Briefing paper on addressing unfair practices in business-to-business relations in the internal market

IMCO
Briefing Paper on
Addressing unfair commercial practices
in business-to-business relations in the
internal market

BRIEFING PAPER

Abstract
At EU level, there are no comprehensive rules with regard to business-to-business unfair commercial practices. This briefing paper examines the usefulness of the introduction of such type of legislation.
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LIST OF ABBREVIATIONS

**B2B** Business-to-Business

**B2C** Business-to-Consumer

**CJEU** Court of Justice of the European Union

**IP** Intellectual Property


**TFEU** Treaty on the Functioning of the European Union


**UWG** Gesetz gegen den Unlauteren Wettbewerb
EXECUTIVE SUMMARY

While competition law in the strict sense is not sufficient to ensure fair commercial practices in B2B relations, there is no strong case for harmonisation of this law at the EU level, in particular since there is no convincing evidence that disparities between the laws of the Member States in this field create (important) obstacles for the internal market.

In any case the utility of such harmonisation is very limited in view of the broad scope of Directive 2005/29/EC (the ‘UCPD’), leaving only a small margin for a specific regulation of B2B commercial practices at the EU level, the fact that the existing EU rules on B2C commercial practices can be invoked between businesses with regard to conduct they deploy vis-à-vis consumers and finally the existence of extensive protection under I.P.-rights, in particular trade mark law.

Additional rules on unfair competition or B2B unfair commercial practices at the EU level, even if they were possible, are not desirable, because they could lead to restrictions of competition that would conflict with the objectives of antitrust law and because they are likely to extend the protection of I.P. rights beyond the limits of that protection organised by specific statutes, thereby giving unmerited protection and stifling competition.

In view of the uncertainty that presently exists, it would be desirable to expressly extend the scope of application of the full harmonisation UCPD to all situations where a business addresses inter alia consumers, so as to harmonise all rules on commercial practices vis-à-vis consumers even where these rules have as their sole or primary object the protection of competitors.
1. SCOPE AND STRUCTURE OF THIS BRIEFING PAPER

This briefing paper addresses the following question: is European legislation on B2B unfair commercial practices desirable or is competition law in the strict sense more appropriate or sufficient to ensure fair commercial practices? The question is asked in the context of a Roundtable on “a more efficient and fair retail sector for business and consumers”. This briefing paper will therefore focus on unfair competition at the retail level. This being said, it would seem that the significance of unfair competition law for the other levels of the value chain is limited (probably to problems such as industrial espionage and the systematic poaching of staff, third complicity to breach of contract, or the use of unlawful state aid, problems largely dealt with by specific statutes).

The question is based on the correct assumption that there are no (comprehensive) rules with regard to B2B commercial practices at the EU level. Recital 8 of Directive 2005/29 reads:

“This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.”

The answer should be given by looking at what relevant rules exist at the EU level, including (as suggested in the question) the competition rules. Relevant rules at the EU level include first and foremost those of the Unfair Commercial Practices Directive (Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, hereinafter also: UCPD) and those of the Misleading and Comparative Advertising Directive (Directive 2006/114)(hereinafter also: MCAD).

In addressing the question, attention should also be paid to another important element of the legal environment, i.e. the protection of intellectual property, in particular trade mark law that is harmonised at the EU level by Directive 2008/95 (repealing Directive 89/104) (see also Regulation 40/94 on a Community Trade Mark).

The Court of Justice has recognised fairness in commercial transactions as a ground of justification for obstacles to free movement (of goods). However that case law does not really distinguish the protection of unfair competition from the protection of consumers and protection of intellectual property.
At the national level the following can be observed. A large number of Member States have a (long) tradition in protecting businesses against acts of unfair competition and other unfair commercial practices between businesses. Unfair competition law as it now stands deals with conduct of businesses vis-à-vis consumers (e.g. misleading or confusing the public) as well as conduct amongst businesses (such as industrial espionage and the systematic poaching of a competitor’s staff, or third complicity to breach of contract). In some Member States rules have been enacted more recently to protect traders against contractual practices of suppliers or clients on which they are dependent.

Unfair competition law has as its aim to protect businesses against unfair competition. Antitrust law (at the EU level Articles 101 and 102 TFEU) on the other hand aims at guaranteeing effective competition. These objectives may conflict. Article 3(3) of Regulation 1/2003, implementing Articles 101 and 102 TFEU, accepts the application of national laws that may lead to an opposite result as the competition rules, on condition that these laws predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU.

In the following note I will first give a short survey of the law of unfair competition and unfair commercial practices in the EU and its member states (without of course going into a real comparative analysis). I will then discuss the relationship of unfair competition with respectively antitrust law and intellectual property law. Next I will address the question of the necessity and possibility (legal basis) of EU legislation in the field of B2B commercial practices by looking i.a. at the case law of the ECJ on free movement of goods and unfair competition. I will conclude with my opinion.
2. THE LAW OF UNFAIR COMPETITION AND UNFAIR COMMERCIAL PRACTICES IN THE EU AND ITS MEMBER STATES - FROM 1958 TO 2011

2.1. The Law of Unfair Competition

The law of unfair competition finds its origin in the Paris Union Convention (1883) on the protection of industrial property, in Article 10bis inserted during the Washington Conference in 1900 as amended in The Hague on 1925. The members of the Paris Union committed to grant each other’s citizens protection against acts of unfair competition, defined as:

"Any act of competition contrary to honest business practices and industrial commercial matters" (in French: "Les actes contraires aux usages honnêtes en matière industrielle ou commerciale").

The Paris Union Convention also contains a list of acts of unfair competition: creating confusion, discrediting competitors and the making of misleading indications.

Germany was the first country to adopt legislation implementing the Paris Union Convention. A first Act on Unfair Competition ("Gesetz gegen den unlauteren Wettbewerb" or UWG) was adopted in 1896 and soon replaced by a more effective UWG in 1909. The 1909 UWG has been a model for several other countries (but has been replaced by a modern law in 2004, see here after). Germany’s example was followed in Austria, Belgium, Greece, Spain, Luxembourg and Poland. By contrast ‘unfair competition’ as such is unknown in England. The law of passing-off under English common law focuses on the consumer: if a consumer is misrepresented by a competitor’s representations or misconduct there is or may be actionable passing-off or injurious falsehood; if not there is likely to be a remedy only on the rare occasions on which one of the so called ‘economic torts’ can be invoked.

The protection against unfair competition was originally seen as an extension of the protection of industrial property, in order to protect also other elements of goodwill, that are not covered by an industrial property right. Later, the scope of unfair competition law has been progressively broadened. First, there was a shift to a more comprehensive protection of competitors against unfair competition beyond the protection of goodwill. Second, there was also a broadening of the protection objectives of the law of unfair competition. Already in the 1920s the German Reichsgericht recognised that the prohibition of unfair competition also aims at the protection of the general interest, in particular the interest of consumers. A similar evolution could be observed in for example Belgium. The first Belgian Act on Unfair Competition of 1934 only related to the protection of competitors against acts of unfair competition. The Trade Practices Act of 1971 integrated the protection of competitors against unfair competition in an Act which also contained provisions on the protection of consumers, against certain sales methods and advertising methods (in particular misleading advertising).

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Addressing unfair commercial practices in business-to-business relations in the internal market

The Act of 14 July 1991 on Trade Practices and Consumer Protection, which was based more or less on the same principles as the 1971 Act and took over most of its provisions, adding some new, introduced for the first time a general clause on consumer protection, prohibiting any act contrary against honest business practices that harms consumer interests. This provision has rarely been applied. The new Belgian Act of 6 April 2010 on Market Practices and Consumer Protection has implemented Article 5 of the UCPD, as far as consumer protection is concerned (general clause), but has on the other hand maintained the traditional provision on unfair competition (any act contrary to honest business practices that harms the professional interest of one or more competitors).

The old German law on unfair competition from 1909 (see now the UWG 2004 discussed hereinafter) was the prototype of a private law approach of the regulation of fairness of commercial practices: protection of private interests (in particular the “Mittelstand” or small shop keepers) and private law enforcement. Quite at the opposite of the German approach Scandinavian countries, first Sweden, started enacting legislation on commercial practices as from 1970. The Scandinavian approach is one of public law (a Consumer Ombudsman) in the interest of consumers.3

The national systems in the EU show varying degrees of autonomy of the law on unfair competition and of integration of consumer law, competition law (in the broad sense) and unfair competition law, with ramifications to I.P.-law.

The German UWG of 1909 has been replaced in 2004 by a modern UWG. § 1 of the new UWG states its objective: the protection of competitors, consumers and other market participants against unfair commercial practices. It also protects the general interest in undistorted competition. In 2008 the Act was amended with a view to implement the UCPD. Not entirely correctly though (by maintaining certain per se prohibitions), as is evidenced by the Plus Warenhandelsgesellschaft Judgment of the ECJ (see hereinafter).

Overall the new German UWG modernises and liberalises this branch of the law. After the earlier repeal of the Zugabeverordenung (regulation on premium offers) the UWG of 2004 (already before its amendment in 2008) also repealed most of the rules of the old UWG on special offers and sales. It expressly recognises the consumer as beneficiary of the law of unfair competition (following standing case law) and it introduces a “de minimis” threshold (like in competition law). In the 1980s the Netherlands (that did not have and still do not have specific legislation on unfair competition) also repealed existing regulations on sales promotions (such as premium offers and clearance sales).

Germany has integrated the rules on commercial practices in the UWG, an Act which also relates to B2B relations. The central provision, the “grosse Generalklausel” of § 3(1), prohibits unfair commercial conduct that is liable to affect appreciably the interests of competitors, consumers or other market participants4. In addition § 1 of the Act states that: “[t]he objective of the Act is to protect competitors, consumers and other market participants against commercial practices.

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3 See for an interesting comparison between the German and the Swedish model: A. Bakardjieva-Engelbrekt, Fair Trading Law in Flux, PhD thesis Stockholm, 2003, p. 13 et seq.

4 § 3(1) UWG: “Unlautere geschäftliche Handlungen sind unzulässig, wenn sie geeignet sind, die Interessen von Mitbewerbern, Verbrauchern oder sonstigen Marktteilnehmern spürbar zu beeinträchtigen.”
It also protects the general interest in undistorted competition\(^5\). In other words the old standard of "gute Sitten" (honest business practices) has been replaced by a notion of fairness that directly relates to the requirements of effective competition and which recognises a market oriented freedom to act and to decide of market participants. This law integrates consumer protection, protection of competitors and protection of competition. It remains to be seen how these new provisions will change the long standing case law that has been developed on the basis of the traditional unfair competition law of 1909, a law that did not mention the consumer or the general interest, but that was often applied taking into account these interests\(^6\).

Before the implementation of the Unfair Commercial Practices Directive (see hereinafter)\(^7\) some Member States\(^8\), like the U.K.\(^9\), Ireland, Cyprus and Malta\(^10\) had no general rule governing the fairness of commercial practices. In other Member States, first and foremost Sweden, the fairness of commercial practices is and was guaranteed by a statute (the Marketing Practices Act) the primary aim of which is to protect consumers and which consists of a general fairness clause supplemented by more specific provisions. Protection of business people against acts of unfair competition is a secondary aim of the Act\(^11\). Denmark has a similar tradition\(^12\). Austria, Germany, Greece, Poland, Slovenia and Spain have a law on unfair competition\(^13\). Originally these laws aimed at business-to-business relations only. Nowadays at least some of their provisions also relate to fairness in business-to-consumer relations. Poland amended its Law on Unfair Competition from 1993 recently, on 15 June 2005: an act of unfair competition is a conduct of an undertaking which violates a legal provision or bones mores and damages or brings in jeopardy the interests of another undertaking or a consumer. The Czech provisions on unfair competition (including a general clause) are integrated in the Commercial Code.\(^14\) In France\(^15\) and the Netherlands fairness of commercial practices is guaranteed on the basis of tort law (Civil Code). Italy has a specific provision on unfair competition in its Civil Code.\(^16\) Belgium has a Trade Practices Act (1991 replaced by the Act of 2010) with a general clause on unfair competition and a general clause on fair practices vis-à-vis consumers (referring to honest business practices derived from the Paris Union Convention).\(^17\) Luxembourg has a comparable Act.\(^18\) In Finnish law there are two separate statutes: a Consumer Protection Act and an Unfair Trade Practices Act.\(^19\) Estonia, Latvia, Lithuania and Hungary have a Competition Act with a double aim: promoting effective as well as fair competition.

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5 "Dieses Gesetz dient dem Schutz der Mitbewerber, der Verbraucherinnen und der Verbraucher sowie der sonstigen Marktteilnehmer vor unlauteren geschäftlichen Handlungen. Es Schützt zugleich das Interesse der Allgemeinheit an einem unverfälschten Wettbewerb".


7 For a list of transposition measures in all member states, see the website of DG SANCO.

8 The overview following here is largely based on Harte-Bavendamm/Henning-Bodewig, see footnote 6; and F.Henning-Bodewig, Unfair Competition Law. European Union and Member States, Kluwer Law International, 2006


10 Harte-Bavendamm/Henning-Bodewig, p. 239 p. 271 and 344.


12 Harte-Bavendamm/Henning-Bodewig, p. 191.

13 Harte-Bavendamm/Henning-Bodewig, p. 180 et seq. and R.Schulze – H. Schulte-Nölke, Comparative Overview, p. 11, for some of the countries.

14 Harte-Bavendamm/Henning-Bodewig, p. 331.

15 Consumer law in France is grouped in a Code de la Consommation.


17 Harte-Bavendamm/Henning-Bodewig, p. 264.

In Portugal “unfair competition” is part of the Code on Intellectual property, but this country also has an Advertising Code and a Consumer Code which contain important provisions in the area covered by the UCPD. Spain has a very complex system of national laws (a Competition Act and an Advertising Act, with civil sanctions) and laws of the autonomous regions.

2.2. History of (Attempts of) Harmonisation at the EU Level

In the early years of the EEC, when harmonisation measures still needed unanimity within the Council, but when the question of Union competence was not posed as sharply as now, the European Commission envisaged harmonisation of the law of unfair competition law of the then six Member States (four of which, Belgium, Germany, Italy and Luxemburg had specific legislation in this field, while in the two remaining Member States, France and the Netherlands, unfair competition is an unlawful act under general tort law) and asked the Max Planck Institute in Munich to make a comparative study of the law of the Member States. This ambitious project has been brought to a successful end by a team of researchers from the Max Planck Institute under the competent leadership of Eugen Ulmer.

The only legislative initiative that was initially taken at the EU level was Council Directive 84/450/EEC concerning misleading and comparative advertising. This directive was amended by Directive 97/55/EC to include provisions on comparative advertising. Much later, in 2005, Directive 2005/29/EC concerning business-to-consumers unfair commercial practices in the internal market (the UCPD) was adopted. It repealed as far as B2C relations are concerned the provisions of Directive 84/450. The remaining provisions of that Directive, that is to say, the provisions on B2B misleading advertising and the provisions on comparative advertising are now consolidated in Directive 2006/114/EC concerning misleading and comparative advertising (MCAD). There are not, presently, at the EU level, any rules on B2B commercial practices, other than rules on misleading and comparative advertising (and those on misleading advertising only achieve minimum harmonisation).

2.3. The UCPD

With the adoption of the total harmonisation Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market the state of play has dramatically changed. In the harmonised field, i.e. commercial practices in the relationship between undertakings and consumers, all Member States have to adopt the same set of rules. “Commercial practices” are defined by Article 2(d) as “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.”

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19 Harte-Bavendamm/Henning-Bodewig, p. 299-300.
20 Harte-Bavendamm/Henning-Bodewig, p. 323-324.
21 Das Recht des Unlauteren Wettbewerbs in den Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft, Gutachten erstattet in Auftrag der Kommission der Europäischen Wirtschaftsgemeinschaft von Institut für ausländisches und internationales Patent, Urheber, und Markenrecht der Universität München, Beck 1965, several volumes (a comparative study and six volumes with national reports, later supplemented with the law of the U.K., Denmark and Ireland, after the accession of these countries in 1973).
This is a very wide concept including sales methods, methods of sales promotion and advertising. The rules are the following. Unfair commercial practices shall be prohibited. A commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. In particular, commercial practices shall be unfair which: (a) are misleading as set out in Articles 6 and 7, or (b) are aggressive (as further set out in Articles 8 and 9) (Article 5(4)). Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive (Article 5(5)).

Professional diligence is defined in Article 2 (h) as the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.

With respect to the relationship between unfair competition law (or the law of passing on, as it exists in England) attention should also be paid to a sentence in paragraph 14 of the preamble of the Directive. It reads:

“It is not the intention of this Directive to reduce consumer choice by prohibiting the promotion of products which look similar to other products unless this similarity confuses consumers as to the commercial origin of the product and is therefore misleading.”

This sentence has given rise to some speculations22 because it could suggest that look-a-likes should not be prohibited if they do not create confusion with the reference product. This interpretation would however not be consistent with the express legal provisions of the Trade Mark Directive 2008/95/EC (Article 5) and the Community Trade Mark Regulation 40/94/EC (Article 9(1)(c)), to the effect that Member States may provide protection against free riding for trade marks with a reputation (see here after paragraph 42) and, with regard to foodstuffs with the protection of geographical indications and designations of origin (Regulation 510/2006).

In the context of this briefing paper point 8 of the preamble to the Directive should also be mentioned. The Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices, but thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. But the recital goes on with the observation that it is understood that there are other commercial practices which, although they do not harm the consumers, hurt competitors and business customers. Finally, the recital states that the Commission should carefully examine the needs for EU action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition. Until now the Commission has not taken such an initiative.

22 See C. Wadlow, footnote 2 above.
Two judgments of the ECJ rule on the relationship between the protection of consumers' interests and interest of businesses under the UCPD. In Plus Warenhandelsgesellschaft\textsuperscript{23}, concerning a prohibition, in the German UWG 2004, of prize competitions as a method of sales promotions (one of the per se prohibitions that survived the modernisation of the German UWG), the Court considers:

"Directive 2005/29 is characterised by a particularly wide scope ratione materiae which extends to any commercial practice directly connected with the promotion, sale or supply of a product to consumers. As is evident from recital 6 in the preamble to that Directive, only national legislation relating to unfair commercial practices which harm ‘only’ competitors' economic interest or which relate to a transaction between traders is thus excluded from that scope".

This ruling has been confirmed in Mediaprint\textsuperscript{24} (concerning a similar provision in the Austrian Unfair Competition Act).

Although the ruling in Plus is not crystal clear (why does the Court put the word only between inverted commas?) it would seem that national rules on commercial practices are only outside the scope of application of the UCPD where either they are not addressed to consumers (i.e. pure B2B relations such as commercial espionage, the systematic poaching of staff or commercial communications that only reach businesses) or, even if they are addressed to consumers they only serve the protection of competitors. A possible example of the latter might be the provision of the Belgian Trade Practices Act that prohibits the announcement of price reductions during three weeks preceding the seasonal clearance sales periods (January, respectively July). It has been argued that this prohibition only serves the interests of competitors. A Belgian judge has referred this question to the ECJ.\textsuperscript{25}

This means that, if the scope of the UCPD remains unchanged, the remaining scope for a specific regulation of B2B commercial practices is very reduced.

Here a final observation should be made. The UCPD can also be invoked between competitors. According to the law of several Member States competitors have standing to invoke the violation by their competitors of the national provisions implementing the UCPD. Indeed by not abiding by the B2C commercial practices rules, traders can take a competitive advantage and commit an act of unfair competition vis-à-vis their competitors. This constitutes another reason why the importance of the provisions on misleading advertising in the MCAD (see next point) is limited.

2.4. The MCAD

The purpose of the MCAD is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted. The MCAD contains provisions on B2B misleading advertising and general provisions (B2B and B2C) on comparative advertising. In this briefing paper I will not discuss comparative advertising.

\textsuperscript{23} Case C-304/08, Plus Warenhandelsgesellschaft, Judgment of 14 January 2010, not yet reported., at paragraph 39.
\textsuperscript{24} Case C-540/08, Mediaprint, Judgment of 9 November 2010, not yet reported.
\textsuperscript{25} Court Dendermonde (ZED).
With regard to misleading advertising in B2B relations this Directive is a minimum harmonisation Directive (as its predecessor Directive 84/450). It means that in B2B relations Member States are free to provide for a better protection of competitors (while they are not allowed to do so in the field of B2C commercial practices, including advertising).

According to Article 2 of the MCAD, misleading advertising means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.

Without going into detail, it is clear that neither the harmonisation character, nor the content, of the two Directives (UCPD and MCAD) are the same.

Finally, attention should be paid to a judgment of the Court of Justice on comparative advertising in relation to misleading advertising. In case C-44/01 Pippig\(^{26}\) the Court of Justice ruled that Directive 84/450/EC (the same would apply to the MCAD) precludes the application to comparative advertising of stricter national provisions on protection against misleading advertising as far as the form and content of the comparison is concerned, without their being any need to establish distinctions between the various elements of the comparison, that is to say statements concerning the advertiser's offer, the competitor's offer and the relationship between those offers. In other words, even in B2B relations the standard of harmonisation of misleading advertising is full harmonisation in respect of (the misleading character of) comparative advertising.

\(^{26}\) Case C-41/01, Pippig, [2003], ECR I-3095.
3. UNFAIR COMPETITION LAW AND ANTITRUST LAW: A LOVE-HATE RELATIONSHIP

The diversity in approaches towards unfair competition and trade practices between the Member States is in sharp contrast with the situation in the field of antitrust, i.a. as a consequence of the modernisation and decentralisation of EU competition law (in particular Regulation 1/2003 implementing Articles 81 and 82 EC, now Articles 101 and 102 TFEU). To summarise: these Treaty articles prohibit respectively restrictive practices between undertakings (businesses) unless they are efficient and abuses by dominant undertakings. There is now a very high degree of convergence between the antitrust laws of the Member States. The same convergence also exists in the field of merger control (see now Regulation 139/2004). With regard to restrictive practices Article 3(1) of Regulation 1/2003 de facto forces the Member States to a (quasi absolute) convergence of their national antitrust laws, in that they are precluded to apply national provisions without at the same time applying the EU competition rules where a given practice affects trade between member States. As they are under an obligation also to apply Article 101 and 102 TFEU in such a situation, maintaining national antitrust laws that differ substantially from Articles 101 and 102 would make enforcement at the national level very difficult. A second important rule is enshrined in Article 3(2): the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which are not prohibited by Article 101. However, Member States are not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings (Article 3(2), last sentence: first exception). In addition, both rules (forced application of Article 101 and 102 when they are applicable and prohibition to forbid under national law forms of conduct that are authorised under Articles 101-102) do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102 (Article 3(3): second exception).

The first exception relates to specific laws that do not make part of unfair competition law in the proper sense (as described hereabove) and that prohibit certain unfair commercial practices between businesses, like the laws in France27 and Germany28 that protect businesses against discriminatory practices and other unfair practices of businesses on which they are dependent (suppliers or clients). These laws prohibit e.g. abuse of economic dependence by businesses that do not hold a dominant position on any relevant market within the meaning of Article 102 TFEU. The second exception of Article 3(3) clearly refers to unfair competition law.

Pursuant to Article 3(3) Regulation 1/2003 there should therefore be no conflict between EU (and national competition law) on the one hand and (national) unfair competition law on the other hand, at least not procedurally. Substantively however the application of the competition rules and unfair competition law may conflict.

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28 § 20, I and II Gesetz gegen Wettbewerbsbeschränkungen.
Legal prohibitions and regulations of certain forms of sales promotion or advertising (like a prohibition of resale at a loss or of premium offers, not tolerated anymore in B2B relations under the UCPD) put a break on the development of effective competition. A too generous application of the fairness test in unfair competition law inhibits dynamic competition. If a novel form of competition is considered being contrary to honest business practices effective competition, the objective of antitrust law, may be put into danger. There is indeed an inherent tension, if not contradiction, between the goals of antitrust law (free and effective competition) and unfair competition law (fair competition only).
4. UNFAIR COMPETITION LAW AND INTELLECTUAL PROPERTY LAW: A MOTHER-DAUGHTER RELATIONSHIP

As already mentioned above, unfair competition law finds its origin in intellectual property law (the Paris Union Convention). Its original function was double. On the one hand it provided for additional protection of elements of goodwill that could not be protected under existing I.P.-statutes (trade marks, patents, copyright), such as trade secrets, trade names, industrial prizes, etc...). On the other hand, it also guaranteed protection against unfair competitive advantages through misrepresentations. Misleading the consumer was considered an act of unfair competition not for the consumer's sake but to protect the honest competitor. Later the objectives of unfair competition law have been broadened such as to include the protection of consumers (or even, as in the German UWG 2004, to guarantee effective competition).

The second original objective as well as the new ("modern") objective of unfair competition law are redundant. B2C unfair commercial practices law, serves the objective of creating a level playing field and protection of consumers, at least at the retail level, far better. As to the original objective (protection of goodwill) it should be conceded that its importance has also diminished substantially with the emergence of new types of I.P. and related rights (see next paragraph). What elements of goodwill should still be protected by the safety net of unfair competition law? Trade secrets? (although they are often also protected by specific (criminal) statutes and/or contractual arrangements). Trade names? Probably yes in Member States where no specific protection exists (although trade names are increasingly also protected via trade mark law).

In the second half of the twentieth century new I.P.-rights have been introduced (designs and models, neighbouring rights, chips, databases,...), rendering the necessity of additional protection in this field less important.

An I.P.-right with a long tradition is the right to a trade mark. Trade mark law is harmonised at the EU level by Directive 2008/95/EC that repeals the first Directive in this field, Directive 89/104, but is based on the same fundamental principles (see also Regulation 40/94/EC on a Community Trade Mark).

Both the notion of trade mark and the scope of the protection are very broad. According to Article 2, a trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

Article 5 confers extensive rights on the proprietor of a trade mark. In short, he can oppose the use of signs that create confusion with his trade mark. Moreover, any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. This extended protection for trade marks with a reputation finds its origin in the law of unfair competition.
It should also be recalled that for agricultural products and foodstuffs there exists protection of geographic indications and designations of origin under Regulation 510/2006.\textsuperscript{29} Registered names are protected against various uses by outsiders, including the use of expressions that unduly take advantage of the reputation attached to products under a protected name.

In view of the already extensive protection against free riding and the creation of confusing under trade mark law and the law of geographic designations, an enhanced protection against unfair competition (resulting from harmonisation of that field of the law at the EU level) bears the risk of extending that protection beyond the scope of protection aimed at by the legislature when adopting the particular statutes.

\textsuperscript{29} O.J., L 93/12 of 31 March 2006.
5. NECESSITY OF EU LEGISLATION IN THE FIELD OF B2B COMMERCIAL PRACTICES?

The EU has no general powers. According to Article 114(1) TFEU the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

In Tobacco II, the ECJ ruled that

"While a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC (now Article 114 TFEU), it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (see, to this effect, the tobacco advertising judgment, paragraphs 84 and 95; Case C-491/01 British American Tobacco (Investments) and Imperial Tobacco [2002] ECR I-11453, paragraph 60; Case C-434/02 Arnold André [2004] ECR I-11825, paragraph 30; Case C-210/03 Swedish Match [2004] ECR I-11893, paragraph 29; and Joined Cases C-154/04 and C-155/04 Alliance for Natural Health and Others [2005] ECR I-6451, paragraph 28).

It is also settled case-law that, although recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (Case C-350/92 Spain v Council [1995] ECR I-1985, paragraph 35; Case C 377/98 Netherlands v Parliament and Council [2001] ECR I-7079, paragraph 15; British American Tobacco (Investments) and Imperial Tobacco, paragraph 61; Arnold André, paragraph 31; Swedish Match, paragraph 30; and Alliance for Natural Health and Others, paragraph 29)."
The UCPD, which harmonises the law of B2C commercial practices, gives the following reasons for harmonisation. These reasons seem rather robust in the light of this case law (although some question whether the preamble does not exaggerate the obstacles to the internal market resulting from disparities in this area, in particular with regard to the argument of lack of consumer confidence):

"(3) The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. In the field of advertising, Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising [3] establishes minimum criteria for harmonising legislation on misleading advertising, but does not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers. As a result, Member States' provisions on misleading advertising diverge significantly.

(4) These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market.

(5) In the absence of uniform rules at Community level, obstacles to the free movement of services and goods across borders or the freedom of establishment could be justified in the light of the case-law of the Court of Justice of the European Communities as long as they seek to protect recognised public interest objectives and are proportionate to those objectives. In view of the Community's objectives, as set out in the provisions of the Treaty and in secondary Community law relating to freedom of movement, and in accordance with the Commission's policy on commercial communications as indicated in the Communication from the Commission entitled "The follow-up to the Green Paper on Commercial Communications in the Internal Market", such obstacles should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty."

The necessity of B2B legislation on commercial practices is far less obvious. As indicated above, the field that can be occupied by such rules is very limited in view of the existence of the spill over effect of B2C rules in this area and of extensive protection of intellectual property rights. In addition, there is no evidence of important obstacles for the achievement of the internal market as a result of disparities of legislation in this field.
Finally, the case law of the CJEU on free movement of goods and unfair competition (explained in the following paragraphs) suggests that if such obstacles exist they can probably not be justified (under the “rule of reason”) and can therefore be struck down (albeit less perfectly than through harmonisation) by application of the fundamental Treaty freedoms. At the same time this case law shows that obstacles arising from disparities in the laws concerning the protection of fairness in commercial transactions are probably not critical.

In its seminal Cassis de Dijon judgment31 the European Court of Justice accepted obstacles to the free movement of goods justified by mandatory requirements relating to inter alia fairness in commercial transactions and consumer protection. Other grounds of justification under this “rule of reason” have been added in later cases (notably the protection of the environment and culture). The rule of reason can only be invoked with respect to measures which apply without distinction to domestic goods and goods imported from other Member States. Express grounds of justification for both import and export restrictions can be found in Article 36 TFEU (i.e. public morality, public policy, the protection of health and life of humans, the protection of national treasures possessing artistic, historical and archaeological value, the protection of health and life of animals and the protection of industrial and commercial property). Member States can also rely on the grounds mentioned in Article 36 TFEU to justify measures that are not applicable without distinction to imported good and domestic goods (and therefore discriminate between these goods, at least formally), provided these measures do not constitute an arbitrary discrimination or a disguised protection for domestic goods (see Article 36, second sentence, TFEU).

The “rule of reason” of Cassis de Dijon has later been extended to the other internal market freedoms: the freedom to provide services,32 the freedom of establishment33 and the free movement of capital.34 In Gebhard35 the Court summarised the “rule of reason” as follows:

"It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 Kraus v Land Baden-Wuerttemberg [1993] ECR I-1663, paragraph 32)."

Consumer protection has often been invoked – and indeed accepted by the Court – as a ground of justification for obstacles to the free movement of goods and the free provision of services.

In a certain number of cases the CJEU has mentioned fairness in commercial transactions (or the prevention of unfair competition) together with consumer protection, i.e. in the field of trade practices and sales promotions.\footnote{36} There are also a few cases, somewhat connected to industrial and intellectual property (copyright, appellations of origin), where the Court examined separately whether a national measure could be justified to secure “fairness in commercial transactions”, “fair trading” or “fair competition”. It is noteworthy that these cases are not particularly recent. There are however, as far as I can see, no judgments in which a national measure restricting free movement of goods has been found to be justified solely on the ground of the protection of fairness in commercial transactions.\footnote{37} It is also noteworthy that Member States generally do not invoke the protection of fairness in commercial transactions as a justification for a restrictive measure, but rather argue that the measure is necessary to protect consumers, when it is obviously not,\footnote{38} or do not argue at all about the justification, but simply deny that the measure is restrictive\footnote{39}. In the field of unfair competition it should be mentioned that the CJEU recognised in several cases that the protection of competitors against the use of a confusingly similar trade name can be justified under Article 36 (the protection of industrial and commercial property).\footnote{40}

The necessity to justify obstacles to the free movement of goods resulting from national rules on sales promotions and sales methods has been mitigated by the famous Keck & Mithouard case law.\footnote{41} This case law is well summarised in a more recent judgment concerning the Belgian law on “itinerant sale”, the Burnmanjer judgment.\footnote{42} Said law subjects the sale of goods outside the premises stated in the registration of the seller in the commercial register to a prior authorisation delivered by the competent Minister. Itinerant selling without authorisation is a criminal offence. Three persons who had been charged with having sold, on the public highway in a Belgian city, subscriptions for periodicals for a German company, challenged the compatibility of that law with the EC Treaty.

\footnote{36} See e.g. Case 120/78, Cassis de Dijon (footnote 8), Case C-362/88, GB-Inno-BM and Case C-126/91, Yves Rocher [1993] ECR I-2361. See further Case 56/80, Dansk Supermarket, [1981] ECR 181, where the Court ruled that since agreements between individuals cannot derogate from the mandatory provisions of the Treaty on the free movement of goods, a party to an agreement is not allowed to classify the importation of goods legally marketed in another Member State as an “improper or unfair commercial practice”.

\footnote{37} Even in a case concerning the protection against imitation (of the design of goods) which is very close to I.P.-law (Case 6/81, Industrie Groep [1982] ECR 707) the Court referred both to consumer protection and fairness in commercial transactions, although there did not seem to be a real consumer protection issue in that case (the Court rightly referred to Article 10Bis Paris Union Convention, the sedes materiae of unfair competition). In Case 182/84, Miro BV, [1982] ECR 3731, the Court examined separately whether a national measure (the prohibition to market, in the Netherlands genever with an alcohol content of less than 30%) was justified on the basis of fairness in commercial transactions, but it found it was not. According to the Court the fixing of the minimum alcohol content of a traditional beverage to be complied with by products of the same kind imported from another Member State cannot be regarded as an essential requirement of fair trading if these goods are lawfully and traditionally manufactured under the same appellation in the Member State of origin and the purchaser is provided with proper information. In Case 16/83, Pranti (the “Bockbeutel” case), and Case 179/85, Commission v Germany, [1986] ECR 3879 (“Petillant de raisin”), the Court found that there were no reasons connected to fair trading (fair and traditional practices) for the Member State concerned (Germany) to refuse wine originating in another Member State in bottles of a certain shape (traditionally reserved to wine makers on its own territory, respectively for a certain type of wine).

\footnote{38} See e.g. Case C-84/00, Commission v France [2000] ECR I-4553, concerning rules on acceptable standards of fineness of precious metal.

\footnote{39} See e.g. Case C-255/97, Pfeiffer Grosshandel, [1999] ECR I-9077.

\footnote{40} See Joint Cases 267-268/91, Keck Mithouard, [1993] ECR I-6097, and numerous later cases.

\footnote{41} See Joint Cases 20/03, Marcel Burnmanjer e.a., [2005] ECR I-4133
Regarding Article 34 TFEU (at that time Article 28 EC) (free movement of goods) the CJEU recalled its previous case law in the following words:

“To establish whether those rules come within the prohibition laid down by Article 28 EC, it is appropriate to note that, under settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions and thus prohibited by that article (see, in particular, Case 8/74 Dassonville [1974] ECR 837, paragraph 5; Case C-420/01 Commission v Italy [2003] ECR I-6445, paragraph 25, and Karner, paragraph 36).

The Court however stated, in paragraph 16 of Keck and Mithouard, cited above, that national provisions restricting or prohibiting certain selling arrangements which apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States are not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the line of case-law initiated by Dassonville.

The Court subsequently found that provisions concerning, in particular, certain marketing methods were selling arrangements within the meaning of Keck and Mithouard (see, in particular, Case C-292/92 Hünermund and Others [1993] ECR I-6787, paragraphs 21 and 22; Joined Cases C-401/92 and C-402/92 Tankstation ’t Heukske and Boermans [1994] ECR I-2199, paragraphs 12 to 14, and TK-Heimdienst, paragraph 24.”

National regulations on advertising, sales promotions and sales methods have thus been described as “selling arrangements” giving these regulations immunity against application of Article 34 TFEU so long as they do not render the marketing of imported goods more difficult than that of domestic goods. A total ban on alcohol advertising in magazines (in Sweden) has been found to disproportionately hinder imported goods (since domestic goods are generally made known to the public via other channels). Thus, the national court had to verify whether the ban could be justified on grounds of protection of public health\(^{43}\) (the referring Swedish court eventually found it was not). A rule forbidding German consumers to buy on line pharmaceutical products was found to hinder more the marketing of pharmaceuticals offered from other Member States than those offered in Germany (where they can be purchased in pharmacies) and not to be justified for the protection of public health as it applies to over-the-counter pharmaceuticals\(^{44}\).

This case law freed Member States from the burden to justify obstacles to the free movement of goods resulting from regulations on selling arrangements (including commercial practices) as being necessary to achieve a goal of general interest, such as fairness in commercial transactions and/or the protection of consumers, but only on condition that these regulations were not, in law or in fact, discriminatory vis-à-vis certain economic operators or vis-à-vis goods imported from other Member States.


\(^{44}\) Case C-322/01, Deutscher Apothekerverband [2003] ECR I-14887.
Because of *Keck* there are relatively few cases in which the CJEU scrutinised national regulations on sales promotions, advertising and sales methods on the ground of Article 36 TFEU or in the light of their (alleged) objective of protecting fair trade and/or the economic interests of consumers. These cases deal with “selling arrangement” type of rules that either affect the conditions subject to which products can be put on the market (e.g. rules on advertising affecting the labelling of products) or have a discriminatory effect on imported goods (such as a ban on the use of a given media for advertising purposes or a ban on the use of the internet for the sale of certain goods)\(^\text{45}\).

In *Mickelsson and Roos*\(^\text{46}\) the Court developed a new test (with regard of national provisions that do not fit either into the *Dassonville* hypothesis nor in the Keck hypothesis), but this does not affect, it is submitted, the assessment of national rules on commercial practices. The Court rules:

> “It must be borne in mind that measures taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably and, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, even if those rules apply to all products alike, must be regarded as ‘measures having equivalent effect to quantitative restrictions on imports’ for the purposes of Article 28 EC (see to that effect, Case 120/78 Rewe-Zentral (Cassis de Dijon) [1979] ECR 649, paragraphs 6, 14 and 15; Case C-368/95 Familiapress [1997] ECR I-3689, paragraph 8; and Case C-322/01 Deutscher Apothekerverband [2003] ECR I-14887, paragraph 67). Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept (see Case C-110/05 Commission v Italy [2009] ECR I-0000, paragraph 37).”

For the sake of completeness it can be observed that with the entry into force of the Directive 2006/123 on Services in the Internal Market (see Article 16(3)), consumer protection or fairness in commercial transactions are not anymore valid grounds of justification for obstacles to the free provision of services.

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\(^{45}\) See Gourmet and Deutscher Apothekerverband, mentioned in the two preceding footnotes respectively.

\(^{46}\) Case C-142/05, Mickelsson and Roos [2009] ECR I-4273.
6. **PITFALLS.**

Should harmonisation of B2B commercial practices (unfair competition) be deemed to be necessary (which ultimately is a political decision), attention should be paid to the relationship between the harmonised law and "neighbouring" laws, both at the EU (UCPD, antitrust, trade mark, geographical names) and at the national level (laws on trade secrets, discrimination, ...). Since these laws have carefully determined their scope of application, after a certain number of checks and balances between protection and competition, new EU legislation should avoid extending unwillingly their scope of protection. This relationship should therefore be carefully assessed.
CONCLUSION

While competition law in the strict sense is not sufficient to ensure fair commercial practices in B2B relations there is no strong case for harmonisation of this law at the EU level.

Admittedly European legislation on B2B commercial practices would to a certain extent be useful because:
- antitrust law in itself does/can not guarantee fair competition, but only effective competition;
- the laws of B2B commercial practices are only partially harmonised (Directive 2006/114/EC dealing with misleading and comparative advertising only) and thus some disparities remain, not only as a result of the fact that some Member States do have a law on unfair competition and others do not, but also as a result of the existence in some Member States of specific rules (like those on non-discrimination or abuse of economic dependence).

The utility of such harmonisation is however limited in view of:
- the broad scope of the UCPD, leaving only a small margin for a specific regulation of B2B commercial practices at the EU level;
- the fact that the existing EU rules on B2C commercial practices can be invoked between businesses with regard to conduct they deploy vis-à-vis consumers;
- the existence of EU rules on I.P.-rights, in particular trade mark law, that give extensive protection against the risk of confusion and free riding with regard to important elements of business and goodwill.

When it comes to the question of necessity and possibility of EU rules on B2B commercial practices, it would seem that such a necessity and possibility are far from obvious, in view of the absence of evidence that differences in legislation in this field (in particular with regard to conduct that does not affect businesses’ relations with consumers) lead to important obstacles for free movement or distortions of competition. It is therefore uncertain that the Treaty provides a sufficient legal basis for EU legislation in this field. Even if that were the case, the nature of the disparities, not only in the field of unfair competition (where several Member States do not even know this notion), but also in the related field of specific laws on discriminatory and other unfair practices between businesses (which do exist in some Member States and not in others) would make harmonisation very difficult to achieve.

In view of all this, it is questionable whether additional rules on unfair competition or B2B unfair commercial practices at the EU level, even if they were possible, would be desirable, because:
- they could lead to restrictions of competition that would conflict with the objectives of antitrust law;
- they are likely to extend the protection of I.P.- rights beyond the limits of that protection organised by specific statutes, thereby giving unmerited protection and stifling competition.

If harmonisation is nevertheless undertaken, the relationship of unfair competition law with neighbouring laws should be carefully assessed.
It should be envisaged to extend the scope of the UCPD so as to encompass all commercial practices in a B2C relationship (whether aiming at the protection of consumers and/or competitors). This would not only take away the uncertainty existing with regard to the scope of application of the UCPD, but in that way most, if not all B2B unfair commercial practices in the retail sector would be covered, and governed by the same set or rules as B2C unfair commercial practices with which they generally coincide.
Role
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