

**EU and Marketing Practices Law
in the Nordic Countries
– Consequences of a Directive on Unfair Business-to-
Consumer Commercial Practices**

**Report for the
Nordic Council of Ministers
Committee on Consumer Affairs**

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1 Introduction

On 18 May 2004 the Competitiveness Council reached a political agreement on a Directive on Unfair Business-to-Consumer Commercial Practices (the Unfair Commercial Practices Directive, or UCPD). A Common Position with a view of adoption of the Directive was adopted by the Council on 15 November 2004.¹ It should be noted from the outset that Member States have not been unanimous in their support of the Directive. Several statements of disagreement were entered in the minutes, whereby Sweden and Denmark reserved their vote. The European Parliament approved the final text of the Directive at second reading on 24 February 2005, introducing a few amendments to the Common Position.² The Directive is expected to be formally endorsed by the Council of Ministers in the early spring of 2005 and should be implemented EU-wide by 2007.

The Directive is the result of more than a year and a half of legislative drafting and political negotiations. The Commission advanced its original proposal on 18 June 2003.³ The European Economic and Social Committee submitted its opinion on 28 January 2004, endorsing the proposal.⁴ The Parliament delivered a legislative report at first reading on 17 March 2004⁵ and gave its opinion on 20 April 2004, tabling over hundred amendments.⁶ The Common Position accepted fully, in part, or in a modified form a great number of these amendments, but also rejects a number of important proposals.⁷ The amendments introduced by the European Parliament at second reading were not numerous and did not change the basic approach and concepts in the Directive.

The UCPD is by far the most ambitious attempt to find a comprehensive solution to the problem of divergent fair trading standards across the Community. In contrast to the colourful patchwork of Community Directives regulating various industry-, media- and distribution- specific aspects of marketing in a vertical manner, the UCPD aims at providing general solutions with an effect across business sectors. It is thus taking a horizontal approach.⁸ The UCPD deals chiefly with substantive law issues, advancing a vision of full harmonisation on the basis of a general ban of unfair business-to-consumer commercial practices. This general prohibition is supported by more detailed provisions on two key types of commercial practices (misleading and aggressive practices) and a “black list” of practices which are in all circumstances considered unfair. According to the

¹ In the following, unless otherwise provided, the abbreviation UCPD refers to the text of the Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market 11630/2/04 REV 2, Brussels, 15 November 2004.

² European Parliament legislative resolution on the Council common position for adopting a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices, P6_TA-PROV(2005)0048. The amendments introduced by the European Parliament became public shortly before the finalisation of the present report but are taken into consideration to the extent possible.

³ COM (2003) 356 final. In the following it will be referred as Commission Proposal.

⁴ CES 0105/2004, OJ C 108 of 30 April 2004, 81-85.

⁵ PE A5-0188/2004.

⁶ PE T5-0298/2004.

⁷ See Statement of the Council's Reasons, 11630/2/04 REV 2 ADD 1, 15 November 2004.

⁸ See Kabel, J., 'Swings on the Horizontal. The Search for Consistency in European Advertising Law', *IRIS* 2003, 2 ff.

press release announcing the initial Commission proposal “this single set of rules will replace the existing multiple volumes of national rules and court rulings on commercial practices. This will give consumers the same protection against sharp business practices and rogue traders whether they buy from the shop around the corner or from a website in another Member State”⁹

The present investigation has been initiated and financed by the Nordic Council of Minister’s Committee on Consumer Affairs. The task is to carry out a balanced and all-sided analysis of the (Draft) Directive on Unfair Business-to-Consumer Commercial Practices and to evaluate its prospective impact on Nordic Marketing Practices law. The investigation takes as a point of departure the considerable similarity and the high level of consumer protection that characterize Nordic Marketing Practices Law, and as outlined in the Report “Harmonisation of EU Marketing Law” TemaNord 2002:529.¹⁰ In the Ex-Ante Impact Assessment produced for the Commission, the Nordic countries were identified as best adapted to meet the challenges of the Directive.¹¹ The question is nevertheless whether the traditional high level of consumer protection will be possible to sustain after entry into force of the prospective Directive.

Given the ambitious scope of the UCPD and the openly pursued dramatic overhaul of national regulative frameworks in the area of marketing practices law, a comprehensive analysis of all aspects of the Directive is not possible in the limited space of this report. Instead, the purpose is to provide an overview of the UCPD and to map out some of, what are believed to be, the most important, unclear or contentious aspects. Also the possible impact on Nordic marketing legislation is discussed, although a more thorough analysis will have to await the final adoption of the Directive and the subsequent process of transposition into national law.

The report first provides general background and deals with questions of legal base and harmonisation approach (Section 2). It then analyses in more detail the structure of the Directive and the main substantive provisions, including an overview of the black list of prohibited practices (Section 3). In Section 4 the report sheds some light on the tricky issue of defining the scope of the Directive, while Section 5 sets out to disentangle the complex relationship of the UCPD to other Community instruments in the field. Section 6 is devoted to the impact of the UCPD on private international law and its relation to the Draft Rome II Regulation. Section 7 gives a brief overview of enforcement and procedural questions. Finally, Section 8 tries to gauge into the prospective challenges of transposition and uniform implementation.

⁹ Press release IP/03/857, Brussels, June 18th, 2003.

¹⁰ Bruun Nielsen, Harmonisation of EU Marketing Law, TemaNord 2002:509. The main legal acts on marketing practices in the Nordic countries are as follows: Danish Marketing Practices Act Nr. 699 of 17 July 2000 (Marknadsføringsloven, mfl); Finnish Consumer Protection Act 38/1978 (Kuluttajansuojalaki, KSL); Icelandic Competition Act Nr. 8/1993; Norwegian Marketing Control Act (Nr. 47 of 16 June 1972 (Lov om kontroll med markedsføring og avtalevilkår); Swedish Marketing Practices Act 1995:450 (Marknadsföringslagen, MFL), all of them with further amendments.

¹¹ Ex-ante Impact Assessment of the options outlined in the Green Paper on EU Consumer Protection , GFA Management, 29.11.2002.

2 General questions

2.1 Background

The efforts to achieve harmonisation in the area of unfair commercial practices within the Community have a long history. Already back in the early 1960s, soon after the European Communities were founded, the European Commission probed into the opportunities for a common legislation in the area of unfair competition. An ambitious comparative study of unfair competition laws across Europe was commissioned to the Max Planck Institute of International and Foreign Patent, Copyright and Competition law under the guidance of Prof. Eugen Ulmer. The project culminated in a comprehensive proposal for harmonisation of unfair competition law in Europe in the form of a convention based on a general clause on protection against unfair competition.¹² The failure of these early and ambitious attempts to create a common unfair competition law for Europe is well known. It is largely attributed to the accession of the UK and Ireland to the Community and their diverging view on the limits and tasks of unfair competition law.¹³ Another major development was the growing influence of the consumerist movement in the 1970s and the ambitions of the Community to take an active stand on this topical subject.¹⁴ Thus the only outcome of the harmonisation attempts was the Misleading Advertising Directive of 1984 applying a minimum harmonisation approach.¹⁵

Meanwhile the situation has changed significantly. The record of Community acts related to fair trading has become ever more impressive. It suffices to mention the Misleading and Comparative Advertising Directive,¹⁶ the Television Without Frontiers Directive¹⁷, the Doorstep Selling Directive¹⁸, the Distance Selling Directive¹⁹, the E-commerce Directive²⁰, the Data Protection Directive²¹ and the Privacy and Electronic Communication Directive²² in order to recall that by now important general aspects of fair trading, main types of marketing practices as well as marketing in the most significant

¹² Ulmer, *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der EWG. Band I Vergleichende Darstellung* (Köln: Carl Heymann, 1965).

¹³ For analysis of the reasons for the failure of the harmonisation project see Ohly, 'Die Bemühungen um eine Rechtsvereinheitlichung auf EU-Ebene von den Anfänge bis zur Richtlinie über irreführende Werbung von 1984' in: Schricker/Henning-Bodewig (eds.), *Neuordnung des Wettbewerbsrechts* (Baden-Baden: Nomos, 1998/99), 69 ff.

¹⁴ Bourgoignie, 'Consumer Law and the European Community: Issues and Prospects' in: Bourgoignie/Trubek/Trubek, *Consumer Law and Federalism* (Berlin: de Gruyter, 1987), 89 ff.

¹⁵ Directive 84/450/EEC, OJ 1984 L 250/17 (Misleading Advertising Directive).

¹⁶ Directive 97/55/EC amending Directive 84/450, OJ 1997 L 290/18 (Comparative Advertising Directive).

¹⁷ Directive 89/552/EEC, OJ 1989 L 298/23, amended by Directive 97/36/EC, OJ 1997 L 202/60 (TV Directive).

¹⁸ Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31 (Doorstep Selling Directive).

¹⁹ Directive 97/7/EC, OJ 1997 L144/19 (Distance Selling Directive). On specific marketing methods see also Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

²⁰ Directive 2000/31/EC, OJ 2000 L 178/1 (Electronic Commerce Directive).

²¹ Directive 95/46/EC (Data Protection Directive).

²² Directive 2002/58/EC (Privacy and Electronic Communications Directive).

media are objects of European legislative initiatives.²³ Moreover, a large number of Community acts govern advertising and marketing in separate industry sectors, like foodstuffs, medicinal products, cosmetics, tobacco, etc.²⁴ Finally, the Injunctions Directive of 1998 marked the first European agreement on harmonisation, or rather on mutual recognition, of enforcement devices in the consumer protection field, including enforcement of harmonised fair trading rules.²⁵

Before proceeding with analysis of the UCPD as it stands now, a brief review of the steps that set the legislative process in motion is in order. Several Commission documents and expert studies form the background of the Directive. In 1996 the Commission submitted a Green Paper on Commercial Communication in the Internal Market.²⁶ The Green Paper was elaborated by the Directorate General Internal Market and bore the imprint of a free trade philosophy. Divergent regulatory standards were chiefly viewed as a frustrating obstacle to cross-border advertising and marketing campaigns. The main thrust of the Paper was consequently the abolition of trade barriers and the promotion of free movement of advertising and marketing services throughout the Community. Liberalisation of commercial communication was the leading strategy.²⁷

Some of the conclusions of the Green Paper were integrated in the subsequent Electronic Commerce Directive. The effect in the area of unfair commercial practices proper was, however, limited. An Expert Group on Commercial Communications was set up with the task of mapping out areas for future harmonization and liberalisation.²⁸ The only proposal which crystallized from the work of the Group was the proposal for a Community Regulation on sales promotion.²⁹ The approach of DG Internal Market remained conventional in that solutions are sought in a vertical and fragmentary manner.³⁰ The Draft Regulation purports to liberalise the legal regime for sales promotion by lifting a number of national restrictions in the area. At the same time it seeks to uphold a satisfactory level of protection of relevant public interests, notably consumer protection, by introducing some uniform restrictions and information requirements. Importantly, the Draft Regulation

²³ In the area of general consumer information see also the Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27.

²⁴ See for instance Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs, OJ 1990 L 276/40; Directive 2000/13/EC on the labelling, presentation and advertising of foodstuffs, OJ 2000 L 109/29; Directive 2001/83/EC on the Community code relating to medicinal products for human use; Directive 1999/45/EC on the classification, packaging and labelling of dangerous preparations, OJ 1999 L 200/1; Directive 2003/33/EC on advertising and sponsorship of tobacco products, OJ 2003 L 152/16 (Tobacco Advertising Directive).

²⁵ Directive 98/27/EC, OJ 1998 L 166/51 (Injunctions Directive).

²⁶ COM (96) 192 final; cf. Follow-up to the Green Paper COM (98)121 final.

²⁷ In its legal part the paper built extensively on a large comparative study on advertising laws in the Community Member States prepared by the Max Planck Institute on Intellectual Property and Competition Law in Munich. This study served as a basis of the ambitious loose-leaf edition Schricker (ed.) *Recht der Werbung in Europa* (1996).

²⁸ See Miklitz et al., *A Study on the Feasibility of a General Legislative Framework on Fair Trading*, 2000, Vol. I and II (*Feasibility Study*).

²⁹ COM (2001) 546 final.

³⁰ See Miklitz/Kessler, *Europäisches Lauterkeitsrecht, dogmatische und ökonomische Aspekte einer Harmonisierung des Wettbewerbsverhaltens im europäischen Binnenmarkt*, *GRUR Int.* 2002, 88 ff., at 886.

relies on an Internal Market approach, including the principles of country of origin and mutual recognition. This approach stumbled on massive critique on the part of consumer protection activists, scholars and politicians. It was objected that liberalisation and country of origin principle were undesirable in the absence of common rules for unfair commercial practices.³¹ Since DG SANCO announced its plans on a framework directive on fair trading the work on the Regulation was slowed down and finally grounded to a halt awaiting the outcome of the legislative process on the former project.

A different, comprehensive and horizontal approach was advanced by the Directorate General SANCO. The idea of a framework directive on fair trading was arguably first outlined in the Consumer Policy Action Plan 1999-2001.³² The need for enhancing the protection of consumers from unfair marketing practices was underlined in Council Resolution of 19 January 1999 on the Consumer Dimension of the Information Society.³³ Following an extensive study on the feasibility of a general legislative framework on fair trading³⁴ and a series of meetings and conferences during the Swedish Presidency, the Commission published a Green Paper on Consumer Protection in the Internal Market in which the idea was fleshed out with more detail.³⁵ The momentum for a horizontal Directive became even stronger in the course of negotiations of the E-Commerce Directive. The deep-reaching effects of the country-of-origin principle in an environment of disparate national fair trading rules nurtured fears of dumping of protective standards and a 'race to the bottom'. Many voices were raised for a different comprehensive type of harmonization, building on common and sufficiently well-elaborated legal concepts and supported by an efficient institutional network for enforcement cooperation.

The Green Paper produced a lively response from among the affected business and consumer circles. Dozens of consumer and business associations, scholars and individuals took a stand on the Paper and expressed their view on the main issues of contention.³⁶ The present legislative act can thus be confidently regarded as anchored in a wide and all-sided debate with the stake-holders involved.

2.2 Choice of legal base

The objective of the UCPD was from the outset defined as two-fold: to contribute to the proper functioning of the internal market and to achieve high level of consumer protection.³⁷ Yet in the original Commission Proposal Article 95 was selected as the sole legal base of the Directive (see Recital 1, COM (2003) 356 final). It is well known that Article 95 concerns the adoption of Community measures for the progressive

³¹ An overview of the debates in the European Parliament with the opposite views expressed by the representatives for the Internal Market and the Consumer Protection Committees can be found in Öberg, Ulf, *Principen om ömsesidigt erkännande och ursprungslandsprincipen i gemenskapsrätten*, TemaNord 2003:534, 86 ff.

³² Section 5.2, COM (98) 696.

³³ Rec. 4(d) and Rec. 6(c), OJ C 23, 28.01.1999, 1.

³⁴ See Micklitz et al., *Feasibility Study* (2000), Volume II, 76.

³⁵ COM (2001) 531 final, 21.10.2001.

³⁶ Follow-up Communication to the Green Paper on EU Consumer Protection, COM (2002) 289 final .

³⁷ See Article 1 Commission proposal; cf. Article 1 UCPD.

establishment of the Internal Market. The notion of the “internal market” has been defined in Article 14 EC Treaty as “an area without internal frontiers in which free movement of goods, persons, services and capital is ensured.” Generally, this definition has been broadly construed by the Community legislator and by the European Court of Justice (ECJ). Thus, for instance a number of Community legislative acts harmonising national laws and regulations have not been able to demonstrate an immediate effect on the free movement within the Community, but have instead claimed to mitigate or eliminate distortions of competition, resulting from divergent legislative standards. This justification has been accepted, despite the fact that the absence of distortion of competition is not mentioned as one of the attributes of the internal market in Article 14 EC Treaty.³⁸

In the Commission Proposal the main justification for the need for further harmonisation has been the existing differences in the standards of fairness in the Member States leading to substantial distortions of competition by cross border demand and supply and the ensuing impediments to the Internal Market (Recital 2 Commission Proposal). In addition uncertainty as to which national rules are applicable is mentioned as leading to high costs in view of cross border marketing (Recital 3 Commission Proposal). A, by now, classical argument for connecting harmonisation in the area of consumer law with the Internal Market, is the claim that uniform high consumer protection rules increase certainty and enhance consumer confidence in the Internal Market, which in turn is expected to be an important factor for the growth and smooth functioning of the latter (Recital 3 Commission Proposal). All these justifications made a convincing case for harmonisation on the basis of Article 95.³⁹

In its opinion at first reading the Parliament insisted that the objective of achieving high level of consumer protection should find a more clear expression.⁴⁰ Following this proposal, the UCPD now contains in Recital 1 an express reference to Article 153(1) and (3)(a) of the Treaty as well. According to these provisions the Community is to contribute to the attainment of a high level of consumer protection by the measures it adopts pursuant to Article 95. Article 153 is thus invoked only as a secondary legal basis.⁴¹

The concern of the Commission on the question of the appropriate legal base is understandable in the light of the ECJ judgment in the *Tobacco Advertising case* which incriminated the Community Directive on the advertising of tobacco.⁴² The conditions this decision sets for use of Article 95 have been summarized in the following way:

"- Distortions of competition caused by differences in national legislation must be appreciable in order to justify its use.

³⁸ See Usher, J., ‘Comments on the Case C-376/98’ (2001) CMLRev., 1519 ff.

³⁹ See, however, the critical comments of Wilhelmsson on the use (or abuse) of the ‘confident consumer’ justification, Wilhelmsson, T. ‘The Abuse of the “Confident Consumer” as a Justification for EC Consumer Law’, 27 JCP2004, 317 ff.

⁴⁰ See Statement of the Council’s Reasons, 11630/2/04 REV 2 ADD 1, 15 November 2004, Amendment 112.

⁴¹ See Communication from the Commission concerning the Common Position, Doc. 15155/04 of 23 November 2004, 3.

⁴² Directive 98/43/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, see Case C-376/98 *Germany v. European Parliament and Council (tobacco advertising)* [2000] ECR I-8419.

- Legislation adopted under Article 95 must contribute to the elimination of obstacles to free movement within the internal market.
- Article 95 cannot be used to circumvent the limits on other Treaty provisions.”⁴³

In light of the ECJ judgement in the *Tobacco Advertising* case, it may indeed be questioned, whether the ambitious harmonisation approach in the Directive, pursuing a high level of consumer protection and introducing a number of new and previously unknown prohibitions of unfair commercial practices, could be seen as genuinely pursuing the completion of the internal market. It may be argued that the UCPD in many respects is more adequately described as a consumer protection document where the appropriate basis should rather be Article 153(3)(b).

At the same time, it should be said, that compared with the incriminated Tobacco Advertising Directive, the UCPD has a much more immediate potential to improve the functioning of the Internal Market by eliminating appreciable distortions of competition. The underlying objectives of the Directive are of an economic nature. Commercial practices of the sort regulated by the UCPD can for the most part be qualified as services in the meaning of Article 50 EC Treaty. This has been confirmed for advertising on multiple occasions by the ECJ.⁴⁴ Commercial practices moreover increasingly involve a cross-border element. The provider and the recipient of the service may be established in different countries of the EU, where either the communication itself, or one of the parties to the transaction move across borders.⁴⁵ Harmonising disparate national rules that govern the provision of services can clearly eliminate barriers to the free movement of services. Furthermore, the UCPD is a full harmonisation directive and not a minimum harmonisation one, as was the case with the Tobacco Advertising Directive (see Article 54 Directive 98/43/EC).⁴⁶ Most importantly, one of the major objections against the Tobacco Advertising Directive was that the Community legislator had circumvented the explicit limits on Community competences in the field of health protection (cf. Article 152 EC Treaty). Such limitation does not exist in the area of marketing practices, which has always been considered a field of divided competence between the Community and the Member States.

2.3 Harmonisation approach

One of the crucial questions for the impact of the future Directive on national law is the chosen venue of harmonisation.⁴⁷ Several alternative approaches have been discussed in

⁴³ Usher, *Ibid.*

⁴⁴ See Case C-155/73 *Sacchi* [1974] ECR 409; Case C-352/85 *Bond van Adverteerders* [1988] ECR 2085. For a review of the case law see Bakardjieva Engelbrekt, *Fair Trading Law in Flux* (Stockholm:2003); Öberg, U., *Principen om ömsesidigt erkännande och ursprungslandsprincipen i gemenskapsrätten*, TemaNord 2003:534.

⁴⁵ See also the situation in Case C-405/98 *Gourmet* [2001] ECR I-01795.

⁴⁶ See now Directive 2003/33/EC of 26 May 2003. On the litigation concerning the legality of other Community instruments regulating the marketing of tobacco products see Bergström, M., ‘Gemenskapslagstiftaren kvitterar i det andra tobaksmålet’, *ERT* (2003), 353 ff.

⁴⁷ On different forms of harmonisation see Slot, P. J., ‘Harmonisation’, 21 *ELRev.* (1996), 378 ff.; Oliver, P., *Free Movement of Goods* (London: Sweet&Maxwell, 1996), 375 ff. (total and optional harmonisation).

the preparatory documents. The Feasibility Study devoted considerable attention to the so-called 'New Approach' developed in the field of technical standards, and explored its applicability to the field of marketing practices. The New Approach essentially builds on a combination of certain minimum mandatory requirements laid down in Community Directives, and a net of non-binding standards elaborated by European standardization organizations under active participation of stakeholders, including consumer organizations.⁴⁸ Compliance with voluntary standards would guarantee free access to the European market. The Feasibility Study discarded this approach, rightly noting the plethora of differences between product standards and marketing standards. An alternative form of harmonisation suggested was the so-called 'mixed approach', combining ambitious harmonisation (on the basis of a general clause and catalogue rules) with an internal market clause and leaving room for non-binding guidance through voluntary codes (co-regulation).

In its Green Paper on Consumer Protection the Commission presented two main options regarding the form of harmonisation, dubbed a specific and a mixed approach, respectively. The specific approach basically referred to the current practice of piecemeal harmonisation in those areas where disparity between national legislative frameworks was perceived as at their widest. This selective approach clearly had few admirers among consumer advocates as well as industry. The lack of coherence and predictability in a patchwork of poorly coordinated provisions is a common concern. From the outset, trust was therefore obviously vested in the alternative, so-called mixed approach. This approach essentially built on country of origin and mutual recognition principles, preceded, however, and in contrast to the Electronic Commerce Directive, by extensive harmonisation. Harmonization was suggested to take the form of a comprehensive framework directive, supplemented by targeted directives where necessary. Comprehensive harmonisation was thus expected to create a genuine basis for institutional confidence, which should arguably be a prerequisite for the full-fledged application of the doctrine of mutual recognition. The Commission Proposal predictably followed the mixed approach. It combined full harmonization with an 'Internal Market' clause.⁴⁹ In the course of political negotiations the Internal Market clause experienced serious modification, whereby the country-of-origin part of the clause was deleted.⁵⁰

2.3.1 Full harmonisation

That the UCPD builds on a full harmonisation approach is declared at many places in the introductory part of the Directive. Recitals 14 and 15 UCPD speak respectively of "[T]he full harmonisation approach adopted in this Directive" and "the full harmonisation introduced by this Directive". Recital 11 UCPD underlines the "high level of convergence" achieved and Recital 12 UCPD elaborates:

On minimum harmonisation see Dougan, M., 'Minimum Harmonisation and the Internal Market', *CMLRev.* (2000), 853 ff.

⁴⁸ See Slot, P.J., *op.cit.*, 395 ff.

⁴⁹ See Art. 4 Proposal for Unfair Commercial Practices Directive, COM (2003) 356 final.

⁵⁰ See Art. 4 UCPD.

“Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a *single regulatory framework* based on clearly defined legal concepts regulating *all* aspects of unfair commercial practices across the EU. The effect will be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and to enable the internal market to be achieved in this area.” (emphasis added)

The concept “full” harmonisation should be understood to signify on the one hand, a comprehensive and complete harmonisation of the subject matter in the coordinated field (as opposed to selective and fragmentary harmonisation). On the other hand, it should involve “maximum harmonisation”, meaning that Member States cannot set stricter requirements than those in the Directive (as opposed to minimum harmonisation).

The preference for full harmonisation marks a clear break with the previous practice of fragmentary and minimum harmonisation directives in the consumer protection field. Under a full harmonisation approach Member States are obliged to transpose all rules and regulations stemming from the Directive, thus ensuring a common standard of fairness throughout the Community. At the same time full harmonisation implies a comprehensive coverage of all situations within the approximated field of the Directive.⁵¹ Within this field Member States cannot add new factual situations and restrictions.

A serious problem with the full harmonisation approach in the UCPD, is that it contradicts the latter’s character of a framework Directive. There is certainly no binding Community definition of the notion “framework Directive”, but it can reasonably be accepted to signify an act of general application, not seeking to provide exhaustive answers to each and every regulative question in the respective area. It is unclear how such an act combines with the notion of full harmonisation.⁵² Furthermore, the harmonisation approach in the UCPD builds essentially on a European general clause which is per definition open and flexible. General clauses are notorious with the large margin of appreciation they leave to the enforcement bodies. Usually a general clause receives a concrete content and meaning only incrementally, by the slow accumulation of consistent case law and administrative practice. It may be questioned to what extent achieving full harmonisation through a general clause is a realistic objective. The difficulties of harmonisation through general clauses are illustrated by recent case law on the Unfair Contract Terms Directive.⁵³ In the foreseeable future the prospect is rather of persisting differences of interpretation, where uniformity will ultimately depend on the willingness (and the capacity) of the ECJ to actively engage in issues of uniform interpretation. I shall return to this issue when discussing the challenges of achieving harmonious implementation.

⁵¹ On defining the approximated scope see below.

⁵² See Glöckner, J., ‘Richtlinienvorschlag über unlautere Geschäftspraktiken, deutsches UWG oder die schwierige Umsetzung von europäischen Generalklauseln’, *WRP* 2004., 936 ff., 942.

⁵³ See Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v. Ludger Hofstetter et Ulrike Hofstetter* [2002]. See Wilhelmsson, *European Consumer Law: Theses on the Task of the Member States*, paper on file with the author.

The principle of full harmonisation is subject to some important derogations. In respect to financial services and immovable property the Directive has only the character of a minimum Directive. Member States may impose requirements which are more restrictive or prescriptive than the Directive in the field it approximates (see Article 3(9) UCPD).⁵⁴ Another derogation negotiated in the last minute under strong political pressure concerns national provisions that are enacted or retained on the basis of minimum harmonisation clauses in other Community directives in the approximated field (see Article 3(5) and the discussion further on in the paper).

2.3.2 The Internal Market clause: a background

In the field of commercial communications, the Internal Market principle was introduced as a legislative concept by the E-Commerce Directive.⁵⁵ However, as an integration technique it is familiar from previous Directives in the field of commercial communications (e.g. the Television Without Frontiers Directive), as well as in other fields.⁵⁶ The concept has not been used in a uniform manner and therefore generalisations can only be made with caution. Traditionally, the Internal Market clause has consisted of the two complementary principles, those of home country control (control at the source of activity, or country of origin in a narrow sense) and of mutual recognition. However, both the margin of appreciation left to the Member States and the scope of the accompanying substantive harmonisation has varied widely.

The principle of mutual recognition has its origin in the *Cassis de Dijon* case law of the ECJ. It has through the years evolved into a decisive method of enhancing integration, contributing substantially to the completion of the Internal Market.⁵⁷ It has been pointed out in legal doctrine that the principle of mutual recognition as a method of interpretation and evaluation of national measures *in casu* on the basis of the basic Community freedoms should not be confused with the country-of-origin principle as a legislative technique advanced by the Commission.⁵⁸ The former principle by no means excludes the application of domestic law, but requires sensitivity of national enforcement bodies with regard to the requirements and standards in the Community Member States. Member States retain, moreover, their power to sustain national restrictions on grounds of overriding requirements of public interest. The latter principle is more and more used as a legislative method of division of spheres of regulatory competences, from the perspective of the regulator, and as a method of determining applicable law, from the perspective of the regulated. Politically, the principle is seen as an effective tool for triggering a process of regulatory competition with the final result of producing deregulation.

⁵⁴ This, however, seems only to apply for domestic traders if read in conjunction with Article 4 UCPD, see the discussion below, 3.2.1

⁵⁵ For a detailed analysis of different forms of harmonisation see Bakardjieva Engelbrekt, *op.cit.*

⁵⁶ For examples from the area of European insurance law see Öberg, *op.cit.*, 72 ff

⁵⁷ See White Paper for the Completion of the Internal Market.

⁵⁸ See Öberg, *op.cit.*, 36 ff.

2.3.2.1 Television Directive

Two examples from the area of commercial communications can give an idea of the different scope and meaning of the internal market principle. The Internal Market principle as enshrined in the **TV Directive** displays an active and a passive aspect. The active part of the principle stands also for the gist of the integration approach, namely that in the areas ‘harmonised by the Directive’, only one country, ‘the one that has jurisdiction over the broadcaster’, shall exert control over the broadcasts. This distribution of jurisdiction and supervisory competence between the Member States is usually referred to as the ‘home country control’ principle.⁵⁹ The active obligation for Member States is laid down in Arts. 2(1), 3(2) and 3(3) of the Directive as revised in 1997.⁶⁰ Member States are required to actively ensure compliance of broadcasters established on their territory with the relevant domestic law, as well as with the provisions of the Directive itself.

The passive aspect consists in the obligation of Member States to guarantee unhindered reception and retransmission of broadcasts originating from other Member States of the Community (Art. 2a(1) of the TV Directive as revised in 1997). In respect of broadcasts from other Member States the Directive thus codifies the principle of mutual recognition. Member States are not allowed to limit or obstruct the reception or retransmission of broadcasts from other Member States on grounds that come within the coordinated field, provided the broadcasts comply with the minimum standards of the Directive. Derogation from this principle is allowed, but only in certain areas of paramount public interest defined in Arts. 22a and 22b and following a specific consultation procedure mediated by the Commission (cf. Art. 2a(2)). As a consequence of this approach in the coordinated areas the mechanism of regulatory competition is consciously set off in order to complement the effective integration achieved by way of substantive standards.⁶¹

The correlation between active and passive obligations under the Directive is designed to create a climate of mutual confidence and undisturbed flow of television broadcasting services throughout the Community. In practice, however, many Member States, especially those priding themselves on high protective standards, have on multiple occasions expressed serious concerns about the deficiencies of the present mechanism.

In the TV Directive the Internal market principle is combined with selective harmonisation. The Directive does not offer a comprehensive legal framework for television broadcasting but harmonizes only some of the most important areas of regulation.⁶² In these regulated areas, called ‘the coordinated field’, deviation by Member

⁵⁹ A number of alternative concepts have been en vogue, such as ‘transmission state principle’ (‘sändarlandsprincipen’), ‘the country-of-establishment principle’ or the more classical term ‘country-of-origin principle’ (in a narrow sense). See Lans, *Jurisdiktion över TV sändningar i EU* (Stockholm: Juristförlaget, 1996), 43.

⁶⁰ Cf. Arts. 2(1) and 3(2) of Directive 89/552/EEC, OJ 1989 L 298/23.

⁶¹ On the concept regulatory competition, see Reich, ‘Competition Between Legal Orders: A New Paradigm in European Law’ *CMLRev.* (1992), 861 ff.; Sun/Pelkmans, ‘Regulatory competition in the Single Market’ (1995) 33 *JCMS*, 67 ff.; Van den Bergh, ‘Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law’ (1998) 5 *Maastricht Journal*, 129 ff.; Bernard, ‘Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware’ (2000) 25 *ELRev.*, 57 ff. Cf. Editorial Comments, ‘Are European Values Being Hovered Away?’ (1993) 30 *CML Rev.*, 445.

⁶² For the areas pertaining to fair trading, the relevant rules are listed above.

States from the common standard is allowed in the direction of more stringent requirements but only in respect of domestic service-providers (Art. 3(1) of the Directive as revised in 1997). Thus a sort of one-sided minimum harmonisation is introduced, where stricter regulation binds only economic operators on the territory of the regulating Member States, but has no effect on broadcasting services originating from other Member States. In the scope of the coordinated field the principle of minimum harmonisation, in other words, is severely curtailed by the pressure of reverse discrimination.

In non-coordinated areas Member States retain their full regulative powers provided they do not violate other obligations flowing from primary Community law, notably the provisions on free movement of goods and services. Defining the objective scope of harmonisation (coordinated field), i.e. the distinction between rules and areas harmonised by the Directive and areas outside the scope of the Directive, has been crucial for determining its effect.⁶³

2.3.2.2 E-Commerce Directive

The harmonisation approach in the **E-commerce Directive** has much in common with that in the Television Directive. As with the Television Directive, the first pillar of the internal market principle is a rule postulating control at the source of activity (Art. 3(1) E-commerce Directive). Following this principle, Member States are obliged to take responsibility not only for enforcement of the national rules and standards on situations having purely domestic effect, but also on the activity of national operators exclusively targeting foreign consumers. Whereas this approach may be justified by the personal connection between the service provider and the controlling countries, there has traditionally been uneasiness in international criminal and administrative law about interpreting the concept of national sovereignty so extensively.

In its second part (Art. 3(2)), the internal market rule reiterates the principle of ‘mutual recognition’. Each country is obliged to assure the free receipt of information society services originating from an ISP established in another country of the EU. Mutual recognition and mutual trust are once again imposed as supreme values of European integration.

However, an important difference in comparison with the TV Directive is that the Internal Market principle is applied on a much more comprehensive scale. The extension is achieved by a far wider definition of the coordinated field in the Directive (Art. 2(h) Directive 2000/31/EC). Under the TV Directive Member States were allowed to require television broadcasters under their jurisdiction to comply with more detailed or stricter national rules, but only in the areas harmonised by the Directive. This strongly curtailed minimum harmonisation clause in effect implied recognition of regulative regimes existing in other Member States for operators established on their territories. The logic of this rule is clear. Since the Directive had successfully harmonized certain areas of regulation, there was a sufficient degree of uniformity that would also justify a higher

⁶³ On this issue see the *De Agostini* ruling of the ECJ Joined Cases C-34, *Konsumentombudsmannen v De Agostini* and C-35 & C-36 *TV Shop* [1997] ECR I-3843..

degree of trust in different regulative approaches, provided that the minimum provisions of the Directive are observed.

The E-commerce Directive represents a different understanding of the concept “coordinated field”. In Art. 2(h) “coordinated field” is defined as requirements laid down in Member States’ legal systems “applicable to information society service providers or information society services regardless of whether they are of a general nature or specifically designed for them.” Importantly, the definition does not mean rules harmonized at a minimum level by the *directive* itself but refers to rules laid down by the *Member States* and, moreover, regarding *all* aspects of regulating the service or the service provider. The phrase ‘coordinated field’ consequently does not refer to an actually achieved harmonisation, but is rather used as a *fictio*. It is assumed that all national measures concerning information society services are coordinated by the Directive. In the initial proposal of 1998⁶⁴ the Commission commented the (then much more cryptic) definition of the term ‘coordinated field’ as follows:

This definition makes it possible to determine the *national provisions* in respect of which the Member States are to ensure compliance under Article 3. It therefore covers *all requirements* which may apply to a person acting as a provider of Information Society services or to Information Society services.⁶⁵ (emphasis added)

The term ‘requirement’ is also important for acquiring proper understanding of the scope of the Directive. *Prima facie* the term seems to cover only rules of public law, such as administrative and criminal law rules and regulations, through which the state controls the activity of commercial actors, and enforced by way of administrative or criminal procedure with the decisive intervention of public authorities. However, this would be a very narrow interpretation that would be in poor harmony with the rather undogmatic approach of the ECJ in its case law on free movement of goods and services. The court has rarely asked whether a certain national rule (or measure) formally pertains to public or to private law. The main question has always been whether the rule in question is likely to negatively influence intra-Community trade. In this test mandatory rules treated in many countries as belonging to private law (such as unfair competition law rules or mandatory rules on consumer protection) have also been scrutinized for their compliance with the fundamental Community freedoms.⁶⁶

2.3.4 The Internal Market principle in the original Commission proposal

The initial Commission Proposal contained an Internal Market clause of the type already familiar from the E-Commerce Directive (see Article 4 COM (2003)356 final). In its first

⁶⁴ COM (1998) 586 final.

⁶⁵ *Ibid.*, 21.

⁶⁶ See rules on free gifts (Case C-286/81 *Oosthoek's* [1982] ECR 4575); on misleading advertising (Case C-238/89 *Pall* [1990] ECR I-4827); mandatory consumer protection rules on cancellation of contract (Case C-91/92 *Faccini Dori* [1994] ECR I-3325; Case C-45/96 *Dietzinger* [1998] ECR I-1199).

limb the clause sought to ensure that traders would comply with only one set of national provisions concerning unfair business-to-consumer commercial practices, namely those in the State of the trader's establishment. This provision had like the previous Directives a prescriptive language imposing on Member States the active obligation of ensuring such compliance on the part of traders. In the second limb of Article 4 the Internal Market clause contained the traditional passive obligation of mutual recognition. According to this provision, Member States are prevented from restricting the freedom to provide services or the free movement of goods for reasons falling within the field approximated by this Directive.

The country of origin principle has been an important driving force for the work on the UCPD. This principle was regarded as a main instrument of achieving simplification and clarity in the regulative environment for traders. It was therefore used as a major argument when initiating the legislative process, especially for convincing businesses of the advantages of prospective harmonisation, and has accompanied the whole drafting process.⁶⁷

According to para. 49 of the explanatory memorandum to the original Commission proposal:

“In this context (the general prohibition), the internal market clause plays a vital role: if a practice is judged to be unfair in one Member State it will be able to prevent traders established on its territory from selling to consumers. But unlike now, it will not be able to prevent traders established elsewhere in the EU from selling to its consumers. This means that there will be a high degree of legal certainty because only one set of rules will apply, and the tests in legislation will be more precise than those which are used.”

The application of the Internal Market principle was in the Commission proposal advanced as going hand in hand with comprehensive harmonisation of the area of unfair commercial practices. Thus the Commission tried to avoid critique of the sort that was levelled against the E-Commerce Directive. It should be reminded that the E-Commerce Directive introduced an Internal Market clause and the country of origin principle in an area practically not harmonised in the Directive itself or through other Community law. Especially in states with high level of protection this triggered fears of dumping of regulatory standards, a so called “race to the bottom” in the face of reverse discrimination. Similar criticism could not be directed at the Commission UCP proposal. The approximated field and the scope of application of the Internal Market principle were admittedly more clearly defined than in the case with the E-Commerce Directive. More importantly the UCPD indeed offers an extensive catalogue of harmonised provisions and purports to achieve full harmonisation.⁶⁸

Despite the allegedly more favourable conditions for introducing an Internal Market clause, in view of the ambitious harmonisation, this approach and in particular the country of origin principle, were nevertheless met by a massive critique. Different reasons for the

⁶⁷ See Explanatory memorandum, COM (2003)356 final.

⁶⁸ For a positive evaluation of the ‘mixed approach’, employing country of origin principle with comprehensive harmonisation see Miklitz/Kessler, GRUR Int. 2002, 885 ff., at 886

objections have been given. Some governments and stake holders pointed that the country of origin principle is most opportune in areas which affect product design and marking. Conversely, in the field of consumers' legal and economic interests this principle is less opportune, since "there is often a large element of discretionary judgement" in such regulation.⁶⁹ In a different vein it has been pointed out that a home country control would be even more difficult to apply where the affected economic operators are of varying size, scale and character. One should also recall the problems associated with preventing abusive establishment, carried out for the chief purpose of circumventing legitimate national restrictions.

Another objection has been that if a truly comprehensive harmonisation is achieved (as claimed by the Commission), the main reason for a country of origin principle, i.e. avoiding legal uncertainty, disappeared. In the somewhat Byzantine turns of the negotiation process the same argument, which was used to justify the introduction of the country of origin principle, namely comprehensive harmonisation, may have been used for the dropping of the principle from the final version of the Directive.

2.3.5 The Internal Market Principle, Supervision Competencies and (National) Private International Law

One controversial issue, which was raised in the debate on the E-commerce Directive, and which is topical also in the UCPD is the relation between the internal market principle and private international law. From the perspective of the Nordic countries this question is often not perceived as particularly contentious or even relevant for the area of marketing practices law. Following the dominant view in legal doctrine, fair trading rules are conceived as part of public law and are consequently not regarded as constituting "civil or commercial matter" in the sense of the Brussels convention/respectively the Brussels regulation on the jurisdiction in civil and commercial matters.⁷⁰ Rather than looking at choice-of-law rules, one is normally concerned with defining the scope of application of national market law rules.⁷¹

Yet in a number of Community Member States, fair trading rules are, conversely, conceived as pertaining to private law. Prohibitions of unfair commercial practices, or unfair competition law rules, are often treated as extension of tort law in the economic sphere. In this view, national rules on jurisdiction and applicable law would apply for cross-border acts of unfair competition and in many instances lead to solutions incompatible with the strict application of the country-of-origin principle. The question of determining the precise relations between the two sets of rules and the order of precedence

⁶⁹ See the position of the Swedish Government on the Green Paper on Consumer Protection.

⁷⁰ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1978 L304/36; Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L12/1.

⁷¹ On the autonomous interpretation of the term civil and commercial matters under the Brussels Convention and on the problems of cross-border enforcement ensuing from different institutional approaches to fair trading see Reich, 'Rechtsprobleme grenzüberschreitender irreführender Werbung im Binnenmarkt' (1992) 56 *RebelsZ*, 444 ff., 445 ff.

is then crucial. In German doctrine the view has long been defended that the country of origin principle can be seen as a sort of choice of law rule in favour of the law of the country of establishment of the service provider in cross-border provision of services.⁷²

It may be recalled that the E-Commerce Directive in its Art. 1(4) explicitly stipulated that it did not aim at establishing additional rules of private international law or on jurisdiction. This unassuming rule produced genuine havoc in German legal doctrine.⁷³ The rule was difficult to reconcile with the firm intent of the Directive to regulate information society services at the source of activity and with the explicit extension of the country-of-origin principle to the area of advertising regulation as well.

The original Commission proposal on Unfair Commercial Practices Directive with its full-fledged Internal Market clause revived the discussion on the relation between the country-of-origin principle and private international law. This time, however, the Commission had prepared the ground for an extended application of the country-of-origin principle beyond the confines of public law rules. In contrast to the E-Commerce Directive, the Commission proposal did not exclude private international law from the scope of the Directive. This was hinted in the Explanatory memorandum of the Commission proposal⁷⁴ and, in addition, made clear by the provision of Article 3(6) COM (2003) 356 final. Article 3(6) states that the Directive is without prejudice to the rules determining the jurisdiction of the courts, but provides no derogation from the scope of the Directive for rules on applicable law. These texts signalled a conscious strategy on the part of the Commission of treating the country-of-origin principle as a true principle of private international law, in case this would be prompted by domestic doctrinal classifications.

This somewhat disguised invasion of the Commission in the area of private international law prompted the objections of the Council Committee on Civil Law Matters, Working Party on Consumer Protection and Information.⁷⁵ This Committee has been entrusted by the Coreper with the not simple task of “ensuring uniformity and coherence in European Community action in the area of civil law.” In a note of 28 January the Committee submitted its Opinion on the Commission proposal for a UCPD. The Committee expressed an open concern that the Internal Market provision in the Commission proposal (Article 4) “would create a choice of law rule designating the law of the country of the establishment of the trader (country of origin) as applicable to matters of unfair commercial practices. Traders would be required to comply only with the laws of the Member State where they are established and other Member States would be prohibited from imposing additional requirements.”⁷⁶

⁷² For a comprehensive review of the debate see Dethloff, *Europeisierung des Wettbewerbsrechts* (Tübingen: Mohr Siebeck, 2001).

⁷³ For a taste of the debate see Ohly, A., ‘Das Herkunftslandprinzip und Kollisionsrecht’ (2001) *GRUR Int.*, 899 ff.

⁷⁴ Cf. the somewhat weird formulation in para. 47 of the Explanatory Memorandum : “The Directive is without prejudice to the application of rules governing international private law provisions in the field which it does not approximate.” Read *e contrario* this statement implied that in the approximated field the rules of private international laws would be affected by the Directive.

⁷⁵ See Institutional File: 2003/0134, 5668/04. JUSTCIV 13, CONSOM 5, MI 19 CODEC 106

⁷⁶ See para 4, Opinion of the Committee on Civil Law Matters, 2003/0134, 5668/04

The Committee analysed the ensuing situation both from a policy and from a technical perspective. As a matter of policy the law of the country of destination (or the country where the competitive interests meet or where consumers' collective interests are affected) appeared more appropriate to provide adequate solutions to questions of cross border unfair commercial practices. This was moreover the accepted solution in the majority of the Member States of the Union. From a technical perspective (i.e. dogmatic private international law considerations) the Committee feared that the split of the regulative regime on the issue of applicable law might bring about an undesired situation of *dépeçage*, i.e. split in the law governing different aspects of one and the same relationship (for instance whether the act constitutes unfair commercial practice and liability issues).⁷⁷

This objection was further taken at heart and pursued by the European Parliament. Apparently moved by similar considerations, in Amendment 26 the Parliament proposed that along with the derogation for matter of jurisdiction, a derogation for questions of the law applicable to non-contractual relations should be added.⁷⁸ The amendment was, however, not acceptable to the Commission. It is interesting to note that in its most recent Communication, commenting on the now handicapped Internal Market clause in the UCPD, the Commission openly describes the latter clause as a choice of law rule.⁷⁹

Interestingly, despite the retreat from the country-of-origin principle and its intended application as a choice-of-law rule, the Directive in defining its scope still mentions that it is without prejudice to the rules determining the jurisdiction of the courts. Nothing is said as to national and Community rules on private international law. This may be just a technical mistake in the haste of last minute revisions and overlooking the need to ensure coherence. But this omission naturally opens for future interpretations in a sense that the mutual recognition principle may impact on national choice-of-law rules.⁸⁰

2.3.6 The taking away of the country of origin principle: how will it influence the future application of the Directive?

In the last round of negotiations ending with the Competitiveness Council Meeting of May 2004, a compromise was achieved to delete the first limb of the Internal Market clause, namely the country-of-origin principle in a narrow sense, from the text of Article 4. It should be noted, however, that no text was entered stipulating that the country of origin principle does not apply. This silence leaves room for conflicting interpretations. Thus the Commission declares that it sees the UCPD as a full harmonisation instrument and shall seek uniform interpretation of the relevant rules not allowing for national deviations.

⁷⁷ The example given is different law applicable to the matter whether an unfair act of competition has been committed (e.g. decided under the law of the country of origin) and to the matter of what types of damages that can be claimed (e.g. the law of the country of conflicting competitive interests according to the ROME II Regulation).

⁷⁸ See European Parliament, Report of the Committee on Legal Affairs and the Internal Market, A5-0188/2004 (final), Amendment 26.

⁷⁹ See Commission Communication of November 2004.

⁸⁰ See Ohly, *GRUR Int.* 2001, *op.cit.* on the relationship between the country-of-origin principle and private international law in the E-commerce Directive; cf. Ohly, A., 'Das neue UWG – Mehr Freiheit für den Wettbewerb?', *GRUR* 2004, 889 ff. for the situation with the Draft UCPD.

Conversely, some Member States interpret the remaining part of Article 4 as a mere restatement of the *Cassis de Dijon* ruling of the ECJ. In other words they consider themselves authorised to retain prohibitions and restrictions if the latter meet the mandatory requirements test under *Cassis*.⁸¹ As noted by others, this interpretation is not particularly convincing and is in blatant conflict with the full harmonisation approach of the Directive.⁸²

An additional complicating factor may be added by the Services Directive, once (and if) it becomes law. In its present status the Draft Services Directive builds extensively on an Internal Market clause, while at the same time advertising is expressly defined as a service within the scope of the Directive. Could it be that the country of origin principle which has been expelled through the front door can re-enter through the back door?

As the Internal Market clause stands now, it seems in any case that it has lost its function of distribution of regulative and enforcement competences across the Community. Contrary to the initial ambitions of the Commission, market actors are well advised to check the rules on jurisdiction and applicable law, in order to ascertain which country's courts have jurisdiction over their cross border marketing, respectively to ascertain the (so far non-harmonised national) rules of applicable law. Technically, the general rules of jurisdiction and applicable law seem to continue to obtain. In reality, however, the Member State where a commercial practice is subject to a legal scrutiny would not be able to judge the practice stricter than it is judged in the country of origin. It would no longer be possible to invoke mandatory requirements *à la Cassis de Dijon* to justify restrictions on the free movement of goods and services in the coordinated field. Consequently, the rules of the country of origin may be considered to play the role of a filter, which ensures compatibility and coordination in the implementation of the Directive.⁸³

Admittedly, such comparison and control *in casu* does not appear particularly practicable for the area of marketing practices. While it does not need much effort to compare technical rules on product composition, labelling or packaging (for instance the alcohol content in blackcurrant liqueur), the legal evaluation in marketing practices law tends to be situation-specific and bound to the circumstances of the individual case. Comparisons with the law of a different country will normally involve a complex analysis of case law and doctrine and may not produce a positive and certain answer. It remains to be seen how national courts are going to cope with the challenge of the new Directive.

The UCPD authorises Member States to adopt or maintain stricter requirements in several situations (cf. Article 3.5 and Article 3.9 about financial services). Article 4 as it now stands containing the rule on mutual recognition (or free movement of services and goods), would mean that these stricter national provisions can only apply to internal situations and in respect to local traders. In contrast, it would not be possible to invoke

⁸¹ See in this sense Glöckner, *op.cit.*, 939. The European Consumer Law Group (ECLG) testifies of similar views supported by some Member States, notably Germany, cf. Opinion of the ECLG on the Proposed Directive on Unfair Commercial Practices, ECLG/134/2004 (in the following referred to as the ECLG Opinion), 9.

⁸² See ECLG Opinon, 9, in a similar sense Ohly, *GRUR* 2004, *op. cit.*, 892.

⁸³ For the filter function of the country-of-origin principle in the E-Commerce Directive see Ohly, *GRUR Int.* 2001, *op.cit.*

these stricter rules to practices originating from another Member State and being in compliance with the rules of that States.⁸⁴

All in all, the situation after taking the country-of-origin provision away from the UCPD is far from clear. On the one hand, it may be true that if the promise of complete and comprehensive harmonisation is to be taken seriously, then there will be hardly room for divergent regulations and hence, for questions of mutual recognition and retaining of regulatory authority. In the present UCPD the advancement of harmonisation is palpable. Indeed, there is a rather detailed regulation of specific factual situations of marketing and advertising practices, which should create a greater confidence in a common and comparable (even if not uniform) standard. On the other hand, the broad discretion left by general clauses would inevitably produce differences in interpretation and conflicting outcomes. In this second situation, the retained Internal Market principle may have its future application.

3 Questions of structure and substantive law

3.1 The balance between general and detailed provisions

The main challenge of marketing practices law has always consisted in finding a regulative approach that ensures the right balance between flexibility and certainty. Flexibility is needed in view of the dynamic development of marketing techniques, and ever changing forms of unfairness. Certainty and predictability are accepted virtues of any legislative intervention, enabling voluntary compliance and effective enforcement. Marketing practices law in the Nordic countries as well as in other European countries has traditionally attempted to achieve this balance by combining a broad legislative general clause, formulated in either negative or a positive manner, with a list of more or less detailed provisions on specific commercial practices. The Swedish Marketing Practices Act of 1996 is one example of a conscious move toward a more elaborate and detailed catalogue of typical marketing practices. The reason for this modification of approach has been the need for increased legal certainty, the already accumulated settled case law, which makes codification of judicial practice possible and the desire to attach more palpable sanctions to violations of well know and specific ethical rules and prohibitions.⁸⁵ Although this has not been explicitly stated in the preparatory works one reason for the codification at the time of drafting, might have been the imminent membership in the European Union and the associated need to provide legal certainty for foreign actors on the Swedish market in respect to their duties viz. Swedish consumers and Swedish authorities.

Following this well-settled Continental (and Scandinavian) approach, the UCPD (similarly to the Unfair Contract Terms Directive) ventures to lay down a single general prohibition of unfair commercial practices and common criteria for its application. This clause sets out to replace the presently existing divergent general clauses in the laws of Member States. At the same time, achieving predictability and certainty are even more crucial in a supranational regulatory context. This has predictably led to the attempt to formulate more

⁸⁴ In a similar sense ECLG Opinion, p. 8.

⁸⁵ See SOU 1993:59; Prop. 1994/95:123.

specific provisions and factual situations in the two main clauses of misleading and of aggressive commercial practices. The strife towards specification however, did not stop here, but instead crossed over to trying to bring on paper a black list of practices that shall always be considered unfair (Annex I UCPD). However, as always when a round of negotiations is triggered under the sign of maximum harmonisation, the regulatory race between national governments is unleashed bringing to unforeseen and often hardly justifiable priorities of concretisation.⁸⁶

The extensive black list in the UCPD may certainly be seen as an expression of the need for more detailed regulation, contributing to legal certainty and transparency of regulative environment in what is supposed to be an Internal Market. Natural as this development may seem, it has effectively turned the logic of marketing practices law on its head. The risk is at present that the list will be regarded by traders and marketing agencies as a sort of check list to be consulted before embarking on a cross border marketing campaign, without due regard been paid to the more overarching requirements of fairness in the general clause and in the prohibitions of the two key types of unfair practices. The nature of the list as exemplification should therefore be underlined.⁸⁷ When Recital 17 speaks of a “full list” it is merely in the sense that only the practices in the Annex I do not need a case-by-case assessment against the provisions of Article 5 to 9.

3.2 The general prohibition of unfair commercial practices

In terms of substantive provisions, the UCPD ventures harmonization through a Community-wide general clause prohibiting unfair commercial practices. In its original proposal the Commission proclaimed this general prohibition to be “the essential element of the Directive”. It expected the prohibition to replace “the existing national general clauses in relation to unfair commercial practices between business and consumers” and to establish “more precise criteria for determining what is unfair than any existing national general clause.”⁸⁸ If this intention is to be taken seriously, then the general prohibition should be transposed literally into the national law of the Member States and no room for deviations should be allowed.⁸⁹

Unfair commercial practice is defined in Article 5 by three criteria. (i) The practice must be contrary to professional diligence. (ii) It must materially distort, or be likely to materially distort, the economic behaviour of consumers. (iii) The benchmark for assessment of the impact of the advertising is the average consumer.⁹⁰ This last criterion came, however, to be significantly qualified depending on the specific circumstances (see below).

⁸⁶ Another example is the Misleading Advertising Directive in respect to comparative advertising. The situation in the UCPD is still different, because the flexible and open general clause remains as a reassurance for Member States that unforeseen situations would nevertheless be captured by the latter’s “safety net”.

⁸⁷ In a similar sense see ECLG Opinion.

⁸⁸ COM (2003) 356 final, Explanatory memorandum, para 49.

⁸⁹ In this sense Köhler/Lettl, ‘Das geltende europäische Lauterkeitsrecht, der Vorschlag für eine Richtlinie über unlautere Geschäftspraktiken und die UWG-Reform, WRP (2003), 1019 ff., 1035. See the discussion on the dilemmas of transposition and uniform interpretation, Section 8 below.

⁹⁰ COM (2003) 356 final; see Art. 5 Draft Directive; cf. Explanatory memorandum, para 51.

3.2.1 Professional diligence

The term professional diligence is relatively unknown in the European scholarly discourse in the field of marketing practices/unfair competition law. Allegedly the concept stems from Italian law and is the English translation of the notion “coretezza professionale” as laid down in Art. 2598 Codice civile. The concept is thus poorly adapted to the consumer protection objectives of the Directive and is in any case better suited for the area of civil liability for non-contractual obligations.⁹¹

Professional diligence is now defined as: “the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity” (see Article 2(h)). This definition differs substantially from the definition in the original Commission proposal (cf. Art. 2 (j) COM (2003) 356 final). In the said proposal professional diligence was defined as “the measure of special skill and care exercised by a trader commensurate with the requirements of normal market practice toward consumer in his field of activity.” This definition was rightly criticised as being too complaisant to the existing usages in the respective industry. Upon the proposal of European Parliament, the category “normal market practice” was therefore substituted by the two concepts “honest market practice” and/or “the general principle of good faith in the trader’s field of activity”.⁹² Both concepts are relatively well-established in national law and practice of the Member States.⁹³ They correctly reflect an understanding of the general clause as setting a normative standard that has to be observed even if this implies breaking with the normal practice. This broader definition also allows better account to be taken of the legitimate expectation of consumers as to honest market practice. It can indeed be confirmed that the conceptual amendment has contributed to the desired “legal clarity, legal certainty and avoiding unnecessary legal disputes.”⁹⁴

It is important to underline also in the context of the UCPD that professional diligence should not only be dependent on the established practices in the respective industry sector, but should also take account of the legitimate expectations of consumers. An unreasonably low but well established standard of skill and care should not be acceptable under the clause. In this respect it is noteworthy that Recital 6 names product placement and product differentiation as legitimate (and accepted) commercial practices that are outside the scope of the UCPD although they may quite effectively influence and distort consumers’ economic behaviour. Such an unconditional exception is not particularly convincing, given that some forms of product placement have been considered as unfair marketing in some Member States.⁹⁵

⁹¹ See Glöckner, J, *op cit.*, 939.

⁹² See also the objections of the European Economic and Social Committee, which noted that the concept professional diligence is alien to the law of the majority of the Member States and could be seen to correspond to “good business conduct”, 3.8.1, 2004/C 108/17)

⁹³ The Swedish Marketing Practices Act of 1995 defines good market conduct (god marknadsföringssed) as “good business conduct or other established norms that aim at protection of consumers or of traders in the marketing of products”. While also this definition is rather broad, it is explicit that the standard of fairness is not identical with the understanding of fairness of traders in the respective industry.

⁹⁴ See Amendment 21, European Parliament, Report of the Committee on Legal Affairs and the Internal Market, A5-0188/2004 (final).

⁹⁵ See Henning-Bodewig, F., ‘Richtlinienvorschlag über unlautere Geschäftspraktiken und UWG-Reform’, *GRUR Int.* 2004, 183 ff., 190.

Despite these welcome clarifications, the definition remains rather vague and is to a certain extent circular. It postulates that a trade practice is unfair if it is contrary to honest trade practice, which does not increase legal certainty. In addition, the reference to special skill and care may wrongly create an impression that some subjective element of intent or negligence forms part of the standard. It should be reminded that Article 11(2) is unequivocal on the point that measures on cessation or prohibition of unfair commercial practices under the Directive shall be taken “even without proof of actual loss or damage or of intention or negligence on the part of the trader.”⁹⁶

The notion of professional diligence will expectedly be given more specific contents when looking closely into the relations in the particular industry or trade in each case of alleged infringement. The UCPD does not attach binding importance to industry codes of conduct, but encourages the emergence of such codes and tries to strengthen the trust in them by different means.⁹⁷ Such codes will definitely be one important source for establishing the prevailing understanding of honest market practice in the respective industry. In this respect the ICC Codes of Advertising Practice may still continue to play the role of indicators as to the industry perceptions about the prevailing standard of fairness.⁹⁸

Likewise legally stipulated obligations of traders in their marketing viz. consumers shall as a rule be part of the fairness standard.⁹⁹ In all Nordic countries the principle of lawfulness of marketing is central and the general clauses in marketing practices acts have been broadly applied to situations of breach of relevant statutory duties (“lagstridighetsprincipen”).¹⁰⁰ Thus the Swedish Market Court has prohibited as unfair the marketing of illegal equipment for decoding of paid TV-channels¹⁰¹, the marketing with the symbols of the Red Cross, as well as the marketing of skateboards with an image of a teenage boy not carrying on the mandatory protective outfit.¹⁰² Such interpretation of the concept of professional diligence seems compatible with the UCPD with the limitation, however, that material distortion of consumer economic interests has to be demonstrated.

Another traditional way of gaining guidance as to the standards of fairness in a particular industry sector or as to a particular marketing practice in the Nordic countries has been the elaboration of guidelines by the Consumer Protection Agencies in cooperation with representatives of the affected industry. Formally, such guidelines are not a binding source of law, but they have traditionally been accepted by the courts as indication of the prevailing standard of fairness in the industry. One question is whether following the Directive’s transposition into national law, this practice will still be in conformity with Community law. Clearly, the negotiations in which guidelines are elaborated proceed with

⁹⁶ See Köhler/Lettl, *op.cit.*, 1036.

⁹⁷ See Article 10 UCPD.

⁹⁸ About the role of the ICC Codes in Nordic marketing practices law see Brrun Nielsen, TemaNord 2002:59.

⁹⁹ See Köhler/Lettl, *op.cit.*, 1036.

¹⁰⁰ The principle is also familiar in German Unfair competition law as “unlauteres Wettbewerb durch Rechtsbruch”, cf. also the doctrine on ‘breach of statutory duty’ in English law.

¹⁰¹ MD 2002:15 (STOP) on decoding equipment, cf. the similar cases MD 2001:19;; 2002:16; MD 2003:30; MD 2004:17.

¹⁰² See MD 2000:8 Bodion; for an overview of the case law see Bernitz, *Marknadsföringslagen* (Stockholm: Juristförlaget, 1997).

participation of the businesses represented in the respective country, and cannot claim to be representative for the whole Community. Can such guidelines still be considered as authoritative?

In all of the above situations, one overarching problem for the uniform application of the Directive is that in many industry and trade sectors, there will be no common Community-wide standards of professional diligence. Codes of conduct are often local, elaborated by the industry members established on the territory of a single Member State. Legal requirements forming part of the standard of good market practice according to the principle of lawfulness may differ from country to country. The guidelines elaborated by local consumer protection authorities have likewise typically limited territorial validity depending on the jurisdiction of the agency. The question which emerges then is how do differing standards of professional diligence between Member States (or regions) affect the prospects for uniform implementation of the UCPD. In its Amendment 21, proposing changes to the concept of professional diligence, the European Parliament had proposed that the concept professional diligence should depend on the honest practices in the country where the trader is established. After the deletion of the country of origin principle such interpretation does not seem sustainable. Instead, the rules of jurisdiction and private international law should indicate the applicable law and respectively the applicable standard of professional diligence.

The remaining mutual recognition principle in Article 4 will, however, continue to act as a filter, obliging Member States to ensure the free movement of commercial practices that comply with the rules of the state of origin. This “filtering” operation threatens, however, to be far from easy. The deciding courts would have to ascertain the standard of professional diligence not only in the country the law of which governs the commercial practice in question following conventional conflict of law principles, but also in the country of origin (if different). It has to further compare the two standards and to ensure the free movement of the commercial practice if it complies with the more relaxed standard in the country of origin. Given the very individual and situation-specific assessment taking place in each lawsuit concerning an unfair commercial practice, such a prospect is hardly attractive to the courts and is hardly realistic. It is submitted, that enforcement bodies will (and should) in the future involve in eliciting Community conform interpretation of the concept taking account of the situation in the whole Community.

3.2.2 Average consumer

The general clause of the UCPD introduces two threshold requirements which limit its scope. It requires material distortion of consumer economic behaviour and it takes as a benchmark for determining unfairness the ‘average consumer’. Through these requirements the UCPD apparently seeks to eliminate exaggerated interpretation and over-enforcement of fairness standards in Europe. In the Explanatory Memorandum to its original proposal the Commission refers to ‘some’ Member States, which instead of applying the test of the average consumer examine the effect of a given commercial practice on a small number of consumers (10-15 percent). Likewise, the Commission

mentions a state practice prohibiting any inaccuracy in advertising even if it has no bearing on consumer decisions.¹⁰³ Both concepts (the average consumer and the materiality requirement) are consequently closely associated with a series of preliminary rulings of the ECJ, requested chiefly by German courts, and seeking to clarify the compatibility of German unfair competition law (UWG) with Community primary and/or secondary law.

The original Commission proposal codified the definition of the average consumer as elaborated in a string of cases of the ECJ.¹⁰⁴ Article 2(b) in the proposal defined the average consumer as “the consumer, who is reasonably well-informed and reasonably observant and circumspect” (COM (2003) 356 final). Such codification was, however, rightly considered as too rigid, as it would not leave room for dynamic development of the notion and for adapting to changing conditions of marketing.¹⁰⁵ In the Common Position the definition was therefore stricken from the text of the Directive while a link to the jurisprudence of the ECJ was established in Recital 18.¹⁰⁶ This solution ensured a better balance between certainty and flexibility. Obviously, however, it was perceived as leaving too broad a margin for divergent interpretations by national law enforcement bodies. Following an amendment by the European Parliament at second reading, a definition of the concept of the average consumer is now introduced in Recital 18, while still no definition is given in Article 2 of the Directive. The definition is more nuanced than the one advanced in the original Commission proposal in that it expressly refers to the acknowledgement by the ECJ of the importance of social, cultural and linguistic factors.¹⁰⁷ Recital 18 now reads:

" 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, as interpreted by the Court of Justice, and taking into account social, cultural and linguistic factors ..."

Positive assessment can be made of the now clearly introduced specific criteria for situations where the marketing targets or reaches specific consumer groups (see Article 5(2)(b) *in fine* and Article 5(3) UCPD). As Recital 18 explicitly acknowledges these provisions aim at "preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices." Where the marketing consciously targets such groups the benchmark consumer is the average consumer from the group (see Article 5(2)(b): “or of the average member of the group when a commercial practice is directed to a particular group”).

An important improvement in comparison with the initial Commission proposal is the rule of Article 5(3) UCPD. According to this rule when commercial practices reach the

¹⁰³ See Explanatory memorandum, para 21, COM (2003) 356 final.

¹⁰⁴ See Case C-210/96 *Gut Springenheide* [1999] ECR I-4657; Case 228/98 *Estée Lauder* [2000] ECR I-117.

¹⁰⁵ See Report of the Committee on Legal Affairs and the Internal Market, A5-0188/2004 (final).

¹⁰⁶ “[i]n 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 as interpreted by the Court of Justice...” Common position Council Doc. 11630/2/04 REV 2

¹⁰⁷ See Case C-313/94 [1996] ECR I-06039

generality of consumers, but are likely to materially distort the economic behaviour of a group of vulnerable consumers, the practice shall be assessed from the perspective of the average member of that group. This provision applies, however, only if the practice is likely to distort the behaviour of such a vulnerable consumer group in a way "the trader could reasonably be expected to foresee". Following an amendment by European Parliament at second reading the group has to be "clearly identifiable", a condition which obviously seeks to make reliance on this clause more difficult.¹⁰⁸ Uncertainty exists also around the condition that the practice shall *only* distort the economic behaviour of the vulnerable consumer group. If interpreted strictly, these conditions may significantly curtail the scope of application of the rule. Which group can be considered clearly identifiable? What happens if a practice is likely to materially distort the economic behaviour mostly of vulnerable consumers, but also of other consumers? Should the practice then be assessed from the point of view of the average member of the general consumer public? We can take the example of misleading advertising of diet food, which is likely to materially distort the economic behaviour of consumers suffering from obesity, but also of other consumers from the general public. Is this a sufficiently identifiable group? Would the average consumer from the vulnerable group be taken as a benchmark or the average consumer in general?

Another concession is made in the second sentence of Article 5(3), where making exaggerated statements or statements which are not meant to be taken literally are exempted as legitimate advertising practice. It should be noted that exactly in the case of vulnerable groups, for instance children, exaggerations can be taken literally. Such a provision could possibly have its place as a general disclaimer in Article 5(2)(b). However, it is misplaced in the context of protection of vulnerable consumer groups. This sentence then may effectively take the edge of the whole provision.¹⁰⁹

For the Nordic countries taking the average consumer as a benchmark should not imply dramatic changes in respect to current law, as reflected in case law and preparatory legal material, provided of course that the notion of the "average consumer" is not interpreted in a too strict and unrealistic way. Already the *travaux préparatoires* to the 1970 Swedish Marketing Practices Act¹¹⁰ attached decisive importance to the perceptions of the targeted consumer group. Following the report of the legislative committee, for advertisements addressing the general public the benchmark is even today considered to be the presumed average consumer with 'normal' comprehension, experience and expertise. This definition of the average consumer is still reiterated in the decisions of the Market Court. In addition it is often stated that in the case of adverts addressed to the general consumer public considerable portion of the consumer audience should run the risk of being misled, in order for an advert to be prohibited:

Vid bedömningen av marknadsföringsåtgärder som riktar sig till enskilda konsumenter i allmänhet är utgångspunkten en tänkt genomsnittskonsument med normal fattningsförmåga, erfarenhet och sakkunskap men utan närmare kunskap

¹⁰⁸ See Amendment 5, European Parliament Legislative Resolution on the Council Common Position, P6_TA-PROV(2005)0048.

¹⁰⁹ In a similar sense the ECLG Opinion.

¹¹⁰ See more particularly SOU 1966:71,

om den vara som marknadsförs. Härtill kommer att en betydande del av mottagarkretsen skall löpa risk att vilseledas.¹¹¹

The average consumer is, however, not seen as a rational ‘*homo economicus*’ fully detached from reality. This consumer is considered without particular experience of the product in question and is presumed to read adverts casually.¹¹² Therefore it is the aggregate overall impression by casual contact that is important.¹¹³ The average consumer is for instance not expected to carefully read small print or to pay attention to quotation marks and question marks used to reverse or place a statement in a larger context.¹¹⁴ In case of doubt, the Market Court tends to follow a strict line of reasoning proceeding from the general consumer protection objective of the MFL.¹¹⁵ A professional audience is normally associated with relaxing the standard of deception. Conversely, advertising targeting consumer groups less capable of critical and informed judgment (for instance children, elderly, and sick) is subject to stricter scrutiny.¹¹⁶ A similar view is established in the other Nordic countries.¹¹⁷

More recently in a number of lawsuits in Sweden parties (typically defendants) have made reference to the average consumer as defined by the ECJ, claiming that this notion should lead to raising the threshold for establishing deception.¹¹⁸ However, the Swedish Market Court has so far not accepted that there is a need to adjust the criterion for deception in the light of the case law of the Luxembourg court. This case law is seen partly as not so extensive as claimed and partly as still unclear.¹¹⁹ It should further be noted that also the

¹¹¹ See the recent case MD 2003:31 *KO mot Försäkringsrådet K. J. AB*; cf. MD 2001:26, *Stora Kopparbergs Bergslags AB mot Alcro-Beckers AB*.

¹¹² Bernitz (1991), 116; Svensson/Stenlund/Brink/Ström, *Praktisk marknadsrätt*, 7th ed. (Stockholm: Norstedts Juridik, 1996), 68.

¹¹³ "Vid tillämpningen av påverkansrekvisitet måste beaktas vilken krets av adressater framställningen vänder sig till. Är det fråga om reklam för allmänheten torde man böra utgå från den tänkta reaktionen hos en genomsnittskonsumant med "normal" fattningsförmåga, erfarenhet och sakkunskap. Men samtidigt måste man komma ihåg att reklam läses flyktigt och oengagerat och att det oftast är ett helhetsintryck läsaren får, inte en nyanserad bild med skilda faktorer. Det är som regel genomsnittskonsumantens tänkta helhetsintryck vid oengagerad läsning, som skall beaktas, inte det intryck, som erhålles vid noggrann genomläsning och analys av skilda detaljer." See SOU 1966:71, cf. Bernitz (1991), 116; Svensson/Stenlund/Brink/Ström, *Praktisk marknadsrätt*, 7th ed. (Stockholm: Norstedts Juridik, 1996), 68.

¹¹⁴ MD 1975:20 ("Philips") about discrepancy between the impression from a casual reading of an ad and the text in the small print.

¹¹⁵ See Svensson/Stenlund/Brink/Ström (1996), 68.

¹¹⁶ See Bernitz, *Ibid.*.

¹¹⁷ See for Norway Comments on a Proposal for a UCP Directive of the Standing Committee of the EFTA States, Working Group on Consumer Protection, Brussels, 26 March 2004, Ref. No. 1041362, on file with the author,

¹¹⁸ "Enligt EG-domstolens praxis från senare år har en viss skärpning av kravet på konsumenternas fattningsförmåga och kravet för att vilseledande skall anses föreligga skett. Enligt EG-domstolen skall domstolarna beakta de förväntningar som en normalt informerad samt skäligen uppmärksam och upplyst genomsnittskonsumant kan tänkas ha. Det är stor skillnad mellan tingsrättens rekvisit "flyktigt betraktande" och EG-domstolens "skäligt uppmärksam". See Skeidar, in MD 2000:25 (Hästens)

¹¹⁹ "I målet har gjorts gällande att det i EG-rättslig praxis från senare år har skett en viss skärpning av kravet på konsumenternas fattningsförmåga och av kravet på att vilseledande skall anses föreligga. EG-domstolens praxis är enligt Marknadsdomstolens mening ännu inte särskilt omfattande och kan inte heller anses vara så klar att den f.n. motiverar överväganden om bedömningsgrunderna i nu angivna hänseenden." *Ibid.*

ECJ has recognised (mainly in trade mark cases) that the average consumer's level of attention is likely to vary according to the category of goods or services in question.¹²⁰

Finally, attention should also be paid to another statement in Recital 18 UCPD with potentially powerful impact on the methods for ascertaining deception and unfairness employed by the national courts in some countries, notably Germany.¹²¹ According to the last sentence of Recital 18 “the average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer.” One could recall that the question of empirical surveys and their use in court proceedings has been referred to the ECJ by German courts in the case *Gut Springenheide*, but did not receive an unequivocal answer.¹²² It is interesting to note that the Swedish Government also intervened in the proceedings. It advocated a normative consumer model (“how consumers in general could be assumed to understand [a statement]”) and against the need for opinion polls. In the same case the Swedish government intervened in support of an abstract test carried out by national courts exercising their own faculty of judgment.¹²³ This approach now seems to gain recognition at the European level.

3.2.3 Material distortion

The ‘material distortion’ condition requires that a commercial practice is used “to appreciably impair the consumer’s ability to make informed decisions, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.” The objective is apparently to codify a *de minimis* rule in the standards of fairness and thereby to curb excesses. This threshold requirement has provoked concern among national governments, in particular in countries having high level of consumer protection, that the new Community Directive would lower their standards of protection. In order to be able to take a well-reasoned and balanced stand on this question a look should be cast at the history and origin of these conditions.

The ‘material distortion’ requirement has its precursor in the Misleading Advertising Directive. According to the definition in Article 2(2) of this Directive ‘misleading advertising’ means “any advertising which ... deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is *likely to affect their economic behaviour* or which, for those reasons, injures or is likely to injure a competitor.” (emphasis added). In other words, to be qualified as “misleading” an advertisement must have (or be likely to have) an appreciable effect on consumers.

The requirement of appreciable effect on consumer economic behaviour has been incorporated in the law of a number of Member States.¹²⁴ In other countries, such as Germany and Belgium, no such adjustment was undertaken. In German legal doctrine concerns were voiced at an early stage that the national law on unfair competition stood in

¹²⁰ See Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819;

¹²¹ See Glöckner, *op. cit.*, at 941.

¹²² Case C-210/96 *Gut Springenheide* [1999] I-4657.

¹²³ Case C-210/96 *Gut Springenheide* [1999] I-4657, Opinion of AG Mischo, para 49.

¹²⁴ For the Nordic countries see below.

conflict with this requirement of the Directive.¹²⁵ However, the view prevailed that the requirement was not binding, given the minimum harmonisation approach of the Directive (cf. Art. 7 Directive 84/450/EEC). Prohibiting misleading advertising even in cases where its effect on consumer decisions would not be appreciable was interpreted as a legitimate way of going beyond the minimum standard of the Directive and providing stronger protection to consumers and competitors. The situation became more complicated after the *Nissan* judgment of the ECJ.¹²⁶ In this case the ECJ embarked on analysis of the relevance of certain information (the mileage in adverts of re-imported cars) for consumers and interpreted the Misleading Advertising Directive as requiring a material impact of the advertisement on consumer purchase decision. The true meaning and effect of the *Nissan* judgment remained, however, a bone of contention in German doctrine and case law.

From the perspective of the Nordic countries it can be stated that some threshold of material effect on consumer economic behaviour has been implicitly incorporated in marketing practices law and acknowledged in legal doctrine, preparatory works or in the law itself.¹²⁷ This is in particular true for the rules on misleading advertising. Thus Bernitz notes that a general (although not expressly formulated) prerequisite for intervention under the rule on misleading advertising in the Swedish Marketing Practices Act is that the information in question is apt to have impact on the demand for the product. This is rephrased as a requirement of commercial effect and is seen to exclude irrelevant or bagatelle representations.¹²⁸ In Denmark and Norway such a requirement of commercial effect is explicitly incorporated in the legal rules on misleading advertising. According to Section 2 Danish Marketing Practices Act it is an offence to make false, misleading or unreasonably incomplete indications or statements that are *likely to affect the demand for or supply* of good, real or personal property and work or services.¹²⁹ Section 2 of the Norwegian Marketing Control Act as well as Article 21 the Icelandic Competition Act require likewise that the misleading representation is likely to influence the demand for or supply of goods, services or other performance.¹³⁰ Generally, such a criterion of likelihood of economic effect is assessed as a fruitful and flexible legal standard.¹³¹

More important than these doctrinal limitations, is the institutional limit on prosecution and enforcement, which are associated with the Nordic model of enforcement of marketing practices law. Having in mind that most of the lawsuits of relevance for consumer interests are filed by the Consumer Ombudsman, i.e. by a public agency, it is evident that there is an implied threshold of appreciable effect, prompted by budgetary limitations and the ensuing need of setting clear priorities. Questionable borderline

¹²⁵ For a more extensive analysis of the evolution of the notions of the average consumer and of materiality in Community law see Bakardjieva Engelbrekt, 2003, 523 ff.

¹²⁶ See Case C-373/90 *Criminal proceedings against X (Nissan)* [1992] ECR 131.

¹²⁷ See already the Report of the Legislative Committee to the first Marketing Practices act of 1971, SOU 1966:71.

¹²⁸ See Bernitz, *Marknadsföringslagen, op.cit.*, 44 with reference to the Misleading Advertising Directive and to SOU 1993:59, 60.

¹²⁹ See Bruun Nielsen, TemaNord 2002:509, 43.

¹³⁰ Bruun Nielsen, TemaNord 2002:509, 52.

¹³¹ See para. 33, Comments of the Standing Committee of the EFTA States, Working Group on Consumer Protection on the UCPD, Brussels, 26 March 2004, Ref. No. 1041363, at 8, where the criterion of material distortion of consumers' economic behaviour is endorsed as adequate and well-chosen for the purpose with reference to the Norwegian Marketing Control Act.

situations would be normally sifted out in the KO's office and would simply not be brought before the Court. Thus a sort of preliminary sorting out on the basis of the public interest in eliminating deception presumably takes place before approaching the Court.

The UPC Directive, however, seems to go a step further than the Misleading Advertising Directive. The condition here is centred not around the material *impact* on consumers' economic behaviour, but the material *distortion* of such behaviour.¹³² Article 2(e) defines the concept "material distortion" as follows:

"to materially distort the economic behaviour of consumers" means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise."

Prima facie the language of the definition in Article 2(e) seems to require an effective change in transactional decision as a result of the practice (and the associated impaired ability of informed choice). Article 5 makes however clear that the prohibition covers also practices that are *likely* to materially distort consumers' economic behaviour. In cases where an effective distortion cannot be demonstrated or has not yet occurred, an evidence of likelihood of distortion should suffice. This however, should not be equated with proof of subjective intent or negligence which are explicitly proclaimed irrelevant by Article (11)(2) second indent (and reiterating the Misleading Advertising Directive).

All in all the UCPD may be regarded as confirming the established line of reasoning in Nordic doctrine and practice. At the same time, one should warn against the risk that affected parties and enforcement bodies perceive the new formula in the UCPD as an indication of change in direction to higher threshold for intervention in comparison with the Misleading Advertising Directive. It is most likely that in the process of enforcement, the need to demonstrate material distortion as laid down in the Directive will prompt defendants to require strong evidence of actual or potential negative impact on consumer behaviour. It is submitted that also in this respect the proviso in Recital 18 concerning the way of establishing infringement should apply. Neither the average consumer test, nor the evidence of (effective or likely) material distortion of the average consumer's economic behaviour should be understood as complex empirical and statistical tests, but should in the normal case require an exercise of own faculty of judgement by the enforcement bodies.

3.3 Key prohibited practices

One of the major drawbacks of harmonization via general clause is clearly the risk of conflicting interpretations by different enforcement bodies. The UCPD purports to reduce this risk by using two techniques. First, the allegedly most widespread unfair commercial

¹³² It is interesting to note that the term "distortion" in the English text of the UCPD is in German translated as "Beeinflussung" and in French "alteration", which may not communicate the same extent of negative impact as the English "distortion" and the Swedish "snedvridning".

practices, namely misleading commercial practices (Arts. 6 and 7 UCPD) and aggressive commercial practices (Arts. 8 and 9 UCPD), are defined in greater detail.

Second, a black-list of specific practices which flesh out the provisions on misleading and aggressive practices is intended to give practical guidance to law-enforcement authorities.¹³³ The practices on the ‘black list’ are in all circumstances to be considered unfair, meaning that they do not require a case by case assessment against the provisions of Articles 5 to 9 (cf. Recital 17). In this the UCPD follows the Feasibility Study. In the Green Paper on Consumer Protection the Commission had advanced a third alternative for ensuring predictability and harmony in implementation, namely drawing up a non-binding practical guidance with stakeholder participation.¹³⁴ In the final proposal of the Commission, however, this particular arrangement was no longer pursued.

3.3.1 Misleading commercial practices (Articles 6-7)

Misleading advertising has been among the first areas of unfair commercial practices regulated at Community level through the Misleading Advertising Directive of 1984. The UCPD revises and complements the existing rules in several respects. First and foremost, the UCPD covers not only misleading actions, but also misleading omissions, which is a novelty and extends the scope of regulation. Furthermore, the prohibition of misleading actions in the UCPD contains new elements that are not familiar from the definition of misleading advertising in Directive 84/450.

3.3.1.1 Misleading action

Article 6(1) UCPD identifies **two ways** of actively misleading consumers. The first one is by straight-forward use of false information, i.e. untruthful commercial practice. The second way is by using information which even if factually correct, deceives or is likely to deceive the average consumer. Despite the new language, the specific mention of untruthful advertising would hardly change anything in substance. The concept of deceptive advertising has always been seen to also cover untruthful information.

As in the whole Directive, the average consumer is used as a **benchmark** and a practice is prohibited only if evidence is provided that it misleads or is likely to mislead the average consumer. More important seems to be the requirement of relevance, namely that the practice is likely to cause the average consumer to take a **transactional decision** that he would not have taken otherwise. A definition of the concept “transactional decision” is now included in Article 2(k) UCPD:

“transactional decision means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;”

¹³³ See Annex 1 to Draft Directive.

¹³⁴ See COM (2001) 531 final, 15.

The definition contributes to legal certainty and is sufficiently broad to correspond to the broad concept of commercial practices used in the UPDC. The significance of the criterion remains unclear, though. Interpreted narrowly, it could be seen as a specific expression of the (now) general requirement of appreciable effect of the commercial practice on consumers' economic behaviour. There is, however, a risk that some courts and enforcement bodies would interpret this requirement extensively and thus significantly raise the threshold for intervention. The *Nissan* judgement of the ECJ indeed contained some statements that could be interpreted in this direction.¹³⁵

The case concerned advertising in France of motor vehicles imported from Belgium. The advert claimed the cars to be new and cheaper, not revealing the fact that they were already registered and put on the road for the purpose of importation and that the lower price referred to a car model differing from the one sold in France (having among other fewer accessories). In principle, the ECJ left the appreciation of whether the advertising was misleading to the national court. However, concerning the claim that the cars were new, the ECJ instructed the national court to take into account the fact whether the knowledge that the cars were registered "would have deterred a significant number of consumers from making a purchase" (para 15). In this part of the judgment the ECJ seems to require a hypothetical and abstract appreciation of the facts. In a subsequent paragraph, referring to the allegedly cheaper price of the cars, the ECJ held:

"...such a claim can only be held misleading if it is established that the decision to buy on the part of a significant number of consumers to whom the advertising in question is addressed *was made* in ignorance of the fact that the lower price of the vehicles was matched by a smaller number of accessories on the cars sold by the parallel importer." (emphasis added)

If taken literally, this statement requires from the national court to engage in a test, establishing the number of purchases as an effect of the advert and the percentage of buyers who would not have bought had they known the fact of the difference in accessories. In contrast to the previous situation, here it is not a question of a hypothetical appreciation, but rather of an empirical test of actual facts.¹³⁶

It is submitted that the *Nissan* judgment was delivered in a specific factual situation of parallel imports, having a significant effect on the internal market. The judgment should therefore be interpreted as having limited authority, not extending beyond the specific circumstances of the case. In particular, it is important not to allow the requirement of evidence of actually conducted transactions in this judgment to have spill-over effects on the interpretation of Article 6 UCPD.

Article 6 includes a long **catalogue** of the elements in respect to which an advertisement can be misleading. In contrast to the similar list in the Misleading Advertising Directive, the language of Article 6(2) UCPD suggests that the list is exhaustive. This is understandable in view of the ambitions to achieve full harmonisation. Nevertheless, and despite the fact that the most important factors that may influence consumer choice are

¹³⁵ See Case C-373/90 *Criminal proceedings against X (Nissan)* [1992] ECR 131.

¹³⁶ For a critique of the *Nissan* judgement see Sack, R., 'Die Bedeutung irreführender Werbung für Importfahrzeuge aus EG-Staaten nach EG-Recht' *WRP*, 23 ff.

included in the catalogue, it is advisable to leave the list open for the purposes of flexibility.¹³⁷

It is interesting to note that the original Commission proposal listed in the catalogue of Article 6(1) “claims about the product which the trader cannot substantiate”. The rule thus introduced indirectly an obligation for traders to be able to substantiate factual (and verifiable) claims, which was equivalent to a rule on reversal of the burden of proof in such situations. This rule has, however, regrettably been abandoned in the course of the negotiation process. It appears that the deletion has taken place on the own initiative of the Council and does not follow an Amendment proposed by Parliament.¹³⁸

The catalogue concerns misleading advertising in respect of traders’ **own business** and product. It does not include misleading information about competitors. This is a result of the divided approach of harmonisation focusing exclusively on B2C relations. Providing misleading information for other business relations, for instance the business or products of a competitor can, however, hurt the economic interests of consumers just as much as misleading information about one’s own business. This is one illustration of the difficulty of drawing a sharp line between B2B and B2C commercial practices.¹³⁹

The status of misleading comparative advertising is uncertain. Article 14(3) amends Article 3a of the Misleading Advertising Directive and specifies that a permitted comparative advertising shall not be misleading according to Article 2(2), 3 and 7(1) of this Directive or Article 6 and 7 of the UCPD. This rule should ensure coordination between the two directives. However, the purpose with the Misleading Advertising Directive after the amendment remains solely to protect the interests of traders. At the same time, Article 6 of the UCPD when enumerating (exhaustively) the aspects in which an advert can mislead consumers, does not mention the products or the businesses of a competitor.¹⁴⁰ One should nevertheless infer that a misleading effect from comparative advertising should in most cases indirectly involve false or misleading claims about one’s own products. Comparative advertising (as well as any other marketing) that involves confusion with a competitor’s product, trade name, trade mark or other distinguishing mark is prohibited on a separate basis in Article 6(2)(a) UCPD.

3.3.1.2 Misleading omissions

The rule on **misleading omissions** in Article 7 UCPD obviously represents a compromise solution, if compared to the initial plans of a full-fledged information disclosure requirement.¹⁴¹ It is less onerous than the existing information disclosure requirements in some Nordic countries and its application is subject to a number of conditions. A practice is found to constitute a misleading omission only in so far as the information is needed by the average consumer to *take an informed transactional decision* and if the omission of

¹³⁷ See in this sense The Comments of the Standing Committee of the EFTA States, Working Group on Consumer Protection, *op. cit.*, para. 35.

¹³⁸ See Compromise text on the Proposal for Unfair Commercial Practices Directive, in view of the Consumer Working Party, Doc. 7805/04, Brussels, 26 March 2004,

¹³⁹ In this sense Köhler/Lettl, *op.cit.*,

¹⁴⁰ See Kohler/Lettl, *op. cit.*, 1034, 1039, ff.

¹⁴¹ On the initial plans see Green Paper on Consumer Protection, Ex-ante Impact Assessment,

such information causes or is likely to cause the average consumer to take a transactional decision that he *would not have taken otherwise* (see Article 7(1) UCPD). This requirement is a restatement of the materiality condition stipulated in the general clause of Article 5. In addition the omitted information shall be *material*, whereby it is for the courts to establish what information is material, taking account of the factual context of the commercial practices and all its features, as well as the limitations of the communication medium. The context thus plays a role at two stages: to ascertain whether there is a relevant omission of information, and to ascertain whether the omitted information is needed by the average consumer. In the first stage the enforcement bodies have to determine whether with regard to the limitations of the communication medium or other circumstances, for instance previous advertising and wide-spread consumer knowledge, provision of the information should not be required. In the second stage, one should determine whether the omitted information can be regarded as important for the consumer purchasing decision.

Importantly, the Directive does not envisage a possibility of imposing on traders an active obligation to disclose, but is confined to enjoining misleading omissions. Given that the remedies are still within the competence of the Member States, it can be reasonably inferred that a remedy consisting in imposing on traders a duty to provide the necessary information through information disclosure orders (påbud att lämna information) would not be in conflict with the UCPD.

In the original Commission proposal the applicability of the rule on misleading omission was confined to pre-contractual commercial practices. Article 7(4) stipulated that “[f]or commercial practices before a commercial transaction a misleading omission may occur only if a trader makes an invitation to purchase.”¹⁴² In this way the Commission wanted to exempt general attention-raising advertising and brand awareness campaigns from the scope of the rule. This limitation has, however, been deleted from the text of Article 7(4). Instead, a detailed proviso has been introduced in the text of Article 7 on the need to take into account the limitations of the communication medium (see this subsection, below).

Article 7(4) UCPD specifies in more detail the information that shall be regarded as material, but only for commercial communication which qualifies as “invitation to purchase”. To avoid different interpretations of the concept “invitation to purchase” the UCPD now gives an autonomous definition, which helps clarifying the scope of Article 7(4).¹⁴³ According to Article 2(i):

“invitation to purchase” means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase”

The finding of misleading omission in other cases of commercial communication, which do not meet the requirements in this definition, would strongly depend on the circumstances of the individual case. As material information Article 7 defines

¹⁴² See COM (2003) 356 final.

¹⁴³ See in this sense the ECLG Opinion.

information on: (a) the main characteristics of the product; (b) the geographical address and the identity of the trader; (c) the price and a number of details associated with the price and the costs of delivery; (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence; (f) the existence of a right of withdrawal or cancellation, where applicable. In quest of uniformity and certainty in implementation, the list of Article 7(4) UCPD is formulated as exhaustive. Yet the same objection as for the list on misleading actions can be made here, namely, that omission of information, which is not listed but nevertheless feels as detrimental to consumers in a particular situation, would not be caught by the prohibition.¹⁴⁴ Possibly, in such cases the general prohibition of Article 5 can be invoked to play its role of a safety net.

Following Article 7(5) information requirements in Community Directives shall always be considered as material under Article 7. By contrast, where Member states have introduced information requirement over and above what is specified in Community law on the basis of minimum clauses, the omission of that extra information will not constitute a misleading omission under the Directive (cf. Recital 15 UCPD). A list of Community Directives containing such requirements constitutes Annex II. In contrast to the list of information requirement in Article 7(4) the list of Directives is non-exhaustive. This once again demonstrates the difficulty of gaining transparency over the regulative regime of commercial practices in Europe. When even the Community legislator cannot provide an exhaustive list of Directives, containing material information for consumers, then the work is shifted to national law-makers and implementing bodies and legal certainty is jeopardized.

If compared to the existing information clauses in Nordic marketing practices legislation, the rule of Article 7 appears less onerous to businesses than information disclosure clauses in some of the Nordic countries.¹⁴⁵ Thus, the Swedish Marketing Practices Act in Article 4(2) contains a positive information disclosure duty, stating:

In their marketing traders shall provide information which is of particular importance from a consumer point of view.

This clause is remarkable in that it is not (expressly) confined to “invitations to purchase” and stipulates no (express) limitations in regard to the advertising medium.¹⁴⁶ A positive duty to disclose is also to be found in Section 3 of the Danish Marketing Practices Act, but it applies only to situations of making an offer and conclusion of a contract and is also subject to other conditions. The general information provisions in the Danish and Norwegian marketing laws seem to be close to the text of the UCPD in that they formulate information requirement in a negative way as part of the rule on misleading advertising

¹⁴⁴ See Comments of the Standing Committee of the EFTA States, Working Group on Consumer Protection, *op.cit.*, para. 36.

¹⁴⁵ For an account on the information disclosure provisions in the Nordic marketing practices law see Bruun Nielsen, *TemaNord* 2002:509.

¹⁴⁶ In practice, however, certain limitations have been acknowledged. For instance information on price is considered mandatory under this provision only in case of marketing of specific product and not in general advertisement of a business activity (See MD 1981:5 McDonald's).

and marketing.¹⁴⁷ A negative duty not to mislead or act unfairly by omission is enshrined in Chapter 2 Section 1 subparagraph 2 of the Finish Consumer Protection Act, but it is confined to information in respect to the health or the economic security of consumers.

In this context it is appropriate to ask whether the Directive once becoming a law, will curtail the existing farther reaching information disclosure provisions in Nordic marketing practices law. Given the full harmonisation approach advanced in the UCPD and the still remaining principle of mutual recognition (Article 4) it appears that the answer should be in the affirmative. It would in any case not be possible to prevent the free circulation of goods and services on grounds of infringement of stricter information disclosure requirements. It is less clear whether such requirements would continue to be applicable in respect to domestic traders. Furthermore, according to Recital 14 “The full harmonisation approach in this Directive does not preclude the Member States from specifying in national law the main characteristics of particular products such as, for example, collectors’ items or electrical goods, the omission of which would be material when an invitation to purchase is made.”

A warning should likewise be raised in respect to the broad margin of appreciation left to the trader to adjust the information to the specifics of the advertising medium (Article 7(3) UCPD). According to this proviso:

Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

One typical example of advertising which can benefit from this clause is television advertising. A recent case before the Swedish Market Court may come to illustrate the underlying issues. The case concerned a TV advertisement for mobile phones. The company (Vodafone) announced in an attention-catching way a special offer for low price mobile phones. However, a number of conditions, which substantially restricted the offer, were only shown for 3 seconds and in small prints, for instance the fact that the prices are valid upon entering a subscription for telephone services for 12 or 24 months, that the monthly fees for the subscription were considerably higher than normal subscription fees, the prices per minute etc. Information on these limitations was illegible in the short time of the TV advert. The defendant objected among others that consumers could get more detailed information about all the conditions of the offer on the Internet. The Market Court considered this advert to be in violation of the information requirements on special offers under § 13 MFL. The Court dismissed the arguments of the defendant that more detailed information was available to consumers by other means.¹⁴⁸ Following the entry into force of the UCPD this case may have a different outcome.

¹⁴⁷ See Section 3 Norwegian Marketing Control Act; Section 2(1) Danish Marketing Practices Act; cf. Schulze/Schulte-Nölke (Eds.), *Analysis of National Fairness Laws, Comparative Part*, 33 ff., available at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/index_en.htm.

¹⁴⁸ See MD 2004:16 (“Vodafone”): ”Vid nu angivna förhållanden kan Vodafone inte anses ha uppfyllt MFL:s krav på tydlig information vid förmånserbjudanden. Att, såsom Vodafone invänt, konsumenterna på annat sätt kan få del av den aktuella informationen, t.ex. vid kontakter med säljpersonal eller genom de

Apart from these general information duties, more specific information requirements are stipulated in some national laws in respect to specific practices. One example is § 13 Swedish Marketing Practices Act, laying down detailed rules as to the information to be provided in connection with special offers, for instance conditions of the offer, the nature and value of the offer, its duration and possible restrictions. A similar rule exists in the Finnish Consumer Protection Act.

Concerning marketing of special promotional offers, in the absence of common Community rules, and while awaiting the Regulation on sales promotion, Member States requirements have to be scrutinized against the requirements of the general clause and of the prohibitions of misleading and aggressive commercial practices. In particular information requirements, have to meet the conditions on misleading omissions.

3.3.2 Aggressive Commercial Practices (Art. 8-9)

Whereas the rule on misleading advertising has a relatively long history in Community law, the regulation of aggressive commercial practices is of a more recent date. Some precursors can nevertheless be found in the Doorstep Selling Directive, which deals exactly with a selling method notorious for the psychological pressure typically exerted over consumers. Some examples of aggressive commercial practices are likewise addressed in the Distance Selling Directive. However, both Directives give more attention to remedies pertaining to contract law such as information requirements and “cool off” periods. But they also include information requirements which fall within the scope of commercial practices law as defined in the UCPD. Finally the Privacy and Electronic Communications Directive represents an effort to provide a more coherent approach to the protection of the private sphere of consumers in the context of ever growing technological opportunities for obtrusive commercial communication.

The definition used in Article 8 contains a number of concepts that are new and not sufficiently clarified. **Harassment**, **coercion** and **undue influence** are all vague notions that can only be filled with content through case law and enforcement practice.¹⁴⁹ A legal definition is only introduced for the concept ‘undue influence’, whereas the concepts “harassment” and “coercion” remain undefined. Article 9 enumerates certain general factors which have to be taken into account in determining whether a commercial practices uses harassment, coercion or undue influence. These factors relate generally to the timing, location, nature or persistence of the practice (see Article 9(a)-(e) UCPD).

Concerning the concept of “undue influence” Article 2(j) provides:

“undue influence” means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force in a way which significantly limits the consumer’s ability to make an informed decision.”

tryckta annonser som Vodafone återkommande distribuerar på marknaden, kan inte påverka bedömningen av de påtalade reklaminslagens tillbörlighet” (jfr t.ex. MD 2000:4); cf. MD 2004:4

¹⁴⁹ See ECLG Opinion, at 15.

Following an amendment advanced by the European Parliament, the definition now clarifies that the undue influence can consist of use of physical force, but is not confined to such situations.¹⁵⁰ Some objections have been expressed about using words like ‘coercion’ and ‘threat’ in a private law text since such conduct would be considered a crime in many Member States’ legislation.¹⁵¹ The mention of “position of power” should not be confused with concepts from “antitrust” law. In the context of commercial practices even a small or medium size competitor can well be in a position of power in relation to the consumer. The position of power can also (and would typically) be created by the trader himself in order to impair consumers’ freedom of choice.

The condition of **material distortion** on consumer’s economic behaviour applies also for aggressive commercial practices. According to Article 8 a practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, it “significantly impairs or is likely to significantly impair, the average consumer’s freedom of choice or conduct with regard to the product offered and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.” Whereas the distortion under Article 7 consists in misleading, under Article 8 in preventing an informed transactional decision, the distortion under Article 8 relates to impairing freedom of consumer choice.

In determining whether a practice is aggressive, the benchmark consumer is again the **average** consumer. There is no specific provision about what applies if the practices are directed to or reach specific consumer groups. Yet it can be assumed that the conditions stipulated in the general clause of Article 5 UCPD apply also for the two key prohibited practices.¹⁵² Thus the interests of vulnerable consumers are taken under consideration both when they are specifically targeted by the trader and when they are reached by the practices and this could have been reasonably expected by the trader. The similar concern as voiced for misleading advertising practices can be voiced also here. Especially in the case of advertising targeting children it would be strange if exaggerated statements or statements which are not to be taken literally are accepted as a common and legitimate practice in all circumstances.

Seen from a Nordic perspective, the emerging rules of Articles 8 and 9, together with the list of examples, in the Annex to the Directive, provide for a regulative regime that in some respects goes beyond existing national law in this area. Certainly, the competent authorities in the Nordic countries have on many occasions intervened against different types of aggressive marketing techniques on the basis of the general clauses of good market conduct. All countries have moreover transposed the Doorstep Selling Directive, the Distance Selling Directive and the Privacy and Electronic Communications Directive

¹⁵⁰ See European Parliament, Amendment 29.

¹⁵¹ See ECOSOC opinion.

¹⁵² See in this sense the Explanatory memorandum to the initial Commission Proposal, COM (2003) 356, final, para. 57: In each of articles 6, 7, 8 and 9 the impact of the commercial practice on the “average consumer” will be assessed, in line with the conditions of the general prohibition. This means that where a particular group of consumers is directly targeted the impact of the commercial practice will be assessed from the perspective of the average member of the group.”

into national law, going most often beyond the minimum requirements of these Community instruments.

Yet general prohibitions against aggressive practices are not commonly codified.¹⁵³ It can be mentioned, by way of example, that in Sweden, a special legislative provision on aggressive marketing has been considered on several occasions, notably when the present Marketing Practices Act (1995:450), which introduced a more elaborate catalogue of special rules, was in the process of drafting. Further on, the Swedish Consumer Agency submitted a report arguing for the need of a special rule on aggressive practices, but also this legislative initiative were not successful.¹⁵⁴ The future transposition of the UCPD may thus bring about a significant legislative innovation.¹⁵⁵

In its opinion on the Draft UCPD the European Consumer Law Group proposed two types of practices to be added not to the black list of the Annex, but in the very text of Article 8:, namely sweepstakes lotteries and additional or joint offers (Zugabe). Sweepstakes are considered as detrimental for consumers because of the “exploitation by a trader of the consumer’s greed and passion for gambling with the purpose of influencing his decision making with regard to a product”. Joint offers are, in turn, viewed as exerting a strong psychological pressure. In addition the argument is voiced that such offers in the long run distort competition. Small producers and traders are not in a position to compete with bigger actors in offering such deals and are gradually eliminated from the market at the expense of diminishing competition and consumer choice.

Proceeding from the Swedish experience of liberalisation of special offers following the 1995 MFL and the replacement of restrictions with information requirements, such a proposal feels like a step back. Drawing the borders between legitimate and undesirable special offers is a notoriously difficult and evasive enterprise, which often ends in arbitrary distinctions. The proposal of the ECLG is too specific and attempts at fixing the exact factual situation which would entail prohibition, and as such is like trying to hit a moving target. The flexibility of the provisions may be sacrificed.

3.3 The black list

The idea of having a detailed list of practices that would be regarded as unfair was advanced already in the preparatory material to the UCPD (see Green Paper on consumer protection; The Feasibility Study of a General Framework of Fair Trading). The black list was seen as a necessary concretisation of the general clause and an important tool for achieving certainty, predictability and uniform application of the future Directive. Apparently, the binding nature of the ‘black list’ and the relative ease of enforcement of the provisions on the list, have prompted Member States governments to seek to have as many unfair practices as possible on the list, taking national legislation and settled case law as a point of departure. The Annex thus turned into an arena of regulatory competition, unleashing what can be called a “race to the top” process and resulting in

¹⁵³ See, however, Section 1(4) Norwegian Marketing Control Act on taking into consideration of the “obtrusive character” of marketing.

¹⁵⁴ See SOU 1993:59; see also Ds. 1999:35, 71 Aggressiva marknadsföringsmetoder, cf. Prop. 1994/95:123, 77, respectively Prop. 1999/2000:40, 30 ff.

¹⁵⁵ A stricter view on aggressive marketing practices has been held, however, in Norway.

excessive density of regulation, which may be objectionable on legal policy grounds. It is symptomatic that the initial nineteen specific situations of misleading and aggressive practices increased to twenty eight in the Common Position. Three more examples (Annex I (12a), (20a) and (20b) were added to the list in the course of the second reading.¹⁵⁶

3.3.1. Structure of the list

The unfortunate consequence of this overabundance of provisions is that, as in the case with overkill of consumer information, it may decrease, rather than increase transparency. The situation does not get any better given the lack of systematic ordering and the feeling of arbitrariness in the selection of commercial practices to be prohibited. In any case, it is difficult to discern clear logic, coherence or policy priority in the selection and ordering of the examples on the list. The impression is that the selection of practices to be put on the list has not always been guided by the seriousness of the harm likely to be caused to consumers or by the frequent occurrence of a practice. Instead, other considerations, for instance the general interest in integration and in market self-regulation may have been of greater significance. This seems to be the case for the provisions concerning codes of conduct, where the promotion of Community wide codes of conduct is a priority for the Commission (see Annex I (1), (2), (3) UCPD). Likewise the rule on language commitment for after-sales services reveals a particular internal market appeal, in strengthening consumer confidence in cross-border shopping (Annex I (8) UCPD).

Even the rather crude ordering into the two broad categories of misleading and aggressive practices is not always consistent. To take one example, falsely stating that the product will be available for a very limited time (Annex I (7) UCPD) is one example of pressure selling, which could well be ordered under aggressive practices.¹⁵⁷ The same applies to claims concerning the nature and extent of the risk to the personal security of the consumer and his family if not purchasing the product (Annex I (12) UCPD), or to sending unsolicited goods thereby creating an impression of a duty to pay (“negative purchasing methods”, Annex I (20) UCPD). As a general observation, it seems that where false or misleading information is involved, the practice is classified as misleading even if there are elements of aggressive marketing involved.

3.3.2. Prohibited practices

3.3.2.1 Misleading commercial practices

Looking more closely at the black list, it appears that many of the factual situations in the first category of **misleading commercial practices** are *mutatis mutandis* familiar from statutory provisions, case law or administrative practice in some or all of the Nordic countries.

¹⁵⁶ Compare Annex I in COM (2003) 356 final and Annex I in the UCPD.

¹⁵⁷ Kohler/Lettl, *op. cit.*,

- Stating or otherwise creating the impression that a product can legally be sold when it cannot according to **Annex I (9)** UCPD is an application of the principle of legality largely accepted in Nordic marketing practices law.¹⁵⁸
- Presenting rights given to consumers in law as a distinctive feature of the trader's offer (**Annex I (10)**) is to my knowledge not regulated in a general manner in the Nordic countries, but there are special rules on marketing of guarantees, for instance in Section 4 Danish Marketing Practices Act which follow similar principles.
- The prohibition on advertorials in **Annex I (11)** is one particular embodiment of the general rule on advertising identification in e.g. § 5 MFL, § 1a KSL, Section 1(4) Marketing Control Act.¹⁵⁹
- The prohibition on including an invoice in marketing material and thus giving the false impression that the consumer has already ordered the product in **Annex I (20)** UCPD is close to the rule on so called "invoice fraud" ("fakturaskojeri") in § 12(2) MFL and Section 2a(1)(a) Marketing Control Act.
- An important provision added by way of an amendment by the European Parliament at second reading concerns misleading imitations.¹⁶⁰ According to the new **Annex I(12a)** "[p]romoting a 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" is prohibited in all circumstances. A counterpart of this provision can be discovered in § 8 MFL.
- Falsely claiming that a product has been approved, endorsed or authorised by a public or private body (**Annex I (4)** UCPD) or that a product is able to cure illness, dysfunction or malformations (**Annex I (16)** UCPD) are also recurrent unfair practices, normally prohibited under the rules of misleading advertising.¹⁶¹ Likewise, 'bait' advertising (**Annex I(5)**) and setting false time limits on the availability of a product (**Annex I(7)**) have frequently occupied the attention of consumer protection agencies and courts.

Other types of commercial practices are more unusual from a Nordic perspective, but can for the most part be easily subsumed under the existing rules on misleading advertising or unfair/improper marketing. Here fall the prohibitions of 'bait and switch' techniques (**Annex I (6)** UCPD) and the prohibitions of practices that undermine the trust in codes of conduct (**Annex I (1)-(3)** UCPD). Other novelties, introduced by the latest amendments of the European Parliament are the provision of **Annex I(20a)** on falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer and of **Annex I (20b)** on creating the false impression that after-sales service in relation to the product is available in a Member State other than the one in which the product is sold.¹⁶²

¹⁵⁸ See the case MD 2002:15 (STOP) on decoding equipment, cf. the similar cases MD 2001:19; 2002:16; MD 2003:30; MD 2004:17.

¹⁵⁹ For Swedish law, see Nordell, P.J., Marknadsföringsrättens öppenhetskrav – reklamidentifiering och sändarangivelse, SvJT 1999, 846 ff.

¹⁶⁰ Amendment 14, European Parliament Legislative Resolution on the Council Common Position, P6_TA-PROV(2005)0048.

¹⁶¹ See in particular the explicit mention of the impact of a product on health or the environment in the special provision on misleading advertising, § 6 MFL.

¹⁶² See Amendment 15 and 16, European Parliament Legislative Resolution on the Council Common Position, P6_TA-PROV(2005)0048.

The original Commission proposal listed as a prohibited practice under Annex I also failure to supply the information stipulated in the Annex of the (Draft) Community Regulation on Sales Promotion.¹⁶³ After the work on the Regulation has been slowed down this provision was taken down from the list of the UCPD. Instead, some of the provisions in Annex I UCPD address some unacceptable forms of sales promotion, for instance the misleading use of terms like “gratis, free, without charge” or false claims of offering a competition or prize promotion (**Annex I (19) and (18) UCPD**). In the absence of more specific rules on sale promotions the numerous and divergent rules and regulations in the laws of the Member States have to be scrutinized against the general prohibitions of misleading, aggressive and unfair commercial practices in the UCPD.¹⁶⁴

3.3.2.2 Aggressive commercial practices

Similar is the situation in regard to the practices in the second group, namely **aggressive commercial practices**. However, in this group more situations may represent a novelty, not specifically addressed by the law and practice in the Nordic countries.

Some of the practices find their loose counterpart in the text of the marketing practices statutes, or in the settled case law of the competent courts of most Nordic countries.

Examples of such practices are:

- inertia selling (Annex I (26) UCPD) which is for instance explicitly addressed in § 12 (2) Swedish Marketing Practices Act, Section 2a Norwegian Marketing Control Act,
- direct appeals to children to exhort parents or adults to purchase products, which are regarded as contrary to good market conduct according to the settled case law and practice in all Nordic countries.

In respect to **direct marketing** the legal regime after entry into force of the Directive may become rather complex. Section 23 of Annex I prohibits “making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation”. This prohibition is without prejudice to Article 10 Directive 97/7/EC and Directives 95/46/EC (Data Protection Directive) and 2002/58/EC (Privacy and Electronic Communications Directive). Thus getting a trustworthy picture of the resulting legal situation is like assembling the pieces of a jigsaw puzzle.

- For automatic calling machines, fax and electronic mail the harassment through direct marketing is already regulated by Article 13(1) Privacy and Electronic Communications Directive 2002/58/EC. The prohibition is unconditional and does not depend on the way and intensity of the solicitation. Being a rule governing specific aspects of unfair commercial practices, Article 13(1) takes precedence over the general rules of Article 5-9 UCPD (cf. Art. 3(4) UCPD).
- For conventional individual advertising by voice telephony Member States retain an option between an opt-in and an opt-out approach on the basis of Article 13(3) and Recital 42 Privacy and Electronic Communications

¹⁶³ See Annex I (11) COM (2003) 356 final.

¹⁶⁴ For the existing rules on sales promotion in the Nordic countries see Bruun Nielsen, TemaNord 2002:509, 135.

Directive 2002/58/EC. This retained choice between several regulatory options is also confirmed by Recital 14, *in fine* UCPD.¹⁶⁵ Here, the UCPD adds a new layer of regulation by imposing on Member States the obligation to always treat the “persistent and unwanted solicitations by telephone ...” as aggressive practice. For incidental and thus non-persistent telephone advertising the Member States remain free to choose between the opt-out and opt-in alternatives.¹⁶⁶

All of the Nordic countries have transposed Directive 2002/58/EC and Article 13(1) into national law. The direct marketing through automatic calling machines, facsimile machines or electronic mail is thus allowed only upon the prior consent of the consumer (opt-in). For other means of distance communication the regulative choices differ somewhat. In Denmark and Sweden direct marketing via any other means of individual communication is subject to an opt-out regime (cf. § 6a (3) Danish Marketing Practices Act; § 13 d MFL). In Finland the opt-in rule is extended also to text, voice and picture messages.¹⁶⁷ In Norway the opt-in rule covers all means of individual distant communication, with the exception of individual communication with a natural person via telephone, which does not require prior consent. The sending of unaddressed advertising via post boxes is subject to an express opt out rule.¹⁶⁸ The UCPD may thus imply sharpening of the control on unsolicited commercial communications by telephone in Denmark and Sweden.¹⁶⁹

One aspect that deserves attention and clarification is the status of the specific misleading and aggressive practices enumerated in Annex I. According to the very title of Annex I these practices are in all circumstances considered unfair. The status of the black list is further clarified in Recital 17 stating:

“It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex 1 therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9.”

This can only mean that in the case of these practices the Community legislator has made an *ex ante* abstract assessment that the conditions in the general clause and in the rules on misleading and aggressive practices are met. Therefore law enforcement bodies are not required to carry out an assessment *in casu* and are even prevented from such assessment. Yet, as some commentators have noticed for some of the practices listed it is difficult to see why an assessment of material effect on consumers’ economic behaviour should not

¹⁶⁵ “This Directive should be without prejudice to existing Community law which expressly affords Member States the choice between several regulatory options for the protection of consumers in the field of commercial practices. In particular, this Directive should be without prejudice to Article 13(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.”

¹⁶⁶ See Köhler/Lettl, *op.cit.*, 1044.

¹⁶⁷ See Act 2004/516 on Data Protection in Electronic Communications, Chapter 7, Direct marketing, § 26.

¹⁶⁸ See Section 2b (2), resp. Section 2c Marketing Control Act.

¹⁶⁹ Of course it may be presumed that persistent telephone advertising could be considered unfair even on the basis of the general clauses of the Swedish and Danish Marketing Practices Acts.

be required.¹⁷⁰ It is in any case important to underline, that the black list is exhaustive only in the sense that those are the practices on which political agreement exists that they do not require individual assessment of unfairness. By no means should the list be perceived as curtailing the powers of national enforcement bodies to interpret the general clause and the key prohibitions as covering other categories of practices. This, however, has to be done on a case by case basis.

Another question is whether the exhaustiveness of the black list means that Member States are precluded from stipulating specific provisions in their national legislation, other than the clauses on the black list (of course, apart from the general clause and the two key types of prohibited practices). At present, Nordic marketing practices legislation abounds of special rules addressing specific practices that would fall within the scope of the Directive, but do not coincide with the list. For instance, as the situation is now, there is no Community wide rule on special offers and sales promotions. However, the Swedish MFL in its § 13 contains a detailed information requirement as to special offers. The logic of this rule largely corresponds to the spirit of the Directive. Special offers are allowed but there is a highly set standard on information disclosure. A similar rule exists in the Finnish Consumer Protection Act (see § 4 KSL), while Danish and Norwegian marketing practices legislation reveal a stricter attitude to special offers.¹⁷¹

Given the general characteristics of Directives as a Community legal act, the answer to this question appears to be that Member States shall remain free to choose the way of transposing the UCPD, provided that the aims pursued are achieved. Certainly, after amendment by the European Parliament at second reading Article 5(5) now emphasizes that "the same single list shall apply in all Member States and may only be modified via revision of the Directive."¹⁷² However, this proviso should rather be understood as a requirement to full and literal transposition of the prohibitions on the list in national legislation. Conversely, it appears still possible for Member States to stipulate other and more specific requirements in their Marketing Practices legislation on commercial practices harming consumers' economic interests, beyond the requirements on the list. Yet it would always be possible to test these requirements against the provisions of Articles 5 to 9 of the Directive. Member States shall be in violation of Community law if the requirements in such provisions go beyond the conditions set in the Community rules, unless the intervention is justified predominantly by reasons of protection of non-economic interests of consumers or other legitimate societal interests and is consequently outside scope (see below).

4 Scope of application

Although the UCPD is conceived as a broad framework Community act, its scope of application is actually limited in a number of respects. The UCPD's sole direct objective is to protect the collective interests of **consumers**, whereby the interests of traders are only

¹⁷⁰ Henning-Bodewig, *op.cit.*, at 191 referring in particular to false claims to be a signatory to a code of conduct when the trader is not and claims that a code of conduct is endorsed by a public or other body (Annex I (1) and (3)).

¹⁷¹ Cf. Section 4 Premiums, Norwegian Marketing Control Act; § 6 and § 8 Danish Marketing Practices Act.

¹⁷² Amendment 6 Rev 1, European Parliament Legislative Resolution on the Council Common Position, P6_TA-PROV(2005)0048.

indirectly affected. As a matter of substance, the UCPD covers only situations that harm **economic** interests of consumers, setting non-economic interests aside.

A number of other limitations apply as well. Given the full harmonisation ambitions of the UCPD it is small wonder that defining its proper scope of application has become a central task and a main point of controversy in the drafting and negotiations process. Article 3 UCPD entitled “Scope” has expanded from initial six to ten sections in the last version, many of the provisions being seriously revised and expanded. A number of recitals are likewise devoted to drawing more sharply the contours of the scope of application. As a general observation, there has been a dilemma for consumer advocates between, on the one hand, a desire to draft a Community instrument as comprehensive as possible, covering also non-economic interests of consumers, and on the other hand, a fear of having too much decision making transferred to the Community level, thus limiting the competence of Member States to provide a more protective legislation.¹⁷³

4.1 Personal scope

The UCPD is confined to business-to-consumer commercial practices. It thus governs only the vertical relations between traders as addressees of the legal rules, on the one side, and consumers as a protected group, on the other.

4.1.1 The distinction between business-to-business and business-to-consumer relations

The UCPD does not encompass commercial practices affecting exclusively competitors’ interests. Traders are not directly protected by the Directive, neither in their capacity of competitors (on a horizontal plane), nor in their capacity of customers and targets of commercial practices (on a vertical plane).¹⁷⁴ According to Recital 6 UCPD:

“This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors. ... It neither covers nor affects the national laws on unfair commercial practices which *harm only competitors’ economic interests* or which *relate to a transaction between traders*; taking full account of the principle of subsidiarity Member States will continue to be able to regulate such practices, in conformity with Community law if they choose to do so.”

However, Recital 6 (and Recital 8) acknowledges that the Directive indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in field coordinated by it. This Recital was introduced in the text in its last version, apparently to appease the critics of the divided approach adopted in the UCPD.

¹⁷³ See for instance the proposal to extend the Directive also to non-economic interests of consumers (e.g. health, privacy), Opinion of the European Parliament’s Committee on the Environment, Public Health and Consumer Policy of 21 January 2004, Report of the European Parliament, A5-0188/2004 Final.

¹⁷⁴ See Köhler/Lettl, *op.cit.*, at 1033.

The divided approach can be criticized – and has been criticized – from a number of perspectives:

(i) Proceeding from an analysis of economic reality one can infer that most commercial practices that are unfair to consumers affect negatively the interests of legitimate competitors as well. This economic reality has been accounted for in commercial practices law in most of the Member States.¹⁷⁵

(ii) From the perspective of normative quality, many of the distinctions introduced in the Directive in order to uphold the division between B2B and B2C feel artificial and experimental. They do not have their counterpart in national market law and will therefore be difficult to implement and interpret. As the Economic and Social Committee pointed out in its opinion, “the simultaneous establishment of two different legal regimes to regulate the same subject – misleading advertising – according to which economic agent is affected, traders or consumers, could considerably complicate the current legal framework and could result in inconsistencies and differences in treatment and regulation. All of this goes against the principle of legislative simplification and could lead to a lack of legal security.”¹⁷⁶

(iii) From the perspective of legal policy the somewhat absurd result produced by the split between B2B and B2C commercial practices is that in the area of marketing practices affecting businessmen only Member States retain a greater margin of freedom to introduce more stringent protective rules and regulations.¹⁷⁷ While such measures remain subject to general Community law and notably to the scrutiny under the free movement principles, an *in casu* control by the ECJ is of course much less efficient. Therefore, the divergence in legal rules in this field is likely to continue to produce distortions of competition in the Internal Market.

(iv) Finally, from the point of view of transposition of the UCPD into national law Member States are confronted with a number of legislative dilemmas. In order to fulfil their obligations on correct transposition of the Directive it appears that a literal transfer of many of the provisions, definitions and concepts of the Directive into national law has to take place. Yet in a number of Member States, notably most of the Nordic countries such as Denmark, Norway and Sweden, but also in Germany, Austria, Greece, many East European Member States etc., the regulation of business-to-business and business-to-consumer relations is integrated in one and the same legal act (see below).¹⁷⁸

The exclusive focus on consumer protection and the resulting divided approach has in the Nordic countries its only counterpart in Finnish law. In the course of the reform of marketing practices legislation in the 1970s the Finnish legislator opted for separating the consumer protection field from the unfair competition field. A major factor for such choice had been the decision to consolidate all legislation pursuing protection of the

¹⁷⁵ See Köhler/Lettl, op. cit., 1033;

¹⁷⁶ See Opinion of the ECOSOC, op. cit.

¹⁷⁷ See ECLG Opinion.

¹⁷⁸ Germany and Austria were, however, the only states to enter an express statement of disagreement on this point in the minutes. See Statements to be entered into the minutes, Council Doc. 14166/04, Add 1 Rev 1 of 12/11/2004.

interests of consumers in the process of marketing of goods and services into a comprehensive self-contained Code on Consumer Protection (from advertising to contract conclusion and after sale service, with the exception of product safety and product liability).¹⁷⁹ The field of unfair competition, i.e. regulating marketing practices with the objective to protect the interests of honest competitors, has been left to the Act on unfair competition. It should be noted, however, that in Finland the Consumer Protection Act and the Unfair Competition Act follow broadly the same structure and the most important rules and definitions, including the general clause, are practically identical.

In the other Nordic countries, despite a particular attention to the consumer interest, marketing practices legislation has remained an integrated area of law where a balance of all interests involved takes place. Although the Nordic countries have been in the forefront of consumer protection in the field of marketing practices, there has been a widely shared perception that there is no strong conflict of interest between honest businessmen and consumers.

4.1.2 Only collective consumer interests

More traditional is the confinement to collective consumer interests. According to Recital 9 individual action brought by those who have been harmed by an unfair commercial practice is exempted from the scope of the Directive. Consequently individual consumer claims based on general tort law, or on special rules on damage compensation for infringement of marketing practices provisions, such as e.g. the Swedish provision on individual consumer's right to damage compensation for infringement of the catalogue rules in the MFL (see § 29 (2) MFL), remain unaffected by the UCPD.

4.1.3 Rules applicable to business-to-business relations

What rules will apply then on Community level in the relations between traders? For non-harmonised areas of commercial practices law it is clear that the national laws of the Member States continue to apply subject to general compatibility test with primary Community law (Recital 6 UCPD). For the important area of misleading and comparative advertising Directive 84/450/EEC will also in the future provide the relevant Community standard for B2B relations. It is, however, unclear whether in the part on misleading advertising it will only be confined to the protection of traders as buyers of goods and services, or it would also extend to providing protection of honest competitors (on a horizontal plane).

In German legal doctrine it has been argued that the Misleading Advertising Directive would apply also in the relations between competitors. Köhler and Lettl point out that in the Recitals of the Misleading Advertising Directive misleading advertising is described as being able to distort competition, which speaks for application on the horizontal plane.¹⁸⁰ In support of this view it could be noted that Article 7 of the Misleading Advertising Directive as amended by the UCPD states:

¹⁷⁹ See Kaulamo, K., Finland, in: Schricker, *Recht der Werbung in Europa*, Nomos, 2002.

¹⁸⁰ Köhler/Lettl, op. cit., 1035.

This Directive shall not preclude Member States from retaining or adopting provisions with a view of ensuring more extensive protection, with regard to misleading advertising for traders and *competitors*. (emphasis added)

On the other hand according to Recital 6 of the UCPD, the Directive does not affect “the provisions of Directive 84/450/EEC on advertising which *misleads business* but which is not misleading for consumers and on comparative advertising” (emphasis added). This Recital appears to define the remaining scope of the Misleading Advertising Directive more narrowly as relating to deception of traders only. Also in Article 14(1) UCPD an amendment to the Misleading Advertising Directive is proposed whereby the sole objective of the latter remains the protection of traders.¹⁸¹ And indeed it seems unfortunate from an Internal Market perspective if one should be able to circumvent the UCPD and its provisions by claiming that a misleading advertising while not appreciably prejudicial to the interests of consumers, encroaches upon the interests of competitors. Such possibility would seriously undermine the objective of achieving uniform standards and would preserve distortions of competition in the Internal Market .

In any case Recital 6 recognizes that there are commercial practices that do not harm the interests of consumers but may harm the legitimate interests of traders as competitors or customers. For such practices the Directive requires the Commission to examine the need for Community action to cover these other aspects of unfair competition.

4.2 Substantive scope

The approximation achieved by the UCPD concerns laws and regulations on unfair commercial practices harming consumers’ economic interests (Article 1 UCPD). Two limitations ensue from this provision. On the one hand, the UCPD has application on commercial practices, excluding non-commercial activities. On the other hand, the UCPD shall govern only commercial practices demonstrating some negative impact on consumers’ economic interests.

4.2.1 Commercial practice

The concept ‘commercial practice’ is used in the Directive in a relatively broad sense. It includes: “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 a consumer.” The UCPD extends not only to pre-contractual relations, but also to commercial practices in the course and after a transaction has been entered into. According to Article 3(1) UCPD:

“This Directive shall apply to unfair business-to-consumer practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.”

¹⁸¹ Article 1 of the amended Misleading Advertising Directive will read: “to protect traders against misleading advertising” and does not mention the unfair consequences thereof.

This approach largely corresponds to the prevailing view in Nordic marketing practices law, where the notion ‘marketing’ is used in a broad sense and is seen to encompass any type of business activity.¹⁸² Possibly, the notion “commercial practice” in the UCPD is even broader than the concept “marketing” (“marknadsföring”) in the Swedish Marketing Practices Act. Unlike the MFL the UCPD does not set a requirement that the practice be “apt to promote the sale or supply of products”. It suffices with any (but direct!) connection with the sale or supply. As in Nordic marketing practices law, non-commercial activities, such as charity, pure information campaigns, etc. are not within the notion “commercial practice” and fall outside the scope of the Directive.¹⁸³

Despite the apparent breadth of this definition, it is at the same time limited by the requirement of **direct** connection with the promotion, sale or supply **of a product** to consumers. Some authors have interpreted this requirement as excluding so called “attention-catching” advertising, campaigns for raising awareness about a brand, or identity advertising from the scope of the UCPD (for instance the false advertising of a beer brand as “Klosterbrauerei”). It seems indeed that general promotion for a company by simply strengthening the brand would not reveal the required “direct connection with the promotion of a product”.¹⁸⁴ Another critique is that the definition does not cover relations between business and consumers where traders are on the demand side (for instance buy-out of antiques or used items).¹⁸⁵

The condition of direct connection with the promotion, sale or supply of a product is further specified in Recital 7 UCPD. This Recital stipulates that the Directive addresses “commercial practices directly related to influencing consumers’ transactional decision in relation to a product.” This excludes commercial practices carried out primarily for purposes other than exerting such influence. This derogation limits additionally the scope of the Directive. If interpreted extensively it threatens to substantially reduce the practical effect of the Directive. One should hope that as any derogation, it should be interpreted narrowly and in any case the subjective intentions of traders should not be the decisive criteria for whether practices are directly related to influencing consumers’ transactional decisions in relation to products. An example explicitly mentioned in the Directive is of commercial communications aimed at investors, such as annual reports and corporate promotional literature. This example is not particularly convincing. It is to question whether data in prospectus that affect the decisions of small-scale investors, indeed should escape the fairness standards of the Directive.¹⁸⁶

¹⁸² In Denmark the term ‘marketing’ is understood widely to cover “any act performed for business purposes”. See Country report Denmark, in: Micklitz et al, Feasibility Study, 34; cf. Bruun Nielsen, Anne-Dorte, Harmonisation of EU Marketing Law, TemaNord 2002:509, 40 with reference to Madsen, Pelle Bo, Markedsret, Del 2, 3 udg., 193 ff. For a similar understanding in Finland see Wilhelmsson, *Konsumentskyddet i Finland*, 88; Kaulamo, *op.cit.*, 11. The Swedish MFL defines marketing as “advertising and other acts in the course of business activity which are apt to promote the selling and supply of products”.

¹⁸³ See Bruun Nielsen, *op. cit.*, 40.

¹⁸⁴ Such forms of marketing traditionally fall within the scope of marketing practices law in the Nordic countries. For Finland see Wilhelmsson, *Konsumentskyddet i Finland*, 89. For Sweden, Bernitz, *Marknadsföringslagen*, 16.

¹⁸⁵ See Köhler/Lettl, *op.cit.*, 1035.

¹⁸⁶ See in this sense Köhler/Lettl, *Ibid.*

4.2.2 The distinction between economic and non-economic interests of consumers

Judging from Article 1 UCPD the Directive does not address commercial practices that do not harm consumers' economic interests. Member States apparently remain free (within the limits of other relevant Community law) to regulate commercial practices with the objective to protect other than economic interests of consumers (and citizens). One of the most crucial distinctions for defining the proper substantive scope of the Directive is consequently that between economic and non-economic interests of consumers. But despite its seeming clarity, the distinction is far from obvious.

First, defining consumers' economic interests is a notoriously elusive enterprise. Seen more broadly, every advertising and marketing affects or purports to affect consumer choice and to increase the sales figures of the advertiser. It thus has certain, even if indirect, effect on consumers' economic interests. Yet it appears that it is not this abstract and general economic effect that defines the scope of the Directive, but instead a more immediate impact with respect to the economic modalities determining consumers' transactional decisions (see Recital 7 UCPD). Among the chief modalities of consumer choice count quality, price, after sale service, etc. However, consumers differ substantially in their preferences about quality and in their purchasing power. It is consequently unrealistic to find a common protective standard directly regulating these modalities. Instead, in a system of welfare market economy based on workable competition, the most uncontested economic interests that marketing practices legislation normally purports to safeguard are the interests in accessible, relevant and truthful information about the main modalities of consumer choice and the interest in exercise of such choice free from pressure and distortion.

Conversely, commercial practices, which do not have immediate connection with the above mentioned economic modalities, appear not to be addressed by the Directive. One can think of advertisements building on emotional and non-rational arguments, playing on consumers' vanity, insecurity, identity-search. Modern marketing uses a plethora of techniques to appeal to these more obscure and under-investigated sides of the consumer psych. Products are presented as "sexy", "youthful", "funny", "cool", "trendy", and are associated with success, responsibility, imagination, etc.; Many of these commercial techniques may be objectionable and unwanted for some portions of consumers due to different reasons: moral objections, concerns for society's excessive commercialisation, and for misallocation of scarce resource, but they would not be seen to affect (and in any case to harm) relevant economic interests under the Directive.¹⁸⁷

Second, economic and non-economic interests are often closely intertwined and a sharp borderline is difficult to draw. As clearly non-economic interests one can classify consumer interests in health and safety, protection of the environment, the interest in personal integrity, the interest in respect for dignity, for non-discrimination on sexual,

¹⁸⁷ How are we, for instance, to evaluate an advert of a beer brand as having a royal affiliation, which turns not to have the royal attributes expected by the average consumer? Is the lack of royal affiliation of the expected sort, affecting consumers' economic interests? Or is the advert anyway seeking to impact on irrational, and hence, irrelevant expectations and interests. See the German case "Königliche-Bayerische Weisse" BGH *GRUR* 1992, 66.

ethnic, racial and religious grounds etc. Measures directed at regulating or restricting commercial practices which harm exclusively this type of non-economic interest seem to fall outside the scope of the Directive. Yet many practices affect both economic and non-economic interests. An advertising that misleads as to the health aspects of a product can affect the non-economic interest in health protection. Likewise, incorrect advertisement for the environmental qualities of a car, can lead to distorted choices which ultimately damage the environment. But even when a commercial practice involves misleading information about a product's price, quality or after sale service one can ask whether the only interest involved is an economic one. When being misled consumers feel cheated and distressed in not only economic way.¹⁸⁸ Even more so in the case of aggressive practices, apart from the negative impact on consumers' economic behaviour, there are closely related interests of human dignity, personal integrity and privacy.

The tricky question is, consequently, how one should treat commercial practices which affect both economic and non-economic interests. Respectively, what is the status of national measures, which regulate such "mixed" practices? Should one measure the degree of harm caused on the economic and the non-economic interests and weigh these against each other? Furthermore, it is not clear what importance should be attached to the normative justifications provided by governments for restricting or regulating such "mixed" practices. And what justifications will be given priority?

It is difficult at this preliminary stage to give a general answer to all these questions. In case the regulations purporting to protect economic and non-economic interests can be distinguished and can co-exist the problem is limited. For instance an information requirement as to the dangerous composition of a food additive is fully compatible with a prohibition of misleading advertising as to the composition of same food. More problematic are measures based on non-economic interests which are pervasive and involve prohibition of a commercial practice as such. Even though based on the non-economic interest objective, such measures in effect provide an overprotection also of the economic interest involved, beyond the maximum level allowed by the UCPD.

Seen from the point of view of the full harmonisation objective pursued by the UCPD, such effects are clearly undesirable. Therefore it appears that there would be a heavy burden of proof on the Member States willing to impose (or retain) such measures for demonstrating: first, that there is a valid non-economic interest worth protection, and second, that the pervasiveness of the measure is the only way to achieve adequate protection of this non-economic interest. The normative justification given by national governments for restricting certain commercial practice will certainly be given serious consideration, but the decisive factor for qualifying measure would nevertheless be the assessment of the objective impact of the practice on consumer interests and the potential of the measure to achieve the goal with least restrictive means.

4.2.2.1 Health and safety

One of the most obvious consequences from the confinement of the Directive to consumers' economic interests is that national marketing rules enacted with the chief

¹⁸⁸ See ECLG Opinion, criticising the limited scope of the Directive to economic interests.

objective of protecting human health and safety, are outside scope. Recital 9 UCPD stipulates that the Directive is “without prejudice to Community and national rules ... on the health and safety aspects of products...” In the original Commission proposal (cf. Recital 6 COM (2003) 356 final) it was not fully clear whether this derogation relates only to the rules concerning the products as such (for instance restrictions on the composition, design, characteristics of products, etc.) which is pretty obvious, or also those regulating exclusively commercial practices, relating to health and safety aspects of products (for instance restrictions on certain forms of marketing of products that are considered prejudicial to human health, notably tobacco and alcohol).¹⁸⁹ After a political pressure by a number of Member States, it is now made sufficiently clear that the Directive does not affect national restrictions and prohibitions of commercial practices on grounds of the protection of the health and safety of consumers on their territory.

More specifically, restrictions or prohibitions of commercial practices in relation to alcohol, tobacco or pharmaceuticals are excluded. Following the last round of negotiations during the Competitiveness Council Recital 9 was complemented by the following sentence:

“...The Member State will thus 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 wherever the trader is based for example in relation to alcohol, tobacco or pharmaceuticals.”

One should, however, not forget that there are rules in other industry- or media-specific Directives that may take precedence over the UCP Directive. Thus the Swedish prohibition of alcohol advertising in television broadcasting should still be scrutinised under the rules of the Television Without Frontiers Directive, in particular Article 16 TWFD. The issue has not yet been tested before the ECJ, but a ruling similar to the *De Agostini* judgment can reasonably be expected in case a Swedish authority intervenes trying to stop a foreign broadcast containing infringing adverts. The Swedish prohibition will be upheld (if considered proportional), but only in respect to domestic broadcasters. Broadcasters established in other Member States, by contrast, would be able to host and transmit to Sweden adverts in violation of the stricter Swedish rules as long as they correspond to the rules of the Directive (See *De Agostini* and the definition of the coordinated field of the TV Directive; cf. the discussion on relation with other Community Directives below).¹⁹⁰

At the same time, using health and safety arguments in marketing in a misleading or aggressive way falls within the scope of the UCPD. According to the Explanatory memorandum to the original Commission proposal “misleading health claims, given their capacity to impair the consumer’s ability to make informed decisions, will be appraised under the provisions on misleading commercial practices”.¹⁹¹

¹⁸⁹ Miklitz/Kessler define this type of measures “undesired marketing” op. cit.,

¹⁹⁰ Joined Cases C-34/95 *Konsumentombudsmannen v De Agostini*, and C-35 & C-36 *TV Shop* [1997] ECR I-3843.

¹⁹¹ See COM (2003) 356 final, para. 43. The example given is “if a product claims to cause hair to grow back on bald heads, but does not do so.”

4.2.2.2 Taste and decency

According to para. 39 of the Explanatory Memorandum of the Commission Proposal the Directive was only concerned with matters affecting consumers' economic interests, meaning that matters of taste, decency and social responsibility would be outside scope unless the trader establishes a specific connection between his obligations in these areas and his products in his marketing. This condition in the Explanatory memorandum has now been integrated in Recital 7 of the UCPD stating:

“[the Directive] does not address legal requirements related to taste and decency which vary widely among the Member States. .. Member States should be able to continue to ban commercial practices on their territory, in conformity with Community law, for reasons of taste and decency even when such practices do not limit consumer freedom of choice.”

Obviously this derogation relates not only to the objective impact of a practice on consumers, but also to the normative grounds (justification) for intervention on the part of the legislator/enforcement bodies.

One example that readily comes to mind is the notorious Benetton advertising campaigns using shocking photos on themes associated with human solidarity, social responsibility, compassion (H.I.V. positive; Soldier's bloody clothes), environmental consciousness (Petrol Duck) and having powerful, even though divergent impact on people's feelings (either of indignation or approval). These photos do not claim any connection of the photographed objects with the trade or products of Benetton, but have for their purpose to attract attention to and raise awareness of the brand. At final event also such campaigns aim at raising the sales figures of the Benetton fashion house. However, it is obvious that if they influence consumer choice they do it in an indirect way, not by using arguments related to the pure economic modalities of such choice, namely quality, price, service etc.

It is well known that even in the Nordic countries this type of advertising was assessed in a widely divergent ways. In Sweden the adverts were never tested under the MFL, obviously because it was anticipated that it would be regarded to fall outside the scope of the MFL since the advert did not have solely commercial relations as an object.¹⁹² Instead they were scrutinized by the competent body of industry self-regulation MER (Marknadens Etiska Rådet), which found only the “H.I.V. positive” photo to be in breach of good marketing practice largely because of the associations with the Nazi concentration camps and the Holocaust. In Finland no obstacles were seen to scrutinize the Benetton adverts under the general clause of the KSL. The conclusion reached by the Market Court was however, that in particular the photograph with the bloody clothes of a Bosnian soldier, did not trigger fear of war and violence (as claimed by the Consumer Ombudsman) and was therefore not against good market conduct.¹⁹³ In Norway the same advert was considered a cynical means of attracting attention to ones' own products, offensive and unfair to consumers, and consequently falling foul of the general clause of

¹⁹² See Kur, A. Anmerkung GRUR Int. 1996, 255.

¹⁹³ Decision of the Finnish Market Court of 17 March 1995, see *GRUR Int.* 1996, 251.

good marketing conduct of the Marketing Control Act.¹⁹⁴ Such differences in judgement are clearly grounded in deep-going differences in the perceptions about what is moral, ethical and allowed in marketing, but also about what should be the domain of the state in these matters. These differences will even in the future remain part of the fragmented reality of the Internal Market.

Likewise marketing which uses sexually provocative or discriminatory images can surely abstractly and indirectly influence consumer choice, but it is not in itself able to harm the economic interests of consumers narrowly understood. National restrictions or prohibitions of such advertising seem to be exempted from the scope of the Directive as dealing with matters of decency and morals. In this respect the practice of some Nordic countries of scrutinizing such marketing under the general clause of the marketing practices act (e.g. Finland and Denmark)¹⁹⁵ or under a special provision of this act (e.g. Norway)¹⁹⁶ can still be retained and will not be subject to the requirements of the Directive.

Another explicit example in the introductory part of the UCPD concerns commercial solicitation on the streets, even when it does not limit consumer choice (Recital 7 UCPD). Individual Member States may still ban such practices **on their territories**, if the practice is perceived as undesirable for cultural reasons. This example is not particularly convincing and the distinction from some of the examples of harassment described in Annex I. The Recital nevertheless asserts that such bans should be in conformity with Community law.

If the advertising trader deliberately brings matters of taste and decency in connection with his product or business, then they shall be subject to the fairness evaluation according to the Directive. An example given in paragraph 39 of the Explanatory Memorandum to the Commission original proposal is a false claim by the trader that part of his profit from the sale of Christmas cards goes for charity.¹⁹⁷ One can also think of false claims that one does not use child labour in one's production, or that a trader participates in a campaign against sexual discrimination. On the basis of the general clause the Norwegian Market Council has prohibited marketing under moral pressure, e.g. the slogan: "Drink coffee with a clear conscience. Development aid that makes sense."¹⁹⁸ It is not certain whether such marketing in the future would be possible to ban on the basis of general moral

¹⁹⁴ See Case MR 22/94, commented by Bruun Nielsen, *TemaNord* 2002:509, 49, see also *GRUR Int.* 1996, 256; Kur, A. Anmerkung *GRUR Int.* 1996, 255.

¹⁹⁵ See *TemaNord* 2002:509, 41 ff.

¹⁹⁶ See Section 1(2) Norwegian Marketing Control Act: "The advertiser and anybody who creates advertising shall ensure that the advertisement does not conflict with the inherent equality between the sexes and that it does not exploit the body of one sex nor implies any offensive or derogatory judgment of female or male." Cf. *TemaNord* 2002:509, 51.

¹⁹⁷ Note that the Swedish translation of this paragraph is deficient, in that the word "false" is omitted. Cf. the Swedish text: "Ett exempel på när direktivet skulle gälla är om en näringsidkare hävdar att en viss del av vinsten från julkort går till välgörenhet" with the English text: "For example, if a trader falsely claimed that a certain proportion of the profits from the sale of a Christmas card would be given to charity that would be within scope."

¹⁹⁸ See Bruun Nielsen, *TemaNord* 2002:509, 49.

considerations, or should be subject to the conditions of Articles 5-9 UCPD; notably the material distortion test.¹⁹⁹

4.2.2.3 Protection of minors

The distinction between economic and non-economic interests raises the question as to the legal qualification of advertising and marketing restrictions introduced on grounds of protection of minors. Law-makers and courts in countries which opt for such interventions usually justify the measures not primarily by reasons of protecting economic interest, but chiefly by moral considerations, such as preventing the exposure of children to commercial influences at an early age, preserving the fragile integrity of children or protecting the relationship of confidence and respect between children and parents. Will such normative justifications have any legal relevance in the future for determining whether the restriction is within or outside the scope of the UCPD?

At the European level the only explicit provision tackling the problem of the effect of advertising on children is Article 16 TV Directive. Judging from the text of this provision, it appears that also the European legislator sees mainly non-economic justifications for setting stricter requirements in respect to television advertising directed at children. Article 16 TV Directive states: “Television advertising shall not cause *moral or physical* detriment to minors and shall *therefore* comply with the following criteria for their protection ...”. The specific limitations introduced by the TV Directive on children advertising are as follows:

- (a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
- (b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
- (c) it shall not exploit the special trust minors place in parents, teachers or other persons;
- (d) it shall not unreasonably show minors in dangerous situations.

The same conditions apply for teleshopping, which moreover shall not exhort minors to contract for the sale or rental of goods and services (Article 16(2) TV Directive).

If justifications provided by the Community legislator are to be taken seriously, situations like those elaborated in this provision would seem to be outside the scope of the UCPD. Indeed showing minors in dangerous situations and exploiting their trust in parents, teachers or others seem reasonably based in primarily non-economic concerns. More difficult is to qualify the prohibitions under Article 16(1)(a) and (b) as serving purely non-economic objectives.

The UCPD reveals, in any case, a different view on this issue. One factual situation, which is similar to the one in Article 16(1)(b) TV Directive is explicitly included in the ‘black list’ of unfair, and more specifically aggressive, commercial practices (cf. Annex I (25)

¹⁹⁹ See also Section 1(3) Marketing Control Act: “An evaluation of whether paragraph one or two have been offended against may, among other things, place emphasis on whether the advertising, for reasons of its design, format, extent or other measures, appears as particularly obtrusive.”

UCPD).²⁰⁰ This obviously implies that such practice is seen as affecting consumers' economic interests and consequently being within scope. In a similar vein, the fact that in ascertaining unfairness or deception, the interests of vulnerable consumer groups, notably children, are taken into account supports such interpretation. Following the deliberations on the Directive in the European Parliament at second reading a clarifying sentence was included in Recital 18 UCPD:

It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, *without imposing an outright ban on advertising directed at children*, protects them from direct exhortations to purchase. (emphasis added)²⁰¹

The main function of this clarification appears to be to underline that outright bans on advertising directed at children would not be considered as being in compliance with the Directive.

It is well known that the Nordic countries have shown a particular engagement in the protection of minors from the, as perceived, negative effects of advertising. Sweden and Norway are the only countries in Europe that have opted for total prohibition of children advertising in television broadcasts (advertising directed at children under 12 years of age).²⁰² In the Icelandic Competition Act special requirements on advertising directed to children have expressly been stipulated. Part of the provisions reveal similarity with the provisions of Article 16 TV Directive, but are valid for all media.²⁰³ However, most of the limitations and special requirements concerning advertising and marketing targeted at children are not to be found in legislative texts, but have been elaborated by the competent courts on the basis of the general clauses of good marketing conduct. This case law, together with rules in codes of conduct (in particular the ICC Codes of Advertising Practices) provide in turn a point of orientation when formulating general recommendations on children advertising by the Consumer Ombudsmen and the Consumer Agencies. The Consumer Ombudsmen in all countries have elaborated guidelines as to the marketing that addresses minors partly in Nordic cooperation.²⁰⁴

²⁰⁰ After amendment by the European Parliament the provision reads as follows: See Annex I (25). "Including in an advertising a direct appeal to children to persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EC."

²⁰¹ Amendment 3, European Parliament Legislative Resolution on the Council Common Position, P6_TA-PROV(2005)0048.

²⁰² On the legal analysis of these prohibitions under EC law see Joined Cases E-8/94 and E-9/94 *Forbrukerombudet vs. 1. Mattel Scandinavia A/S and 2. Lego Norge A/S*, OJ C 239, 14/09/1995; Joined Cases C-34/95 *Konsumentombudsmannen v De Agostini*, and C-35 & C-36 *TV Shop* [1997] ECR I-3843.

²⁰³ See Article 22 Icelandic Competition Act no 8/1993 with subsequent amendments

(2) Advertisements shall be presented on the assumption that they will be seen and heard by children, and shall in no way be offensive to them.

(3) Special care must be evinced in advertisements by reason of the credulity of children and young persons and the impressions received by them.

(4) If children are shown in advertisements care shall be taken not to show or describe dangerous acts or situations that may lead to them or other children coming into a situation of danger or evincing conduct which is not permitted.

²⁰⁴ See the Nordic Consumer Ministers position concerning marketing on the Internet directed at children and young people, available in Swedish at:

http://www.kuluttajavirasto.fi/user_nf/default.asp?site=35&tmf=7953&lmf=8574&id=10037&mode=readdo

As an illustration some main principles of marketing in respect to children elicited in the Guidelines of the Norwegian Consumer ombudsman can be mentioned. As a general principle, advertising in relation to children and young people is subject to stricter assessment. There is more scope for the Marketing Control Act to be regarded as violated when the marketing is directed at minors (see Section 3.1 Guidelines). The specific requirements of Article 16 TV Directive are considered as giving guidance also for other media. The principles elaborated in Article 14 of the ICC Code of Advertising Practice also enjoy authoritative position, in particular the prohibition to misuse children's inexperience and credulity, the principles of avoidance of harm and of respect for social values (See Section 3.2 Guidelines). As an example of the last mentioned principle advertisements should not suggest that possession or use of a product will alone give the child or young person physical, social or psychological advantages over other children or young people of the same age, or that non-possession of the product would have the opposite effect. Television and cinema are regarded as especially strong and obtrusive media with a large influential power where strong effects are readily adopted.

Turning to specific situations the Guidelines provide an abundant material on case-law and administrative practice of the Consumer Ombudsman:

- The requirements on direct marketing will be stricter on marketing addressed directly to children than if similar material is directed at adults.
- Concerning invitation to purchase, the Consumer Ombudsman has held that acting as if the minor is legally obliged to pay money must be regarded as an unfair action in conflict with the MCA, s. 1. The same applies on even stronger ground in respect to telesales.
- In product presentation to children special care should be taken to ensure that advertisements do not mislead children and young people as to the true size, value, nature, durability and performance of the advertised product (see Section 4.4. Guidelines)
- Marketing of dangerous products to children, incitements to criminal offences, dangerous behaviour, breaches of safety standards are generally considered as unfair and in breach of the general clause of the Marketing Control Act (Section 4.4.2 Guidelines).
- The use of effects that are likely to create an unreasonable pressure to buy are likewise prohibited as unfair (Section 4.4.3 Guidelines).²⁰⁵
- Advertisements to children that create terror, fear or anxiety²⁰⁶, or that use aggressive effects such as violence²⁰⁷, sex, intoxicants are treated with particular strictness by the law enforcement bodies (Sections 4.4.4 and 4.4.5 Guidelines).

c. See also the Guidelines on the Norwegian Consumer Ombudsman's Practices, Marketing in Relation to Children and Young People, of March 1999, available at: <http://www.forbrukerombudet.no/assets/509/barn&unge-engelsk.doc>. Detailed overviews of the relevant case law, the administrative practice of the Consumer Ombudsmen, as well as the principles that guide the policy of the consumer authorities in this field is to be found on the websites of the Consumer agencies in all Nordic countries.

²⁰⁵ For examples from Finnish marketing practices law see MD 1987:13 CO v. McDonald's Oy,

²⁰⁶ From Finnish case law see MD 1990:16 CO v. McDonald's Oy, showing a child alone and needing a friend, whereby warmth, happiness and being with a friend was associated with the advertised product.

²⁰⁷ From Finnish case law see MD 2001:016 CO v. DNA Finland Oy

The question is whether restrictions like those listed above and to be found in legal acts and case law can be sustained after entry into force of the UCPD. Part of these restrictions will easily fulfil the general conditions of Articles 5-9 of the UCPD, especially having in mind the stricter criteria for assessment of commercial practices addressing vulnerable groups in Article 5 UCPD. Concerning restrictions going beyond the rules of the UCPD, as a rule of thumb, it seems that in order to be sustained they have to be specific and to address a clearly defined non-economic interest of children. From this perspective prohibitions of practices like marketing of dangerous products, incitements to criminal offences, dangerous behaviour, breaches of safety standards (see e.g. Section 4.4.2 of the Guidelines of the Norwegian Consumer Ombudsman) or advertisements that create terror, fear or anxiety (Section 4.4.4. Guidelines) or use of aggressive effects such as violence, sex, intoxicants fall clearly outside the scope of UCPD and would be possible to sustain even in the future. Likewise limitations on advertising of certain foods or other products that may be particularly detrimental to children (e.g. for reasons of obesity) can probably be defended as pursuing primarily non-economic objectives.

Less clear is the situations with outright prohibitions of certain forms of marketing. Thus for instance the Swedish Market Court has found direct marketing to children under the age of 16 as falling foul of the general clause of § 4 MFL.²⁰⁸ If such prohibition is defended on economic grounds, evidence should be brought that the direct marketing in all circumstances fulfils the conditions of being contrary to professional diligence and being likely to materially distort the economic behaviour of the average consumer of the targeted group. In case the prohibition is defended on non-economic grounds, these grounds shall be carefully elaborated and the proportionality of the measure has to be demonstrated, something which appears difficult in this particular case.

The tentative conclusion from the above is that in the future each measure and limitation aiming at protection of minors should have to be scrutinized in itself. “Pointillist” interventions against individual commercials where the ground is primarily protection of non-economic interest would most probably fall outside scope. However, sweeping prohibitions of advertising and marketing targeted at children will be hard to sustain since the purpose and the justification of the measure would be difficult to discern. In any case it would be difficult to argue that such measures are chiefly prompted by non-economic concerns and pursuing protection of other than economic interests.²⁰⁹ Under the present reading of the Directive the same appears to apply to general prohibitions of TV advertising to children. The Commission would hardly accept such prohibitions since the purpose and the justifications behind such a measure would be less refined and nuanced. There will in any case be a mix of justifications where economic interests would inevitably play a substantial role.

Finally, it should be noted that despite the strict view on children advertising the courts, at least in Sweden have opined that advertising cannot be prohibited on the basis of the

²⁰⁸ See, however MD 1997:4 Egmont Serieförlag on the relation between this prohibition and the constitutionally protected freedom of the press.

²⁰⁹ Such an interpretation was advanced by representatives of the Commission at a meeting on 4 February 2005.

Marketing Practices Law for the sole reason that it lures children into consumption.²¹⁰ Additional grounds for unfairness have to be shown.

4.2.2.4 General assessment

The limited scope of the Directive, focusing solely on consumers' economic interests, can be well understood from the point of view of the Community legislator and concerns for subsidiarity. It comes, however, in conflict with the traditional definition of the scope of marketing practices law in most of the Nordic countries. Thus in Denmark the Marketing Practices Act covers not only economic but also ethical and social interests of consumers and of society at large, such as protection from ethnical, racial or sexual discrimination, protection against the detrimental effects of excessive alcoholic consumption, etc.²¹¹ Similar is the view in Norway, where sexually discriminatory advertising is explicitly regulated in Section 1(2) Marketing Control Act.²¹² In Finland the general clause has been interpreted so that the concept of fairness is seen to incorporate broader concerns, not having exclusively economic relevance.

In Sweden the scope of the MFL has been more narrowly defined, in view of the strong constitutional status of freedom of the press and freedom of speech. In the preparatory works to the 1970 MFL the general clause was seen as applicable in relation to print advertising only when the advert "has purely commercial relations as an object, i.e. address the commercial activity of the trader or the goods or services supplied."²¹³ It is further clarified that the general clause should not be applied to intervene against advertising in printed matter which is directed at inducing certain values to the general public or to influence its conduct in a certain direction.²¹⁴ Following a line of cases of the Swedish Market Court and the Swedish Supreme Court, the scope of the Marketing Practices Act has been defined to cover only publicly disseminated information which is commercial in its character and has only commercial relations as its object.²¹⁵ Likewise, the objective of the MFL is seen to be to protect the interests of consumers as purchasers of goods and services and not in other capacity (for instance of sexual belonging). That is why the control over sexually obtrusive and discriminatory marketing is left to industry self-regulation.

This notwithstanding, even in Sweden, the Marketing Practices Act is seen to protect other than purely economic interests of consumers, e.g. protection of consumer privacy, protection of consumer health and of the environment, etc. For instance the Market Court has banned as contrary to good marketing practice and advertisement for sports shoes showing a foot tramping violently on a human face. A future transposition of the UCPD

²¹⁰ See MD 1981:5 "McDonald's": "Marknadsdomstolen har tidigare funnit att annonsen inte på dessa grunder kan bedömas som otillbörlig. Med hänsyn härtill kan inte heller hävdas att annonsen påverkar konsumenternas förtroende för reklamen på ett sätt som skulle kunna anses otillbörligt." The court has been strongly divided in this decision, however.

²¹¹ See Bruun Nielsen, TemaNord 2002:509, 40.

²¹² See Bruun Nielsen, TemaNord 2002:509, 49.

²¹³ See Prop. 1970:57, 67.

²¹⁴ "Generalklausulen bör inte kunna användas för att ingripa mot reklam i tryckt skrift vilken är inriktad på att bibringa allmänheten vissa allmänna värderingar eller påverka dess allmänna beteende i en viss riktning."

²¹⁵ See for instance the following cases NJA 1975 sid. 589 (Helg Extra); MD 1994:1 (Botkyrka kommun); MD 1997:4 Egmont Serieförlag

will require a careful accommodation of the concepts and distinctions of the Directive to the texture of national marketing practices law. The effects of this accommodation are difficult to foresee, but generally certain at least initial uncertainty in the implementation process will be inevitable.

4.2.3 The distinction in respect to contract law

The Directive is relatively broad in scope compared to both national and Community legislation on unfair commercial practices in that it covers not only commercial practices in the pre-contractual phase, but also commercial practices at the stage of conclusion and performance of the contract. At the same time Article 3(2) stipulates that the Directive is “without prejudice to Community and national rules on contract law.” (cf. Recital 9 UCPD). Article 3(2) makes clear that the derogation concerns in particular rules on the validity, formation or effect of a contract. Thus national legislation on consumer contract law and on general contract law is not affected by the UCPD. This applies also to national rules transposing Community legislation in the area of contract law.²¹⁶

The importance of carefully drawing the dividing line between commercial practices law and contract law becomes clear also in the context of interpreting the numerous derogations from the Directive and its complex relationship with existing Community Directives. According to Recital 15 Member States will be able to retain or add information requirements relating to contract law and having contract law consequences where this is allowed by the minimum clauses in the existing Community law instruments. On the basis of such minimum clauses Member States will be able to maintain or introduce more stringent provisions so as to ensure a higher level of protection of consumers' individual contractual rights. Many Community instruments address both issues of commercial practices and of contract law, e.g. the Doorstep Selling Directive, Distances Selling Directive, Consumer Credit Directive. One should always need to carefully identify the exact character of each provision in order to assess the legality of possible more stringent legislation in the Member States.

Although the Directive proclaims neutrality in respect to contract law, in many respect it is undeniable that definitions and concepts introduced by the Directive go to the heart of contract law. One example is the definition of the notion “invitation to purchase”. This definition was introduced in the last version of the UCPD and is an improvement in comparison to previous drafts. It is particularly relevant in the case of misleading omissions (Article 7), where certain information is only to be given to consumers upon “invitation to purchase”. For some countries these information duties have so far been only regarded as part of the pre-contractual obligation to provide information on the *essentialia negotii* and have consequently been governed exclusively by contract law. Introducing sanctions for failure to provide such information under unfair commercial practices law is thus a novelty. Despite the disclaimer, the UCPD clearly enters deep into the sphere of contract law.

²¹⁶ See for instance the contractual part of the Timeshare Directive, Door Step Selling Directive, Distance Selling Directive, Directive on Consumer Guarantees,

4.2.4 Other derogations

Other derogations concern financial services and immovable property. Whereas commercial practices relating to these products are within the scope of the Directive, they are not covered by the maximum harmonisation principle of the UCPD. Member States remain free to lay down more stringent prescriptive or proscriptive provisions with a view of protecting the interests of consumers (Article 3(9) UCPD). Certification and indication of the standard of fineness or articles of precious metal are outside the scope of the Directive (Article 3(10) UCPD). And finally UCPD is without prejudice to authorisation regimes, codes of conducts or other specific rules governing the regulated professions (Article 3(8) UCPD).

5 Relation to other Community law

As already mentioned above, the work on an Unfair Commercial Practices Directive does not take place in a vacuum. Quite to the contrary, this legislative initiative is preceded by a long and piecemeal process of harmonisation of particular areas of commercial practices law resulting in numerous product-specific, media-specific and method-specific Community instruments. The Commission thus had the uneasy task of trying to introduce some order and coherence in the unwieldy thicket of Community provisions in the field.

Indeed, one of the major promises of the framework directive was that of simplification. The initial intent has been to consolidate the majority of existing provisions of fair trading scattered among various directives and eventually to repeal the obsolete directives. This is, however, not achieved by the UCPD. The only pre-existing legal acts that would be absorbed by the Framework Directive would be the Misleading Advertising Directive (without, however, its part on comparative advertising!). The large variety of other horizontal and vertical directives will also continue to exist. This poses the question of the relationship of the UCPD with previous (and future) Community instruments in the field.

Furthermore, the relation of the UCPD to the Draft Services Directive has to be briefly discussed. The fate of the Services Directive is still uncertain and the analysis can only be speculative. Nevertheless, it appears important to carefully follow developments on this prospective Community instrument, because of its possible repercussions on the scope and effects of the UCPD.

5.1 *Relation to other Community Directives on unfair commercial practices*

As evident from the introductory part of the Directive and more specifically Recital 10, the objective has been to ensure that the relationship between the UCPD and existing Community law is coherent. This corresponds to the initially announced intention of the Commission to achieve simplification and greater transparency in a field which has so far been regulated in a fragmentary way. Contrary to this ambition, however, the Directive in its present form contains a number of rather complicated cross references purporting to clarify the relations with existing Community instruments, which are far from clear and

transparent. In effect and despite the Commissions allegiance to the contrary, the UCPD does add another layer to the already existing layers of regulation.²¹⁷

5.2.1 Relation to Community instruments regulating specific aspects of unfair commercial practices

According to Article 3(4) in the case of conflict between the provisions of the UCPD and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects. This provision is a concrete application of the general principle “*lex specialis derogat legi generali*”. According to Recital 10 “This Directive applies only insofar as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer.”

There is an extensive number of Community Directives approximating national rules and regulations on commercial practices in particular industry and trade sectors. Other Directives deal with specific commercial practices such as forms of direct marketing. Likewise a number of Directives have been enacted to regulate among other things marketing and advertising in particular media. The UCPD thus requires a rather complex exercise of scrutinising existing or future directives and drawing a distinction between general and specific aspects of unfair commercial practices. In all instances where the industry-specific directives refer to general requirements of fairness, the UCPD’s general rules and prohibitions shall apply, of course after entry into force of the new Directive. Conversely, rules governing specific aspects of commercial practices take precedence. The specific aspect can refer to a particular category of commercial practice, concerning the way the commercial message is shaped or the information is presented. A typical example here would be the Misleading Advertising Directive in respect of comparative advertising (Art 3a), the Doorstep Selling Directive and the Distance Selling Directive in respect to information requirements set for these particular categories of commercial practices, involving per se a higher degree of pressure on consumers.

Other Directives, some of them not mentioned in Annex II, set out specific requirements on commercial information and marketing practices in relation to certain products and certain industry sectors, for instance in the area of foodstuffs, drugs, cosmetics, etc. Some examples are Directive 2000/13/EC on the approximation of the laws of the Member State relating to the labelling, presentation and advertising of foodstuffs and Directive 90/496/EEC on nutrition labelling for foodstuffs. Specific labelling requirements also apply to dangerous preparations (Directive 76/69EEC and 1999/45EC, OJ 1999 L 200/1 the former also relating to cosmetics), as well as to tobacco products (Directive 98/622/EEC). The rules in some of these Directives can, of course, be regarded as being prompted by concerns about human health and safety and as such to fall outside the scope of the UCPD on a separate ground (see Article 3(3) UCPD). Another important sector that has given rise to intense special regulation is the financial services sector (cf. the provisions containing information requirements listed in Annex II UCPD)

²¹⁷ For a critique see the opinion of the ECOSOC, 3.9.1.

Specific aspects of unfair commercial practices are also contained in media-specific directives. At Community level, important media-specific regulations exist primarily for the television broadcasting and electronic communications sectors (see e.g. Television Without Borders Directive 89/552/EEC; Electronic Commerce Directive 2001/31/EC;). Here the specific aspects can be linked to the particular characteristics of the medium or can address certain specific categories of practices. For the Television Directive examples of such rules are:

- recognizability of (television) advertising (Art. 10(1) TV Directive);
- the exploitation (in television advertising) of the inexperience, credulity and trust of minors in adults (Art. 16(a)(c) TV Directive) ;
- the direct encouragement (in television advertising) of minors to persuade their parents or others to purchase goods or services being advertised (Art. 16(b) TV Directive).

The other provisions in the TV Directive on tobacco, drug and alcohol advertising (Articles 13-15 TV Directive), on respect for human dignity, non-discrimination, non-encouragement of conduct prejudicial to health or to the environment (Article 12 TV Directive), as well as, arguably, the remaining situation of advertising targeting children (Article 16 (d) TV Directive), are outside the scope of the UCPD, since they are not directed at protection of the economic interests of consumers (see the discussion above, 4.2.2.3).

For the E-Commerce Directive the examples of rules governing specific aspects of unfair commercial practices and thus, taking precedence over the UCPD would be all specific regulations on commercial communications such as:

- the general requirements on information to be provided by service providers (Article 5 E-Commerce Directive);
- the requirement on clearly identifiable commercial communication (Article 6 (a) E-Commerce Directive);
- the information requirements to special offers in e-commerce (Article 6(c) and (d) E-Commerce Directive).

Theoretically, for marketing in these media one unfortunate consequence is a divided regime of enforcement and interpretation. All specific aspects of commercial practices addressed by specific provisions of the E-Commerce and the TV Directives will be subject to the principles of home country control and country of origin as stipulated in these Directives. The same would apply for marketing practices falling within the coordinated field of the E-Commerce and TV Directive, but being outside the scope of UCPD (for instance restrictions on advertising on the Internet on grounds of health protection). At the same time, all general aspects of fairness will be regulated by the UCPD and the general principles of applicable law (or on the territorial scope of marketing law, depending on doctrinal classification) would apply. Given the unclear meaning of the different Internal Market clauses the practical implication of this divergence is difficult to gauge.

5.2.2 Relation to Community Directives containing a minimum harmonisation clause

The “*lex specialis*” principle in Article 3(4) is valid for “**Community rules**” governing specific aspects of unfair commercial practices. In contrast, the UCPD would apparently

take precedence over stricter ***national rules*** enacted on the basis of minimum harmonisation clauses in the same Directives, provided that such rules are within the coordinated field.²¹⁸ This relationship is not clearly formulated in the text of the Directive. However, already in the Explanatory Memorandum to its proposal for a UCPD of 18.6.2003 (cf. para 30) the Commission specified:

It [the Directive] fully harmonises EU requirements relating to unfair business-to-consumer commercial practices and provides an appropriately high level of consumer protection. This is needed to address the internal market barriers caused by divergent national provisions and to provide the necessary support to consumer confidence to make a mutual recognition workable. *Member States will not be able to use minimum clauses in other directives to impose additional requirements in the field co-ordinated by this Directive.*” (emphasis added)

As a consequence of this arrangement, a number of provisions incorporated by Member States on the basis of minimum harmonisation clauses in other Directives may become invalid after entry into force of the UCPD. This result has provoked criticism on the part of national governments and in legal doctrine. Clearly, the approach is not fully convincing, neither on policy, nor on logical grounds. One can, for instance, argue that the minimum clauses in sector- and media-specific Directives and the national provisions on their basis are also introduced in view of the “specific aspects” of the respective unfair commercial practices, i.e. the specific characteristics of the product, of the industry sector or of the communication medium. In other words, the rationale of the “*lex specialis*” principle is valid also for national rules incorporated on the basis of minimum clauses.

By way of example, the Timeshare Directive’s scope of application extends to a specific type of contracts, involving minimum use of an immovable property per year of at least one week and a minimum total length of the contract of three years.²¹⁹ The Directive contains a long list over the information, which has to be provided upon request to a consumer interested in purchase of the right to use immovable property on a timeshare basis. In transposing the Directive most Nordic countries have defined the scope of the national law broader to encompass even contract for time share for shorter periods of use of less than a week.²²⁰ The Finnish law transposing the Timeshare Directive is unique in that it does not prescribe any duration for the contract.²²¹ Furthermore Finland, Denmark and Norway have introduced a longer list of information requirements. In Norway the list includes information on the closeness of the property to a railway station or an airport, on the aggregated annual costs for the consumer for using the property, including maintenance, fees and other administration costs and the ways those costs are calculated,

²¹⁸ See Standing Committee of the EFTA States, Working Group on Consumer Protection,

²¹⁹ See Article 2 Directive 94/47/EC

²²⁰ See for Norway Lov om salg av tidsparter i fritidsbolig (tidspartloven), cf. Ot. prp.43 (1997-97). For Sweden see Lag (1997:218) om konsumentskydd vid avtal om tidsdelat boende. Cf. Prop. 1996/1997:127, Chapter 14 Lagens tillämplighet på korttidsavtal.

²²¹ See Report on the Application of Directive 94/47/EC, SEC (1999) 1795 final, p.9, cf. Law 1162/97 of 11/12/97, KSL, Kap. 10 Marknadsföring och kop av tidsandelbostäder.

on possibilities for exchange etc.²²² In Sweden it was not considered necessary to go further than the Directive in strengthening the consumer right to information.²²³

Similarly the information requirements in the Doorstep Selling Directive are laid down in view of the specific aspects of this commercial practice. National provisions which set stricter information requirements are also prompted by the specific aspect of door-to-door selling, namely the greater pressure exerted on consumers, when surprised in the quiet of their homes. Apparently, however, these national rules will no longer be sustainable after entry into force of the Directive.

Likewise, national provisions going beyond the requirement of Article 16 TV Directive as to children advertising, notably the ban on such advertising in Sweden and Norway, are shaped in view of the more pervasive effects of advertising disseminated via television broadcasting. These specific effects have in the future to be assessed against the general clause on unfair commercial practices, against the provisions on misleading and aggressive commercial practices. Alternatively substantial non-economic interests have to be demonstrated that can only be protected by the pervasive measure in question (see above 4.2.2.3) .

The taking away of rules in national law that are stricter than minimum harmonisation Directives without consideration of the consequences in each particular case may certainly bring about undesired and unforeseen results. To mitigate the effect of such a drastic intervention Article 3(5) UCPD in its present wording stipulates a **temporary derogation** for more stringent (prescriptive or proscriptive) national provisions implementing minimum harmonisation clauses in Community Directives. After amendment by the European Parliament at second reading Article 3(5) now reads:

“For a period of six years from ... 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 that objective.”(emphasis added)²²⁴

Such national provisions have to be duly notified to the Commission (cf. Article 3(6) UCPD). The six-year period may be prolonged, if considered appropriate with a further limited period of derogation.²²⁵

The derogation in Article 3(5) was advanced by European Parliament at first reading as Amendment 109 to the Commission Proposal.²²⁶ It constitutes a major concession on the

²²² See § 6 (o), respectively § 6 (e) Lov om salg av tidsparter i fritidsbolig (tidspartloven), cf. Ot. prp.43 (1997-97). For Sweden see Lag (1997:218) om konsumentskydd vid avtal om tidsdelat boende. Cf. Prop. 1996/1997:127, Chapter 14 Lagens tillämplighet på korttidsavtal.

²²³ See Prop. 1996/1997:127, Chapter 18.2 Krav på information.

²²⁴ Amendment 4, European Parliament Legislative Resolution on the Council Common Position, P6_TA-PROV(2005)0048.

²²⁵ See the discussion above.

part of the Commission and of advocates of the Internal Market. Almost all previous directives in the area of commercial practices have been based on a minimum harmonisation approach. The true dimension of the derogation is, however, far from clear. One question is whether the notion “national provisions” refers to specific legislative measures or could it also apply to stricter interpretation of minimum standards as practiced by national law-enforcement bodies. It can be speculated that derogations shall be narrowly construed and therefore the first interpretation alternative appears more convincing. Presumably the derogation would apply not only to provisions specifically enacted to implement Community minimum harmonisation clauses, but also to existing national provisions which have been retained on the basis of minimum clauses. Through the last amendment introduced by the European Parliament at the second reading it is now made clear that Member State would in any case not be able to introduce new restrictions during the derogation period (cf. **continue** to apply).

Another question is how this rule relates to the mutual recognition principle. If taken seriously, the mutual recognition principle would imply that stricter national requirements on the basis of minimum harmonisation clauses would continue to apply for the six-year period, but only to traders established on the respective Member State’s territory. It would not be possible to use such measures to restrict the free movement of services in the coordinated field.²²⁷

Still one aspect of the complicated relationship with previous Community instruments is evident by looking at national information requirements based on minimum clauses, for instance the information rules on consumer credit as stipulated in the Swedish Consumer Credit Act, and their relation with the rule on Misleading omission (Article 7 UCPD). Member States have been free to introduce information requirements, going beyond the minimum requirements of the Community Consumer Credit Directive. An infringement of such national requirements has so far been easily subsumed under the information disclosure clause of Article 4(2) MFL. This would no longer be allowed, following Article 7(5) in connection with Recital 15 UCPD. It is not clear whether the effect of this rule is also postponed by the temporary derogation in Article 3(5).

In any case, the derogation in Article 3(5) cannot be perceived as a free ticket to keep all national measures going beyond the minimum requirements of existing Directives. There are serious conditions for applying the derogation that should not be underestimated. Member States are required to bring evidence that the measures are *essential* for the adequate protection of consumers against unfair commercial practices. This seems to put a rather heavy burden of proof, beyond a conventional proportionality test in the face of the already achieved high level of consensus and approximation in the area. Moreover the measure must be able to satisfy the, by now classical test of proportionality between means and ends. The obligation to notify such measures is one guarantee that the conditions will be carefully monitored by the Commission.

²²⁶ See Commission Communication, doc 15155/04, 4. On a standstill clause proposed by the ECOSOC see opinion, op. cit.

²²⁷ See the justification of the EP for proposed amendment 27 (Article 3(6a))

5.2 Relation to the Draft Services Directive

The UCPD does not mention the ongoing work on a Services Directive, while the reverse is true – the Draft Services Directive in the introductory summary makes an explicit reference to the Unfair Commercial Practices Directive (see para. 16, COM (2004) 2/3). In this paragraph the Services Directive, however, does not clarify the relationship between the two directives. It leaves the impression that it is a question of two different acts covering different areas and activities.

At the same time when defining the scope of activities covered by it, the Services Directive mentions advertising (see Summary, p.20).²²⁸ This is indeed uncontroversial. That advertising is to be seen as a service has been confirmed by the Court of Justice in a number of judgements. In order to classify as a service under Community law, it is not necessary that the remuneration is provided by the recipient of service. Also services provided free of charge to consumers, but which are sustained by advertising fees (for instance search engines or web-hotells) are considered services according to Art. 50 EC Treaty. In the E-Commerce Directive also advertising by e-mail was seen to fall within the concept of “Information Society Service”.²²⁹ There is a consequently no doubt about the close connection between the two instruments.

The Services Directive so far explicitly builds on a country of origin principle. According to the explanatory memorandum:

“the application of the country of origin principle will make it possible to achieve the objective of guaranteeing the free movement of services whilst allowing the various national regimes to co-exist with all their distinctive characteristics. These regimes may not be used to restrict the provision of services by an operator established in another Member State;” (see p. 18 Summary, COM (2004) 2 final/3).

This passage clearly demonstrates a reliance on a “competition between legal orders” approach, especially if keeping in mind that the Directive does not introduce full and exhaustive harmonisation.

Article 16 Draft Service Directive stipulates the country of origin principle as follows:

²²⁸ Not covered by the Directive’ definition are “non-economic activities, nor activities performed by the State for no consideration as part of its social, cultural, education and judicial functions where there is no element of remuneration.” (Note a difference from the Swedish text where on p. 21 it says: “omfattas inte verksamhet som inte är av ekonomisk art eller där betalning inte förekommer, när det gäller den verksamhet som staten bedriver utan ekonomisk ersättning”. It is not clear what does the phrase “när betalning inte förekommer” relate to.

²²⁹ The parties to the service transaction are however, different. Advertising may be considered as a service delivered by the advertising company (e.g. advertising agency) to the supplier of goods or services, by the media company (TV-broadcaster, radio broadcaster, a newspaper) to the advertiser, or by the supplier of goods and services to the consumer. See most recently the Opinion of the Advocate General Alber in Case C-71/02 Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH.

(1) Member States shall ensure that providers are subject only to the national provisions of their **Member State of origin** which **fall within the coordinated field**.

Paragraph 1 shall cover national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, **advertising**, contracts and the provider's liability.

(2) The Member State of origin shall be responsible for supervising the provider and the services provided by him, including services provided by him in another Member State.

(3) Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide services in the case of a provider established in another Member State, in particular, by imposing any of the following requirements:

The definition of the coordinated field is as always particularly important. In the Draft Services Directive the concept is defined in the widest possible way even when compared to previous Directives, such as the E-Commerce Directive. According to Recital 21

(21) The concept of the coordinated field covers all requirements applicable to access to service activities and to the exercise thereof, in particular those laid down by the laws, regulations and administrative provisions of each Member State, whether or not they fall within an area harmonised at Community level or are general or specific in nature and regardless of the legal field to which they belong under national law.

In this definition it is remarkable that the Commission makes an explicit disclaimer in a sense that views as to the doctrinal belonging of a legal field are without importance.²³⁰

More specifically the concept "coordinated field" is defined in Article 4 (1)(9):

"coordinated field" means any requirement applicable to access to service activities or to the exercise thereof;

Article 17(21) of the Directive stipulates a specific derogation from the country of origin principle relating to contracts. This provision reads as follows:

Article 16 shall not apply to the following:

...

(21) contracts for the provision of services concluded by consumers to the extent that the provisions governing them are not completely harmonised at Community level

In a recent report for the Consumer Ombudsman on consumer aspects of the Draft Services Directive the question has been raised whether this derogation could be

²³⁰ See in this sense Bakardjieva Engelbrekt, 2003, 412.

interpreted broadly to exempt also the area of consumer-related advertising regulation.²³¹ Such an interpretation would in my view stretch excessively the scope of the derogation and would hardly do justice to the intentions of the drafters. As the authors acknowledge themselves, derogations are normally interpreted narrowly. Moreover, as a matter of traditional interpretation the areas of marketing regulation and contract have been tackled as separate areas in Community law, something corresponding to the doctrinal views in the predominant number of jurisdictions in the Union. It is probably only in Sweden where the information in advertising is awarded direct importance in contractual relations.

As to the case law of the ECJ in respect to the Brussels Regulation on Jurisdiction in Civil and Commercial Matters, it is true that in *Henkel*, Case C-167/00 [2002] ECR I-81 an injunction lawsuit of an Austrian Consumer Organisation based on the law on unfair competition was considered to pertain to civil and commercial matter in the meaning of the Regulation. This lawsuit, however, did not deal with defining the scope of contract law, but instead with the scope of the much broader term “civil and commercial matters”. It is thus, hardly indicative of a broad understanding of contract law that would encompass marketing law. The more convincing way of interpreting the derogation in Article 17(21) is indeed by confining it to the field of consumer contract law.

Marketing law in the way it is conceptualised in the Nordic states constitutes a bundle of provisions which relate to the exercise of any service, in the sense that it governs the way such services can be marketed. On the other hand it directly affects the conditions of providing advertising as a service to consumers, because it involves a number of restrictions and standards about the content and the way such advertising shall be carried out. Restrictions on advertising in particular media or of particular services can be also perceived as restricting the access to the service of advertising for the customers of such service, i.e. suppliers of goods or services. Consequently, if Article 16(1)(2) is unrestricted, then the country of origin principle may have a very substantial impact on marketing regulation.

Having in mind the obscure status of the country-of-origin principle in the Unfair Commercial Practices Directive after the last amendments and the silence as to the relationship between this Directive and the Services Directive, the impact of the country-of-origin principle in the latter directive is in need of clarification.

6 Relationship to private international law

6.1 Does private international law have any relevance in the area of marketing practices law?

Given the fact that this investigation is carried out from a Nordic perspective and for a Nordic audience the question should initially be addressed whether private international law has any relevance in the area of marketing practices law at all? As already stated above, it is familiar from preparatory works, case law and legal doctrine in the Nordic

²³¹ See Otken Eriksson, Ida/Öberg, Ulf, Konsumentaspekter på EU:s Ramdirektiv om tjänster på den inre marknaden, Report for the Swedish Consumer Ombudsman, 2004.

countries that the dominant view has so far been that market law has a prevalingly public law character. Dogmatically, such classification has been explained chiefly by looking at the protected collective interests of consumers and at the sanctions that are imposed in case of infringement of marketing practices law. These sanctions have traditionally been injunctive prohibition and information disclosure orders ('förbud' and 'påbud'), both associated with the area of public law.²³² Consequently, cross border situations have been treated from the perspective of defining the territorial scope of application of national marketing practices law rather than a question of applicable law. In all Nordic countries the main principle accepted in doctrine and case law on the scope of national market law has been the so called "effektlandsprincipen", i.e. that marketing practices are governed by the law of the country where they have an appreciable effect.²³³ This principle was also defended in the Joint Recommendation of the Nordic Consumer Ombudsmen on Marketing and Advertising on the Internet.

Yet recently, largely under the influence of European Community law, a different and more nuanced view has evolved, at least in some of the Nordic countries. Given the gradual harmonisation of this area of law at a European level, it has been considered important to take into account the existing divergent views on the systematic treatment of marketing practices law and on the question of applicable law in particular in different EC countries.²³⁴ In many continental countries, such as Germany, Austria and Spain, to name but a few, marketing practices law is defined as unfair competition law and is traditionally treated as an area of private law. In Sweden, an acknowledgement of this divergence of views has prompted a more careful and open attitude in the preparatory works on the transposition of the Injunctions Directive, the Distance Marketing Directive and of the E-Commerce Directive.²³⁵

Also in Norway, the transposition of the Injunctions Directive prompted a reconsideration of the status of national marketing practices law. While reaffirming the view of the predominantly public character of Norwegian marketing practices law due to the main objective of protecting collective consumer interests, it was noted that certain provisions have a private law character.²³⁶ Following the principle of interpreting national law based on Community directives in conformity with the intent of the Community legislator and in any case with a view of achieving most effective harmonisation this approach is to be recommended in respect to the UCPD as well.

²³² For a summary of the Swedish view see Bogdan, EU Direktivet om förbudsföreläggande för att skydda konsumenternas intressen (1998) SvJT, 532 ff. ; A similar view seems to be reflected in the Danish context see Lovforslag nr. L 61 (concerning the transposition of the E-Commerce Directive in Danish law), 15, where a distinctive characteristic of public law rules is said to be that the sanction for infringement is "förbud, påbud eller straff". For Norway, a discussion on the public/private law character of marketing practices law is to be found in Chapter 4.2.4.3 of the Governmental Bill on amending the Marketing Control Act so that to transpose the Injunctions Directive.

²³³ See in the Swedish context the *Scanorama* case, MD 1989:6. For Norway see Chapter 4.2.4.3 of the Governmental Bill on amending the Marketing Control Act so that to transpose the Injunctions Directive.

²³⁴ See Bodgan, op.cit.

²³⁵ Conversely, in Denmark the view on the public law character of marketing practices law seems to remain unshaken, see above.

²³⁶ Chapter 4.2.4.3, Ot.prp.nr. 91(2000-2001), pp.

6.2 The UCPD relation to the Draft Rome II Regulation

The statement that private international law is indeed relevant in the field of marketing practices law finds its corroboration in the Draft Regulation on the law applicable to non-contractual obligations (Rome II). Article 5 of the Regulation entitled “Unfair Competition” reads as follows:

The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where the competitive relation or the collective interests of consumers are or are likely to be directly and substantially affected.

Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3(2) and (3) shall apply.

Article 5(1) basically codifies a well-established rule in legal doctrine and judicial practice of a large number of continental European countries that have traditionally represented an “unfair competition” approach to marketing practices law.²³⁷ The dominant rule of private international law applying to acts of unfair competition in these countries is usually dubbed “*lex loci competitionis*”, and refers to the law of the country where the competitive interests collide.²³⁸ The rule in the Draft Rome II Regulation is more modern in that it takes due account of the collective interests of consumers and incorporates them as an independent factor in the definition. In the majority of situations, however, the country where the collective interests of consumers are affected will coincide with the country where the competitive relation is affected, since competition per definition is directed at the same consumer circle. In cross border advertising and marketing campaigns this rule brings to application of the law of the country of destination. If a trader domiciled in Germany targets Finnish consumers through a TV advertisement broadcasted on Finnish TV, Finnish unfair competition law would be applicable to determine the non-contractual liability according to the rule in the Draft Rome II Regulation.

Certainly, the scope of Article 5 Draft Rome II Regulation differs from that of the UCPD. Article 5 Rome II applies to non-contractual obligations arising out of an act of unfair competition, whereas the UCPD governs unfair commercial practices having direct effect on consumer economic interests. Cross border commercial practices which adversely affect the relations between competitors but have no effect on consumer economic interest (for instance disparagement or advertisement taking unfair advantage of the reputation of a competitor) would thus fall within the scope of the Rome II Regulation, but will be outside the scope of the UCPD. At the same time, the predominant part of unfair commercial practices, which affect collective economic interests of consumers and are governed by the UCPD, indirectly affect competitors’ interests as well and would in many countries qualify as acts of unfair competition. Thus misleading advertising was acknowledged as an act of unfair competition already in the Paris Convention on the Protection of Industrial Property of 1883, which also explains the right of action of the

²³⁷ For an extensive comparative report see Dyer, A., Hague Conference on Private International Law., *Recueil des Cours* 1988, 377 ff.

²³⁸ An alternative term in German legal doctrine is the “Markortprinzip”, or the law of the country where the market is affected by the unfair competition act in question, *op.cit.*

competitors granted in most Member states.²³⁹ Likewise, certain forms of aggressive marketing practices undoubtedly occur at the expense of competitors.

Clearly, the original Commission proposal based on a country of origin principle would have produced results diametrically opposite to those under the Draft Rome II Regulation. The country of origin principle instructs traders engaged in cross border commercial practices to only comply with the law in the country of establishment, thus practically exempting them from the jurisdiction and the applicable law of the country of destination.

This effect was noticed at an early stage by the Council Committee on Civil Law matters, which submitted the above referred opinion and first suggested that the country of origin principle should be deleted from the UCPD.²⁴⁰ Technically speaking, such a divided regime would not be legally impossible. Article 23(2) Draft Rome II Regulation sets out to regulate exactly this type of conflicts between the conflict of law rules of the Regulation and the country of origin principle in certain matters of Community law. Not surprisingly, this provision decides possible conflicts in favour of the country of origin principle. According to this provision:

This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject the supply of services or goods to the laws of the Member States where the service provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances.

Yet the objections of the Committee on Civil Law Matters were of a more general nature. On the one hand the Committee defends the superiority of the solution in the Rome II Regulation on legal policy grounds. A connection to the law of the country where the market distortion arises is seen as better apt to protect the interests of all parties involved, notably those of consumers and of the general public, than the law of the country where the distorting act originates. The Committee expressed additional objections on technical and doctrinal grounds already discussed above. Eventually, the country of origin principle was taken out of the UCPD as a last-minute manoeuvre with the purpose to achieve a political agreement on the Directive.

Trying to appreciate the present position, it appears that the second limb of the Internal Market clause, the mutual recognition obligation, taken alone, can hardly be interpreted as governing matters of applicable law. The combined result appears to be that commercial practices within the scope of the UCPD, which constitute acts of unfair competition will be governed by the law of the country where the market distortion takes place (the damage occurs), provided of course that the Rome II Regulation becomes law in an unchanged form. For practices which cannot be qualified as acts of unfair competition, the general rules of private international law will apply. Possibly, the mutual recognition limb of the Internal Market clause may perform the function of a filter preventing barriers to the free movement of services to occur on a case by case basis.

²³⁹ On the evolution of the international law of unfair competition see Bakardjieva Engelbrekt, *Unfair Competition Law After TRIPs: Yet Another Challenge to Doctrinal Cohesion*, *NIR* 1998, 371 ff.

²⁴⁰ Opinion of the Committee on Civil Law Matters, 2003/0134, 5668/04.

6.3 Do national choice of law rules have any importance after a comprehensive harmonisation?

Of course, a legitimate question is whether the issue of applicable law would have any practical importance after achieving what is claimed to be full and exhaustive harmonisation of national laws and regulations on unfair business-to-consumer commercial practices. Before jumping to this conclusion, however, it is necessary to return to the analysis of the meaning of full harmonisation. As mentioned in the introduction, harmonisation is not equivalent with uniform rules. The UCPD is a framework legal act and as such does not aim at detailed rules. Member States will still have some margin of freedom to implement the common rules. The Directive will soon be converted into twenty five different pieces of legislation, some of them new and following closely the structure and the wording of the directive, some of them old and accommodating the new provisions to old structures and provisions. As a matter of law enforcement technique in cross border situations national courts would be obliged to employ a conventional analysis of jurisdiction and applicable law.

7 Institutional and enforcement issues

It is generally acknowledged that the major difference between national institutional frameworks of fair trading lay not so much in the different concepts at the basis of the general clause, but rather in the density of control behind such concepts.²⁴¹ The density of control is, in turn, influenced by factors such as legal culture, political tradition and last but not least, the institutional structure of enforcement. Seen in this light, uniformity in the wording of substantive provisions has little value if not paralleled by approximation in the area of enforcement of rights and obligations.

7.1 Enforcement in the UCPD

The UCPD itself adopts a minimalist stance on the issue of enforcement. Articles 11-13 UCPD essentially reproduce already existing provisions on enforcement, including in particular Articles 4 to 6 of the Misleading Advertising Directive. These provisions are extended to the whole area of unfair commercial practices.²⁴² Consequently, the Directive allows a centralised administrative and a decentralised civil law model of enforcement. It focuses on the injunction as a main remedy and includes facultative provisions on control prior to publication of the decision.

As mentioned above, regrettably the question of burden of proof has not received a more clear and satisfactory solution than in the Misleading Advertising Directive. Member States are obliged to confer upon enforcement bodies the power to apply a reversed burden of proof. The final discretion of when and whether to apply such a rule lies,

²⁴¹ Instead of many see Micklitz et al., *Feasibility Study* (2000) Volume I, 14.

²⁴² Art. 11 Proposal for a Unfair Commercial Practices Directive, COM (2003) 356 final.

however, with national courts and administrative agencies (see Article 12 UCPD, which now is explicitly dubbed “Substantiation of claims”).

At the same time, it is widely acknowledged that even if the main conditions for misleading or unfair commercial practices are harmonised, differences in respect to burden of proof may lead to largely divergent outcomes in similar cases. Thus, for instance, in the Nordic countries the high standards of truthfulness in marketing can largely be attributed to the predominant view that the burden of proof lies with the advertiser/trader for any claim that can be substantiated.²⁴³ When combined with a broad understanding as to what claims are verifiable this view indeed sets the benchmark of unfairness very high. In Swedish marketing practices law not only verifiable superlative advertisements such as “the lowest prices in town” and the “most sold cars in Europe” are considered unfair upon failure of substantiation, but also exaggerations of the sort “the finest beds in the world”, which may appear an extreme outcome.²⁴⁴ Likewise in Finnish law, the advert: “the lightest shoes in the world” is considered unfair marketing since the trader could not substantiate the claim.²⁴⁵ It remains to be seen to what extent differences in national law as to the burden of proof will continue to lead to divergent interpretations and different protective standards in the future.

As to right of action, Member States are required to open avenues for enforcement to “persons and organisations regarded *under national law* as having a legitimate interest in combating unfair commercial practices, *including competitors*.” (see Article 11(1)(2) UCPD, emphasis added). The special emphasis on competitors’ standing to take legal action against commercial practices affecting consumer interests represents obviously one attempt to mitigate the much lamented effects of the split up between the areas of business-to-business and business-to consumer commercial practices.²⁴⁶ Less clear is the legal position of trade associations. The more convincing interpretation seems to be that the Directive has not intended to set up new procedural rights in this respect and the question should therefore depend on national law.

A novelty in the rules of enforcement is the provision of Article 11(1)(3), second sentence, reading as follows:

²⁴³ The rule on the burden of proof is sometimes set out in legislative acts such as in § 2(2) Danish Marketing Practices Act, or ensues from preparatory works and settled case law of the competent national courts (so as in Sweden). The principle that the advertisers shall be able to substantiate their claims, is to be found in § 21 ICC International Code on Advertising Practice of the International Chamber of Commerce (ICC) which enjoys considerable authoritative power in the Scandinavian countries. See Bruun Nielsen, TemaNord 2002:509, 104. Note, however, that in Finnish marketing practices law, the burden of proof is reversed only when applying the general clause and not in connection of the special provision on misleading advertising. As observed in legal doctrine, the principle is not seen as strictly procedural, but is rather a result from the substantive law requirements of truthfulness in marketing. On the reversal of proof in Swedish law see prop. 1970:59, 68; cf. Bernitz, *Marknadsföringslagen*, 45. For Finnish law see Kaulamo, K, Finland, in: Schricker (Ed.) *Recht der Werbung in Europa*, Nomos, 2002, 31 ff.; cf. Wilhelmsson, *Konsumentskyddet*, 127.

²⁴⁴ See MD 2000:20 (Hästens) concerning among others the logo “Världens skönaste sängar; see also MD 2004:2 (Hästens v. J Möbler) concerning the expression “No 1 in laying comfort” (No 1 i liggkomfort)

²⁴⁵ In addition, the Consumer Ombudsman had brought evidence that on the market there were even lighter shoes than those of the defendant. See MT (1980:2), as quoted by Kaulamo, *op.cit.*, 33.

²⁴⁶ This text was included for the first time in the compromise text in view of the Consumer Working Party on 30 and 31 March 2004. See Council doc 7805/04. In this sense Glöckner, *op. cit.*, 938.

These facilities shall be available regardless of whether the consumers affected are in the territory of the Member State where the trader is located or in another Member State.

The purpose of this provision appears to be mainly to ensure the frictionless interplay of the UCPD with the Consumer Co-operation Enforcement Regulation and the earlier Injunctions Directive. These Community instruments were actually enacted with the chief objective of preparing the ground for the full application of the country of origin principle in the area of consumer protection in general, and of commercial communications in particular. The rule purports to neutralise possible obstacles in national law as to enforcement in cross-border situations. For countries relying on public law enforcement, such obstacles may consist in requirements that national administrative (and public law) rules are solely applied in situations affecting domestic consumers. For countries relying on private law enforcement schemes, the obstacles may, conversely, consist in not granting standing to local consumer organisations on grounds of absent interest in proceedings since the affected consumers were in a different jurisdiction. If the country of origin principle is taken out from the text of the Directive, these instruments may lose some of their pertinence.

One important clarification concerns the term penalties used in Article 13 UCPD. Initially some concerns were raised that it had different connotation than the previously common term sanctions and could involve an obligation for the Member States to impose administrative or criminal law sanctions for violations of the substantive provisions. This would be in contrast to the established approach in many countries of the Union. The Council has now made a declaration appeasing such concerns. In the opinion of the Council, "when the word "penalties" is used in the English version of legal instruments of the European Community, this word is used in a neutral sense and does not relate specifically to criminal law sanctions, but could also include administrative and financial sanctions, as well as other types of sanctions. When Member States are obliged to introduce "penalties", it is up to them to choose the appropriate type of sanction in conformity with the case law of the European Court of Justice.... If, in revised English versions of legal instruments where the word "sanctions" has previously been used, this word is replaced with the word "penalties" this does not constitute a substantive difference."²⁴⁷

7.2 The relations between the UCPD and the Regulation on Consumer Protection Enforcement Cooperation

The relatively undemanding approach to enforcement in the UCPD is explained by the parallel process of negotiating a separate Community document, devoted entirely to enforcement, as indicated already in the Green Paper on Consumer Protection.²⁴⁸ Only a month after publishing the Commission Proposal on a Draft Framework Directive on Unfair Commercial Practices, it submitted a proposal for a Regulation on Consumer

²⁴⁷ Statements to be entered in the minutes, doc 14166/04 of 12 November 2004 Revised addendum to the I/A item note, 3.

²⁴⁸ COM (2001) 531 final, 16 ff.

Protection Cooperation.²⁴⁹ This legislative initiative received remarkable support from among Member State governments and stake holders. Within little more than a year the Regulation passed the meanders of the Community legislative process and was enacted on 27 October 2004.²⁵⁰

It is not the task of this report to provide an analysis of the Regulation on Consumer Protection Cooperation. Suffice it to say that the Regulation is remarkable in its exclusive focus on public law enforcement of consumer protection laws. The Regulation purports to establish a network of public consumer protection authorities in the Community Member States with considerable powers to act in cross-border infringement situations. These authorities are to be identified, clearly listed and obliged to offer information and mutual assistance.

The UCPD will be one of the many consumer-centred Community Directives to be monitored and enforced with the help of the public-authorities network envisaged by the Regulation (see Article 16 UCPD). This approach is indeed to be commended. It witnesses of awareness of the importance of enforcement and of the inevitable limitations of private action to enforce collective consumer interests. The Regulation does not exclude or replace private enforcement (for instance via consumer associations), but complements such action in situations, where the latter cannot be expected to bring about satisfactory results. One should of course not lose sight of the complex realities of institutional legacies and incremental institutional adjustment.²⁵¹ The Regulation seems, however, to enhance the plurality of enforcement avenues and thus to create better conditions for approximation of substantive standards.

8 Challenges of transposition and uniform interpretation

The UCPD will certainly pose a number of challenges before national lawmakers and enforcement bodies. The problems are foremost associated with the degree of detail to be pursued in the process of transposition, drawing clearly the scope of the implementing legislation and ensuring the frictionless coexistence of the new rules with already existing legal rules. Furthermore, a serious risk exists that the complexity of the Directive and the sometimes vague standards it introduces, may significantly impede harmonious, let alone, uniform interpretation.

²⁴⁹ Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation"), COM (2003) 443 final.

²⁵⁰ See Regulation No 2006/2004 of the European Parliament and of the Council on consumer protection cooperation, OJ L 364/1 of 9.12.2004.

²⁵¹ See for instance the final compromise solution in Article 8(3) Regulation 2006/2004. According to this provision the requested authority may fulfil its obligation by way of designating a (private) body having a legitimate interest in the cessation or prohibition of intra-Community infringements of consumer law Directives. Apparently this compromise has been necessary to accommodate the German institutional tradition with broad competences of consumer associations. The delegation has, however, to satisfy a number of requirements and to follow a specific procedure (see Article 8(4) and (5) Regulation).

8.2 Transposition dilemmas

8.2.1 The problem with the split up between B2B and B2C relations

The split up introduced by the Directive between the areas of business-to-business and business-to-consumer commercial practices poses a number of serious dilemmas before the national lawmakers, who would soon be faced with the obligation to transpose the UCPD into national law. In most Member States marketing practices/unfair competition law has so far been regulated in an integrated manner, taking into account all interests concerned – not only those of consumers, but also competitors and the general public. The question is how to reconcile the new rules with the inherited structure and substance of law. Two alternatives appear probable:

The **first** alternative is to sustain the integrated approach in national legislation in the form of a general clause which would cover both B2B and B2C relations, but to borrow the language and the exact formulation of the general clause from the Directive.²⁵² As demonstrated above, the standard of professional diligence can be seen as largely compatible with the existing standards of good market conduct in Nordic marketing law. More specifically, the requirement of material distortion of consumer interests could then be reserved only for business-to-consumer relations, affecting consumer economic interests. Rules in national market law on misleading and aggressive practices would have to be respectively adjusted to the new Community rules. A careful consideration would be required for each rule, to estimate whether the factual situation can be extended to business-to-business relations or whether a different wording be needed. Finally, the catalogue of specific prohibitions would have to be complemented with those rules that apply only to business-to-business relations, e.g. possible rules on trade secrets, on disparagement, on slavish imitation, on corruption etc.

The **second** alternative would be to have a new and independent legal act on business-to-consumer commercial practices, which would follow closely the structure and the contents of the UCPD. Existing Marketing Practices (or Unfair Competition) Acts can then be limited to apply only to business-to-business relations. However, they have then to be purged of all rules relating to factual situations aiming at consumer protection. This type of transposition would follow closely the already existing Finnish model of marketing practices law. Before embarking on the transposition of the UCPD a careful study of Finnish law from the particular perspective of a divided regulatory regime could therefore be recommended.

8.2.2 The choice between detailed or goal oriented transposition

A slightly different type of concerns is raised by the question of the degree of detail required for loyal transposition of the Directive into national law. National legislators are facing the uneasy task of having to transpose vague and open general clauses, on the one

²⁵² In German legal doctrine the prevailing view so far seems to be that there is no need for introducing a divided regime and that only incorporating the threshold for intervention in business-to-consumer relations would suffice. The rest would then be outside scope and should therefore be compatible with Community law. See Ohly, *GRUR* 2004, *op.cit.*, 891; Glöckner, *op. cit.*, 938. More hesitant on the question are Köhler/Lettl, *op. cit.*, 1051. Henning-Bodewig, *op. cit.*

hand, and detailed black lists, on the other. Are national lawmakers expected to ensure a literal transposition of the general clause, the two key prohibitions and the black list? Or should it suffice if the main criteria in the general clause and the key prohibitions are outlined, whereby the black list is introduced in national law approximately (modifying the terms to national traditions? The difficulty is enhanced by the contradictory status of the UCPD of being an act of full harmonisation and at the same time remaining a framework directive.²⁵³

Legally speaking, the margin of appreciation left to national legislators has been subject to interpretation on the part of the ECJ in a number of cases. As a matter of principle, literal transposition cannot be required provided a Member State can demonstrate a transposition that ensures efficiently the goals to be achieved with the legal act. Despite this principled standpoint, it is submitted that many of the provisions of the Directive would require literal transposition. This applies for the black list of prohibited practices not only due to obligations under Community law, but also as a matter of courtesy to Member States' citizens. The importance of the black list for ensuring smooth, harmonious and effective enforcement was underlined in the recent amendment to the UCPD introduced by the European Parliament at second reading. The modified Article 5(5) now includes the following clause:

The same single list shall apply in all Member States and may only be modified via revision of the Directive.²⁵⁴

This provision leaves no doubt as to Member States obligation of close transposition of the list. The detailed stipulation of all the elements of prohibitions on the list are expected to facilitate voluntary self-enforcement and conflict-settlement and to increase legal certainty.

A close transposition is moreover, advisable also in the case of the more abstract and vague requirements of the general clause and the two key prohibitions. These requirements, despite their imprecise language, aim at ensuring the incremental emergence of a common and coherent body of jurisprudence, giving substance to the sometimes hollow phrases and concepts in the UCPD. This body of case law cannot only consist of ECJ judgments. In view of the broad scope of the Directive and the broad range of activities it encompasses not all instances of conflicting and confusing interpretation would reach the Community judiciary. Instead it is submitted, that the task will increasingly be one of coordination and mutual consultation between national courts and other enforcement bodies in the Community Member States. Seen in this light a close transposition would serve to reduce the tension in this complex and difficult process. As with other Community instruments, the result may be that Member States incorporate unclear definitions into their domestic legislation, thus staying in line with the Directive, but at the same time transporting the problem of interpretation from the supranational to

²⁵³ In a similar sense see Ohly, *GRUR* 2004, 891.

²⁵⁴ Amendment 6, European Parliament Legislative Resolution on the Council Common Position, P6_TA-PROV(2005)0048.

the national level.²⁵⁵ Needless to say, the task of ensuring harmony with domestic law as a whole will be daunting.

Finally, as to the form of transposition, despite the sympathetic view taken by the ECJ on the Swedish technique of transposition through preparatory works, a legislative transposition is to be recommended in the present case. The reasons are broadly the same as the stated above.²⁵⁶

9 Conclusion

If we return to the bold statements in the press release announcing the first Commission proposal we can ask whether the prospective Directive indeed is likely to grant the European consumers the promised equal protection against sharp business practices and rogue traders “whether they buy from the shop around the corner or from a website in another Member State”. As a general answer it can be submitted that the optimism of the Commission might have been premature and exaggerated. There are many aspects of the new Directive that demand further clarification and that increase, rather than decrease, legal uncertainty.

The scope of application of the UCPD, as well as its relations with other Community instruments could have been better defined to enable a reasonably uniform implementation of the Directive. This would have been desirable not only from the perspective of law enforcement bodies, but also for ensuring the promised legal certainty for the normative addressees of and the beneficiaries from the Directive.

As it is now we still have several layers of overlapping instruments. Potential problems and conflicting interpretations may emerge in trying to define the relationship between product-, industry-, and media-specific directives, on the one hand, and the present UCPD, on the other. Likewise, the relation between previous minimum-harmonisation directives and the present directive is not sufficiently clarified. Questions of jurisdiction, distribution of competences and applicable law leave much to be desired from a legal certainty and transparency perspective. The notions ‘professional diligence’ and ‘material distortion’ may be sources of persisting divergence when trying to establish the specific content of the general clause on unfair commercial practice.

On the positive side, the UCPD represents the first genuine attempt to regulate unfair commercial practices in a comprehensive and horizontal manner. Despite a number of concessions and half-way solutions the Directive has as a whole sustained the promises of achieving harmonisation at a high level of consumer protection. Many of the most common unfair commercial practices have found an unequivocal legislative regulation and are banned, either under the black list of prohibited practices or on the basis of the general clause and the key prohibitions of misleading and aggressive practices. Seen from a

²⁵⁵ See Report on the Implementation of Directive 90/314/EEC on Package Travel and Holiday Tours in the Domestic Legislation of EC Member States, SEC (1999) 1800, available at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/pack_trav/pack_trav02_en.pdf

²⁵⁶ See Glöckner, op. cit., with reference to the case *Commission v. Sweden*, [2002] ECR I-4147

common European perspective, the UCPD will certainly raise the standards of protection in a number of Member States. And even in areas where many fear a sinking of standards the effect may not always be exclusively negative. It is secret to nobody that there are instances where an alleged high level of consumer protection may serve other, not so commendable, purposes such as distortion of competition. With its conditions of appreciable impact on consumer economic behaviour the UCPD has the potential to prevent possible abuses of consumer protection rules for anticompetitive ends and to generally streamline existing consumer protection standards in the Member States.

It has been noted in a number of preparatory documents and scholarly analyses, based on a long term experience in the field of marketing practices law and on comparative evaluations, that the major source of divergence in this field has been not so much the difference in substantive law, but the widely divergent techniques of enforcement and the associated institutional infrastructure and actors involved. The present Directive will – and can – do little to overcome this deeper source of divergence. More hopes can be vested in the Consumer Enforcement Cooperation Regulation, but also here one should not underestimate the tenacity of institutional traditions and existing structures.

Finally, one should retain a sound dose of scepticism as to how much can be achieved by positive legal means. The trust that builds between consumers and the local shop around the corner is a complex asset, having relatively little to do with the legal rules framing this relationship. It is foremost a matter of time vested in nurturing this relationship by repeated contacts and fulfilled expectations. And it is surely time again, intensified cross border trade and repeated contacts with traders from other Community Member States that will eventually build consumer confidence in the Internal Market. Despite its deficiency, the UCPD may nevertheless be considered an important step on the way toward a truly common and safe market for the European consumers.

Summary

EU och den nordiska marknadsföringslagstiftningen:

Konsekvenser av ett Direktiv om otillbörliga affärsmetoder som tillämpas av näringsidkare gentemot konsumenter på den inre marknaden

Antonina Bakardjieva Engelbrekt²⁵⁷

Den 15:e november 2004 antog rådet en gemensam ståndpunkt om Europaparlamentets och rådets direktiv om otillbörliga affärsmetoder som tillämpas av näringsidkare gentemot konsumenter på den inre marknaden (direktiv om otillbörliga affärsmetoder, nedan UCPD, den engelska förkortningen).²⁵⁸ Direktivet godkändes av Europaparlamentet (EP) i andra läsningen med endast några få ändringar.²⁵⁹ Direktivet förväntas bli formellt antaget i juni 2005. Därefter har medlemsländerna två år på sig för att genomföra direktivet till nationell rätt.

UCPD utgör det hittills mest ambitiösa försöket att harmonisera medlemsländernas regler och standarder när det gäller otillbörliga affärsmetoder. Direktivet siktar på fullständig harmonisering och erbjuder genomgripande, industrineutrala lösningar med generell effekt (horisontellt tillvägagångssätt). UCPD behandlar huvudsakligen frågor av materiellrättslig natur. Direktivet inför ett generellt förbud mot otillbörliga affärsmetoder som tillämpas av näringsidkare gentemot konsumenter. Detta förbud konkretiseras genom två bestämmelser om de två oftast förekommande kategorierna av otillbörliga affärsmetoder: vilseledande affärsmetoder, samt aggressiva affärsmetoder. För att uppnå ett större mått av rättsäkerhet och förutsebarhet införs i bilaga I en uppräkningslista ("svart lista") av affärsmetoder vilka under alla omständigheter är att anse som otillbörliga.

Denna rapport har till syfte att presentera en genomgripande analys av direktivet och att försöka förutspå direktivets inverkan på nordisk marknadsrätt.²⁶⁰ Rapporten har initierats och finansierats av Nordiska Ministerrådet, Ämbetsmannakommittén för konsumentfrågor. I en konsekvensanalys av kommissionen bedömdes de nordiska medlemsländerna vara bäst i stånd att bemöta de anpassningskrav som ett framtida ramdirektiv kommer att ställa på nationell rätt.²⁶¹ Den fråga som kan ställas är emellertid huruvida de nordiska länderna skall kunna behålla den höga skyddsnivå de eftersträvat i sin marknadsrättsliga lagstiftning och praxis.

Nedan presenteras kortfattat bedömningar som görs i rapporten.

²⁵⁷ Docent i civilrätt, Stockholms universitet, Juridiska institutionen.

²⁵⁸ Med förkortningen UCPD hänvisas till texten av Rådets gemensamma ståndpunkt, dok. 11630/2/04 REV 2, Bryssel, 15 november 2004.

²⁵⁹ Europaparlamentets lagstiftningsresolution, andraläsningen, dok. P6_TA-PROV(2005)0048.

²⁶⁰ Bruun Nielsen, D., Harmonisation of EU Marketing Law, TemaNord 2002:509.

²⁶¹ Ex-ante Impact Assessment of the options outlined in the Green Paper on EU Consumer Protection, GFA Management, 29.11.2002.

Allmänna frågor

Rapporten analyserar i avsnitt 2 några övergripande frågor såsom direktivets syfte, rättslig grund och tillvägagångssätt. Särskilt uppmärksamhet ägnas principen om fullständig harmonisering (se skäl 14 och 15, UPCDs ingress). Fullständig harmonisering anses innebära dels att harmoniseringen på det samordnade området är omfattande och uttömmande (i motsats till selektiv och fragmenterad harmonisering) och dels att den medför maximiharmonisering (i motsats till minimiharmonisering). Ett problem med det valda tillvägagångssättet med fullständig harmonisering i UPCD anses vara att det går stick i stäv med direktivets karaktär av ett **ramdirektiv**. Direktivet bygger dessutom på **generalklausuler**, som är notoriskt kända för sin flexibilitet och det betydande tolkningsutrymme de lämnar åt tillämpningsorgan. Rapporten ifrågasätter om syftet med en fullständig harmonisering genom generalklausuler överhuvudtaget är realistiskt.

Vidare analyseras inre marknadsprincipen i art. 4 UPCD. Kommissionens förslag vilade på en fullbordad inre marknads princip (art. 4 KOM(2003) 356 *slutlig*), som i sitt första stycke slog fast principen om kontroll i hemlandet (ursprungslandsprincip i snäv bemärkelse) och i sitt andra stycke principen om ömsesidigt erkännande. Till följd av en massiv kritik från medlemsländerna sidoslutsades vid rådets möte (konkurrenskraft) i maj 2004 att ursprungslandsprincipen skulle strykas från art. 4.1 i kommissionens direktivförslag. I avsaknad av en uttrycklig reglering är rättsläget något oklart och motstridiga tolkningar kan bli möjliga. Rapporten drar slutsatsen att den beskurna inre marknadsklausulen i UPCD i alla fall för gränsöverskridande situationer har förlorat sin funktion när det gäller frågor som rör fördelningen av övervaknings- och rättstillämpningskompetens. Samtidigt anses principen om ömsesidigt erkännande innebära att medlemsländerna är fråntagna möjligheten att tillämpa nationella restriktioner inom direktivets samordnade område på varor och tjänster med ursprung i andra gemenskapsländer. Det ”tvingande skäl” testet enligt *Cassis de Dijon* anses inte kunna åberopas i sådana situationer. Tjänstedirektivet, när och i fall det blir antaget, lyfts fram som en annan komplicerande faktor.

Strukturella och materiella frågor

I avsnitt tre görs en utförlig analys av direktivets mångskiktiga struktur och dess materiella bestämmelser. Vid granskningen av generalklausulen om förbud mot otillbörliga affärsmetoder läggs särskild vikt vid de tre kriterier som skall prövas för att avgöra om en metod är otillbörlig: (i) metoden skall strida mot god yrkessed; (ii) bedömningen ska göras utifrån genomsnittskonsumentens perspektiv; (iii) metoden måste innebära avsevärd snedvridning av genomsnittskonsumentens ekonomiska beteende.

Definitionen av **god yrkessed** i art. 2 h UPCD anses ge uttryck för en normativ standard som måste följas även om detta skulle innebära en avvikelse från vedertagen praxis. Denna definition bedöms motsvara lagstiftning och praxis i de nordiska länderna och innebära en förbättring jämfört med den motsvarande definitionen i kommissionens förslag. Betydelsen av rättsliga normer i annan lagstiftning (lagstridighetsprincipen), av konsumentmyndigheters riktlinjer samt av uppförandekoder för konkretiseringen av begreppet ”god yrkessed” diskuteras särskilt.

Ett övergripande problem som uppmärksammas är att det i flera sammanhang kommer att saknas enhetliga och gemensamma standarder för god yrkessed för hela den europeiska marknaden. Frågan som ställs är då hur skillnader i uppfattningar och standarder när det gäller god yrkessed mellan länder eller regioner i Europa kommer att påverka utsikterna för en enhetligt och harmonisk tillämpning av UPCD. Efter borttagandet av ursprungslandsprincipen torde vid gränsöverskridande situationer sedvanliga regler om lagarnas territoriella tillämpningsområde, resp. internationella privaträttsliga regler, gälla. En noggrann bedömning i det enskilda fallet tycks emellertid vara påkallad, innefattande en jämförelse mellan normerna för god yrkessed i etableringslandet och i destinations- (mottagar-) landet. Striktare normer i mottagarlandet torde inte kunna tillämpas för att begränsa rörelsefriheten av skäl som omfattas av UPCDs samordnade regelområde och i enlighet med principen om ömsesidigt erkännande (art. 4 UPCD). En sådan jämförelse kommer dock förmodligen att vara förknippad med en betydande komplexitet. Det mer realistiska sättet för nationella domstolar och tillämpningsorgan att bemöta denna utmaning kommer sannolikt att vara att försöka utmejsla genomsnittliga standarder för god marknadspraxis av relevans för hela gemenskapen.

Genomsnittskonsumenten definieras inte i direktivets text, men däremot i direktivets ingress (se skäl 18).²⁶² Risken med en definition är att den kan försvåra direktivets anpassning till ändrad praxis från EGD och ändrade marknadsförhållanden.²⁶³ Definitionen betonar emellertid vikten av sociala, kulturella och språkliga faktorer vid bedömningen i det enskilda fallet, något som också erkänts av EGD.²⁶⁴ Direktivet innehåller några bestämmelser, art. 5.2.b och 5.3 UPCD, som ämnar förhindra exploatering när kunders egenskaper gör dem särskilt sårbara för otillbörliga affärsmetoder. Dessa bestämmelser anses utgöra en betydande förbättring av direktivet jämfört med kommissionens ursprungliga förslag. Likväl noteras i rapporten flera förbehåll i art. 5.3 UPCD som skulle kunna försvåra tillämpningen av denna bestämmelse i praktiken.

Rekvisitet **avsevärd snedvridning** avser tydligen att infoga en "*de minimis*" tröskel för tillämpningen av direktivets förbud. *Prima facie* tycks definitionen i art. 2(e) kräva en effektiv förändring av affärsbeslut som resultat av den affärsmetod som granskas. Art. 5 tydliggör emellertid att det är tillräckligt med "sannolikhet" när det gäller avsevärd snedvridning.²⁶⁵ UPCDs krav på avsevärd snedvridning av konsumentens ekonomiska beteende anses i stora drag bekräfta den linje som etablerats i nordisk marknadsrätt.²⁶⁶ Samtidigt varnas för en risk för att begreppen i direktivet tolkas extensivt av processande parter så att rättstillämpningsorganen får svårare att intervensera mot otillbörliga marknadsföringsåtgärder.

²⁶² Se Ändring 3 EPs lagstiftningsresolution, andra behandlingen, dok. P6_TA-PROV(2005)0048.

²⁶³ Se Mål C-210/96 *Gut Springenheide*, REG 1999, s. I-4657; Mål C-228/98 *Esteé Lauder*, REG 2000, s. I-117.

²⁶⁴ Se Mål C-313/94 *Graffione*, REG 1996, s. I-06039.

²⁶⁵ Frågan om betydelsen av rekvisitet "påverkan på konsumenternas ekonomiska beteende" i Direktivet om vilseledande reklam ställdes på sin spets i Nissan avgörandet av EGD. Se Mål C-373/90 *Criminal proceedings against X (Nissan)* [1992] ECR 131.

²⁶⁶ Se Comments on the Draft Directive, Standing Committee of the EFTA States, Working Group on Consumer Protection, Brussels, 26 March 2004, ref. 1041362, p. 35.

Rapporten granskar ingående de bestämmelser som reglerar de två huvudkategorierna av otillbörliga affärsmetoder, dvs vilseledande och aggressiva affärsmetoder. Art. 6 om **aktivt vilseledande** anses i huvuddrag motsvara bestämmelserna i direktivet om vilseledande reklam, med den skillnaden att uppräkningsen av aspekter i förhållande till vilka en affärsmetod kan vara vilseledande formuleras som uttömmande. Däremot utgör art. 7 om **vilseledande underlåtenhet** en nyskapelse i gemenskapsrätten. Bestämmelsen är menad att stärka konsumentskyddet, men dess tillämpning görs beroende av allt för många villkor som kan begränsa dess praktiska betydelse (se särskilt art. 7.3). Art. 7 bedöms kunna innebära en inskränkning av befintliga mer föreskrivande bestämmelser i nordisk rätt.

Medan bestämmelserna om vilseledande reklam har en relativt lång historia i gemenskapsrätten är regleringen av **aggressiva affärsmetoder** ett nytt fenomen (se dock direktiven om hemförsäljning, om distansförsäljning, samt om skydd för privatsfären och elektroniska kommunikationer). Från ett nordiskt marknadsrättsligt perspektiv anses reglerna i arts. 8 och 9 UPCD kunna lägga grunden för en ganska långtgående reglering av aggressiva affärsmetoder.

Uppräkningen av affärsmetoder som under alla omständigheter skall betraktas som otillbörliga (**den svarta listan**) beskrivs som ett nödvändigt instrument för att infria förväntningarna om förutsebarhet, som förknippas med fullständig harmonisering. Listan är emellertid allt för lång, svåröverskådlig och föga konsekvent. Risken är att katalogen betraktas av företagare som en ”checklista” på vad som är förbjudet och att den överskuggar betydelsen av generalklausulen som ett övergripande krav på god affärssed. Den svarta listans karaktär av exemplifiering bör därför betonas. I rapporten görs en mer detaljerad redovisning av metoderna i den svarta lista.

Tillämpningsområde

Direktivets tillämpningsområde definieras genom ett stort antal svårtolkade begränsningar och avgränsningar, vilka till viss mån anses strida mot den uttalade ambitionen om fullständig och omfattande harmonisering, samt om förenkling av regelverket. Med avseende på **subjekt** reglerar direktivet endast affärsmetoder mellan näringsidkare och konsument (skäl 6, UPCDs ingress). Den splittring av regleringen av otillbörliga affärsmetoder som införs genom direktivet kritiserar i rapporten på flera grunder: ekonomiska, lagstiftningstekniska och rättspolitiska.

En viktig avgränsning med avseende på **objekt** är att direktivet endast behandlar affärsmetoder som snedvrider konsumentkollektivets **ekonomiska** intressen (se skäl 6 och 7 UPCDs ingress). Icke-ekonomiska konsumentintressen, såsom hälsa och säkerhet, miljöskydd, skydd för den personliga integriteten, skydd mot diskriminering mm, faller därmed i regel utanför direktivets tillämpningsområde. Undantagna är särskilt restriktioner i nationell lagstiftning av marknadsföring av alkohol, tobak, och andra hälsoskadliga ämnen (se art. 3.3, samt skäl 9, UPCDs ingress). Begränsningen till ekonomiska intressen leder också till att direktivet inte berör frågor om smak och anständighet.²⁶⁷ Medlemsländerna är således fria att intervensera mot moraliskt stötande reklam eller att

²⁶⁷ Se skäl 7, UPCDs ingress.

reglera marknadsföring på grund av etnisk, sexuell eller annan diskriminering inom medlemsländernas kompetens.²⁶⁸

Det är emellertid ofta vanskligt att dra gränsen mellan ekonomiska och icke-ekonomiska intressen. Dessutom finns flera situationer där ekonomiska och icke ekonomiska intressen berörs samtidigt. Svårigheterna illustreras väl av åtgärder som åsyftar att kontrollera och begränsa affärsmetoder riktade mot minderåriga. I rapporten görs en detaljerad genomgång av lagstiftning samt regler som utmejslats i domstols- och myndighetspraxis i de nordiska länderna och som syftar till att skydda barn och minderåriga från icke önskvärda effekter av reklam och marknadsföring. En del av dessa restriktioner anses stämma väl överens med direktivets huvudbestämmelser om bedömning av affärsmetoder utifrån den utsatta konsumentgruppens perspektiv (art. 5.3 UPCD). Samtidigt dras slutsatsen att begränsningar som går längre än direktivets krav i fortsättningen sannolikt kommer att underkastas en strikt granskning när det gäller deras eventuella inverkan på icke-ekonomiska intressen.

Förhållandet till annan gemenskapslagstiftning

Avgränsningen av UPCDs förhållande till annan gemenskapslagstiftning beskrivs i rapporten som en av direktivets svaga punkter. En ingående analys görs av art. 3.4. Denna bestämmelse avser att lösa eventuella konflikter mellan UPCD och andra direktiv som reglerar **specifika aspekter** av otillbörliga affärsmetoder genom att de senare ges företräde ("*lex specialis derogat legi generali*"). I rapporten ges en överblick över de gemenskapsdirektiv som kan kvalificeras som reglerande "specifika aspekter".

Den "*lex specialis*" princip i art. 3.4 UPCD gäller enbart *gemenskapsbestämmelser*. Däremot ges nationella bestämmelser som grundas på **minimiklausuler** i andra direktiv på marknadsrättens område inget företräde framför direktivet. För att mildra effekterna av denna förtäckta förändring i nationell rätt har ett tidsbegränsat undantag förhandlats fram i art. 3.5 UPCD, enligt vilket medlemsstaterna under sex år får behålla tvingande nationella bestämmelser på grundval av gemenskapsklausuler om minsta harmonisering.²⁶⁹ I rapporten diskuteras vidden av undantaget och de villkor som måste vara uppfyllda för att medlemsstaterna skall kunna åberopa art. 3.5 UPCD.

Slutligen anses UPCDs förhållande till förslaget om tjänstedirektiv i behov av att förtydligas. Rapporten gör bedömningen att i avsaknad av en uttrycklig bestämmelse som utesluter art. 16 tjänstedirektivets tillämpning på otillbörliga affärsmetoder, kan det inte uteslutas att ursprungslandsprincipen som strukits från UPCD hittar tillbaka till direktivet bakvägen.

Förhållandet till internationell privaträtt

Efter borttagandet av ursprungslandsprincipen från direktivet behåller strikt juridiskt sett konventionella (nationella) regler om internationell privaträtt, respektive om

²⁶⁸ Se dock p. 39, Motivering, KOM(2003) 356 slutlig.

²⁶⁹ Se p. 30 motivering, KOM(2003) 356 slutlig.

lagstiftningens territoriella tillämpningsområde, sin relevans. I rapporten diskuteras de skilda uppfattningar som råder när det gäller marknadsrättens natur och även relevansen av internationell privaträtt på området. I de nordiska länderna har marknadsrätten traditionellt uppfattats som ett primärt offentligrättsligt (eller blandat) rättsområde. I rättspraxis och doktrin har den så kallade effektlansprincipen utvecklats enligt vilken nationell rätt är tillämplig endast på marknadsföring som har kännbar effekt på det egna landets territorium.²⁷⁰ Samtidigt måste beaktas att utifrån en privaträttslig syn på marknadsrätten tillämpar andra medlemsländer internationella privaträttsliga regler i gränsöverskridande situationer. Den förhärskande doktrinen är den så kallade *lex loci competitionis* doktrinen om att rättsreglerna i det landet där konkurrerande näringsidkares intressen kolliderar ska tillämpas. Denna doktrin kommer med all sannolikhet att stadfästas i gemenskaprätten genom den planerade Rom II förordningen om tillämplig lag för utomobligatoriska förpliktelser, som också tar hänsyn till de kollektiva konsumentintressena.²⁷¹

På grundval av art. 4 UPCD kommer det emellertid inte att vara möjligt att åberopa mer restriktiva nationella regler och tolkningar i mottagarlandet som faller inom UPCDs samordnade område för att begränsa den fria rörligheten av varor och tjänster inom EU.²⁷² Reglerna i ursprungslandet kan således anses fylla funktionen av ett filter som försäkrar direktivets 'effet utile'.

Frågor kring processrätt och tillämpning

UPCD medför inga nyheter beträffande processrättsliga regler och institutionella frågor utan bekräftar endast de principer som finns lagfästa i direktivet om vilseledande reklam. I rapporten diskuteras vikten av regeln om omvänd bevisbörda, som inte görs bindande enligt direktivet. Sambandet mellan direktivet och förordningen om konsumentskyddssamarbete, som lanserades parallellt av kommissionen och som antogs hösten 2004, betonas.²⁷³

Utmaningar när det gäller genomförande och enhetlig tillämpning

I avsnitt 8 analyseras de utmaningar som direktivet, med sin uttalade harmoniseringsambition, innebär för de nordiska lagstiftnings- och rättstillämpningsorgan, samt svårigheterna med att försäkra harmonisk och enhetlig tolkning. Ett särskilt dilemma anses vara förknippat med den splittring som direktivet åstadkommer mellan å ena sidan affärsmetoder mellan näringsidkare och konsument (B2C), och å den andra, affärsmetoder mellan näringsidkare emellan (B2B). De flesta nordiska länderna (förutom Finland) har hittills valt ett integrerat förhållningssätt där hänsyn tagits till konsumentintresset, men

²⁷⁰ Se de nordiska Konsumentombudsmännens gemensamma rekommendation om marknadsföring och reklam på Internet.

²⁷¹ Se art. 5 "Otillbörlig konkurrens", Förslag till Rom II förordning, KOM (2003)0427 slutlig.

²⁷² Om möjliga konflikter mellan ursprungslandsprincipen som den definierats i Kommissionens förslag till direktiv om otillbörliga affärsmetoder och Förslaget till Rom II förordning se, Yttrande av Kommittén för privaträttsliga frågor, Rådets dok. 2003/0134, 5668/04.

²⁷³ Europaparlamentets och rådets förordning (EG) nr. 2006/2004 om samarbete mellan de nationella tillsynsmyndigheter som ansvarar för konsumentskyddslagstiftningen.

även till näringsidkarnas intresse av tillbörlig konkurrens. Två alternativ för anpassning till direktivets krav ventileras: (i) Det första alternativet vore att försöka integrera direktivets bestämmelser i den befintliga lagstiftningen men introducera tydliga avgränsningar för tillämpningsområdet av de bestämmelser som härstammar från direktivet och som inte är anpassade för B2B situationer. (ii) Ett andra alternativ vore att införa en särskild lag om affärsmetoder mellan näringsidkare och konsumenter som nära motsvarar direktivets bestämmelser. Den nuvarande marknadsföringslagen kan då fortbestå men tillämpas endast i förhållandena näringsidkare emellan.

Andra svårigheter är förknippade med frågan om på vilken detaljnivå direktivets bestämmelser bör överföras i nationell lagstiftning. Rättsligt betraktat kräver gemenskapsdirektiv som bekant inget bokstavligt genomförande, så vitt medlemsländerna kan påvisa att syftena med direktivet uppnåtts på ett effektivt sätt. I rapporten görs dock gällande att många av direktivets bestämmelser helst skulle överföras i nationell lagstiftning så nära direktivets text som möjligt för att tillåta att direktivets termer och villkor gradvis utmynnar i genuint gemensamma juridiska begrepp och tolkningar.

Slutsatser

Sammanfattningsvis görs bedömningen att flera av direktivets aspekter behöver klargöras. Direktivets tillämpningsområde samt dess förhållande till andra gemenskapsakter förblir några av direktivets mest sårbara sidor och kan i framtiden ge upphov till avvikande tolkningar i olika länder. Någon avsevärd förenkling av regelverket kan det knappast vara fråga om. Tvärtom har vi, delvis som resultat av direktivet, flera skikt av överlappande instrument, med oklara inbördes förhållanden, vilket kommer att försvåra direktivets genomförande. Några av direktivets centrala begrepp, såsom avsevärd snedvridning av konsumenternas ekonomiska intressen, är öppna för motstridiga tolkningar.

Det positiva med direktivet anses emellertid vara att det utgör det första renodlade försöket att reglera otillbörliga affärsmetoder i EU på ett övergripande och horisontellt sätt. Trots ett antal kompromisser har direktivet på det hela taget inte svikit löftet om en hög konsumentskyddsnivå. Många av de oftast förekommande otillbörliga affärsmetoder har kategoriskt förbjudits antingen genom den svarta listan eller på grundval av direktivets bestämmelser av mer generell natur. Betraktat från ett gemensamt europeiskt perspektiv har direktivet en trovärdig potential att väsentligt höja skyddsnivån i ett flertal europeiska länder. Och även på områden där oro uttryckts om att direktivet kan leda till en sänkning av standarder kan det inte uteslutas att konsekvenserna på längre sikt alls inte kommer att vara negativa. Det är ingen hemlighet att det finns situationer där en hög konsumentskyddsnivå används som täckmantel för mindre lovvärda syften, som till exempel hämmande av oönskad konkurrens. Direktivet kan bidra till att förebygga sådan konkurrensbegränsande användning av marknadsrätten och därmed renodla regelverket.