

Jan Kabel en Frauke Henning Bodewig, *Should the objectives of the rules on unfair competition be the protection of competitors, or consumers, or of other interests? How should any conflict between these objectives be resolved?* International Report for the LIDC Amsterdam Congress on Competition Law, 5-7 oktober, www.ligue.org , 50 pp.

The European Directive 2005/29/EC on unfair commercial practices of May 11, 2005 regulates exclusively unfair commercial practices which are directly related to influencing a transactional decision of end-consumers and excludes all practices that are neither directed to end-consumers, nor directly influencing a transactional decision of consumers. Misleading advertising, for instance, is now judged on the basis of two different sets of regulation: the new Directive 2005/29/EC deals with "B2C"-advertising while "B2B"-advertising has to comply with Directive 84/450/EEC. This international report, based upon contributions from eleven countries is devoted to the question whether there are a priori two different standards for assessing unfair commercial practices. Is there one standard for consumers and another one for competitors? On the other hand, are the interests of all market participants too intertwined to allow different standards of fairness? More generally: Should the rules on unfair competition focus on the act as such - which, of course, must be seen against the background of all circumstances, especially the target group – or should they focus primarily on the protection of the end-consumer or of competitors?

A. Introduction

I. The Issue

1. Unfair commercial practices usually affect all market participants, either directly or indirectly. Hitherto, the regulation of unfair commercial practices has focused on the control of the behaviour in question and not so much on the aspect whether the practice primarily affects the decision-making of consumers or of non-consumers. This was at least the approach of the only international regulation in the field of unfair competition law (Art. 10^{bis} Paris Convention) and of Secondary Community Law (especially Directive 84/450/EEC on misleading and comparative advertising).

2. The European Directive 2005/29/EC on unfair commercial practices of May 11, 2005, which has to be implemented until June 2007, takes a different approach. It regulates exclusively unfair commercial practices which are directly related to influencing a transactional decision of end-consumers and excludes all practices that are neither directed to end-consumers, nor directly influencing a transactional decision¹ of consumers. Misleading advertising, for instance, is now judged on the basis of two different sets of regulation: the new Directive 2005/29/EC deals with "B2C"-advertising while "B2B"-advertising has to comply with Directive 84/450/EEC.²

3. This leads to the question whether there are a priori two different standards for assessing unfair commercial practices. Is there one standard for consumers and another one for competitors? On the other hand, are the interests of all market participants too intertwined to allow different standards of fairness? More generally: Should the rules on unfair competition focus on the act as such - which, of course, must be seen against the background of all circumstances, especially the

¹Art. 2, k. Directive: " 'transactional decision ' means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;"

² See for recent literature on the Directive: R.W. de Vrey, *Towards a European Unfair Competition Law: A Clash Between Legal Families. A comparative study of English, German and Dutch law in light of existing European and international legal instruments* (diss. Utrecht), Leiden: Koninklijke Brill 2005; J. Stuyck, E. Terry, T. van Dyck, 'Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market', *Common Market Law Review* 2006-43, p. 107-152; H. Collins, *The Forthcoming EC Directive on Unfair Commercial Practices*, The Hague: Kluwer Law International 2004.

target group – or should they focus primarily on the protection of the end-consumer or of competitors? For the advertiser who, for instance, advertises a car or a personal computer, it is often not foreseeable for which purposes (private, professional) the advertised or promoted product is purchased. Should the enterprise be allowed to rely on one uniform standard?

Consumers in many cases will not be misled by cheap ‘look alike’s’. Should it therefore be allowed that producers of imitation products offer their goods to the consumer, if they inform him of the nature of the product? Stated otherwise: could an action based upon confusion be rejected because the consumer is not misled as to the origin of the product? This seems to be the UK-approach.

4. It is furthermore important to know whether unfair competition law is (or should be) restricted to purely economic aspects or whether it should also take into account aspects such as social responsibility, public policy, privacy, etc. In addition, if these ethical aspects are of importance in unfair competition law: can they justify a prohibition of a commercial practice that is otherwise allowed?

5. These questions also concern the sanctions against unfair competition. Should the remedies against unfair commercial practices be open to consumers and competitors (and their organisations) alike? On the other hand, does the interest of consumers require special enforcement mechanism, especially state agencies? Can, for instance, the competitor take action based on an infringement of duties especially towards the consumers, e.g. informational duties?

6. It is worthwhile to note that the Ad Hoc Committee on Unfair Commercial Practices of the League in its Budapest Resolution (2004) stated:

“The exclusion of B2B practices from a Directive Proposal on unfair commercial practices is regrettable, as a restriction to B2C practices can lead to legal uncertainty and may potentially harm consumer interests. The introduction of a right of action for competitors (Art. 11 par. 1 Council Directive Proposal) is a step in the right direction as only competitors often notice breaches of unfair competition vis-à-vis consumers. However, a number of practices, which harm the competitor as well as the consumer, are still left out of the scope of the Directive Proposal. (...) The LIDC nevertheless still supports a widened scope of application of the Council Directive Proposal as the examination process will necessarily delay the harmonization of B2B practices.”

7. This International Report aims at an in-depth study of these issues. It was drawn up based on national reports in response to the questionnaire (Question B) as well as some additional sources regarding the situation in other countries. Our warmest thanks go to the national groups and reporters:³

- Enrique ARMIJO (Spain)
- Aimé de CALUWE and Alex TALLON (Belgium)
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- Petr HAJN (Czech Republic)
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II. Considerations with respect to the concept of unfair competition

The law of unfair competition is not a clearly defined subject as it is, for instance, trade mark law. Although all countries agree that competition should not only be free but also fair, there are different views on the question which subject matters belong to the field of “unfair competition”, if they form a separate field of law, what are the relevant standards and how they should be

³ Wolfgang Sakulin, PhD Student at the Institute for Information Law, was of great help in processing part of the national reports. We received comments on the first draft from Jules Stuyck (Belgium), Christian Bovet (Switzerland), Mary Claude Mitchell (France) and Amédée Kasser (Switzerland).

enforced. An answer to the question what subject matters are inside the field of unfair competition is also relevant for the activities of the Ligue. If, for example, consumer interests would take the larger part of the field of unfair commercial practises, the Ligue should ask itself what subject matters precisely should be appropriate for her to study and discuss. After all, the Ligue surely is not a Consumers Ligue. On the other hand, a very narrow interpretation of unfair competition law would exclusively restrict subject matters to deception, confusion, and disparaging acts in competitive relationships.

The reason for these differences is mainly historical. The different approaches to unfair competition law stem from the fact that the mechanisms to ensure commercial fairness are deeply rooted in the national systems of law. In most countries, unfair competition law developed from tort law, namely competitors' actions against those practices that are regulated in Article 10^{bis} Paris Convention: risk of confusion, discrediting, misleading allegations. The problem is that the legislation in a number of countries has gone far beyond this. It deals quite broadly with all unfair trade practices or even market conduct in general. A good example for this development is the situation in Belgium where the law against unfair competition developed from some narrow criminal offences over a tort law approach - based on the tort law clause in the Code Civil - to a general law on "market practices". There are, however, only few countries (especially the United Kingdom), where there is no developed doctrine on unfair competition law per se.

Seen from a comparative point of view,⁴ the main difference today seems to be the way in which the interests of consumers are taken into consideration. While some countries (e.g. Belgium, Austria, Germany, Switzerland, Sweden, Spain) protect competitors and consumers alike under their law against unfair competition or market practices, other countries (e.g. France, Italy, Brazil) reserve the expression "unfair competition" ("concurrency déloyale") to the original tort law for competitors and deal with consumer protection under a second set of regulations (usually enforced through criminal or administrative sanctions). It seems that the developments in the law of the European Union tend to the system that is represented by the last category of countries, that is to a system which is least represented in the Member States of the European Union. There may be a possibility that a choice for an exclusive consumer based approach of unfair commercial practises that is so little represented in the laws of most Member States, might lead to serious legal troubles in the process of implementation.

The term "unfair competition law" thus can have a different meaning in different countries. It can be interpreted quite broadly, indicating a separate field of law which usually encompasses all market practices - or rather narrowly, indicating the traditional "concurrency déloyale"-actions of competitors. The main criterion for application of the law of unfair competition with respect to the narrow interpretation is the existence (and proof) of a competitive relationship between plaintiff and defendant. The focus with respect to the broader interpretation does not rely on a competitive relationship, but on fairness of the marketing practise itself. Insofar, the term "unfair commercial practices," as used in the Directive 2005/29/EC, seems to be more neutral. This neutrality, however, as we have seen before, is in appearance only. In fact, the term 'unfair' in the Directive refers exclusively to unfairness towards the consumer. On the other hand, Art. 10^{bis} Paris Convention speaks of "unfair competition" as does the majority of the European countries, thereby leaving the question unanswered whether a narrow or a broad interpretation should be followed.

Whereas these differences should not be overrated, they are at the same time not only of a terminological nature. In the end, it is not the definition or the exact place of regulation that counts, but the interests (of consumers, of competitors, of the general interest) that are protected when considering the unfairness of a certain commercial practise. Seen from this (wider) point of view, national regulations and rules concerning the fairness of commercial practices can be found in four categories (which, of course, overlap):

- Unfair competition law (either in a broader or a narrower sense);
- Consumer law protecting the economic interests of consumers;

⁴ See recently Frauke Henning-Bodewig, *Unfair competition Law – European Union and Member States*, Kluwer Law International 2005. See for an older comparative study Reiner Schulze and Hans Schulte-Nölke, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practises*, June 2003, a study commissioned by DG SANCO for the preparation of Directive 2005/29, to be consulted on: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/studies_en.htm

- Consumer law protecting the non-economic interests of the public at large;
- Competition law.

One should not forget, however, that all four categories have something in common. First, there is the fact that a commercial practice is judged according to a certain standard of commercial fairness. Second, competitors and consumers both are market participants and thus share a common interest in the well functioning of the market. Nevertheless, the main question is if there could be developed a standard of unfairness that covers all commercial practises, or if we have to live with different standards, dependant of the interests at stake. In the following, we use the neutral term: unfair commercial practises, instead of unfair competition. This term stands for unfairness in all above-mentioned fields of the law.

B. Answers

I. Could you give a list of commercial practices that are considered as “unfair” (by statute, by case law or by self-regulation)?

The importance of this question mainly lies in the difference between judge-made law and statute-made law. In the field of unfair competition law *stricto sensu*, judge-made law prevails. The corresponding legal approach to cases of unfair competition is to consider these cases in the light of the principle of freedom of competition; restrictions of this freedom may be legitimised by the need to suppress acts that are contrary to honest practises in industrial or commercial matters. Thus, judges have a wide and flexible competence to decide on unfairness, but this competence, of course, could not be a political one; it is not up to judges to prohibit commercial practises as such. This authority is reserved to lawmakers and to the accompanying political process. Even if a competitor contravenes specific statute laws, the answer to the question if this is unlawful against other competitors and if they therefore could have an action against the infringer, cannot in most countries, be simply based upon the infringement as such. Additional circumstances that make the infringement unfair are required. This should however be nuanced for some jurisdictions. E.g. in Belgium, where according to the theory of the “concurrency illicit” every breach of statutory provision in the exercise of a business is in itself contrary to honest business practices and hence, if either the professional interests of one or more competitors (Art. 93) or the interests of one or more consumers (art. 94) are harmed or likely to be harmed falls under the general norm of Article 93 or 94.⁵ Although there are limits to the theory it is still good law.

On the other hand, the lawmaker may qualify certain commercial practises as such as unfair and therefore prohibited, irrespective of the specific circumstances of the case. This method is introduced by the Directive’s Black List on unfair commercial practises; judges are supposed to decide these practises as unfair per se, which method is comparatively spoken alien to the assessment of acts of unfair competition.

Q.I.1. The basis for protection: statutory law, case law, or self-regulation?

As to the question whether these practices are regulated in statutory law or are primarily dealt with by the courts or by self-regulation, the following distinction can be made:

- In most countries, consumer issues are (at least also) regulated by statutory law. This is even true for countries where unfair competition law is mainly case law. The reason for this is, among others, that “consumer protection” is a relatively recent development, often originating from Community Law. Non-economic aspects of commercial practises (for example the requirement that advertising should be ‘decent’) mainly are subject of self-regulation.
- In all countries, there are specific regulations products, certain media, or certain (vulnerable) target groups (children for example) that supplement case law on unfair competition.
- The situation as to the traditional “concurrency déloyale” varies. In all countries (except the UK), unfair competition law developed from case law based on the general tort clause. However, in some countries this case law has been codified in the meantime, often together with consumer protection issues (e.g. Belgium, Germany, Switzerland, Sweden) while in other countries it is still

⁵ Cass. 2 may 2005, see J. Stuyck, *Handelspraktijken* 2004, p 146 et seq. ; p 154.

the main basis for the protection of business against unfair commercial practices (esp. France, Italy, the Netherlands, and Brazil).

The following short **survey** may give an idea of the different legal bases for protection against unfair commercial practises in the countries examined:

- **Belgium:** The main basis is the "Act on Commercial Practices and Consumer Information and Protection" (LPC) of 14 July 1991. It contains two general clauses and regulates a number of practices. Protected are the interests of the "seller," the consumer as well as the public at large. Application of the Act does not require a competitive relationship. The LPC is sanctioned with a special "action en cessation" (action for injunction relief).

- **Brazil:** Unfair competition is broadly understood as any act contrary to the honest practices in trade matters. Therefore, the Brazilian legislation does not provide a list of acts regarded as unfair. Under this perspective, a wide range of trade practices is vulnerable to fall into the scope of unfair competition. Some of the unfair competition practices are identified in scattered legislation. Nevertheless, Law 9,279/96 enlists some activities as crime since they affect more intensively trade and disrupt reputation of companies and the consumer relationship.

- **Czech Republic:** The basis for protection against unfair competition is the Commercial Code, supplemented by the Advertising Law (1995). §§ 41 ff. Commercial Code contain a general clause as well as several specific causes of action that are "especially" considered unfair competition. They aim at the protection of competitors and consumers alike as well as and the general public's interest in the functioning of competition. Application of the Act does not require a competitive relationship.

- **France:** Protection of competitors against "conurrence déloyale" is granted on the basis of the general tort clause in Article 1382 Code Civil while the protection of consumers (and the public at large) against specific unfair commercial practices can be found in various regulations in the Code de la Consommation; these are predominantly sanctioned by criminal or administrative law.

- **Germany:** The basis for protection against unfair competition is the "Act against Unfair Competition" (UWG) of 3 July 2004. It protects competitors and consumers alike and contains a general clause, which is specified by several examples of unfair commercial practices. The UWG is almost exclusively enforced through civil law remedies.

- **Great Britain:** Common law provides for remedies in cases of passing off, injurious or malicious falsehood and defamation. Other unfair commercial practises are regulated in the Trade Description Act, the Consumer Protection Act, and the Control of Misleading Advertising Regulations. In addition to the statutes, self-regulation plays a prominent part in the suppression of unfair commercial practises in the field of advertising, sales promotion and direct marketing.

- **Italy:** The civil law protection of competitors against "concorrenza sleale" is based on Articles 2598 to 2601 Codice Civile. This law is limited to suits brought by competitors. Legislative Decree 74/1992, enforced by the Autorità Garante della concorrenza e del Mercato, regulates advertising in the interest of all market participants.

- **The Netherlands:** The law against unfair competition ("ongeerloofde mededinging") is predominantly case law on the basis of the general tort clause in Article 6:162 Burgerlijk Wetboek; statutory regulations in Article 6:194 et seq B.W. deal with misleading and comparative advertising. These two articles do not require a competitive relationship. Other commercial practises are regulated in various statute laws, like the Telecommunications Act, the Gas and Energy Act and other acts, implementing European Directives.

- **Spain:** Spanish unfair competition law is predominantly based on the Law No. 3/1991 (LDC) and the Law No. 34/1988 (Advertising Act). Both laws protect all market participants alike and are enforced through civil law remedies.

- **Sweden:** The foundation of Swedish unfair competition law is the Market Practices Act (MFG) of April 27, 1995. It contains a general clause and regulates several causes of actions in the interest of business and consumers.

- **Switzerland:** The Swiss law against unfair competition can be found in the law of December 19, 1986. It serves the interests of the economy, the consumers, and the public at large. The law contains a general clause, which is made more precise by several examples. It is enforced through civil law.

Q.1.2. The practices that can be considered as “unfair”

The individual practices that, according to the national reports, can be considered as “unfair” (either by statutory law or by case law) cover a broad range. Below we make a distinction according to the classic approach, that is: unfair commercial practises according to unfair competition law in the sense of *concurrency déloyale*, unfair commercial practises in the field of competition law and unfair commercial practises in relation to the protection of the consumer. This is not to say that there could be no common standard as to the unfairness of commercial practises. However, the question is if a common standard would be of much help in precisely defining unfairness in these different fields of the law.

a. Unfair commercial practises against competitors: the classic approach

The Brazilian reporter provides an exquisite overview of practises, considered as unfair against competitors and based upon the classic principle that acts contrary to honest practises in trade matters should be prohibited. The list is composed of a myriad of variations of the three practises, already prohibited in the Paris Convention (defamation, confusion and misleading acts), added by practises as (and we follow the numbering of the original): (iv) use any fraudulent means to divert, for his own or for a third party’s benefit, another’s clientele; (xi) give or promise money or other utility to the employee of a competitor, whereby that employee, in failing in his duty in his employment, provides him with an advantage; (xii) disclose, exploit or use, without authorization, confidential knowledge, information or data, usable in industry, commerce or the providing of services, except that which is of public knowledge or which is obvious to a person skilled in the art, to which he has had access by means of a contractual or employment relationship, even after the termination of the contract; (xiii) disclose, exploit or use, without authorization, knowledge or information as mentioned in the previous item (xii) above, when obtained directly or indirectly by illicit means or to which he has had access by fraud; (xv) divulge, exploit or use, without authorization, the results of tests or other undisclosed data the elaboration of which involved considerable efforts and which has been presented to government entities as a condition for approving the commercialisation of products; (xix) violate non-competing clause by assignor when it derives from the assignment of the commercial establishment to a competitor; (xxi) acquire clientele based on non-payment of taxes that leads the infringer to obtain a competitive edge in the market.

b. Unfair commercial restrictive practises

Most national reporters refer also to the field of competition law in their overview of unfair commercial practises. We take the extensively elaborated French report as an example to point out some specific practises and do not treat well known practises as discrimination, abuse of a position of economic power, and the like. The French Code of Commerce contains a separate paragraph on para-commercialism, i.e. commercial activities, executed by public financed organizations in competition with private companies. Article L. 442-7 and 8 of the Code sanctions anyone, who: « le fait d’offrir à la vente des produits ou de proposer des services en utilisant, dans des conditions irrégulières, le domaine public de l’Etat, des collectivités locales et de leurs établissement public ». Furthermore, the French Code prohibits sale at a loss. Article L. 442-2 sanctions any trader « de revendre ou d’annoncer la revente d’un produit en l’état à un prix inférieur à son prix d’achat effectif est puni de 75 000 euros d’amende.» We point out that sale at a loss is an example of a regulation of sales promotions, included in the aborted proposal for a regulation on sales promotions in the internal market. It is not mentioned on the black list of the Directive on Unfair Commercial Practises. Both practises, para-commercialism and sale at a loss could be seen as unfair practises which do not serve the protection of the consumer.

c. Unfair commercial practises against the consumer

Consumer law, as it has developed since the fifties of the last century, provides for the prohibition of other commercial practises. Consumer law thereby combines different areas of the law. Contract law plays an important part, protecting the consumer against professional parties. The liberalization of markets like the telecommunication market, gas and energy, or transport, the developments on financial markets or the commercialisation of broadcasting have all led to specific forms of market survey, whereby governmental agencies are attributed with specific competences to guard the interests of the consumers on the market place. Practises like

spamming, surreptitious advertising, bait and switch tactics, sweepstakes and other forms of sales promotions, have been subject of regulation. An enormous amount of information duties accompanies these regulations. The counterpart of these information duties is the thesis of the informed consumer, as developed by the European Court of Justice in cases like Gut Springenheide or Estée Lauder.

In all countries misleading, misleading comparative advertising included, is considered as unfair against the consumer. The French report mentions as other commercial practises that deserve regulation to protect consumers: door to door selling and similar forms of unsolicited direct marketing, premiums, sweepstakes, lotteries, inertia selling and pyramid promotional schemes. This list is common to most other countries. Moreover, French law prohibits «de refuser à un consommateur la vente d'un produit ou la prestation d'un service, sauf motive légitime... » and furthermore prohibits conditional sales.

It must be repeated that not all of these practices are regulated in one statute; often they are shattered over several laws or are case law. In some countries, the focus of unfair competition law is much narrower, leaving, for instance, abusive clauses to the general civil law or predatory pricing etc. to antitrust law. However, in most countries the violation of these laws can be seen as unfair competition ("breach of the law"), if additional circumstances are present, so that a close connection is maintained.⁶

To sum up: the list of unfair commercial practices might show that these practises can neither be restricted to competitor nor to consumer issues. They encompass traditional competitor issues, consumer issues and, as a common basis for both, competition oriented issues. Nevertheless, seen from a different angle, there are big differences: the unfairness of refusal of sale to a consumer is for instance difficult to fit in a classical unfair competition law system; there could be many similar examples that show the same difficulty.

Q.I. 3. Does the law in your country contain a "black list" of commercial practices that are considered unfair per se?

a. In none of the countries examined, a general differentiation is made between unfair commercial behaviour prohibited by statute or case law and an additional "black list" of practices that are forbidden per se. In the Netherlands, the Electricity Act 1998 and the Gas Act contain a non-exhaustive black list of sales methods which are considered to be unfair per se; furthermore Article 6:236 Civil Code contains a black list of onerous contractual clauses.

b. However, the borderline between a "black list" and expressly regulated causes of action can be fluent. On the one hand, even the "black list" in the Directive 2005/29/EC is open to interpretation. For instance, No. 28 of the "black list" forbids "persistent" telephone calls. The courts in the light of the purpose of the Directive must interpret the question of what is "persistent." On the other hand, the prohibited behaviour in national law on unfair trade practices can be regulated in such a precise way that the courts have little room for interpretation.

c. In general, the following distinction can be made:

- In countries where unfair competition law is mainly case law (Brazil, France, the Netherlands), a "black list" of forbidden practices generally spoken does not exist; the courts typically have broad discretion what they consider as unfair.

- The same is true for those countries where a general clause is at the core of a specific regulation against unfair practices - and the expressly regulated causes of action are seen as examples of the general clause (Germany or Switzerland).

- In countries, where the specific regulation of certain unfair commercial practices is not seen as examples of a general clause (France, insofar as the Code of Consommation is concerned, Italy as to "concorrenza sleale", Belgium), the individually regulated causes of action resemble more of a "black list." However, they are usually open to some additional interpretation.

II. Material Rules

⁶ See however the case of Belgium, mentioned in par. B.I.

Q.II.1. Are there a priori different rules regarding unfair commercial practices against consumers and against enterprises? Are there, in particular, different general clauses for consumers and enterprises forbidding unfair commercial practices?

a. In most countries examined, the legislator has tailored some causes of action to the special needs of certain market participants, esp. consumers. This is obvious in those countries where a second set of regulation was installed for the protection of consumers (e.g. France as regards the regulations in the Code de la Consommation). However, it is also true for those countries that protect consumers and competitors alike. In Germany the Act Against Unfair Competition serves a threefold purpose, but the strict opt in-solution regarding cold calls applies only to consumers (while the prohibition of disparagement requires a "competitor").

b. There is only one country where a general clause against unfair competition differentiates between consumers and competitors. Article 93 of the Belgian "Loi sur les Pratiques du Commerce" prohibits any act contrary to honest trade practices whereby a seller damages or may damage another seller's economic interests. Article 94 LPC has an identical wording but protects the interests of consumers. According to the Belgian Supreme Court, the consumer general clause already applies if the consumer is "manipulated."

Q.II.2. Are there different benchmarks for the assessment of unfair commercial acts depending on whether they are seen from the consumers or the competitor's perspective? Or is the focus on the commercial practice as such that, of course, must be seen in connection with all "special circumstances," which may also include the target group (general public, youth, professional, etc.).

Most countries do not fundamentally differentiate between the interests of consumers and competitors. The standard of fairness is the same, no matter whether the practice is directed towards consumer or towards business. Of course, in assessing a practice the courts take into account the target group, namely whether the practice is directed towards end-consumers, professionals, a special vulnerable group like children etc. This is, however, only a consequence of the general "rule that the assessment of unfairness requires the consideration of all relevant aspects," especially the target group. At least a priori, there are no different rules as to whether the practice is directed towards consumers or businesspersons.

In particular, the general clause in those countries that have specific regulation on unfair trade practices (Austria, Spain, Germany, Switzerland with the exception of Belgium) encompasses quite generally consumer's and competitor's interests alike, providing a general standard of fairness for all market practices. The same seems to be true for countries that more or less grant civil law protection against unfair trade practices based on the general tort clause (France, Italy, the Netherlands, Brazil). Even if the right of action is restricted to competitors, this does not necessarily imply a different standard of fairness. For instance, in France "dénigrement" is considered as one of the main cases of "conurrence déloyale" (developed by case law on the basis of Article 1382 C.C.), but it is apparently not judged differently whether the harmful remark is made to a consumer or to a competitor. Furthermore, even in countries that have developed case law, the interest of the consumer can be taken into account.

Q.II.3. Are there relevant definitions of consumers as opposed to non-consumers in the law of unfair competition and if so, how are they qualified?

In most countries, the definition of consumers is found in the Civil Code or in the Consumer Code. Most unfair competition laws, except Belgian and Swiss law, do not contain definitions of consumers as opposed to non-consumers.

In general, the status of "consumer" is related to the transaction at stake and not to the actual status of someone as an enterprise or as a private person. A business may thus act as a protected consumer in some cases. There are two ways of defining consumer transactions. Most laws contain the negative definition that a consumer is someone who does not act as a business or who does not conclude transactions that have a (direct) relationship with business dealings. Brazilian and Spanish Consumer Law and French criminal courts operate with the positive definition of consumers as persons who conclude transactions to satisfy their own needs or who actually consume the goods and services at stake.

- **Belgium:** The Belgian LPC defines the consumer as *"Toute personne physique ou morale qui acquiert ou utilise à des fins excluant tout caractère professionnel des produits ou des services mis sur le marché"*.

- **Brazil:** In Brazil, there are no relevant definitions of consumers in unfair competition law, because unfair competition applies only to competitive relationships. The Consumer Code (Law 8,078/90) defines consumers as all natural or legal persons who acquire or uses products or services as final addressee.

- **Czech Republic:** Czech unfair competition law does not contain a definition of the consumer. Section 52 of the Civil Code defines the consumer as the person, who does not act as an undertaking or business in concluding contracts or business.

- **France:** French law does not know a uniform definition of consumers. Article 121(22) 4 of the Consumer Code defines a consumer as every physical person who enters a contact without direct relationship to his or her profession. The Ministerial Circular of 19th July 1988 defines the consumer as *"le consommateur final, qui les emploie pour satisfaire ses propres besoins et ceux des personnes à sa charge ; et non pour les revendre, les transformer ou les utiliser dans le cadre de sa profession."*

French criminal jurisprudence employs slightly broader definition of consumers. Instead of the "direct relationship" criterion, it requires that a consumer must personally consume or enjoy the use of the object of the transaction.⁷

- **Germany:** The German "Gesetz gegen den unlauteren Wettbewerb" (UWG) refers to the consumer definition of Section 13 of the German Civil Code. It defines consumers as every physical person who concludes a transaction for a purpose that does not fall under his business or self-employed activities.⁸ Furthermore, the German UWG knows definitions of an enterprise, competitors and of (other) market participants.

- **Italy:** Italian unfair competition law does not contain a definition of (non-) consumers. However, Article 1519-*bis* of the Civil Code, regulating the sale of consumer goods states that a) a consumers is *"...any person who acts, in sale, exchange, supply contracts, outside the limits of the commercial or professional activity habitually performed"*

- **The Netherlands:** Article 6:236 and 6:237 of the Dutch "Burgerlijk Wetboek" define the consumer as a physical person who does not act as a business.

- **Spain:** The Spanish Unfair Competition Law does not include a definition of the consumer. It simply applies: "to all who participate in trade." A definition of consumers can be found in the General Consumer Protection Law, which defines consumers as individuals (or indeed companies) who is/are the ultimate buyer(s) or user(s) of personal or real property, products, services or activities, regardless of whether the seller, supplier or producer is a public or private entity, acting alone or collectively. The Spanish Supreme Court recently stated that the notion of consumer in the Unfair Competition Law does not identify by definition the "average consumer." It can also refer to the professional retailers dealing with the category of the products concerned.⁹

⁷ Cass. Crim., 12 février 1990, JCP G 1990, II, 21582, note P. Conte; Cass. Crim., 19 déc. 1989, pourvoi n° 887.666.

⁸ Section 13 Civil Code defines a consumer as: "Jede natürliche Person, die ein Rechtsgeschäft zu einem Zweck abschließt, der weder ihrer gewerblichen, noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden kann".

⁹ Decision of 6 October 2004 (RJ 2004/5988).

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2 - **SWITZERLAND:** IN SWITZERLAND, ARTICLE 10 LCD ALLOWS "CLIENTS" TO BRING AN ACTION. "CLIENTS" IS DEFINED AS INCLUDING THE CLIENTS OF THE INFRINGING AS WELL AS THE TARGETED COMPETITOR AS WELL AS POTENTIAL OR FUTURE CLIENTS. PROFESSIONALS ARE ALSO CONSIDERED AS CLIENTS.

- **United Kingdom:** In the United Kingdom, statutory law is, in some cases, restricted to consumers. Section 20(6) of Consumer Protection Act 1987 and section 3(1) of the Unfair Terms in Consumer Contracts Regulations 1999 exclude those who are consuming for the purposes of business. Consequently, these laws are restricted to protecting consumers alone.

3 *THE CONTROL OF MISLEADING ADVERTISEMENTS REGULATIONS 1988, WHILST SEEMING TO BE DIRECTED TO BUSINESS ADVERTISEMENTS, DOES NOT LIMIT THE CLASS OF PEOPLE WHO CAN MAKE COMPLAINTS TO THE RELEVANT AGENCY (OFT). ADDITIONALLY, THE TRADE DESCRIPTIONS ACT WOULD ALSO SEEM TO APPLY TO THOSE WHO ARE RECEIVING TRADE AS PART OF A BUSINESS.*

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5 III. NON-ECONOMIC ASPECTS

5.1.1 Q.III.1 TO WHAT EXTENT DO OTHER THAN ECONOMIC ASPECTS (E.G. THE SOCIAL RESPONSIBILITY OF MARKETING, THE PROTECTION OF CHILD, AGAINST DISCRIMINATION, RELIGIOUS FEELINGS, THE RIGHT OF PRIVACY, ETC.) PLAY A ROLE IN UNFAIR COMPETITION LAW AND CAN THESE ASPECTS LEAD TO THE PROHIBITION OF A COMMERCIAL BEHAVIOUR THAT DOES NOT HARM THE ECONOMIC INTERESTS OF ENTERPRISES OR CONSUMERS?

In the answers given to Q.III.1, one can differentiate between three situations.

- There are only a few countries where non-economic aspects seem to play no role at all (UK, Switzerland).

- In most countries, the law against unfair competition directly or indirectly also takes into account the non-economic interests of market participants, especially consumers. This is predominantly the case in those countries where a general indicating ethical aspects ("bones mores" etc.) is at the core of unfair competition law (Sweden, Czech Republic, Brazil). However, even if the focus is more on the functioning of competition, at least some legislators have expressly prohibited commercial practices that, for instance, exploit a consumer's gullibility or harass consumers or other market participants, e.g. through cold calling, spams etc. (Germany). In addition, several Advertising Laws etc. that supplement unfair competition laws (also) regulate public policy issues (e.g. in Spain the offence of personal dignity).

- In addition to this, many countries consider the violation of specific laws on public policy issues (health or safety issues, protection of children or privacy) as unfair competition at the same time. The benchmark for the so-called "breach of the law"-doctrine is, however, different in the countries examined. Only in Belgium, any violation of any other law is seen as unfair competition per se; in most other countries, additional requirements must be met (e.g., in Germany, the violated law must concern market behaviour).

In **Belgium**, other than strictly economic aspects can be considered as “unfair” if they amount to dishonest commercial practices. Furthermore, the violation of any other law, independent of its purpose, is considered as a violation of the Market Practices Act (1991).

In **Brazil**, non-economic aspects like the exploitation of children, sexual or age discrimination, violation of the right to privacy, the refusal to collect taxes or counterfeiting are relevant in determining the unfairness of a commercial practice, since they bring to the company dishonest competitive advantages.

In the **Czech Republic**, non-economic aspects are covered by the general clause of Section 44 (1) of the Commercial Code (“bones mores”) as well as by the Advertising Act.¹⁰

In **France**, the regulation in the Code de la Consommation in principle protects only the economic interests of consumers. However, equitable considerations can be taken into account in their application and Art. L-2 (?) expressly forbids the abuse of consumer weakness or ignorance even if there has been no effective damage to the economic interests of the consumer (Cour de Cassation).¹¹ As regards the so-called ‘*concurrency déloyale*’; in principle the economic interests of an undertaking must be impaired (although recent decisions handle the requirement of commercial damage quite liberally^{12 13 14 15 16}).

In **Germany**, the new Unfair Competition Act from 2004 (UWG 2004) restricts the public interest to “undistorted competition.”

Whether the violation of public policy issues can lead to unfair competition under the general clause, is doubtful. However, § 7

UWG expressly forbids commercial harassment (e.g. cold calling, spam) even if it does not affect the decision-making.

Furthermore, § 4 No. 3 UWG forbids the abuse of the inexperience of children etc.

Regular **Italian** Unfair Competition Law rules apply only to the conflicts between entrepreneurs and, according to some older case law and a part of the more traditional authors, to direct competitors. Still, some of the non-economic aspects cited as examples may be taken into account if they fall within the general provision of Article 2598 (3) CC. (Legislative decree 74/1992 also protects public policy issues in advertising, for instance....)

The **Netherlands**: non-economic aspects can play a role in unfair competition cases. In a civil proceeding against the advertiser, consumers can invoke a (negative) recommendation of the Dutch Advertising Standards Committee (“Reclame Code Commissie”, RCC) with respect to the advertisement in question.¹⁷ This refers not only to economic aspects but also to non-economic aspects such as religion and moral intentions.

The **Spanish** Unfair Competition Law prohibits statements that impair the credit of a market participant in particular where such statements relate to the nationality, the beliefs or ideology, the private life or any other strictly personal circumstances. In addition, Article 3 of the General Advertising Law prohibits “*Advertising which offends personal dignity or which violates those values and rights which are recognized by the Spanish Constitution, specially in so far as children, youth and women, are concerned.*”

In **Sweden**, the assessment of “fairness” is primarily of an ethical character. In addition, the Market Practices Act is interpreted with a view, among others, to ICC codes on marketing practices and advertising, other non-legal rules adopted by industry and other generally accepted norms to the protection of consumers.

¹⁰ It is decisive whether an unfair commercial practice limits or affects the positive effects of competition. Henning-Bodewig, *Unfair Competition Law*, Kluwer Law International, The Hague 2006.

¹¹ Cass. crim., 12 janvier 2000, n° 99-81.057, Rev. lamy dr., aff. 2000, n° 26, n° 1630, obs. P. Storrer.

¹² TGI Paris, 2 mai 1968, JCP éd. G 1969, IV, p. 53.

¹³ Lyon, 27 juillet 1936, DH 1938, som. p. 3.

¹⁴ Cass. 2^{ème} civ., 19 juin 1996, n° 94-20.515, Bull. civ. II, n° 153, p. 93, D. Aff. 1996, p. 1056.

¹⁵ Versailles, 15 février 2001, PIBD 2001, III, p. 516 ; Cass. com., 6 janvier 1987, D. 1988, somm. P. 211, obs. Y.

Serra ; Cass. com., 8 juillet 1997, Jurisdata n° 1997-003643.

¹⁶ Paris, 15 décembre 1994, France Télécom c. Girard, D. 1996, 489

¹⁷ The text of the Advertising Code can be found at: <http://www.reclamecode.nl/index2.html>

The **Swiss** *Loi fédérale contre la concurrence déloyale* of 19 December 1986 aims at protecting economic competition. The general clause of Article 2 LCD requires that an act of unfair competition has a real effect upon the relationship of market participants towards each other.^{18 19}

In the **United Kingdom**, non-economic aspects play very little role in connection with passing off law unless they are related to the circumstances of the misrepresentation.

5.1.1.1 IV. Procedures

Q.IV.1. Are there different sanctions provided in the rules to combat unfair competition depending on whether the unfair practice affects primarily consumers or enterprises?

Q.IV.2. Are there, in particular, different proceedings or authorities for the application of rules against unfair commercial practices affecting consumers?

Q.IV.3. Is it possible for enterprises to file an action against a competitor based on the violation of specific rules for the protection of consumers; for instance rules that require information to consumers?

The answers to Q.IV.1. and Q.IV.2. show that a difference must be made between the question of sanctions (in particular if they are civil, criminal or self-regulatory) and the question of who may bring an action.

All countries know civil sanctions. In most cases, these are damages, injunctions, rectification, and declaratory judgements. Criminal sanctions play an important role in France to protect consumers, and in Brazil, Germany, and Switzerland for severe breaches. Self-regulatory bodies play a role in The Netherlands and in Spain. France knows a special commission on abusive clauses, which examines model contracts. Naturally, civil actions are brought before civil courts and the public prosecution authorities enforce criminal laws. In the United Kingdom, the Office of Fair Trading enforces by the local trading standards authorities and consumer protection.

(Affected) Competitors may bring a civil action in all countries. Individual consumers may bring a civil action in Belgium, in Brazil, in the Czech Republic, in The Netherlands, in Spain and in Switzerland. In France, consumers may join the criminal prosecution as a “partie civile” to ask for damages. Consumers may not bring an action in under the German UWG and in Italy they may bring an action for a cease and desist order or rectification in case of misleading and comparative advertising. In some countries, consumer associations and business associations may bring civil actions for injunctions or rectifications.

In most countries, an enterprise may bring an action for the violation of provisions that protect consumers, when it is itself affected.

¹⁸ ATF 126 III 198, consid. 2c/aa et les références.

¹⁹ Recently the Federal Tribunal (High Court) has reconfirmed that article 1 LCD guarantees to market participants undistorted and pure competition. The LCD therefore does only deal with competition on an economic level between persons who offer their economic achievements. ATF du 15.12.2005, 4C.295/2005, consid. 3.1.

The reporters of Belgium and the **Netherlands** chose to provide a joint response to these three questions. The other reporters provided separate answers to the individual questions.

The **Belgian** cessation action takes the same form in all three cases and takes place before the same tribunal. An enterprise may file an action against a competitor who neglects his duty to provide information to consumers. However, he needs to prove his interest or damage to his own activities.

In the **Netherlands**, anyone may claim damages under the general tort provision (Article 6:162 BW). In addition, consumers may bring an action under contract law for dissolution, for annulment of (sales) contract, for damages or for substitution. Additional protection against unreasonably onerous general conditions in sales contracts is provided by Article 6:236 BW (a 'black list' of terms) and by Article 6:237 BW (a 'grey list' of terms). Consumer associations may file for annulment of such provisions. Remedies obtained in such an individual civil procedure do only relate to specific cases, are lengthy and costly.

Besides individual action, the Dutch BW contains a provision for collective action. Article 3:305a BW allows a foundation or association to bring an action for a declaratory judgement or for an injunction. Collective actions have a subsidiary character.

In addition, claims can be brought before self-regulation bodies. The Advertising Standards Committee (RCC), which handles complaints against advertisements that conflict with the Dutch Advertising Code (NRC), can recommend that the advertiser should stop using the advertisement in question. The currently 33 dispute committees for consumer affairs affiliated to the institution "Stichting Geschillencommissies voor Consumentenzaken" (SGC) have jurisdiction in disputes relating to e.g. travelling, furnishing, textile cleaning, energy, telecommunication, banking, home shopping etc. Consumers can bring claims before them at relatively low cost.

Public enforcement is currently carried out by a number of sector specific regulatory authorities. As from January 1st, 2007, a newly set up Dutch Consumer Authority ("ConsumentenAutoriteit") will start to operate. It will, in a complementary manner, protect *collective* interests of consumers rather than handle individual claims. Its tasks and powers will be laid down in the new Dutch Act on Enforcement of Consumer Protection ("Wet handhaving consumentenbescherming"), which is yet to be adopted.

5.1.2 Q.IV.1. ARE THERE DIFFERENT SANCTIONS PROVIDED IN THE RULES TO COMBAT UNFAIR COMPETITION DEPENDING ON WHETHER THE UNFAIR PRACTICE AFFECTS PRIMARILY CONSUMERS OR ENTERPRISES?
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Brazilian law knows different sanctions to those unfair activities that affect consumers. In the case of competitors, an action can be based on the general clause of the law on torts (Illicit Acts), which obliges any trader to compensate another one who by his fault causes damages by means of infringement of the loyal competition. The remedies are contained in Articles 186, 187 and 927 to 954 CC and cover the possibility to obtain damages and re-establish the violated "status quo" through an injunction.

Brazilian criminal law (Article 195 of Law 9,279/96) penalizes some unfair practices that may deeply damage the "fair practice in the course of trade," or that interfere with the free competition and the notoriety of companies.

The interests of consumers are safeguarded through actions based on civil law, through administrative law and through criminal law.

Consumers can lodge a civil action for indemnity for losses and damages, which shall occur without prejudice to the payment of a fine or any of the administrative penalties.

Czech law knows the same sanctions for actions brought by competitors and by consumers.

In **France**, the kind of sanctions depends to a large part on the unfair practice at stake. In principle, the interests of consumers are protected through criminal sanctions and of the interests of competitors are protected through civil actions.

The French Consumer Act foresees in criminal sanctions except in cases of abusive clauses or sales. The Consumer Act knows minor and major 'crimes' (felonies and misdemeanours), which are prosecuted before the *Tribunal de police* and the *Tribunal correctionnel* and are sanctioned with fines and imprisonment. Acts affecting the general interest of consumers are equally penalized.

Competitors can bring civil actions for damages and injunctions against unfair practices and practices that restrict competition.

In the case of illegal and misleading advertising, the victim may ask criminal sanctions to be placed on the advertiser. In fact, misleading and comparative advertising and other misleading practices are primarily subject to criminal sanction.

Under the **German** UWG 2004, individual competitors may bring actions as may business associations and in particular the "Wettbewerbszentrale." In contrast, the protection of consumers' interests is entrusted solely to consumer associations. Individual consumers may bring an action under regular civil law.

The UWG 2004 knows the sanctions of removal, injunctions, damages and confiscation of profit. A competitor can bring a claim for removal or for an injunction, which is foreseen under section 3 and Section 4 UWG, by a professional association or, by a consumer association. Damages can be claimed solely by the competitor and only for the damage he personally suffered (Section 9 UWG). A person who may bring a claim for an injunction can claim confiscation of profit.

In **Italy**, no special sanctions are provided for unfair behaviour that affects consumers under the Codice Civile. Under the Legislativ Decree No. 74/1992 on misleading and comparative advertising the *Autorita Garante della Concorrenza e de Mercato* may issue final cease and desist orders and orders for rectification.

In **Spain**, unfair practices, which constitute violations of the Spanish General Consumer Law (or the Spanish General Advertising and Competition laws) may give rise to administrative sanctions and fines as well as to civil liabilities. By contrast, violations of the Unfair Competition Law will only give rise to civil liabilities. In both cases, proceedings for determination of the civil liabilities under the above laws will be essentially the same. Spanish law also knows criminal sanctions relating to unfair practices.

In **Switzerland**, unfair competition is protected first by civil sanctions and second by criminal sanction; administrative sanctions are marginally applied. Constitutionally unfair competition and consumer protection belongs to the federal domain; the organisation of the judiciary, the procedure and administration of justice in civil matters belongs to the domain of the Cantons; and the organisation of the judiciary and administration of justice and the execution of sanctions in criminal matters belongs to the domain of the Cantons.

The civil remedies for competitors of Article 9 LCD are injunctions, a declaratory judgement, (public) rectification, damages, and reparation of immaterial damage and confiscation of profit. Consumers can claim them in the same manner if their economic interests are harmed (Article 10 LCD). Article 10 (2) LCD states that professional associations, by consumer associations and, under some conditions, can claim injunctions, declaratory judgements, and rectifications by the federal government.

Article 23 foresees in criminal sanctions for intentional breaches of Articles 3 to 6 LCD and 24 LCD foresees in criminal sanctions for breach of the obligation to indicate prices to consumers. Some breaches can only be prosecuted based on a complaint.

In the **United Kingdom**, there is, for example, potential criminal liability under the Trade Descriptions Act and the Consumer Credit Act but these are primarily examples of UK consumer protection law rather than unfair competition law. There are no criminal sanctions associated with the law of passing off unless the defendant breaches an injunction in which case they would potentially be liable for contempt of court.

Q.IV.2. Are there, in particular, different proceedings or authorities for the application of rules against unfair commercial practices affecting consumers?

In **Brazil**, there are different proceedings when unfair competition violates the consumer rights. The injured party in a traditional unfair competition should initiate legal proceedings in a civil court based on the general rules of the Civil Procedural Code (CPC). Law 8,078/90 provides two types of action available to consumers. These are individual actions and class actions for the protection of homogeneous individual interests. Class actions can be brought by the Attorney General's Office, the Federal Government, the States, Municipalities and the Federal District, governmental entities and agencies and associations that have been legally constituted for at least one year and whose statutes cover the defence of the interests and rights protected by the Consumer Code.

Section 54 (2) of the **Czech** Trade Act stipulates that the burden of proof is reversed in the favour of consumers in cases of injunctions and actions for removal. The burden of proof for other claimants is not reversed.

In addition to his answer to Q.IV.1 above the **French** reporter remarks that he sees a grave risk that unfair practices at the detriment of consumers would rarely be brought before civil courts by consumers themselves. Therefore, he deems prosecuted criminal sanctions necessary. In contrast, unfair practices against competitors have been decriminalised. Some grave practices are criminalised under the Trade Act and are tried before the Tribunal correctionnel. Victims can become a "partie civile" in such cases.

There is also a French special commission on abusive clauses set up by Article 132 (2) Of the Consumer Code. This commission examines model contracts and recommends striking out or amending provisions, which have as object or effect the creation of a serious imbalance in rights and obligation of consumers and non-professional parties.

In **Germany**, the proceedings for consumers and competitors are identical. No central authority is supervising the application of the UWG. The enforcement, including the confiscation of profit, is sanctioned by civil law. Still, the UWG knows some criminal sanctions in some cases of misleading and theft of know how (trade secrets), which are prosecuted by the public prosecutor.

In **Italy**, a direct protection of consumers against unfair competitive behaviour is only provided under Article 7 of Decree No. 74/1994 against misleading and comparative advertising. These proceedings take place before the *Autorita Garante della Concorrenza e de Mercato*.

Spanish Unfair Competition Law (UCL) provides for a wider scope of protection against unfair competitive practices than the General Advertising Law, the General Consumer Protection Law, or the Spanish Competition Law.

Remedies under the Unfair Competition Law include a declaratory judgement, injunctions, restitution, rectification, damages, and an action against unjust enrichment. Both consumers and competitors may bring an action under the UCL.

Both consumers and competitors may bring an action for an injunction or for rectification under the General Advertising Law; consumers may bring an action for damages under the General Consumer Protection Law; and "affected" parties may bring an action for damages under the Spanish Competition Law. The relevant authorities may impose additional administrative sanctions.

In addition, consumers and competitors may take recourse to the "Jurado de Autocontrol", a self-regulatory body for disputes concerning advertising.

In **Switzerland**, there is no difference in actions against commercial practices for consumers or for competitors.

A 1981 amendment to the federal constitution established a simple and fast procedure for claims between consumers and retailers if the litigation value (Streitwert) does not surpass a certain threshold. The LCD expanded this procedure to unfair competition. Since April 1st 2003 the threshold is CHF 20,000, -. If the litigation value is higher, the general procedural rules do apply. Whether consumer protection or unfair competition is at stake, the relevant court is decided according to the litigation value.

In the **United Kingdom**, consumer protection legislation such as the Trade Descriptions Act is enforced by the local trading standards authorities, which are part of UK local government. Additionally the Office of Fair Trading has some responsibilities for enforcement.

5.1.3 Q.IV.3. IS IT POSSIBLE FOR ENTERPRISES TO FILE AN ACTION AGAINST A COMPETITOR BASED ON THE VIOLATION OF SPECIFIC RULES FOR THE PROTECTION OF CONSUMERS; FOR INSTANCE RULES THAT REQUIRE INFORMATION TO CONSUMERS?

In **Brazil**, an enterprise can only file an action against a competitor based on the violation of consumers' rules if the enterprise itself suffers the damage of such practices. This damage can be depicted if the enterprise acts as a consumer. I.e. it suffers commercial losses for the unfair act of its competitor directed to his company.

In **France**, Article 2 of the Criminal Procedure Code specifies that everyone who suffered personal damage may bring a civil action for damages. The new CPC extends this right to parties with an "intérêt légitime" or an "intérêt déterminé". The party who brings the action must show a personal and direct damage to his material or non-material interests. Consequently, enterprises cannot bring an action on the basis that provisions to protect consumers have been violated, if their own interests are unharmed. In this context, it has been decided that in case of a violation of the prohibition on prize games under the Consumer Code, an enterprise can bring an action for unfair competition for the damage it suffered by the conduct of his competitor.²⁰

Article 411 (11) of the (Code du travail) Labour Code states that professional association may bring an action if the unfair practice harms directly or indirectly the collective interests of the "profession" they represent. This interest must differ from the interest that a consumer would hold. The *Cour de cassation* has declared inadmissible an action of a professional association for violation of a provision that was meant exclusively to defend consumers.²¹ However, a commercial practice that violates provisions to protect consumers may cause simultaneous prejudice to the interests of the profession. This might be the case where an enterprise violates provisions to indicate prices to consumers. For example, an association of perfume retailers brought an action as *partie civile* in a case against a perfume retailer who violated a provision to indicate prices. The court held that the enterprise had altered the images of the concerned trademarks and that its conduct had harmed the collective interests of the perfume industry.²²

In **Germany**, competitors or professional associations are free to enter claims for violation of provisions that protect consumers. For example, Section 4 UWG prohibits connecting prize games to the sale of products only if consumers are affected. A competitor may nevertheless bring an action for an injunction, removal, or damages for the violation of this provision.

In **Italy**, the violation of civil or administrative law provisions, which seek to protect consumers, may be invoked as a ground to act against a competitor. This is important in cases of misleading and comparative advertising (Decree No. 74/1992), where the communication with consumers is affected.

In **Spain**, enterprises may only bring an action if their economic interests are directly prejudiced or threatened and if the competitor's practice falls under the scope of one of the statutory definitions of unfair commercial practices of the Unfair Competition Law, the General Advertising Law, etc.

Under **Swedish** law, an undertaking may enter a claim as long as it can demonstrate that it is affected by the alleged violation²³.

The **Swiss** LCD protects competitors as well as the collective interests of consumers. The Tribunal federal has held in a comparative advertising case that the provisions restricting this practice are in

²⁰ Cass. com., 11 mars 2003, n° 00-12.124, Bull. civ. IV, n° 45, p. 53.

²¹ Cass. crim., 22 novembre 1962, Bull. crim. 1962, n° 338.

²² Cass. crim., 24 avril 1997, Bull. crim. 1997, n° 146, p. 488.

²³ SMPA Section 38.

the first place meant to protect the consumer and the transparency of prices²⁴. However, an action brought by an enterprise to enforce the rules of competition against a competitor is considered to be indirectly in the general interest of consumers²⁵.

Furthermore the question whether an enterprise may bring an action based on the violation of a provision to protect consumers, depends on whether it can bring a civil action (Articles 9 and 10 LCD) or a criminal complaint (Articles 23 and 24 LCD).

An enterprise may bring a civil action against an act of unfair competition if it suffered damage to its customers to its reputation or to its economic interests. Equally, a consumer may bring a civil action where its economic interests are affected. The nature of the unfair practice plays no role.

A competitor may thus bring an action where his customers are misled about prices²⁶ or where they are impeded in their freedom to take economic decisions by aggressive practices²⁷.

A criminal complaint can be brought for violations of Articles 2 to 6 LCD under the same conditions as a civil action.

In sum, a competitor must establish that an act of unfair competition affects his economic interests.

In the **United Kingdom**, this is generally not possible. The prosecuting state authorities must generally take enforcement action. In respect of registered trademark infringement, however, it is possible for a proprietor of a registered trademark to make a private criminal prosecution against an infringer.

6 V. OPINIONS

6.1.1 Q.V. 1. SHOULD THERE A PRIORI BE DIFFERENT LEGAL RULES FOR FAIRNESS IN MARKET BEHAVIOUR BASED ON THE FACT THAT A COMMERCIAL PRACTICE PRIMARILY INFLUENCES THE CONSUMER'S DECISION MAKING (AND ONLY INDIRECTLY THE ECONOMIC INTEREST OF ENTERPRISES)? OR SHOULD THERE BE A UNIFORM STANDARD FOR (UN)FAIRNESS, FOCUSING ON THE BEHAVIOUR AS SUCH (BUT TAKING INTO ACCOUNT ALL CIRCUMSTANCES, E.G. THE TARGET GROUP OF THE ACT)?

All reporters, except those of the United Kingdom, concur in stating that there should be a uniform standard for fairness focussing on the behaviour as such. The reporters of the United Kingdom think that a standard based on intra-business ethics would provide adequate protection to consumers and that some practices that harm businesses are neutral to consumers.

Some reporters stress the need for specific protection to be accorded to consumers. On the one hand, they point out that consumers are often in a vulnerable position; on the other hand, they state that in particular regular civil damages are not an efficient remedy for consumers due to high costs and long durations of procedures. The French reporters therefore stress the

²⁴ Selon l'art. 3 let. e LCD, agit de façon déloyale celui qui compare, de façon inexacte, fallacieuse, inutilement blessante ou parasitaire sa personne, ses marchandises, ses œuvres, ses prestations ou ses prix avec celles ou ceux d'un concurrent ou qui, par de telles comparaisons, avantage des tiers par rapport à leurs concurrents.

²⁵ ATF 129 III 426 consid. 2.2.

²⁶ Art. 3 let. g LCD.

²⁷ Art. 3 let. h LCD.

need for criminal sanctions to protect consumers' interests whereas the Swiss reporters seem to favour the establishment of a cheap and easily accessible self-regulatory mechanism.

The German reporter pointed out that Unfair Commercial Practices Directive unnecessarily complicates the system. By applying only to B2C relations, it seems to hinder the establishment of a uniform standard for fairness.

In **Belgium**, both aspects of protection are combined in one law. Therefore the Belgian reporter is of the opinion that unified legislation with a double objective would be sufficient and satisfactory.

The **Brazilian** reporters are of the opinion that, whether a commercial practice affects the consumer or not, there should not be any different legal rules for fairness in market behaviour. Nor should there be a uniform rule of disloyalty. Instead, they recommend the adoption of a uniform standard for unfairness focusing on the behaviour as such but taking into account all circumstances. Such a standard would serve for a fair balance by keeping the possibilities for defining commercial behaviours as unfair competition with clear disadvantages to competitors and consumers.

French law distinguishes between unfair commercial practices that affect consumers and those that affect enterprises. The reason for this is that the type of commercial practices differs. In the case of consumers, enterprises usually try to profit from abusing consumers' vulnerability. The Consumer Code specifically limits these excesses in unfair practices and foresees in strong protection of vulnerable consumers.

The French reporter deems criminal sanctions necessary to protect consumers efficiently. In contrast, he deems criminal sanctions unjustified in case of unfair commercial practices against competitors. In his opinion, these practices often represent more of a strategic choice than being based on fraudulent intent. However, he sees the limits of this approach where unfair practices affect both competitors and consumers alike. In this respect the reporter remarks that acts of unfair competition of enterprises, such as the confusion of product, or the disturbance of the market by e.g. behaviour that affects retail prices, may harm the interests of consumers. In these cases, he has no right to bring an action.

Increasingly, the general clauses of French civil law are used to approximate the rules of French consumer law and unfair competition law. These are concepts such as of abuse of economic dependency or the good faith principle that apply to all contracting parties regardless of their status. It seems therefore that French law is moving towards a unified concept of unfairness, which is applicable to specific practices.

Under **German** law, the focus is on the unfair conduct as such. Division in separate areas of protection is not favoured. The idea at the basis of German law is that interests of consumers and competitors cannot be separated. They are rather seen as two sides of the same coin. In addition, it is supposed that market conduct cannot be strictly divided in B2B and B2C relations. It may be often unclear whether advertisements for e.g. cars or computers are aiming at businesses or at consumers. Consequently, it is deemed in the interest of businesses that a uniform standard is set.

This approach does not exclude room for provisions that protect the interest of a certain group, e.g. the *Endverbraucher* in cases of cold calling. In addition, practices may be judged differently according to whom they are affecting. In all cases, the fairness of the conduct as such remains at the heart of the assessment.

The German reporter sees this German approach to be in line with the approach of EU legislation up until now, e.g. under the Comparative and Misleading Advertising Directive or the E-Commerce Directive, which do not distinguish between B2B and B2C relations. The Unfair Commercial Practices Directive is seen as complicating the system unnecessarily.

In the opinion of the **Italian** reporter, a uniform standard focussing on the behaviour as such seems to be more in line with the function of unfair competition rules. They are mainly intended to regulate the behaviour of entrepreneurs and they only indirectly mean to protect the interest of consumers. In the Italian system, consumers are the objects of different systems of protection, based on individual actions.

In addition, the Italian reporter stresses that unfair competition rules may be applied only when a competitive relationship exists. He deems it hard to imagine that such a relationship between undertakings and consumers who are unlikely to invoke the enforcement of said rules, which are primarily provided to regulate the competition between entrepreneurs.

The group of **the Netherlands** answers questions V.1 and V.2 jointly. They believe that the law of unfair competition should provide consumers with rules that provide for additional protection based on their weak position on the market place. Nonetheless, they feel that both the rules on unfair competition that protect the interests of consumers and the rules that protect the interests of businesses, should be regulated under one "umbrella" as to prevent these fields of law from drifting apart. The main principle: "unfair competition is not allowed," should be applicable to all sorts of interests (interests of consumers and enterprises). In addition to the main principle, specific rules that provide the consumers with additional protection may be drafted.

The Dutch group also thinks that a uniform standard of unfairness should focus on the behaviour, but at the same time in its assessment take into account all circumstances, e.g. the target group of the act.

The general principle should cover interests of all market participants, but certain specific rules that prohibit specific unfair trading practices may be geared towards protecting a single interest (e.g. the economic interest of consumer).

The **Spanish** reporter is of the opinion that there should not be different legal rules for fairness in market behaviour because a commercial practice mainly influences the consumer's decision making but if it influences only indirectly the economic interest of enterprises. In his opinion, there should be a uniform standard for fairness/unfairness focusing on the behaviour as such.

The **Czech** reporter favours a uniform standard, but thinks that "taking all circumstances into account" is less favourable.

The **Swedish** reporter expresses the opinion that there should be a uniform standard. He thinks that generally it could be assumed that the consumer and the commercial interests would coincide when determining the ethical standards for commercials and other advertisement.

The **Swiss** LCD and its functional approach seem to complicate the adoption of separate provisions for consumers and competitors. The Swiss reporter quotes Prof. Dessemontet who gave a description of the weaknesses of Swiss consumer protection. He stated that Swiss law lags behind EU legislation for consumer protection; that under Swiss law individual actions by consumers are virtually inexistent; that the actions by consumer organisations can be counted on the fingers of one hand; and that the Swiss federal government, who may bring an action since 1982, has only brought one action so far, that has been rejected.

The reporters of the **United Kingdom** think that it is unlikely that a consumer law that is based primarily on the rules of intra-business ethics would provide adequate protection to consumers. It is important to note that, in some cases, business-to-business conduct that is neutral from the perspective of the consumer is nevertheless 'unfair'. An example is where one business misappropriates the trade secrets of another – for example its customer databases. In their view, adopting a uniform standard for unfairness would not be able to simultaneously provide adequate protection to consumers and enforce appropriate business ethics.

6.1.2 Q.V.2. SHOULD THE RULES CONCERNING UNFAIR COMMERCIAL PRACTICES BE SEEN PRIMARILY FROM A CONSUMER'S POINT OF VIEW OR SHOULD THEY EQUALLY TAKE INTO ACCOUNT THE INTERESTS OF ALL OTHER MARKET PARTICIPANTS? SHOULD REGULATIONS ON AN INTERNATIONAL OR EUROPEAN LEVEL AIM AT A COMPREHENSIVE, COHERENT REGULATION OF UNFAIR COMMERCIAL PRACTICES IN THE INTEREST OF ALL MARKET PARTICIPANTS?

The reporters of Belgium, Brazil, the Czech Republic, Germany, the Netherlands, Sweden and Spain favour that the interests of all market participants are taken into account. The reporters of France and Italy see a qualitative difference in unfair commercial practices, which affect consumers and those, which affect competitors. The reporters of the United Kingdom stress that the English law of "passing off" applies only to other market participants.

The Brazilian reporter suggests an exemplary list of unfair commercial practices to be drafted in the framework of the Paris Convention; the French reporter calls for further EU legislation especially because of the difficulty to sanction conduct with originates abroad; the Swiss reporter suggests changes to be made to Swiss law. The reporters of the United Kingdom feel that, given different understanding of business ethics, it is extremely difficult to establish a set of coherent rules.

In **Belgium**, the rules on unfair competition allow to consider three different interests. An interested party (but not a consumer organization or the representative of the government) may in addition to obtaining an injunction under a fast procedure, claim damages under EU law.

The **Brazilian** reporters expressed the opinion that the rules concerning unfair competition should take into account the interests of all market participants, including consumers since the loyalty and fairness affect companies, trade, free competition, and consumer rights. According to Article 170 of the Brazilian Federal Constitution, the protection of free trade and consumer rights are equally viewed as principles for the promotion of the economic order based on the social justice and human dignity. Furthermore, the Brazilian reporters were of the opinion that there should be a list regulating unfair competition in an International level regarding the interest of all market participants. This list would be considered as an improvement and/or update of Article 10^{bis} of Paris Convention. The proposed list should be exemplary and it should set guidelines. It should not attempt to cover all events of unfair competition. An exhaustive International regulation would not be effective, as it would be difficult to achieve an agreement on the practices considered unfair, considering the peculiarities of each country.

The **French** group thinks that one should take care in deciding whether unfair competition law should *a priori* protect consumers or all interested parties. All depends on the practice at stake. There is little homogeneity of those practices and they spring from different motivations. However, the group would favour approximation of the rules by focussing on the common interests of all market participants, whether it concerns consumers or businesses. The interests of both groups are often commonly affected, and consumers sometimes benefit by actions brought by competitors. Still under French law, only persons with a legitimate interest can bring an action.

Furthermore, the French points to the fact that the law has been already greatly harmonised at EU level and that the European Court of Justice eradicates the remaining differences. Difficulties remain with regard to extraterritoriality and in particular with regard to the imposition of criminal sanctions on extraterritorial actors. In the opinion of the French group, unified EU legislation would better secure the protection of consumers and businesses. Finally, the explosion of distance sales especially via the Internet calls for EU and international harmonisation. Therefore, the French group pleads for European harmonisation of unfair competition rules in the interests of all market participants.

German unfair competition law stresses that the interests of all market participants shall be taken into account. The interest of the public is reduced to the interest in undistorted competition.

The **Italian** reporter is of the opinion that consumer protection and regulation of unfair competition should be kept separate, since regulation of unfair competition should apply only to competing entities. He deems it doubtful that regulations against unfair competition, at the International or European level may represent the appropriate way to realise consumer protection.

The **Czech**, the **Swedish**, and **Spanish** reporters expressed the opinion that regulation concerning unfair commercial practices should take account of the interests of all market participants and that comprehensive and coherent regulation is desirable. The Czech reporter also pointed to the fact that under Czech law Directive 2005/29/EC needs to be transposed literally, which might cause problems.

The **Swiss** reporter points out that under Swiss law consumer protection is no priority. There are few actions brought by consumers, despite their right to bring action in case of economic damage as well as in case of threat (menace). Fear of high costs and long duration seem to be responsible. Actions by consumer associations are rare as well.

In the past years, various legislative proposals to improve the role of the consumer have been rejected or withdrawn. In December 2005, the proposal to amend the *Loi fédérale du 5 octobre 1990 sur l'information des consommatrices et des consommateurs* was rejected. It foresaw in the constant protection of consumers and in an extra-judicial mechanism to resolve consumer conflicts.²⁸ Proposed modifications of the Law on Unfair Competition as part of a project of federal law on electronic commerce, creating new cases of unfair competition in relation with on-line shopping, was withdrawn in November 2005 by the Swiss Federal Council, who estimated that an extension of the protection of the consumers was not justified at this stage.

The reporters of the **United Kingdom** stress that to the extent that unfair competition law exists as a variety of passing off law in England, it is focused almost exclusively upon the interests of other market participants. Over-regulation in this area is, they feel, also dangerous. While it is certainly the case that there appear to be considerable divergences between the member states of the EU in the area of business ethics (see, for example, the variations in the approach adopted to whether registration of a trade mark is made in "bad faith"), it would in their view be extremely difficult to provide a set of coherent rules that apply across all business sectors.

6.13 Q.V.3. SHOULD THE REMEDIES AGAINST UNFAIR COMMERCIAL PRACTICES BE BROUGHT IN LINE WITH THOSE OF THE DIRECTIVE 2004/48/EC ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (EUOJ L-157, 30 APRIL 2004, P. 45)?

In the words of the Dutch reporter Directive 2004/48/EC provides right holders with a far-reaching set of remedies, including *inter alia* seizure of offenders' bank accounts and other assets and profits to ensure payment of due damages, the recall of infringing goods at the offender's own expense, the choice for the right holder of either lump sum damages (up to double normal royalties or licence fees) or compensation for lost profits, payment of legal costs (and 'other expenses') by the offender where an infringement is established, the winding up of companies found guilty of the most serious infringements, the banning of machines used to produce counterfeit security features for goods covered by industrial property rights (e.g. trade marks), a power for the authorities to seize documentary evidence relating to the suspected infringement (as well as the suspect goods themselves) and a 'right of information' (an obligation for courts to provide information on the source of infringing goods).

Member States have the option "to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities."²⁹ They can therefore decide to make these special remedies available to plaintiffs who seek redress against unfair trading practices.

The French, Czech, Italian, Spanish, Swiss and the UK reporters seem to favour the remedies of Directive 2004/48/EC to be applied in case of unfair commercial practices. They point to the fact that applying these remedies would be very efficient. The

²⁸ Avant-projet de loi fédérale sur l'information et la protection des consommatrices et des consommateurs (LIPC) et rapport explicatif, du 16 mars 1994, par P. *Pichonnaz*, http://www.consommation.admin.ch/imperia/md/content/pressemitteilungen/begleitberichte/begleitberich_tfrpdf.pdf

²⁹ See the preamble of Directive 2004/48/EC, nr. 13.

Brazilian, French and UK reporters also point out that their national laws already encompass most of the remedies at stake. The Belgian and Dutch reporters stress that their national remedies are already sufficient and that they do not need to be altered.

Finally, the Dutch reporters stress that IP rights differ from unfair competition because they are "*monopolies meticulously created by the legislator*" that are exceptions to the rule of freedom of competition. They seem to warn that implementing severe remedies for reasons of efficiency alone may distort free competition.

According to the **Belgian** reporter, it is difficult to apply these rules to unfair competition. The standard rules of reparation seem to suffice.

In **Brazil**, the rules contained in Directive 2004/48/EC are already part of the Civil Code, the Industrial Rights Law, and the Consumer Code. According to the Brazilian reporters, the most important improvement of the unfair competition system would be the creation of specialized courts for dealing with intellectual property conflicts and those involving unfair competition.

The **French** group believes that the remedies contained in Directive 2004/48/EC are essential for effectively sanctioning unfair commercial practices. French Law already contains the same types of remedies. Victims of unfair commercial practices may claim:

- l'obtention, avant tout procès, de moyens de preuve, tels une expertise probatoire, à l'appui d'un éventuel procès sur les faits dont pourrait dépendre la solution du litige ;
- l'obtention en référé de mesures provisoires et conservatoires, et notamment la cessation des agissements déloyaux, ordonnées avant toute décision au fond et éventuellement assorties d'une astreinte ;
- la condamnation pénale de l'auteur de l'infraction à une amende et/ou à une peine d'emprisonnement ;
- l'octroi de dommages et intérêts civils ;
- la nullité des clauses ou contrats mettant en œuvre les pratiques commerciales déloyales ;
- une injonction au fond visant à interdire la poursuite des pratiques déloyales, éventuellement assortie d'une astreinte ;
- la publication du jugement, aux frais de l'auteur de l'infraction, dans la presse ;
- la condamnation de l'auteur de l'infraction au paiement des frais de justice exposés par la victime.

Some provisions of the **German** UWG protect efforts similar to intellectual property rights (Leistungsschutz). However, the German legislator is of the opinion that the remedies of the Directive should not apply to the UWG. Unfair competition law will therefore not be affected by the implementation of the Directive.

The **Italian** reporter states that in many cases unfair competitive behaviours extend their effects to intellectual property rights. Therefore, the enforcement of the Directive, as well as of the national provisions based on the same, may be invoked in unfair competition cases. He thinks that it would be extremely effective to bring remedies against mere unfair commercial practises in line with the provisions of the Directive, even when said practises do not involve violations of intellectual property rights.

In the **Netherlands**, a plaintiff who brings an action against unfair competition will have the standard remedies available for tortious liability under art. 6:162 BW. He can therefore file for an

injunction, if need be in conjunction with a daily default fine, he can claim damages³⁰, or he can ask for a declaratory judgement. In certain cases, specific remedies will be available like a rectification, compulsory publication of the judgement, the declaration of a new legal status, a product recall,³¹ or a claim for submission of exhibits. In addition, in the near future there will be the possibility of public enforcement by the Dutch Consumer Authority of provisions dealing with unfair commercial practices in cases where collective consumer interests are involved, as the Dutch group outlined in their answer to question IV.

Although the law of unfair competition shows many similarities with the various intellectual property laws, the Dutch reporters think these areas of law cannot be fully put on a par. Intellectual property rights, as absolute and exclusive rights, are monopolies meticulously created by the legislator. Each of these intellectual property rights serves its own functions that justify its exception to the general rule of freedom of trade. Different from intellectual property rights, unfair competition is not an absolute and exclusive right. The Dutch reporters think that this difference should be born in mind whilst discussing the desirability and possibility of bringing in line the remedies against uniform commercial practices with the remedies against infringements of intellectual property rights (Directive 2004/48/EC on the enforcement of intellectual property rights).

Furthermore, they think that the present remedies available under Dutch law (summed up above) will be generally sufficient to a plaintiff seeking redress against unfair commercial practices. However, they consider the extension of these remedies possibly useful especially to deter companies from committing unfair commercial practices. In that respect, some of the remedies provided in Directive 2004/48/EC may – in addition to the already existing national remedies – be effective means to combat unfair commercial practices.

The **Spanish** and **Czech** reporters feel, like the Dutch, that remedies against unfair commercial practices should be brought in line with those of Directive 2004/48/EC (enforcement of intellectual property rights).

The **Swedish** reporter thinks that violations of IP rights and violations of unfair competition rules should be tried before the same court, because they often coincide. Currently, this is not the case in Sweden. He deems harmonization of the remedies acceptable. However, IP violation should not be subject to administrative fines since IP rights protect a proprietary interest, which differs from to the broader general consumer interest.

The **Swiss** reporter generally welcomes bringing in line the remedies against unfair competition and against IP violations. With regard to damages, he points out that they are very difficult to calculate. Therefore, he pleads for easing the burden of proof comparable with the one for *dommages-intérêts forfaitaires*.

The implementation of the enforcement directive into **United Kingdom** law was achieved through a statutory instrument, which made relatively minor changes to UK procedure. Passing off and the English Civil Procedure Rules have given rise to the core remedies provided by the enforcement directive for many years. To the extent that passing off constitutes the English law against unfair commercial practices, the position in England is that this has already been aligned with the directive. As far as the general principle underlying this question is concerned, we feel that it is appropriate for the remedies to be brought into line with the enforcement directive

³⁰ The plaintiff can claim special damages or he can claim for the surrender of profits, cf. art. 6:104 BW which states: “If a person liable to another on the grounds of an unlawful act or a failure in the performance of an obligation has derived profit from that act or failure, the court may assess the damage, upon the demand of such other person, at the amount of such profit or a part thereof.”

³¹ See e.g. President District Court Breda 28 December 1990, IER 1991, no. 18, p. 43; President District Court Rotterdam 16 March 1995, KG 1995, 171. See also *Grosbeide, F.W.*, Product recall bij misleidende reclame, WPNR 1995, 6182, pp. 333-335.

Draft Resolution Question B

Consideration

1. The Ligue has undertaken detailed comparative research on the extent of which it appears that there are different approaches to ensure fairness in competition. The main difference seems to be the handling of consumer protection. While some countries favor an integrated approach, thus protecting consumers and competitors through the same rules and principles, others reserve protection against unfair competition to competitors and protect consumers through specific statutes.
2. While unfair competition law started out as a protection of honest businessmen against their competitors and only indirectly as a protection of consumers (Art. 10 bis PC), the focus now seems to shift to the protection of consumers with only indirect consideration of business (see f.i. the European Directive on unfair trade practices). Concern was expressed that this sole concentration on the consumer aspects of unfair competition law (as well as the sole concentration on competitor aspects) distorts the balance between the market participants which have a common interest in the well functioning of competition.

Resolution

1. The Ligue recommends that the term unfair competition law should not be interpreted narrowly, but encompass all rules to combat unfair commercial practices in question. However, to avoid terminological misunderstandings, the term competition should be replaced by commercial practices.
2. Although the interest of consumers and competitors are not always identical, it should be recognised that the rules against unfair commercial practices are never exclusively competitor's law nor consumers law but touches either directly or indirectly upon the interests of all market participants.
3. Although the assessment of unfairness should focus upon the commercial practice as such, the need for protection of certain parties in the market place may require special rules and standards. Application of these rules, however, should also take into account their impact on the interests of all market participants.
4. Although it may be necessary to tailor certain prohibitions in the way of absolute prohibitions or black lists, the courts should, in principle be free to take into consideration the specifics of the case as long as this is in accordance with the principle of legal security.
5. Although the law of unfair competition should focus on commercial practices capable of influencing the economic situation of market participants, non-economical aspects with regard to the unfairness of a commercial practice may be considered.
6. Although specific needs of market participants can warrant public enforcement, the rules of unfair competition should at least also be enforceable by private parties by means of civil law remedies.

Vorschlag einer Resolution Frage B

Präambel

1. Die von der LIGUE unternommene detaillierte rechtsvergleichende Studie hat gezeigt, dass es offensichtlich unterschiedliche Ansätze zur Gewährleistung der Lauterkeit (Fairness) im Wettbewerb gibt. Die Hauptunterschiede scheinen dabei die Einordnung des Verbraucherschutzes und die Frage der Rechtsdurchsetzung zu sein. Während einige Länder einen integrierten Ansatz bevorzugen und Verbraucher und Mitbewerber durch dieselben Regeln und Grundsätze schützen, behalten andere den zivilrechtlichen Schutz gegen unlauteren Wettbewerb den Mitbewerbern vor und schützen Verbraucher durch spezifische, häufig strafrechtlich oder verwaltungsrechtlich sanktionierte Gesetze.

2. Das Recht zur Bekämpfung des unlauteren Wettbewerbs hat sich aus dem Schutz des anständigen Gewerbetreibenden gegen seine Mitbewerber mit nur reflexartiger Berücksichtigung der Interessen der Verbraucher entwickelt (Art. 10 bis Pariser Verbandsübereinkunft). In letzter Zeit scheint der Fokus umgekehrt auf dem Schutz der Verbraucher mit nur reflexartiger Berücksichtigung der Interessen der Unternehmen zu liegen (siehe insbesondere die Richtlinie der EU über unlautere Geschäftspraktiken). Es wurde die Besorgnis geäußert, dass die ausschließliche Konzentrierung auf die Verbraucher Aspekte des Rechts des unlauteren Wettbewerbs (eben so wie die frühere ausschließliche Konzentrierung auf die den Mitbewerber betreffenden Aspekte), das Gleichgewicht zwischen den Marktteilnehmern – die ein gemeinsames Interesse am Funktionieren des Wettbewerbs haben - stört.

Resolution

1. Die LIGUE empfiehlt, den Begriff „unlauteren Wettbewerb“ nicht eng zu interpretieren, sondern so, dass er alle Regeln zur Bekämpfung unlauterer Geschäftspraktiken umfasst. Um terminologische Missverständnisse zu vermeiden, sollte der Ausdruck „Wettbewerb“ durch „Geschäftspraktiken“ ersetzt werden.
2. Obgleich die Interessen der Verbraucher und der Unternehmer nicht immer identisch sind, sollte Klarheit darüber bestehen, dass die Regeln zur Bekämpfung unlauterer Geschäftspraktiken niemals ausschließlich ein Recht des Unternehmers oder ein Recht des Verbrauchers sind, sondern direkt oder indirekt die Interessen aller Marktteilnehmer berühren.
3. Obgleich die Beurteilung der Unlauterkeit (Unfairness) an der geschäftlichen Praktik als solche ansetzen sollte, kann das Bedürfnis nach Schutz für bestimmte Marktteilnehmer spezielle Regeln und Standards rfordern. Die Anwendung dieser Regel sollte jedoch die Auswirkungen auf ie Interessen aller Marktteilnehmer berücksichtigen.
4. Obgleich es notwendig sein kann, gewisse Verbote im Wege von absoluten erboten oder schwarzen Listen zu regeln, sollten die Gerichte im rundsatz die Besonderheiten des spezifischen Falles berücksichtigen ürfen, sofern dies mit dem Grundsatz der Rechtsicherheit in Einklang steht.
5. Obgleich Schwerpunkt die Bekämpfung unlauterer Geschäftspraktiken, die die ökonomische Lage der Marktteilnehmer beeinflussen können, sein sollte, können auch nicht-ökonomische Aspekte die Unlauterkeit (Unfairness) einer geschäftlichen Praktik begründen.
6. Obgleich die besonderen Bedürfnisse bestimmter Marktteilnehmer eine staatliche Durchsetzung erfordern können, sollten die Regeln zur Bekämpfung unlauterer Geschäftspraktiken zumindest auch durch Private mittels zivilrechtlicher Maßnahmen durchgesetzt werden können.