

Deutsche Vereinigung  
für gewerblichen Rechtsschutz  
und Urheberrecht e.V.

Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht  
Theodor-Heuss-Ring 19-21 • 50668 Köln

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Sitz Berlin  
Hauptgeschäftsstelle Köln

Europäische Kommission  
z.Hd. Herrn Direktor Agne Pantelouri  
GD Gesundheit und Verbraucherschutz  
Rue de la Loi 200

50668 Köln, den **28.02.2002**  
Theodor-Heuss-Ring 19-21  
Telefon (0221) 77 16-151  
Telefax (0221) 77 16-205  
e-mail: office@grur.de

B-1049 Brüssel

Ihr Zeichen:  
Unser Zeichen:  
(Bei der Antwort bitte angeben)

**Comments on the “*Grünbuch zum Verbraucherschutz in der Europäischen Union*”  
 (“Green Book on Consumer Protection in the European Union”) of the European  
Commission dated 2 October 2001 – KOM (2001)**

Dear Mr. Pantelouri,

*Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V.* (GRUR = German Association for the Protection of Intellectual Property Rights) is an association of professionals and academics working in the area of intellectual property and copyright law including the law against unfair competition and anti-trust law. According to its articles of association, the purpose of the association is to provide continuing legal education in the area of intellectual property and to support legislative bodies as well as ministerial agencies and institutions in issues of intellectual property and fair trading laws.

In its above-mentioned Green Book, the Commission deals in a general way with the future regulatory strategy for the area of consumer protection.

In view of the fact that the Green Book was not made public until 2 October 2001, it has not yet been possible for the *Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht* to conclusively review the considerations of the Green Book. The first discussion of numerous issues addressed in the Green Book took place at the meeting of the Committee on Trademark and Competition law on 7 December 2001.

Since the Commission has requested comments at very short notice, by the middle of January 2002, we will give you a first assessment based on the view which emerged at the above-mentioned meeting of the Committee.

Before we go into details, the following aspect should be especially emphasised: according to the wording of the Green Book, it does not seem quite clear whether only concerns of *consumer protection* or an “overall approach”, an “increase of harmonisation” of “*fair trading law*” (law against unfair competition) in its hitherto customary (i.e., considerably broader) meaning are to be pursued. Thus, for one (especially in No. 2.1), the goal of the highest possible consumer protection level is emphasised; for another, the general harmonisation of the fair trading law of the Member States is mentioned. The latter occurs, for example, in No. 2.2, which deals with the directives on misleading advertising and on comparative advertising, even if under the heading “consumer protection directives”, or in No. 2.3, which concerns the approach taken by most of the Member States to connect aspects of consumer protection with ensuring fair business practices and/or morals in competition.

It seems essential to adhere to a comprehensive approach in line with the legal tradition in the great majority of the Member States which has stood the test in legal practice. If one wished to dispense with a “protective purpose triad” (***Schutzzwecktrias***) (in terms of a simultaneous consideration of the interests of the consumer, the competitor, and the public), this would lead to a further fragmentation, which is justifiably criticised in a different context in the Green Book, for example when the disadvantages of the sector-specific individual arrangements for the solution of selective problem cases are described (No. 2.2, page 5). If hitherto “a regulation framework which is complicated and difficult to understand for the economy and also for the consumer” is supposed to have emerged - and one can certainly agree with that at least in some areas - we are convinced that this is not due to a “mutual interlocking of EU consumer protection regulations and the other named measures” (as in No. 2.2 on page 6), but rather to the hitherto often too specific approach and the difficulties of reaching a consensus at Community level. The goal to create an extensively harmonised fair trading law which simultaneously serves to protect the consumer, the competitor, and the public should not under any circumstances be abandoned or made more difficult to reach by further fragmentation. The assessment given by *Schricker/Henning-Bodewig*, commissioned by the Federal Ministry of Justice, on

“Elements of Harmonisation of the Laws on Fair Trading in the European Union” confirmed that this goal is not unrealistic.

A clear separation between pursuing consumers’ interests and those of the competitors and the public would also threaten to erode the directives concerning misleading advertising and concerning comparative advertising, since these directives clearly assume the reasonability of a combined protection approach. Furthermore, the proposal contained in the Green Book would otherwise seem to be contrary to the system of including the Directive concerning misleading advertising in the (consumer) directive being discussed.

Only on that condition - continuing to pursue the route of the „protective purpose triad“ which was taken by the Directives concerning misleading and comparative advertising - we consider (subject to the following comments) material features of the concept introduced in the Green Book partially deserving, partially worth considering.

The following statements refer to some of the questions to which the Commission, in the first introductory section of the Green Book, requested comments:

**I. "Do you agree that there is a need for a reform of consumer protection laws in the Internal Market?"**

1. The wording of the question as well as the corresponding statements hereto of the Commission in No. 2 of the Green Book (but also in the following sections) indicate that the Commission itself assumes, for a number of reasons, that there is a considerable need of regulatory reform in the area of consumer protection.

A general answer to this question - especially in a general „yes“ or „no“ form as suggested by the way the question is worded - by our association is impossible because although different legal areas of consumer protection and the laws on fair trading, which *inter alia* form a significant object of the efforts of our association, do indeed show points of contact, it is generally known that they are by no means identical. For one thing, the consumer protection regulations in existence today go far beyond the fair trading laws and concern, in particular, also issues of the initiation and performance of contracts. For another, the laws on fair trading serve - as mentioned above - (also) according to conventional German understanding, not merely consumer protection but also other significant

goals, namely, the protection of competitors against unfair practices in competition as well as the interests of the general public.

2. Against this background, it can, however, be affirmed that it was always a long-term goal of our association to reach a certain Community-wide harmonisation also in the area of fair trading law, as a contribution to the realisation of the Internal Market. Thus, to the extent certain elements of a "reform of consumer protection" should be composed of an active continuation of the efforts for a further harmonisation of fair trading law - also in the form of an increased harmonisation of fundamental issues - our association is, in principle, in favour of it.

## **II. "Should a reform be effected on the basis of the existing specific approach or the combined approach outlined in the following?"**

1. Here, the Commission poses the decisive question on the future regulatory basic approach: it describes the hitherto regulating technique, of harmonising single subject matters in meanwhile numerous directives rather selectively, whether they are product- or sector-related (e.g., certain consumer goods, consumer credit, etc.) or whether they are for the area of fair trading (namely, the Directive concerning misleading and now also concerning comparative advertising), with the term "existing specific approach". The Commission itself describes various weaknesses of this approach in the Green Book.
2. In fact, the so-called "specific" approach poses the risk of creating bit by bit a complex regulatory "patchwork" more and more lacking in clarity and inner coherence, which eventually might complicate the effective implementation in the national legal systems and moreover might not in every case further the intended harmonisation in terms of a reasonable harmonisation of basic legal conditions in the Internal Market.

Finally, the recent Commission proposal for a regulation on "sales promotion in the Internal Market" seems - regardless of its weaknesses in terms of content - to be a negative example of this already because of its selective and almost random selection and regulation of certain single forms of "commercial communication" or types of "sales promotion campaigns". We called attention to this in our comments on the draft directive.

Especially for the area of fair trading, the "specific approach" proves more and more to be a disadvantage, since individual aspects issues which can objectively be assigned to this area of law form the subject matter, in fragmentary form, of directives which primarily concern other issues. As an example, the less fortunate regulation of the "country of origin principle" in the E-Commerce Directive should be pointed out, which apparently claims applicability also for certain types of advertising in electronic business, whereas traditional rules on conflict remain applicable outside the online area.

3. Against this background, it seems by all means conceivable that pursuing a "combined approach" in terms of a frame directive aiming at harmonisation which is more comprehensive and above all co-ordinated in its individual regulations and coherent could by all means offer the chance of a better, more appropriate and clearer overall regulation of fair trading laws than a continuation of the "specific approach" in the same manner as previously, which displays to a continually decreasing degree a regulatory overall concept for the area of fair trading (including its consumer protection aspects).

In doing so, the difficulties to be expected in reaching a consensus for such an "overall solution", which will result from the different legal traditions of the Member States in this area, should not be underestimated. On the other hand, comparative research shows that many Member States have a mutual basis of similar values and regulations in this area; the steps towards harmonisation taken in the past (e.g., in the areas of misleading and comparative advertising) have effected a closer convergence. Thus, the goal of an "overall solution"- as emphasised earlier - does not seem to be unreachable, the more so as the rulings of the European Court of Justice in recent years have caused an increased convergence of the Member States in basic issues of fair trading laws - in Germany, for example, with the consequence that fair trading laws have been liberalised step-by-step by the legislature over the past years and that the concept of the „average consumer“ has been approximated in recent court rulings to the requirements of the European Court of Justice.

- III. **"What would the key elements of a general clause, the common examination, and the core principles of a regulation of business practices be?"**

**"What would be better: a frame directive with a general clause based on the principle of fair trading practices or a frame directive which merely presumes misleading and deceptive practices? Which approach would more likely, to be realisable? With which approach would it be more possible to pursue the issue of fragmentation in the Internal Market?"**

These questions touch the core of the subject. We offer the following deliberations on this:

1. A frame directive including only misleading or deceptive practices would hardly suffice for the described goal of a more comprehensive and coherent harmonisation of fair trading laws in the Internal Market. Material areas of fair trading law - e.g., most of the categories regulated by §1 UWG (Act Against Unfair Competition) - would not be included in the harmonisation.
- 2.a) An overall solution in terms of a comprehensive frame directive would seem hardly conceivable without a general clause. As recently established in the opinion delivered by *Schricker/Henning-Bodewig*, such a general clause conforms to the legal traditions of the majority of the present Member States, despite all the differences in details. For arguments on its necessity, reference can be made to the assessment by *Schricker/Henning-Bodewig*.

As far as wording and content of such a general clause are concerned, it would first be desirable that they reflect the above-mentioned threefold cause of protection or in any case that its wording should not be an obstacle to a commensurate interpretation. Details of the wording would require an intensified examination and discussion. From the German point of view, the deliberations and proposals in the *Schricker/Henning-Bodewig* opinion (e.g., in Section A III.1.) contain valuable considerations and should therefore be included in the Community-wide discussion to be expected as a part of the German contribution.

- b) A number of concrete examples could then be combined with the general clause. A regulation standard which has been in existence for a while is, as is generally known, Article 10<sup>bis</sup> PVÜ, whereas it will probably be necessary for the desired harmonisation to include a considerably more comprehensive catalogue of single facts in such a frame directive. The

assessment of *Schricker/Henning-Bodewig* also contains detailed deliberations on this point, which at least offers valuable starting points.

3. A comprehensive and coherent harmonisation would probably require that the regulation matters which are already the object of matters of secondary EU law - in particular, the regulation of misleading and comparative advertising - be included in the frame directive.
4. Up to now, a central application criterion of all the provisions of German fair trading law was the existence of a "competitive relationship" or "acting for the purpose of competition". A possible comprehensive harmonisation could, due to the familiar problems that this feature entailed in the past, offer an opportunity to develop a more modern and appropriate wording of this criterion which might be more to the purpose of sales promotion in business.
5. Furthermore, it would seem more than self-evident to integrate the "sales promotion campaigns", which are to be the object of the planned regulation concerning sales promotion in the Internal Market, in the frame directive. Insofar it would rather clearly contradict the purpose as expressed in the Green Book in terms of the "combined approach" to continue the "specific approach" by means of such a regulation, which - regardless of considerable terminological and technical deficiencies - would rather contribute to a further fragmentation of the efforts to regulate fair trading laws on the Community level, the more so as here, unlike previous EU secondary law matters - and unlike the planned harmonisation directive - the legal form of a directly applicable regulations (thus even more difficult to integrate into the legal systems of the individual Member States) is supposed to be chosen.
6. As already expressed in the term "frame directive", it would not be necessary that it contain all provisions with a fair trade character. In fact, it could be combined with individual directives on special issues (which is also expressed in the Commission's wording "combined approach"). In this connection, a number of areas should be considered in which individual provisions already exist today (primarily in the form of directives), for example, for the composition and labeling of certain consumer goods (e.g., food), commercial communication in television, and declaration of geographical place of origin and price. With regard to

continuing sectoral regulations, the frame directive would offer the chance of a uniform terminology and a coherent regulation system.

7. As already explained, the laws on fair trading do not merely pursue the purposes of consumer protection. For this reason, it would hardly seem to the purpose to restrict the area of applicability of a frame directive to relationships with the end consumer. Rather, in addition to the "B2C area" (in the terminology of the Commission), the "B2B area" in terms of a general applicability of fair trading laws also between the trade levels would be included.
8. However, it would seem less to the purpose to include in such a frame directive sector-specific provisions as well as standards with an exclusively consumer-protective character (namely, with respect to the initiation and performance of contracts, certain contractual clauses, product liability issues, etc.).
9. Finally, a frame directive could also offer the opportunity to establish an appropriate separation and co-ordination of harmonised fair trading laws with respect to certain other areas of law - namely, antitrust and trademark cases.

**IV. "Would it be to the purpose to provide for a basis for self-regulation in a frame directive? If so, what would be the key elements for the individual options and what would be the criteria for such an inclusion in a frame directive?"**

1. Whereas techniques of self-regulation or voluntary self-control have greater importance in some Member States, such systems have hitherto been hardly significant in Germany. It would therefore correspond more to our legal traditions and our experience with fair trading laws to regulate everything essential - in particular, the basic issues of fair trading laws - in a legally binding form. This would, however, not necessary exclude providing for supplementary possibilities of self-regulation in ancillary areas, e.g., to regulate certain sector-specific issues.

Admittedly, a thorough examination will be necessary to ascertain whether the far-reaching legally binding effects of corresponding codes of conduct envisaged by the Commission (for example, with direct claims of consumers and by creation of state supervisory authorities) are really appropriate. It would seem preferable to settle disputes with regard to such codes of conduct among the in-

involved or concerned companies before proper courts, before arbitration courts, or by other alternative methods of dispute-settlement.

2. Altogether, much speaks in favour of less rather than more statutory requirements or frame regulations for such "voluntary" self-regulation if it is indeed supposed to be its goal to act as a liberty-protecting element of economical autonomy.
3. Finally, such a self-regulation would have to take place on the European level, Community-wide, in order to attain the harmonisation desired for the Internal Market. More detailed assessments would be necessary to determine whether sufficient similarities for this already exist at all in certain areas.

**V. "Would it be useful to develop non-binding practical guidelines? Should this type of orientation be done preferably in the form of recommendations of the Commission or with the aid of a list of permissible or impermissible procedures in the appendix of the directive to serve as a basis?"**

**"Should a stakeholder participation be provided for for the formulation of non-binding statutory guidelines?"**

1. Should the above-discussed "combined approach" with a comprehensive frame directive and a harmonised general clause be realised, the rulings of the European Court of Justice would have even more weight than hitherto. In particular, it would be the responsibility of the European Court of Justice to guarantee the uniformity of court rulings in the interpretation and development specific categories of case studies within the framework of the general clause. A number of approaches can already be found in the decisions of the European Court of Justice on fair trading issues on the basis of provisions of the free movement of goods or relevant secondary rights provisions.
2. Against this background, the development of non-binding practical guidelines in the case of a realisation of the combined approach would seem reasonable, especially for the initial period after the introduction of a frame directive (and its implementation in the Member States), in order to provide the authorities and courts with a basis for an appropriate application of the provisions and to encourage, from the outset, their uniform execution in the Internal Market, especially in issues for which there are as yet no specifications or guidelines through rulings of the European Court of Justice. Such non-binding guidelines should be developed in consensus. Interested groups and, in particular, also the bodies of experts on fair trading laws in the various Member States should be included in the discussion. If practice in the various Member States has already been researched by scholars - such as, for example, *Ulmer* in the past and now in the legal opinion of *Schricker/Henning-Bodewig* - this should be taken into appropriate consideration.

**VI. "Will a legal framework for the improvement of the co-operation between the authorities responsible for the enforcement of consumer protection be necessary?"**

1. The liberal approach of leaving the enforcement of fair trading provisions primarily up to the market participants by means of civil law and of placing less emphasis on supervision and enforcement by authorities has proven itself in Germany for the area of fair trading laws.

In addition, the provisions of criminal law regarding violations of fair trading laws still seem to differ considerably in the individual Member States.

All this speaks in favour of placing the main focus of the efforts on the – probably not simple - more comprehensive harmonisation of the material fair trading laws.

2. As already mentioned, the success of a possibly more comprehensive harmonisation of fair trading laws as a contribution to the realisation of the Internal Market depends also on the harmonised provisions being comparably understood and interpreted in the various Member States. To attain this goal, primarily the development of common non-binding guidelines as well as an exchange of information among the Member States on their experience with the new regulation would thus seem recommendable.

Dr. Kunz-Hallstein  
President

Dr. Loschelder  
Secretary General