

5 The Statutory Frameworks and General Rules on Unfair Commercial Practices in the 25 EU Member States on the Eve of Harmonization

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1. Introduction

(i) Misleading Perceptions of the Unfair Commercial Practices Directive

The Directive on Unfair Commercial Practices (UCPD) is certainly one of the most spectacular examples of European private law legislation.² The Directive provides a general prohibition of unfair commercial practices. An annex to the Directive holds 31 specific practices that are deemed to be unfair, regardless of whether they are capable of influencing consumer behaviour. Besides this grand general rule, the Directive contains two small general rules, one on misleading practices and one on aggressive practices. Misleading practices include the hiding of material information or providing it in an ‘unclear, unintelligible, ambiguous or untimely manner’, thus preventing the consumer from taking an informed decision (Articles 6–7).³ Aggressive commercial practices by the trader include harassment, coercion and undue influence (Article 8).

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2 Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. See also H. Collins (ed.), *The Forthcoming EC Directive on Unfair Commercial Practices* (The Hague-London-New York, 2004); R.W. de Vrey, *Towards a European Unfair Competition Law. A Clash Between Legal Families* (Leiden-Boston, 2006); M. Radeideh, *Fair Trading in EC Law* (Groningen, 2005). J. Stuyck, E. Terryn and T. Van Dyck, ‘Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market’, *CMLR*, 43 (2006): 107.

3 The drafting of this wording could have been inspired by the communication style of some governmental authorities.

It is asserted that the Directive does not deal with contract law matters, that it deals with business-to-consumers (B2C) relations and not with business-to-business (B2B) relations and that it contains maximum harmonization. These assertions are slightly ambiguous, if not misleading, in the sense of Article 6 of the Directive.

First, in the ninth recital it is considered that the Directive does not deal with contract law matters. Article 3(2) provides: 'This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.' However, in most Member States it will be hard to implement the Directive without affecting, at least indirectly, national contract law provisions since the Directive applies to practices taking place before, during and after a commercial transaction (Article 3(1)).⁴ It is hard to see why Articles 8 and 9 (aggressive practices) will not encroach on national contract law concepts like duress and undue influence. Neither is it hard not to link Articles 5–7 (general rule and misleading practices) to the issue of material information which may give rise to actions for misrepresentation or breach of contract.⁵ Changing the general contract laws of the Member States is a politically sensitive matter and the ninth recital can therefore be considered to be a political incantation rather than a usable legal delimitation of the scope of the Directive.

Second, the Directive is considered to be a B2C Directive which is not applicable in B2B relations. Article 2(d) describes a B2C practice 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'. There are, however, a number of instances of bringing traders' interests within the realm of the Directive.

Most notably, Article 11 UCPD provides that Member States shall ensure that adequate and effective means exist to enforce compliance with the Directive in the interest of consumers and that such means shall include provisions under which persons or organizations, including competitors, may take legal action against unfair commercial practices. This last minute amendment will give rise to complexity and confusion. Another example is Article 6(2)(a), holding that a commercial practice shall also be regarded as misleading if it involves any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor. This is a provision that seems to focus on competitor's interests rather than consumer's interests.⁶

4 The question is, for example, whether the Member States remain free to attach contract law consequences to the failure to comply with disclosure duties; see Stuyck, Terry and Van Dyck, 'Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market': 129–130.

5 Compare also Article 2 of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees: 'The seller must deliver goods to the consumer which are in conformity with the contract of sale.' This is the case if the goods '... comply with the description given by the seller and possess the qualities of the goods which seller has held out to consumers as a sample or mode'. See furthermore H. Collins, 'EC Regulation of Unfair Commercial Practices', in: H. Collins (ed.), *The Forthcoming EC Directive on Unfair Commercial Practices*, pp. 13 and 37.

6 De Vrey, p. 62. See also number 13 of the 'blacklist' in Annex 1: 'Promoting a

More generally, Recital 8 provides a view to the Commission's future agenda:

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.

Finally, the Directive is presented as a measure of maximum harmonization which, to a considerable extent, it is not.⁷ Maximum harmonization means that the Member States are not allowed to deviate from its rules. This approach replaced the initial choice for mutual recognition and has met fierce criticism from various authors.⁸ There are at least five reasons why differences will remain between Member States' rules on unfair B2C commercial practices.

(ii) Exceptions to the Directive's Supposed Maximum Harmonization

First, there are instances in which national law partly determines the way a Directive concept is to be interpreted. One may think of the concept of 'average consumer' interpretation of which is partly left to the national courts taking into account social, cultural, and linguistic diversity. Recital 18 holds:

It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice (...).⁹

product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.' These are the civil law concept of 'slavish imitation' and the common law tort of 'passing off', which are both directed at protecting the interests of competitors, not consumers. See De Vrey, p. 71.

7 The original proposal opted for an internal market clause applying the country of origin principle. See about this background Stuyck, Terryn and Van Dyck, 'Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market': 117–120 and H.-W. Micklitz, 'A General Framework Directive on Fair Trading', in H. Collins (ed.), *The Forthcoming EC Directive on Unfair Commercial Practices*, p. 43 ff.

8 For example, G. Howells and T. Wilhelmsson, 'EC Consumer Law: Has it come of age?', *EL Rev.*, [2003]: 370ff, argue that the shift towards maximum harmonization requires a thorough assessment of substantive consumer policy, which has not yet taken place.

9 Case C-210/96 *Gut Springenheide GmbH v. Oberkreisdirektor des Kreises Steinfurt*

The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.

More generally, the question of legal fairness is one that strongly divides the European jurisdictions. What is considered to be fair in one country can be considered unfair in another. Whereas in Germany fair commercial practices are strongly regulated, in England the approach is quite the opposite: ‘The world is a very unfair place, and the sooner you get to know it, the better. In my view, unfair competition is not a wrong known to the law.’¹⁰ For example, in the area of misleading advertising the German model is, in principle, based on the protection of minorities and a factual approach based on a percentage of the consumers being misled for assessing whether an advertisement is misleading. English courts, on the other hand, take a much more liberal model attuned to customers who ‘expect hyperbole and puff’: the English consumer is therefore supposed to be not easily misled.¹¹ Hence, it will be an interesting rope dance for the European courts to balance national diversity and the need for a level playing field.¹²

Second, the Member States are allowed to continue to apply national provisions that are more restrictive or prescriptive for six years from 12 June 2007, the day by which the Directive must have been implemented.¹³ This was part of the political compromise to ease acceptance by the Member States. This deference is provided for in Article 3(5) which runs:

For a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to in Article 18 may, if considered appropriate, include a proposal to prolong this derogation for a further limited period.

The latter means that it is conceivable that the promised land of maximum harmonization will never be reached and that the international traders and consumers will keep wandering in the desert of partially maximum and partially minimum harmonization. The background of this provision is that it was considered

[1998] ECR I-4657, para. 31.

10 *Swedac v. Magnet & Southern* [1989] FSR 243 at 239, per Justice Harman.

11 De Vrey, p. 283. He rightly adds, at p. 288: ‘This does not necessarily mean that the average English recipient of advertising is *de facto* more used to such statements, it could also mean that the courts believe that they should be more used to it.’

12 See, for example, T. Wilhelmsson, ‘Consumer Images in East and West’, in: H.-W. Micklitz (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa?*, (Baden-Baden, 1996) and more generally about cultural diversity: G. Hofstede and G.J. Hofstede, *Cultures and Organizations. Software of the Mind*, (New York, 2005).

13 The provisions have to be applied as from 12 December 2007.

to be undesirable to transform the minimum harmonization Directives to maximum harmonization Directives through the backdoor of the UCPD.¹⁴

Third, the remedies to enforce the rules of the Directive are mainly for the national law to determine be it that Community law generally requires that the national law remedies are in line with the principles of effectiveness and equality.¹⁵ Article 11(1) of the Directive requires Member States to ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers. Furthermore, Article 13 holds that Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive. These provisions leave the Member States a fairly large margin of discretion in the way they want to ensure compliance. They also remain free to provide for private law sanctions.

This implies that private enforcement is only harmonized to the extent of the principles of equality and effectiveness and that differences between the Member States laws will remain. For example, Germany has a strong private enforcement tradition as regards unfair commercial practices in which consumer protection groups play an important role. In France private enforcement mainly goes for B2B situations and not so much for B2C situations which are more subject to criminal and administrative sanctions. The latter also goes for the Scandinavian Ombudsman approach.¹⁶ England does not know a private enforcement tradition in B2B neither in B2C practices and much is left to self-regulation with hardly any possibility for consumers or competitors to enforce their rights.¹⁷ For example, in the framework of Misleading Advertising the UK did not grant private law remedies and left enforcement to self-regulation with a provision in the Control of Misleading Advertisement Regulations 1988 that entitles the Office of Fair Trading, in exceptional cases where

14 Stuyck, Terry and Van Dyck, 'Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market': 141–2.

15 International enforcement cooperation is endorsed by Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

16 Stuyck, Terry and Van Dyck, 'Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market': 111.

17 Section 8(2) Enterprise Act 2002 holds that the Office of Fair Trading may '... make arrangements for approving consumer codes and may, in accordance with the arrangements, give its approval to or withdraw its approval from any consumer code'. Currently more than 40 codes of self-regulation have been promulgated by trade associations in a wide variety of sectors. Also in other Member States like Italy and the Netherlands self-regulation plays an important role but without a legislative framework. See H.-W. Micklitz, 'A General Framework Directive on Fair Trading', p. 77.

self-regulation has failed, to apply for a court order.¹⁸ Whether this approach will change with the implementation of the Directive is not yet clear.¹⁹

Diversity and underdevelopment of private remedies was also the main conclusion in the Ashurst report as regards the private enforcement of competition law.²⁰ In the latter area, the European Commission presented a Green Paper on the possibilities to improve damages actions for breach of the EC antitrust rules.²¹ If it is deemed to be necessary to improve private enforcement of EC competition law, then it is obvious that the same (or at least something similar) should apply to the private enforcement of EC unfair commercial practices law since, in the end, both set of rules aim to prevent distortion of competition.

Fourthly, according to Article 3(9), the Member States will be able to retain or introduce restrictions and prohibitions of commercial practices on grounds of the protection of the health and safety of consumers in their territory, for example in relation to alcohol, tobacco or pharmaceuticals. Because of the complexity and inherent serious risks, the Directive is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers in the field of financial services and immovable property. In a similar vein, Recital 7 holds that States are allowed to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency.²²

Finally, as with each Directive, also the UCPD has to be implemented into national law. This means that the rules of the Directive will be inserted into the existing private law systems of the Member States. The intertwinement with these systems can lead to difficulties because the implemented rules will be read in the context of the national system. 'During this process, it seems likely that fresh divergences emerge as the requirements of the Directive are understood in different ways by each system.'²³ The problem goes back to the fact that a Directive is implemented into a national

18 R. Schulze and H. Schulte-Nölke, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices* (place of publication unknown, 2003), pp. 21 and 23; A. Ohly, 'Towards a Harmonised European Unfair Competition Law? Comments on the Proposal for a Directive on Unfair Commercial Practices', Lecture given to the Hungarian Competition Law Association in Budapest, 4 March 2005, pp. 2 and 13.

19 Department of Trade and Industry, *Summary of Responses to the Consultation on implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation*, June 2006, p. 4: 'Most enforcer and consumer groups expressed a preference for individuals to have a private right of action which should apply to all breaches of the Directive. (...). Business groups strongly opposed giving individuals a private right of action.'

20 Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules* (Brussels, 2004).

21 COM(2005), 19 December 2005, 672 final.

22 See also Stuyck, Terryn and Van Dyck, 'Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market': 122–3.

23 Collins, 'EC Regulation of Unfair Commercial Practices', p. 19.

legal system with its own longstanding historic, cultural and social environment.²⁴ As such this goes for all Directives but in case of maximum harmonization the matter is more pressing, even though there are important exceptions to the maximum harmonization character of the Directive.

Hence, business and consumers need to remain reasonably observant and circumspect as regards the level of harmonization of unfair competition laws across Europe. This means that also the question of the applicable law remains of importance. The draft Rome II Regulation provides in Article 6(1) that the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.²⁵

However, despite all the caveats to the Directive's maximum harmonization character, the Directive achieves a result which could only be dreamed of in the 1960s when the European Commission launched its first project to harmonize the law of unfair competition and asked the Max Planck Institut in Munich to undertake a comparative analysis of the Member States' trade laws in order to assess whether differences between the national rules were liable to affect the (then) Common Market. For a long time the sole visible result was a beautiful series of books edited by Eugen Ulmer.²⁶

(iii) Aim and Plan

In order to understand how the UCPD will 'land' in the national legal systems, this paper illustrates the state of play in the Member States as regards the general features of the law of unfair commercial practices on the eve of European harmonization. It will also show the task for each member state to bring this Directive home and a fortiori for the European Commission to supervise the implementation process in the 25 Member States.

In practice, Member States need to take active steps to implement the Directive. Although this is not formally required, national law has to guarantee that the legal position under national law is sufficiently precise and clear, that individuals are fully aware of their rights and that they can rely on them before the national courts. Particularly when the protection of consumers is at stake the European Court of Justice (ECJ) requires specific statutory provisions.²⁷ This means that the Member States will not be able to simply rely on their existing unfair commercial practices legislation, even if this contains a general clause similar to the one in the Directive.

24 See fundamentally G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *Modern LR*, 61 (1998): 11.

25 Common position adopted by the Council with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('ROME II'), Brussels 11 August 2006, 9751/06.

26 E. Ulmer (ed.), *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der EWG* (Köln, 1965) (seven volumes, one per Member State and a comparative study).

27 Case C-365/93, *Commission v. Greece*, [1995] ECR I-499, paras 9 and 21, and Case C-144/99, *Commission v. The Netherlands*, [2001] ECR I-3541, para. 17.

Considering the number of Member States involved the paper is necessarily confined to a bird's eye view. The scope of the paper is limited to the general rules on unfair commercial practices. It does not go into specific statutory rules, such as on misleading advertising, unlawful imitation by misrepresentation, misappropriation of another's achievements, and so on.²⁸

The information on the national laws in this paper is primarily based on two comparative reports written for the European Commission. One report contains a survey of the 15 old Member States and was aimed at preparing the drafting work for the Directive.²⁹ The other report contains a survey of the ten new Member States and was conducted when the political process of adopting the Directive was already on its way.³⁰

The structure of this paper is as follows: s. 2 will provide an overview of the legal framework of unfair commercial practices law in the Member States. Section 3 will go into the national general rules which apply in this area and in s. 4 the standards embodied in this general rule will be analysed and compared to the one provided for in the UCPD.

2. The National Legal Frameworks

(i) Introduction

As will be shown in this section, the laws of the Member States show a great variety in the ways in which they have regulated commercial fairness on the eve of harmonization by the UCPD.

Four categories of approaches can be distinguished. In nine countries, commercial fairness is regulated in a major act regulating fair competition (see s. 2.2). In seven countries the general framework can be found in a combination of statutory instruments like a commercial code, a competition act, a consumer protection act and the civil code (see s. 2.3). Finally, seven countries do not hold a statutory framework to regulate commercial practices. In seven of these countries the specific legislation in force is supplemented by the general tort law provisions in the Civil Codes (see s. 2.4), whereas in the three common law systems as regards the latter only specific tort law provisions apply (see s. 2.5). In s. 2.6 the lines of this section will be drawn together.

(ii) Statutory Framework: One Comprehensive Act

In the first category of Member States the statutory framework regarding unfair commercial practices is dominated by one instrument, particularly a Competition Act or a Marketing Act. These Acts generally protect both business (B2B) and

28 See for a broader comparative analysis but confined to the laws of England, Germany and the Netherlands: De Vrey *Towards a European Unfair Competition Law. A Clash Between Legal Families*.

29 Schulze and Schulte-Nölke.

30 Van Dam and Budaite.

consumers (B2C). This goes for Austria, Belgium, Denmark, Germany, Greece, Hungary, Lithuania, Luxembourg, and Sweden.

Austria: Act against Unfair Competition (Bundesgesetz gegen den unlauteren Wettbewerb, UWG) In Austria the law on unfair commercial practices is codified in the UWG which contains a general clause (§ 1 UWG) and provisions on specific issues (§§ 2 onwards UWG) as well as an authorization of more detailed regulations (§§ 31(2) and 32 UWG). The UWG protects fairness in competition as a whole. Although it is not specifically aimed at protecting consumers, the modern view of this statute is that it has a protective function in B2C relationships, at least if they have an implication on competition between businesses.³¹

Belgium: Act on Commercial Practices and Consumer Information (Loi sur les pratiques du commerce et sur l'information et la protection du consommateur) (1991) (LPC) The central pillar of the Belgian legal framework is the LPC. This Act pursues both to protect both business and consumer with a large set of rules and two general clauses. The first rule refers to fair competition in commercial relations (Article 93 LPC) and the second to consumer protection and information (Article 94 LPC). In addition to the LPC there are many other acts and regulations on specific issues.³²

Denmark: Marketing Practices Act (MPA) (Markedsfoeringsloven) (1974) The Danish MPA constitutes the core of the Danish legal framework regarding unfair commercial practices. It regulates marketing activities from private business. Its purpose is twofold: to protect consumers from unfair market behaviour and to protect competitors against acts of unfair competition. The MPA contains two general clauses: Section 1 sets out the principle of 'good marketing practices' and s. 2 concerns misleading advertising. These general provisions serve as an umbrella and are supplemented by a number of special provisions in the MPA as well as by special legislation (concerning specific marketing practices, specific products and specific media).³³

Germany: Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb) (1909) For almost a century the central pillar of the German legal framework in the field of fair trading rules was the Act against Unfair Competition of 7 June 1909 (Gesetz gegen den unlauteren Wettbewerb) ('UWG'). This Act contained a general clause prohibiting any competitive behaviour which is contra bonos mores (against good morals) (§ 1 UWG).

In 2004 a new Act against Unfair Competition entered into force. § 3 of the Act provides a general clause prohibiting unfair commercial practices. This clause is supplemented by a list of unfair acts of competition in § 4 UWG, such as regarding unreasonably manipulating or exploiting consumers, surreptitious advertising, sales

31 Schulze and Schulte-Nölke, p. 12.

32 *Ibid.*

33 *Ibid.*, pp. 12–13.

promotions, competitions, draws and prizes, and so on. To a great extent the new Act codifies and systematizes the case law of the German court decided under the old Act. One of the changes is the introduction of a *de minimis* threshold in § 3 of the new Act and the introduction of a claim to skim unlawful profits (§ 10 UWG).

Greece: Act against Unfair Competition (1914) The strong links in the early twentieth century between German and Greek law were also expressed in the fact that the Greek followed the German example in the Act against Unfair Competition of 27 January 1914 (Act 146/1914). The Act contains a general clause (Article 1) which prohibits competitive behaviour that is *contra bonos mores*. The general clause is supplemented by specific provisions on misleading advertising, liquidation and end of season sales and so on. In addition to this, Article 9 of the Act 2251/1994 on Consumer Protection regulates various forms of unfair, misleading and comparative advertising.³⁴

Hungary: Act on the Prohibition of Unfair and Restrictive Market Practices Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices contains a general clause on unfair commercial practices with a view on the interests of the undertakings as well as on the interest of consumers. This Act applies to the market conduct of natural persons and legal entities, as well as of unincorporated business associations. Article 2 prohibits carrying on economic activities unfairly, in particular, in a way violating or jeopardising the lawful interests of competitors or consumers, or in a way breaching the requirements of business integrity. Hence, this general clause applies to B2B, as to B2C.³⁵

Lithuania: Act on Consumer Rights Protection Lithuanian law did not hold a general statutory framework on unfair commercial practices. For a claim against an unfairly acting business, the consumer had to rely on the general tort law provisions and on the specific rules regarding specific practices.

This situation will change with an amendment to Act on Consumer Rights Protection. Article 6 of this Act sets forth the principle of fair commercial practice. It expressly states that sellers and service providers must obey fair commercial practice while offering and providing goods and services to the consumers. Goods and services have to be offered in a proper manner that consumer could clearly understand the commercial nature of such an offer.³⁶

Luxembourg: Act Regulating Certain Commercial Practices and Unfair Competition (Loi du 30 juillet 2002 réglementant certaines pratiques commerciales et sanctionnant la concurrence déloyale) (2002) The core of Luxembourg's unfair competition law is contained in the Act on Certain Trade Practices and Unfair Competition which also contains the implemented Directives 84/450/EEC and 97/55/EC. Article 14(a) contains a general clause on unfair trade practices directed exclusively at

34 *Ibid.*, pp. 13–14.

35 Z.K. Suhajda and S. Lendvai, Hungary, in Van Dam and Budaite, p. 76.

36 S. Katuoka, Lithuania, in Van Dam and Budaite, p. 123.

competitors. Consumer protection is considered as a kind of reflex of competition law. The general clause is complemented by provisions on advertising, sale at a loss, competitions/lotteries and pyramid selling which are – unlike the general clause – not limited to competitors but also cover B2C transactions.³⁷

Sweden: Marketing Act (Marknadsföringslagen) (1995) The Swedish Marketing Act of 27 April 1995 (Marknadsföringslagen 1995:450) contains a broadly formulated general clause (s. 4), a small general clause on misleading advertising (s. 6) and a number of special provisions. These special provisions concretize the general rule for various factual situations. Violation of a special rule can give rise to an obligation to pay damages but – contrary to other legal systems – a violation of general clause cannot. The Swedish Act protects both consumers and competitors but, a modern touch, it expressly and primarily addresses consumers. Section 1 puts the concept of combating unfair commercial practices within a broader concept to promote interest of consumers and of trade and industry in connection with the marketing of products.³⁸

(iii) Statutory Framework: Combination of Acts

In seven Member States the framework to regulate commercial practices is divided over several Acts, such as the Commercial Code, the Act on Consumer Protection, or the Competition Act. In these countries, the general provisions of the Civil Code (or the Law of Obligations) can play an additional role. This goes for Czech Republic, Estonia, Finland, Latvia, Poland, Slovakia, and Spain.

Czech Republic: Commercial Code, Chapter V, Act on Consumer Protection, Civil Code Unfair commercial practices are dealt with in general terms in § 44–52 Commercial Code. § 44(1) contains the general clause on unfair commercial practices as well as a list of different categories of unfair competition (§ 44(2)). The following provisions specify these various categories.

The Act on Consumer Protection deals in more detail with some kinds of unfair competitive conduct. It is not related to economic competition but, for instance, to the information that must be provided to the consumer, a prohibition of misleading the consumer and so on) and provides for administrative supervision and administrative sanctions, whereas the emphasis in the Commercial Code is on the private enforcement by harmed consumers or businesses.

A third legal instrument regarding unfair commercial practices is the Civil Code. On one hand it is applied as a *lex generalis* as regards the Commercial Code (see § 1(2)), on the other hand it contains general provisions on the liability for damage (§ 415 ff CC).³⁹

37 Schulze and Schulte-Nölke, pp. 14–15.

38 *Ibid.*

39 M. Malacka, Czech Republic, in Van Dam and Budaite, p. 35.

Estonia: Consumer Protection Act (Tarbijakaitseadus), Competition Act (Konkurentsiseadus), Law of Obligations (Võlaõigusseadus) Estonian law contains two important instruments to regulate unfair commercial practices. Firstly, the Consumer Protection Act (Tarbijakaitseadus), the purpose of which is to safeguard consumer rights (§ 1(1)) and to regulate the offering and sale, or marketing in any other manner, of goods or services to consumers by traders, to determine the rights of consumers as the purchasers or users of goods or services, and to provide for the organization and supervision of consumer protection and liability for violations of this Act (§ 1(2)).

Secondly, § 50(2) of the Competition Act (Konkurentsiseadus) prohibits unfair competition. Unfair competition is defined as ‘... dishonest trading practices and acts which are contrary to good morals and practices’ (§ 50(1)). The scope of this Act is to ensure the proper functioning of the market and thus to safeguard competition in the interest of free enterprise upon the extraction of natural resources, manufacture of goods, provision of services and sale and purchase of products and services, and to prevent limitation of competition in other economic activities.

Finally, the Law of Obligations Act (Võlaõigusseadus) contains general provisions which may be applicable as regards unfair commercial practices such as the rules regarding damages and the principle of good faith (Article 6). This is, however, only a supporting argument and no independent basis for legal action as regards a trader.⁴⁰

Finland: Consumer Protection Act, Unfair Trade Practices Act Finnish law contains two main legal instruments as regards unfair commercial practices. The Consumer Protection Act applies to offering, selling and other marketing of consumer goods and services by business to consumers. It is aimed to prevent undue influence on the decisions of consumers to guarantee the provision of essential information by tradesmen.

The Unfair Trade Practices Act, however, aims at the protection of traders and of fair trading as a whole and thus to prevent commercial practices which may harm competition and competitors.

Both Acts are supplemented with sector-specific legislation, which is aimed at regulating and restricting the marketing of particular products (for example, Alcoholic Beverages Act, Tobacco Act and specific provisions concerning TV advertisements).

Each of the Acts contains a general clause prohibiting unfair commercial practices, be it that in the Consumer Protection Act the point of view of consumers is decisive and in the Unfair Trade Practices Act the point of view of other tradesmen.⁴¹

Latvia: Competition Act, Consumer Right Protection Act Article 11 of the Competition Act holds that the violation of unfair commercial practices rules creating a hindrance, restriction or distortion of competition, shall be deemed to be unfair competition.

40 K. Käsper, Estonia, in Van Dam and Budaite, pp. 62–3.

41 Schulze and Schulte-Nölke, p 13.

According to Article 17 of the Consumer Right Protection Act, a manufacturer, seller or service provider is obliged to provide the consumer with true and complete information regarding the quality, safety, price, guarantee and the possibilities for guarantee service, directions regarding use, the name (firm name), given name, surname and address of the manufacturer, seller or service provider regarding the goods or services offered, indicating such information in the labelling, the attached instructions for use, the technical certificate or in other written information in respect of such goods or services.⁴²

Poland: Act on Combating Unfair Competition; Civil Code The Act on Combating Unfair Competition of 16 April 1993 regulates acts of unfair competition, such as misleading and aggressive conduct of ‘traders’. The aim of the Act is to prevent and fight unfair competition in the interest of the public, traders, customers and in particular the consumers (Article 1). Although the consumers are mentioned as protected persons, they are unable to take a case to the court on the basis of the provisions of this Act. However, it is possible for them to use other provisions such as Article 388 Civil Code (referring to the law of contractual obligations and regulating undue influence/exploitation) and Article 5 Civil Code (referring to the general ‘abuse of rights’ – the use which is contrary to the socio-economic aim of the right and the principles of social cooperation). Proceedings based on the Act on Combating Unfair Competition can also be commenced by certain bodies or organizations representing consumer interests.

The Act refers to ‘acts of unfair competition’, which have been defined as acts contrary to legal provisions or the principle of good faith, threatening or infringing the interests of other traders or the customers (Article 3.1). The Act regulates specific examples of such conduct – misleading indication of the company, misleading or untruthful indication of the geographic origin of the goods or services, misleading description of goods or services, inciting rescission or failure to fulfil a contract, counterfeiting products, criticising or unfair praises, unfair or prohibited advertising, organising a snowball system of sale of goods (under certain conditions), lottery sales (under certain conditions), some free gifts, consortium-type organizations aimed at buying rights, movable or immovable goods or services. The Act on the Protection of Competition and Consumers mentions misleading or unfair advertising as an example of a practice which infringes collective interests of consumers (Article 23(a)(2)).⁴³

Slovakia: Commercial Code, Act on Consumer Protection, Civil Code Unfair commercial practices are dealt with in general terms in §§ 44–52 Commercial Code. § 44(1) contains the general clause on unfair commercial practices as well as a list of different categories of unfair competition (§ 44(2)). The following provisions specify these various categories.

The Act on Consumer Protection deals in more detail with some kinds of unfair competitive conduct. It is not related to economic competition but, for instance,

42 S. Grebe, Latvia, in Van Dam and Budaite, pp. 98–9.

43 M. Sengayen, Poland, in Van Dam and Budaite, p. 176.

to the information that must be provided to the consumer, a prohibition on misleading the consumer and so on) and provides for administrative supervision and administrative sanctions, whereas the emphasis in the Commercial Code is on the private enforcement by harmed consumer or business.

A third legal instrument regarding unfair commercial practices is the Civil Code. On one hand it is applied as a *lex generalis* as regards the Commercial Code (see § 1(2)), on the other hand it contains general provisions on the liability for damage (§ 415 ff CC).⁴⁴

Spain: Act on Unfair Competition (Ley de Competencia Desleal); Act on Consumer Protection (Ley General para la Defensa de los Consumidores y Usuarios) Spanish law provides for a combination of legal instruments to regulate unfair commercial practices. The most important statute is the Ley de Competencia Desleal (Ley 3/1991). Consumer protection rules can be found in the Ley General para la Defensa de los Consumidores y Usuarios (Ley 26/1984) and the Ley General de Publicidad (Ley 34/1988) regulates advertising. Also, the Spanish autonomous regions (Comunidades Autónomas) are entitled to enact rules as regards unfair commercial practices.

The Act on Unfair Competition protects both competitors and consumers whose interests are directly affected by unfair competitive behaviour. Article 5 holds that any behaviour is unfair, if it objectively violates the principle of good faith. This Act contains several special provisions concerning specific behaviour which do not require individual investigation as to whether there has been a contravention of the principle of good faith.⁴⁵

(iv) No Statutory Framework but General Rules in the Civil Code

Six Member States do not have a statutory framework aimed at regulating unfair commercial practices. Private law protection against unfair competition in these countries is, apart from specific legislation, based on the general contract law and tort law clauses in the Civil Codes. This goes for France, Italy, Malta, the Netherlands, Portugal, and Slovenia.

France The general rules of the Code civil regarding the conclusion of contracts (Art. 1108 onwards, Code civil) play an important role in regulating pre-contractual transparency and fairness. In addition, a lack of transparency in the pre-contractual stage may constitute a civil wrong to which the general rules of tort law are applicable (Articles 1382 and 1383 Code civil). Based on these rules the courts have also developed the concept of unfair competition ('concurrency déloyale'), according to which a business whose commercial freedom is harmed by a competitor may obtain a cease and desist order and damages for a loss suffered.⁴⁶ Besides these general rules

44 Malacka, pp. 196–7.

45 Schulze and Schulte-Nölke, p. 14.

46 C. van Dam, *European Tort Law* (Oxford, 2006), nr. 712.

in the Code civil the Code de la Consommation contains fairness and transparency provisions aiming at the protection of consumers.⁴⁷

Italy Competition is mainly controlled by constitutional principles and by the Codice civile. For the most part, trading rules are derived from the concept of professional fairness contained in Article 2598 Codice civile, which also contains a general clause (Article 2598 No. 3) and represents the most important provision connected with unfair practices. Article 2598 No. 3 states that acts of unfair competition are committed by any person who directly or indirectly makes use of any other means not in accordance with the principles of professional fairness, which would be likely to damage the business of others. This article is deemed to solely protect the interests of competitors.⁴⁸

Malta There is no general legal framework as regards unfair commercial practices but there are various laws dealing directly or indirectly with certain practices that might be considered as unfair.

A damages claim for unfair commercial practices can be based (both by a consumer and a trader) on the general tort law provisions if it can be shown that there was a fault on the part of the trader and that damage was suffered as a result of such practices (Articles 1031–33 Civil Code). A person is deemed to be at fault if he does not use the prudence, diligence or attention of a bonus paterfamilias. The same goes for someone who voluntarily or through negligence, imprudence or want of attention, commits any act or omission constituting a breach of the duty imposed by law.

An example of specific legislation can be found in the Articles 32–7 Commercial Code (Chapter 13 of the Laws of Malta), prohibiting various forms of unfair competition between traders such as the use of names or marks that might create confusion with other names or marks, the use of false indications of origin of goods, or disseminating information that is prejudicial to other traders. Such practices carry a civil law sanction in the form of damages, a penalty or an injunction. These provisions are aimed to protect other traders rather than consumers.⁴⁹

Netherlands There is no general structure of legislation on unfair competition or unfair trade practices in the Netherlands. Unfair competition rules can be found in a variety of legal and self-regulatory instruments, whereas the general principles of unfair competition are derived from the general clause in the Civil Code concerning the law of tort (Article 6:162 Burgerlijk Wetboek). The case law regarding unfair commercial practices is developed on the basis of the violation of ‘unwritten law’ as provided for in the general clause (Article 6:162(2)).⁵⁰

47 Schulze and Schulte-Nölke, p. 12.

48 *Ibid.*, p. 15.

49 P.G. Xuereb and E. Buttigieg, Malta, in Van Dam and Budaite, pp. 152–3.

50 Schulze and Schulte-Nölke, p. 15.

Portugal Portuguese law in the area of unfair commercial practices is highly fragmented. Fair trading is not governed by a general statutory framework but by a large number of specific rules. There is especially strong regulation in the areas of advertising and intellectual property.

Article 260 Industrial Property Act (Codigo da Propriedade Industrial) holds a general clause on unfair trade practices supplemented by a non-exhaustive list of examples. However, the scope of this clause is limited. It requires a competitive relationship and additionally a close similarity in commercial activities between the parties. Hence, it only applies in B2B and not in B2C relations.

The Law for Consumer Protection (Lei da Defeso do Consumidor) focuses on information requirements and advertising. Regarding advertising, the Portuguese constitution provides for the consumer's general right to information and prohibits hidden, indirect or fraudulent advertising.⁵¹

Slovenia There is no specific legislation in Slovenia governing fairness of commercial practices. Instead, the issue of unfair commercial practices is addressed in a piecemeal manner by a number of laws regulating various aspects of fairness in commercial transactions.

The Protection of Competition Act is the most general in its scope but its primary purpose is not the protection of consumers in business transactions. Rather, the main aim of the Act is to ensure fairness between competitors by safeguarding against distortions in the market caused by competitive advantages gained by businesses using unfair commercial practices.

Accordingly, the economic interests of consumers are only indirectly protected from unfair B2C commercial practices; their interest is only protected if unfair competition as between businesses can be shown to have occurred. This means that for damages actions consumers have to rely on the general tort law provisions in the Civil Code.⁵²

(v) No General Framework and no General Rules: Common Law

Three Member States do not have a statutory framework aimed at regulating unfair commercial practices. Private law protection against unfair competition in these countries is, apart from specific legislation, based on the piece meal tort rules of the common law. This goes for Cyprus, Ireland and the United Kingdom.

Cyprus There is no general comprehensive statutory framework as regards unfair commercial practices. There are, however, various specific legislative provisions, dealing directly or indirectly with practices, which might be considered as unfair. In addition, self-regulation is a method of control of unfair commercial practices in Cyprus. Also, the fairness of commercial practices may be challenged under common law. An unfair commercial practice may constitute a breach of contract in

⁵¹ *Ibid.*, p. 16.

⁵² A. Stanic, Slovenia, in Van Dam and Budaite, p. 226.

appropriate cases or duress or undue influence as well as other tortious claims, such as passing off or injurious falsehood depending on the nature of the case.⁵³

Ireland Irish law does not contain comprehensive legislation in the area of unfair commercial practices. Fair trading rules can be found in the common law, and in a number of statutes and statutory instruments.⁵⁴

United Kingdom English law does not recognize a concept of unfair competition or a general rule governing the fairness of commercial practices. The courts have been reluctant to develop a general principle of unfair competition, despite the accession of the UK to the Paris Convention bringing along the obligation to assure to nationals of other countries effective protection against unfair competition. The subject matter is dealt with in more than one hundred Acts and Statutory Regulations, as well as in self-regulatory Codes of Conduct and tort law precedents. The most important applicable torts are passing off, defamation and malicious falsehood.⁵⁵ In *Moorgate Tobacco v. Philip Morris* Deane J. stated that the phrase ‘unfair competition’ has been used to ‘describe what is claimed to be a new and general clause of action which protects a trader against damage caused either by “unfair competition” generally or, more particularly, by the misappropriation of knowledge or information in which he has a quasi-proprietary right’.⁵⁶

(vi) *Conclusion*

Looking at the various ways the legal systems have regulated commercial practices, there are in fact three categories to be distinguished.

At one end of the spectrum are the most comprehensive statutory frameworks aiming at regulating commercial practices. They can be found in the Germanic,⁵⁷ Eastern-European⁵⁸ and Nordic systems.⁵⁹ Within this category, there are differences in legislative technique, in the sense that some countries have adopted a one statute for all approach (s. 2.2) and others have divided the rules on unfair commercial practices over two or three statutory instruments (s. 2.3). However, there does not seem to be a strong difference between these approaches if it comes to regulating conduct. The difference is more a matter of legislative technique than a matter of principle as regards regulating conduct. What they have in common is that the

53 A. Katsis, Cyprus, in Van Dam and Budaite, p. 8.

54 Schulze and Schulte-Nölke, p. 16.

55 *Ibid.*

56 The need for more general guidance is apparent from the core principles of the Department of Trade and Industry (DTI), that consumers should see ‘truthful advertisements’, ‘clear, helpful and adequate pre-contractual information’ as well as ‘clear, fair contracts’.

57 Germany, Austria, Greece.

58 Czech Republic, Estonia, Hungary, Latvia, Lithuania (in the near future), Poland, and Slovakia. An exception is Slovenia.

59 Denmark, Sweden, Finland.

political will to regulate commercial practices (rather than leave it to the courts and the market) was strong enough to enact a statutory framework in this respect.

At the other end of the spectrum, the island states (United Kingdom, Ireland and Cyprus) have taken the loosest approach.⁶⁰ As countries with a common law tradition, they only regulate specific situations and do not hold overarching general rules or general Acts. Here, the corrections to market failures are approached in a more pragmatic way, leaving more space for the protection of the freedom of trade.

In the middle are the remaining Western-European countries which are partly French orientated. They do not have general statutes regulating commercial practices but they rely on specific provisions and on the general provisions in the Civil Code.⁶¹ Important exceptions in this area are, however, Spain, Belgium and Luxembourg, the latter being closer to the Germanic approach.

The obvious starting point in all European economies is the freedom of trade and the freedom of competition. All countries recognize that, although much is allowed in this respect, competition and trade needs to be fair, both towards other traders and towards consumers. A parallel can be drawn between sports competition and economic competition. Both areas accept competition as a useful and beneficial incentive for action and therefore emphasize the value of the freedom to act. Protection of competitors' or opponent's interests only comes into play in case of unfair conduct according to the characteristics of the competition.⁶²

The common starting point of all European economies is emphasized by the fact that all Member States hold a body of statutory rules regarding specific commercial practices. The differences between the Member States are gradual rather than a matter of principle. However, from a harmonization point of view these differences are far from negligible. They are reflected in the way market behaviour is regulated in the Member States. Generally, it can be said that the looser the statutory framework, the more emphasis will be put on the freedom of trade. For example, the common law does not know a general principle of fair trading and applies a piecemeal approach in order to limit the freedom to trade. It formulates exceptions only for certain specific cases of unfair trading practices that are likely to hinder competition.⁶³ On the other hand, German law takes fair trading as the starting point and the general rule of its statutory framework.

Another difference worth mentioning is that in economic tradition: whereas the old Member States have always embraced a (social) market economy, most of the new Member States were for decades strongly influenced by socialist politics and the accompanying collective rather than individual approach in regulating market behaviour. Most of these countries have adopted a more general statutory framework for regulating commercial practices.

It is the aim of the UCPD to eliminate these differences between the Member States as regards the regulation of commercial practices. The Directive provides for

60 Cyprus, Ireland and United Kingdom (but not Malta).

61 France and Italy, and, more at a distance from the French Code, the Netherlands and Portugal.

62 Van Dam, *European Tort Law*, nr 809–1.

63 De Vrey, pp. 279–281.

an overarching set of rules of market behaviour in the relation between business and consumers. This approach is familiar to 16 of the 25 Member States. These countries will have to fine-tune their legislation in order to make it compatible with the content of the Directive. The other nine Member States will have to introduce a (more) comprehensive statutory framework on the regulation of commercial practices in order to implement the Directive.

A comprehensive statutory framework aiming at regulating commercial practices, as embodied in the Directive, can contribute to a more visible life of the principle of fair trading within the legal systems and its content stronger impregnated in the legal minds. It can also encourage the development and elaboration of the principle of fair trading throughout the European Union.

3. Scope of the National General Clauses

(i) Introduction

Article 5 is the central provision of the UCPD and provides for a grand general clause and two small general clauses. The grand clause of Article 5(1) holds that 'Unfair commercial practices shall be prohibited'. Article 5(2) provides that 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 ...'. Besides this general clause, two small general clauses outlaw commercial practices that are misleading (Articles 6–7) and aggressive (Articles 8–9). These general clauses are supplemented by an Annex blacklisting 31 commercial practices (23 misleading practices and eight aggressive ones).

In most Member States, the fairness of commercial practices is governed by general clauses. For a few countries this is the general tort law rule, but the vast majority knows a general clause that specifically relates to commercial practices. These clauses will be analysed in this section. Obviously, Member States that do not provide for a general clause on fair commercial practices (Cyprus, France, Ireland, Malta, the Netherlands, Portugal, and the United Kingdom) will not appear in this section.

(ii) Member States Holding One General Clause

Austria, Czech Republic, Denmark, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Slovakia, Spain, and Sweden hold a general clause as regards unfair commercial practices.

(1) Austria

§ 1 Bundesgesetz gegen den unlauteren Wettbewerb:

Any person who acts *contra bonos mores* in business dealings for a competitive purpose shall be liable to proceedings for a restraining injunction and damages.

Additionally, there is a small general clause on misleading advertising in § 2(1) UWG. It consists of a formulation in general terms ('Any person who, in the course of business activity and for purposes of competition, makes deceptive statements concerning business matters ...') and contains a list of unfairness categories by way of example.⁶⁴

(2) Czech Republic

§ 44(1) Commercial Code:

Unfair competition is conduct in an economic competition, which is contrary to the *bonos mores* of the competition and is capable of harming other competitors or consumers. Unfair competition is prohibited.⁶⁵

(3) Denmark

Section 1 Markedsføringsloven:

This Act shall apply to private business activities and to similar activities undertaken by public bodies. Such activities shall be carried on in accordance with good marketing practices.⁶⁶

(4) Germany

§ 3 Gesetz gegen den unlauteren Wettbewerb:

Acts of unfair competition which are liable to have a more than insubstantial impact on competition to the detriment of competitors, consumers or other market participants, are prohibited.

§ 1 Gesetz gegen den unlauteren Wettbewerb:

This Act intends to protect competitors, consumers and other market participants from unfair competition. At the same time it intends to protect the public interest in undistorted competition.

(5) Greece

Article 1 Act Against Unfair Competition prohibits any competitive behaviour that is *contra bonos mores*.⁶⁷

(6) Hungary

Article 2 Act on the Prohibition of Unfair and Restrictive market Practices:

It is prohibited to conduct economic activities in an unfair manner, in particular in a manner violating or jeopardising the lawful interests of competitors and consumers, or in a way which is in conflict with the requirements of business integrity.⁶⁸ This Act applies both to B2B and B2C relations.

64 Schulze and Schulte-Nölke, p. 17.

65 Malacka, p. 28.

66 Schulze and Schulte-Nölke, pp. 12–13 and 18.

67 *Ibid.*, p. 19.

68 Suhajda and Lendvai, p. 29.

(7) Italy

Article 2598 No. 3 Codice civile:

Acts of unfair competition are committed by any person who directly or indirectly makes use of any other means not in accordance with the principles of professional fairness, which would be likely to damage the business of others.⁶⁹

This article is deemed to solely protect the interests of competitors.⁷⁰ Consumer protection rules are to be derived from the general tort law rules.

(8) Latvia

Article 18 Competition Act:

Actions that violate regulatory enactments or the fair practices of commercial activities and which have created or could create a hindrance, restriction or distortion of competition, shall be deemed to be unfair competition.⁷¹

(9) Lithuania

Draft Article 6 Act on Consumer Rights Protection (pending before Parliament):

Sellers and service providers must obey fair commercial practice while offering and providing goods and services to the consumers. These have to be offered in such a way that the commercial nature of the offer is clear to the consumer.⁷²

(10) Luxembourg

Article 14 Loi réglementant certaines pratiques commerciales et sanctionnant la concurrence déloyale:

Any act by any person exercising a commercial, industrial, artistic or liberal activity, contrary to honest practices in commercial, industrial, artistic or liberal matters or to contractual engagement, which removes or tries to remove a part of the clientele from their competitors or from one of them or which is detrimental to, or intends to be detrimental to their competitive capacity is unfair.⁷³

This general clause addresses competitors and consumer protection. The general clause is complemented by provisions on advertising, sale at a loss, competitions/lotteries and pyramid selling which are – unlike the general clause – not limited to competitors. These specific provisions also cover business-to-consumer transactions.⁷⁴

(11) Poland

Article 3.1 Act on Combating Unfair Competition prohibits unfair competition, including misleading and aggressive conduct of traders. Acts of unfair competition

69 Schulze and Schulte-Nölke, p. 19.

70 *Ibid.*, p. 15.

71 Grebe, pp. 29–30.

72 Katuoka, p. 30.

73 Schulze and Schulte-Nölke, pp. 19–20.

74 *Ibid.*, p. 14.

are acts contrary to legal provisions or the principle of good faith, threatening or infringing the interests of other traders or the customers.⁷⁵

(12) Slovakia

§ 44(1) Commercial Code:

Unfair competition is conduct in an economic competition, which is contrary to the *bonos mores* of the competition and is capable of harming other competitors or consumers. Unfair competition is prohibited.⁷⁶

(13) Spain

Article 5 Act on Unfair Competition (Ley de Competencia Desleal):

Any behaviour objectively violating the principle of good faith is unfair.⁷⁷

(14) Sweden

Section 4(1) Marketing Act (Marknadsföringslagen):

Marketing must be compatible with good marketing practice and also in other respects be fair towards consumers and businessmen.⁷⁸

(iii) Member States Holding Two General Clauses

Belgium, Estonia, Finland, and Slovenia, hold two general clauses as regards unfair commercial practices.

(15) Belgium

Article 93 Act on Commercial Practices and Consumer Information (Loi sur les pratiques du commerce et sur l'information et la protection du consommateur):

Any act contrary to fair commercial practice by which a seller harms or may harm professional interests of one or several other sellers is prohibited.

Article 94 Act on Commercial Practices and Consumer Information (Loi sur les pratiques du commerce et sur l'information et la protection du consommateur):

Any act contrary to fair commercial practice by which a seller harms or may harm the interests of one or several consumers is prohibited.⁷⁹

The two general clauses differ only with regard to the damage or potential damage to be proven (damage to other sellers in Article 93 and to consumers in Article 94). The notion of 'fair commercial practices' is the same.⁸⁰

(16) Estonia

Article 12 Consumer Protection Act (Tarbijakaitseadus):

75 Sengayen, p. 30.

76 Malacka, p. 30.

77 Schulze and Schulte-Nölke, p. 20.

78 *Ibid.*, pp. 20–21.

79 *Ibid.*, p. 17.

80 *Ibid.*, Belgian Report, 4.

The offering and sale of goods and services to consumers shall follow good trade practice and be honest with regard to the consumers.

§ 50 Competition Act (Konkurentsiseadus):

- (1) Unfair competition includes dishonest trading practices and acts which are contrary to good morals and practices.
- (2) Unfair competition is prohibited.⁸¹

(17) Finland

Section 1 Consumer Protection Act:

No conduct that is inappropriate or otherwise unfair from the point of view of consumers shall be allowed in marketing. Marketing that does not convey information necessary in respect of the health or economic security of consumers shall always be deemed unfair.

Section 1.1 Unfair Trade Practices Act:

Good business practice may not be violated nor may practices that are otherwise unfair to other entrepreneurs be used in business.⁸²

(18) Slovenia

Article 13 Competition Act:

Unfair competition is to be understood as an act contrary to good business practices which causes or is likely to cause damage to another market participant.

Article 25 Consumer Protection Act:

A business which sells goods or provides services to consumers has to do so in a manner which is not contrary to good business practices.⁸³

(iv) Conclusion

Consequences of the choice for a general clause in the Directive:

General clauses as such are not unknown in European Community law. In the adjacent area of competition law, Article 82 EC holds a general clause prohibiting the abuse of a dominant market position.⁸⁴ This general clause is followed by four categories of situations of which such abuse may consist.⁸⁵ In this sense, there is a parallel with

81 Käsper, p. 29.

82 Schulze and Schulte-Nölke, p. 18.

83 Stanic, p. 31.

84 Article 82 ECL 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States'.

85 '... (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

the construction in the UCPD with its general clause supplemented by an Annex of 31 practices which are deemed to be unfair. The application of Article 82, however, has been very complicated and it is clear from the outset that the application of the general rule in the UCPD will be far from easy either.

The general clause of Article 5 simply bans unfair commercial practices. Such a general rule suggests unity but in fact it does not give the courts much guidance. This lack of specificity is partly made up for by the list of 31 concrete commercial practices which are deemed to be unfair. Since also misleading and aggressive practices are governed by more specific general clauses (Articles 6–9), the general clause of Article 5 will usually be the port of last resort. In this respect the maxim holds that the general clause only applies if there is no special provision covering the particular case (*lex specialis derogate legi generali*). This maxim does not only apply within the framework of the Directive but in Community law generally. This means that more specific Community rules (or applicable specific national rules for that matter), such as in European Directives regarding distance selling, doorstep selling, (misleading) advertising and the like have precedence over the general rules of the Articles 5–9 of the Directive (see Article 3(4) of the Directive).⁸⁶

The general clause introduced in the UCPD will replace the existing divergent general clauses in the Member States and define a common EU wide framework. It is, however, doubtful whether this general clause will considerably simplify the legislative environment in which traders and consumers operate.⁸⁷ Indeed, the upside of a general clause is the flexibility needed to adapt decisions to new unfair trading practices. The downside is, however, a lack of legal certainty which can only be provided by case law over a longer period of time. Moreover, it is unlikely that the ECJ will or even can provide the clear guidance necessary to create a level playing field. The experiences with the concept of the average consumer (s. 1.2) have shown that the Court is increasingly inclined to confine itself to questions of interpretation and to delegate more detailed decisions of application to the national courts, thus leaving space for cultural, social and linguistic differences in what can be considered to be an application of the principle of subsidiarity. The division of competence between the European and the national courts is, however, far from crystal clear.⁸⁸

86 See, for example, for an overview of the extensive Community rules on advertising: J. Kabel, 'Swings on the Horizontal: The Search for Consistency in European Advertising Law', *Iris Plus* 2003–8: 2–8.

87 De Vrey, pp. 65–6, is more optimistic about the effects of the general rule.

88 Ohly, 'Towards a Harmonised European Unfair Competition Law? Comments on the Proposal for a Directive on Unfair Commercial Practices', p. 7; Stuyck, Terryn and Van Dyck, 'Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market': 138–9, the latter pointing out that as regards interpretation of the blacklist the ECJ will decide itself since unfairness in the sense of the blacklist does not suppose an examination of the concrete circumstances. More generally, they criticize the regulatory approach of the Directive, advocate an approach more closely to the *Lamfalussy Report* as regards the regulation of the European securities markets; *ibid.*, 144–7.

B2B and B2C protection

The concept of unfair competition entered the international scene with the Paris Convention for the Protection of Industrial Property of 1883. This Convention contains a general clause in s. 10bis(2) and three more specific provisions (against the creation of confusion, the discrediting of competitors through false allegations and the misleading of the public) but the scope of this Convention and of other Conventions on more specific issues (for example TRIPS) is limited to acts of competition between competitors. Consumer interests entered the international stage only some time after World War II.

In the 1970s consumer protection became one of the official policies of the European Community⁸⁹ and this reflected the growing importance of the European consumer at a national level. At a European level, this resulted in a considerable number of consumer protection directives, such as the Directive on Misleading Advertising in 1984.⁹⁰ The UCPD can be considered as the culmination of this policy.⁹¹ However, the scope of the Directive is completely opposite to that of the Paris Convention in that its scope is limited to consumer protection and that it does not offer protection in B2B situations – some exceptions aside which have been pointed out in s. 1.2.

Also at a national level, the focus has shifted in order to include consumer protection. For example, the starting point for German unfair competition law was to enforce the *'bonos mores'* of the marketplace. This criterion has recently been replaced by the criterion of 'unfairness'. Although this is a quite similar criterion its scope is not confined to what is fair according to the 'best market practices' in a specific branch of producers, but to what is deemed to be fair or unfair in the eyes of the public.⁹² Also recent acts such as in Sweden, Denmark, and Belgium illustrate the shift to the inclusion of consumer protection, providing for a more progressive model of combined competitor and consumer protection law.⁹³

89 The EEC Summit in Paris of October 1972 is generally considered to be the starting point for the European Community's consumer policy; the participants declared '... à renforcer et à coordonner les actions en faveur de la protection des consommateurs'. See PE 31.196/Ann./déf., 16 (http://aei.pitt.edu/1112/01/Paris_72_summit_ep_report.pdf). The entry into force of the Maastricht Treaty in 1993 conferred explicit legislative competence on the EC as regards consumer protection. According to Article 153(3)(b) the Community may adopt measures which support, supplement and monitor the policy pursued by the Member States in order to promote the interests of consumers and to ensure a high level of consumer protection. This puts the EC in a secondary position to the Member States in matters of consumer protection.

90 Also the European Commission's Green Paper, *Damages Action for Breach of the EC Antitrust Rules*, 19 December 2005, COM(2005) 627 final, takes a combined consumer-business interest approach.

91 See Micklitz, 'A General Framework Directive on Fair Trading', p. 43 who argued in 2004 '... that a European legislative framework [on fair trading] has to pay tribute to the rise of consumer protection in recent decades'.

92 De Vrey, p. 279.

93 De Vrey, p. 278.

In most Member States holding one general clause, this clause applies to both unfair B2B and B2C practices. In Member States with two general clauses, one applies to B2B and one to B2C practices. The consequences of the Directive's B2C approach are that the first group of Member States will have to split their general clause into two: one European B2C clause and one national B2B clause. The second group will have to adapt their general clause relating to B2C relations.

The limited approach of the Directive was obviously not a matter of principle but of practicality. It was considered to be politically too complicated to combine both strands of commercial practices. The Directive is rather to be seen as a first step to a general legal framework for regulating commercial practices because a broadening of the current Directive is on the European Commission's agenda as set out in Recital 8 (s. 1.2). It provides the Commission with the task to 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. In the meantime, it is not excluded that the current Directive can contribute to a kind of harmonization of B2B situations if Member States choose to apply the Directive standard to the B2B situations which are covered by national law.

4. Content of the National General Clauses

(i) Introduction

In a fast changing world, general clauses are indispensable. As the Commission pointed out in the Green Paper on Consumer Protection, a high degree of specificity quickly becomes obsolete as rogue traders will find new methods.⁹⁴ In the same Green Paper the Commission pointed out that the general clause was to be understood as being based on legal models such as 'fair commercial practices' or 'good market behaviour', but it would imply a general test not to engage in unfair commercial practices.⁹⁵ In the final version of the Directive, Article 5(1) prohibits unfair commercial practices, whereas Article 5(2) holds that 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.⁹⁶ Hence, the Directive contains a double standard: first, professional diligence, and second that the practice materially distorts the consumer's economic behaviour.

94 COM(2001) 531, 2 October 2001, para. 2.2.

95 Radeideh, p. 259.

96 Article 5(3) provides a specific rule for commercial practices which are likely to materially distort the economic behaviour of a group of particularly vulnerable consumers because of their mental or physical infirmity, age or credulity.

Professional diligence is defined in Article 2(h), stating that ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest business practices and/or the general principle of good faith in the trader’s field of activity’. Compliance with codes of conduct can be taken into account when assessing whether the requirements of professional diligence are infringed but this cannot be decisive.⁹⁷ This diligence standard does not apply to misleading and aggressive practices (Articles 6–9).

The notion ‘material distortion of the consumer’s economic behaviour’ is defined in Article 2(e) as ‘the ability to make an informed decision is appreciably impaired, thereby causing the consumer to take a transactional decision that he would not have taken otherwise’. The requirement of material distortion does not apply as regards the commercial practices which are blacklisted in Annex I to the Directive and which are deemed to be unfair *per se*.⁹⁸

How does the Directive’s double standard relate to the ones that are currently applicable in the Member States? Two major categories can be distinguished in this regard. In nine countries the notion of good trading practices or *bonos mores* applies as standard (s. 4.2). In nine other countries applying a general rule, notions like honesty, fairness, good morals, good faith and business integrity are being used.

(ii) *Good Trading Practices (bonos mores)*

(1) Austria

§ 1 UWG:

Any person who acts *contra bonos mores* in business dealings for a competitive purpose shall be liable to proceedings for a restraining injunction and damages.

(2) Czech Republic

§ 44(1) Commercial Code:

Unfair competition is conduct in an economic competition, which is contrary to the *bonos mores* of the competition and is capable of harming other competitors or consumers. Unfair competition is prohibited.

(3) Denmark

Section 1 MPA:

This Act shall apply to private business activities and to similar activities undertaken by public bodies. Such activities shall be carried on in accordance with good marketing practices.

97 Stuyck, Terryn and Van Dyck, ‘Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market’: 137, arguing that these codes can have potential anti-competitive effects and are not always established in the general interest but sometimes merely in the interest of the sector concerned.

98 Critical about this concept is Radeideh, pp. 261–5.

(4) Estonia

Article 12 Consumer Protection Act (Tarbijakaitseadus):

The offering and sale of goods and services to consumers shall follow good trade practice and be honest with regard to the consumers.

§ 50 (1) Competition Act (Konkurentsiseadus):

Unfair competition is defined as 'dishonest trading practices and acts which are contrary to good morals and practices'.

(5) Finland

Chapter 2, Section 1 CPA:

No conduct that is inappropriate or otherwise unfair from the point of view of consumers shall be allowed in marketing.

Section 1.1 UTPA:

Good business practice may not be violated nor may practices that are otherwise unfair to other entrepreneurs be used in business.

(6) Greece

Following the example of German law, the Greek codification contains a general clause (Article 1), which prohibits any competitive behaviour that is *contra bonos mores*.

(7) Slovakia

§ 44(1) Commercial Code:

Unfair competition is conduct in an economic competition, which is contrary to the *bonos mores* of the competition and is capable of harming other competitors or consumers. Unfair competition is prohibited.

(8) Slovenia

Article 13 Competition Act:

Unfair competition is an act contrary to good business practices which causes or is likely to cause damage to another market participant.

Article 25 Consumer Protection Act:

A business which sells goods or provides services to consumers has to do so in a manner which is not contrary to good business practices.

(9) Sweden

Section 4(1) Marketing Act:

Marketing must be compatible with good marketing practice and also in other respects be fair towards consumers and businessmen.

(iii) Other References: Honesty, Fairness, Good Morals, Good Faith and Business Integrity

(10) Germany

§ 3 Gesetz gegen den unlauteren Wettbewerb:

Acts of unfair competition which are liable to have a more than insubstantial impact on competition to the detriment of competitors, consumers or other market participants, are prohibited.

(11) Hungary

Article 2 Competition Act:

It is prohibited to conduct economic activities in an unfair manner, in particular in a manner violating or jeopardising the lawful interests of competitors and consumers, or in a way which is in conflict with the requirements of business integrity.

(12) Italy

Article 2598 No. 3 Codice civile:

Acts of unfair competition are committed by any person who directly or indirectly makes use of any other means not in accordance with the principles of professional fairness, which would be likely to damage the business of others.⁹⁹

(13) Latvia

Article 18 Competition Act:

Actions that violate regulatory enactments or the fair practices of commercial activities and which have created or could create a hindrance, restriction or distortion of competition, shall be deemed to be unfair competition.

(14) Lithuania

Draft Article 6 Act on Consumer Rights Protection (pending before Parliament):

Sellers and service providers must obey fair commercial practice while offering and providing goods and services to the consumers.

(15) Luxembourg

Article 14 LPC:

Any act by any person exercising a commercial, industrial, artistic or liberal activity, contrary to honest practices in commercial, industrial, artistic or liberal matters or to contractual engagement, which removes or tries to remove a part of the clientele from their competitors or from one of them or which is detrimental to, or intends to be detrimental to their competitive capacity is unfair.

(16) Poland

Article 3.1 Act on Combating Unfair Competition prohibits unfair competition, including misleading and aggressive conduct of traders. Acts of unfair competition are acts contrary to legal provisions or the principle of good faith, threatening or infringing the interests of other traders or the customers.

(17) Portugal

Article 260 CPI:

⁹⁹ Schulze and Schulte-Nölke, p. 19.

Any person acting in the course of business activity and trying to cause a loss to anyone, or to get an illegitimate gain for himself or for a third party is deemed to be acting unfair if his behaviour is in breach of rules or of honest trade practices.

(18) Spain

Article 5 LCD:

Any behaviour objectively violating the principle of good faith is unfair.

(iv) *Conclusion*

When defining unfair commercial practices most general clauses refer to good trading practice, in particular, to *bonos mores* of the competition (Austria, Czech Republic, Germany, Greece and Slovakia), to good business, trade and marketing practice, fairness, honesty and good morals (Denmark, Estonia, Finland, Germany, Luxembourg, Portugal, Slovenia, Sweden), to the principle of good faith (Poland, Italy and Spain) and to business integrity (Hungary). In countries in which the general rules of the Civil Code apply, the standard is, for example, '*faute*' in France and '*onrechtmatigheid*' (unlawfulness) in the Netherlands.

The national general clauses do not refer to the standard of professional diligence. Indeed, it has been rightly argued that it is not appropriate to relate the standard for commercial practices to diligence. What is at stake in commercial practices is not so much a standard of diligence (just as it is not appropriate to require people playing sports to behave diligently, see s. 2.6) but of fairness, good business practice or lawfulness.¹⁰⁰ Although the Directive's terminology is not very fortunate, it is not to be expected that it will as such have a considerable impact on the content of the rule.¹⁰¹ Of more importance are the political, economic and cultural traditions in striking a balance between free and fair competition. For example, in the UK the emphasis has traditionally been more on freedom and in Germany more on fairness. A comparison can be drawn with the European-wide divergence in interpreting the concept of good faith.¹⁰² More generally, Collins rightly said: 'No doubt there is much common ground between the different jurisdictions, but at the boundaries of permitted trading behaviour there are likely to be many disagreements about how to draw the line between unfair sharp practice and merely efficient marketing techniques.'¹⁰³

The second leg of the standard (whether the practice materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average

100 Ohly, p. 8. In this respect it can be argued, perhaps slightly paradoxically, that the extensive self-regulatory rules in the United Kingdom may serve as an inspiration for interpreting and concretising the general rule.

101 Compare in this respect for instance the change in the German statutory wording from conduct *contra bonos mores* to unfair competition which, according to the German Ministry of Justice, was not supposed to lead to any change in the content: see Schulze and Schulte-Nölke, p. 19.

102 R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law* (Cambridge, 2000).

103 See also Collins, 'EC Regulation of Unfair Commercial Practices', p. 40.

consumer, according to Article 5(2)(b) neither has a link with the Member States' general clauses. This is not surprising since the standard is formulated in purely economic terms. However, it can be argued that in national law this requirement is disguised in the legal requirements of causation and damage.

An important question in this respect is whether the courts will consider this latter requirement as a *de minimis* rule (which means that the courts should not interfere with practices that harm nobody)¹⁰⁴ or whether it will be given a broader meaning. The latter seems to be more likely but it will not be easy to assess whether a practice materially distorts the consumer's economic behaviour. Moreover, the two legs of the standard cannot be easily separated and it has been rightly argued that there is only a thin line between 'persuasion' and 'appreciable impairment' and that the national courts in Europe will come up with diverging interpretations.¹⁰⁵

The requirement of material distortion is directly linked to the concept of the average consumer of Article 5(2)(b). The higher the level of the 'average consumer' – that is the more informed, observant and circumspect he is supposed to be – the lower the protection provided and vice versa. More generally, the concept of the 'average consumer' is fuelled by the theory, or rather the belief, that informed choices lead to efficient choices ensuring maximization of consumers' collective interests.¹⁰⁶ More empirical evidence is needed as to what the factual influence of information is on the efficiency of consumers' choices and whether consumers need more protection than just being properly informed.¹⁰⁷

The advantage of the Directive's terminology is that it is new: it does not have clear links with the existing Member States' terminology. This provides for a 'neutral' start for the new general standard. At the same time, however, it is conceivable that the national courts will be inclined, at least initially, to look at the new standard through their old national spectacles. In this respect, it will be hard to change trained legal minds. And whereas it is hardly feasible for the ECJ to give more than general guidance (see s. 1.2), the new standard is liable to maintain divergence as regards the application of the European standard for fair commercial practices. This might

104 In this sense Ohly, p. 8, probably inspired by the German § 3 *Gesetz gegen den unlauteren Wettbewerb*: 'Acts of unfair competition which are liable to have a more than insubstantial impact on competition to the detriment of competitors, consumers or other market participants, are prohibited.'

105 Stuyck, Terryn and Van Dyck, 'Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market': 126–7.

106 Stuyck, Terryn and Van Dyck, 'Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market': 108 and 122, on the differences between the outcome of empirical research and the description of the vulnerable consumer in Article 5(3) of the Directive. See with regard to the 'information belief', for example, Case C–362/88 (GB-INNO BM) [1990] ECR 667, and the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on Consumer Policy Strategy 2002–2006 (COM(2002) 208 final).

107 Also critical about the information paradigm are, for example, Howells and Wilhelmsson, 'EC Consumer Law: Has it come of age?': 370 ff.

also go for those blacklisted commercial practices in the Annex that are vaguely formulated.¹⁰⁸

5. Concluding Remarks

This chapter has provided an overview of the current national laws on unfair commercial practices throughout the European Union and their relation with the upcoming UCPD. It has been illustrated how diverse the current national approaches are and how the rules to be implemented create a new standard and structure.

It was pointed out in s. 2 how the statutory frameworks of the Member States as regards commercial practices differ. The Directive does not aim to bring harmony in this respect because the Member States are free to choose the statutory instruments to implement the Directive. In a number of Member States, the Directive will not even be visible as such if the provisions are to be inserted in various existing Acts.

Section 3 showed that the UCPD runs counter to two important features of the current national laws. On one hand, the UCPD forces common law countries to adopt a general clause on unfair commercial practices and on the other it forces most civil law countries to split their rules on unfair commercial practices into two categories: one for B2B and one for B2C situations. The latter does not make a lot of sense, the more so since the Misleading and Comparative Advertising Directive was aimed at protecting traders and consumers and is partially amended by Article 14 UCPD in order to limit applicability to traders' interests. Also, consumer protection and competitor protection can be considered to be two sides of the same coin because many practices affect consumers and competitors alike.¹⁰⁹ However, it has also been pointed out that feasibility has remained over desirability.

Section 4 has shown that the content of the Directive's general rule in Article 5 represents a new approach which does not have an explicit parallel in the Member States. The advantage is that the standard is not prejudiced towards one or more national standards. The downside is that the development of the content of the rule starts from scratch and that it will take time, not only to develop this content but also to make it an instrument to create a level playing field. Furthermore, the risk involved in this new approach is that the national courts will initially be inclined to fall back on the old national standards with which they are familiar.

This chapter has illustrated the huge and complicated task for the national legislators to implement the Directive into national law and for the European Commission to supervise this process. The character of maximum harmonization does not give the legislators much manoeuvring space whereas many Member States have a long standing and elaborate national tradition in the area of regulating

108 Stuyck, Terryn and Van Dyck, 'Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market': 130 ff, who also argue more generally that the interplay between the different levels of prohibitions (grand general clause, small general clauses and the blacklist) will lead to problems and diversity.

109 Ohly, 'Towards a Harmonised European Unfair Competition Law? Comments on the Proposal for a Directive on Unfair Commercial Practices', p. 5.

unfair commercial practices. The implementation process is, of course, much more complicated because this paper only highlighted a few aspects of it.

After the implementation is completed, the problems will only have begun. It will be interesting to see how the national courts are going to deal with the challenge of applying the Directive. This does not only go for those courts which are used to their own former general rule, but also and particularly for courts which are not used to applying a general rule in this area at all.

