour of potential customers. Disputes regarding unfair competition should be therefore in principle dealt with according to the nature of these disputes, that is according to the law of the market place where competitors are competing with each other for the favor of consumers and suppliers. Distortions in unfair competition law should then be tackled by applying EC-law or by harmonizing substantive law on unfair competition. The case is stated very clearly by Dr. Rainer Herzig, our Austrian reporter: "The harmonization of the rules on Unfair Competition Law should be done by a Directive on Unfair Competition and not by manipulating the Laws on Conflict of Laws." [26] Work on the harmonization of the laws on unfair competition has seriously started at the recent Budapest Congress of the LIDC (October 1993) and will be continued at its Berlin Congress of 1994.

4.6 Nature of commercial communication

The nature of commercial communication itself provides at least for the necessary balancing of the rules of the country of destination against these of a home country. It would be incomprehensible for the public of a country of destination if it were to be confronted with a ban of certain transborder advertisements only because of the unlawfulness of these advertisements in the country of origin. On the other hand it would be as incomprehensible to be confronted with advertisements which are offensively contrary to the law of the country of destination but nevertheless should be allowed because of a more lenient regime in this respect in the home country. This of course could easily be the case in delicate questions of decency in advertising, concerning topics like the use of female stereotypes in advertising, questions of racial discrimination and the like. More important however is the fact that the lawfulness of commercial communication by its nature also is defined by taking into account the impression made on the receiver of the commercial message.

4.7 Necessity of making differentiations

Differentiation of course is needed between the various forms of commercial communication. Direct marketing and advertising, professional publicity, public relations, sponsoring in the media, all this categories require their own legal treatment. Professional publicity seems more close to freedom of expression than advertising is; this is also the case with sponsored publicity in television programmes and the like. Direct marketing shows close connections with contractual law. As we have seen before, it is exactly in the field of professional publicity and direct marketing that country of destination rule has a priority.

It is only in the area of specific, vertically harmonizing directives that one sees the

principle of application of the law of the country of origin clearly at work (television advertising, food stuffs, cosmetics, medicines, consumer credit, etc...). Even then the assessment of the action being in accordance with the law of the country of origin, could be a difficult one like nowadays seems to be the case with Luxembourg broadcasts being challenged by Dutch authorities on its accordance with Luxembourg broadcast law and the Luxembourg law in its turn challenged on its conformity with the Directive.

4.8 Problems in defining country of origin and of destination

Problems in defining the country of origin or the country of destination of course are less important than the answer to the principle which rules should be applied. We mention however that the method of defining a country of destination closely, as shown in part I sub b) of the LIDC Resolution, is connected with the nature of commercial communication and with jurisprudence, whereas a country of origin principle leads to a lot of artificial hypotheses as to the domicile of the advertiser, or of the medium, or of the distributor of the message, all of which factors could be considered as of equal importance in defining a commercial communication being located in some country of origin.

CONCLUSION

Advertising law is part of unfair competition law. The latter could be defined as law of a repressive nature, being not preventive; as law concentrated on individual cases, not by way of general measures; law which is based on general principles, and in principle not politically orientated; as not always predictable; directed to justice and not to public order solutions. In short, unfair competition law is private law, to be applied in individual cases, with a certain necessary flexibility and unpredictability, required to cope with unfairness in competition which is not to be regulated by way of limitative enumerations of unlawful activities because of its 'Proteus' character: every specific prohibition appeals to the creativity of commercial people to develop new ways of competition which circumvent the legal prohibitions. Unfair competition law therefore is not a case for the legislature; it is and will be judge made law. If one should ever succeed to harmonize an area as complex as that of unfair competition, the nature of this branch of the law as described above will necessarily lead to the use of vague concepts also, which could, and sometimes should, be differently applied in different law systems. The question therefore is not if either home country rule or country of destination rule should be followed; a better wording of the question is if home country rule alone could be a solution or if problems are better dealt with by balancing both sets of rules. The nature of commercial communication itself provides at least for the necessary balancing of the rules of the country of destination against these of a home country. It would be incomprehensible for the public of a country of destination if it were to be confronted with a ban of certain transborder advertisements only because of the unlawfulness of these advertisements in the country of origin. On the other hand it would be as incomprehensible to be confronted with advertisements which are offensively contrary to the law of the country of destination but nevertheless should be allowed because of a more lenient regime in this respect in the home country. The approach of the EC-Court of Justice, balancing the two sets of rules against each other in the frame work of European law, corresponds with the necessity of balancing the different interests at stake in case of unfair competition.