

Deutsche Vereinigung
für gewerblichen Rechtsschutz
und Urheberrecht e.V.

Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht
Hohenstaufenring 30-32 • 50674 Köln

Mrs. Carina Tornblom
Head of Unit B 2 Unfair
Business practices
DG Health and Consumer Protection
European Commission
Rue de la Loi 200 / Wetstraat 200

B-1049 Bruxelles c

Sitz Berlin
Hauptgeschäftsstelle Köln

50674 Köln, **19th December, 2003**
Hohenstaufenring 30-32
Telefon (0221) 650 65-151
Telefax (0221) 650 65-205
e-mail: office@grur.de
www.grur.de

Our ref.:
(Bei der Antwort bitte angeben)

Statement on the proposal by the European Commission for a Directive concerning unfair business-to-consumer commercial practices in the Internal Market, COM (2003) 356 final.

Dear Mrs Tornblom,

The German Association for Intellectual Property and Copyright Law (GRUR) is an independent association of scientists and practitioners who work in the field of intellectual property, copyright and competition law. According to its statutes, the association's objectives are the scientific development as well as education in the area of intellectual property rights and the support of the legislative organs as well as the competent ministries and institutions on questions of intellectual property and the law of fair trading.

The following statement is based on the results of a discussion of the Committee for Competition and Trademark Law which was held in Hamburg on 29th September 2003.

I. Objective and structure of the draft Directive. Limitation to consumer interests

In the Green Paper on consumer protection KOM (2001) 531, diverging national legal provisions on commercial practices in the B2C area are rightly identified and described as an impediment to a fully-operating Internal Market for the consumers. The conclusion of the Green Paper that further harmonisation is necessary in order to overcome this abuse, has been welcomed. Our association also underlined this at the time in its statement on the green paper.

1. The Consumer Protection Directorate-General has presented a draft of a **Directive on unfair commercial practices** between companies and consumers which must be understood as a follow-up measure to the green paper. In conceptual terms, it picks up what is described in the green paper as a composite approach (3.4 of the green paper). A comprehensive technology-independent EU framework directive is proposed on the harmonisation of the individual national unfair competition regulations for commercial practices in the B2C area.

We approve the attempt of the Commission to initiate harmonisation of the unfair competition law with the help of a directive. It also appears correct to us that this directive is formulated more generally, i.e. does not merely regulate sectoral or exclusive technology-related individual questions.

Also to be welcomed is the proposed regulating mechanism, namely to envisage a general clause in Art 5 Par. 2, which serves as a major premise and subsidiary clause of an enactment. To facilitate the application of the law, individual unfair commercial practices are firmly addressed in provisions of their own and prohibited, e.g. in Articles 6 and 7: misleading actions, in article 8 and 9: aggressive commercial practices such as harassment, coercion and undue influence. In particular, the general clause will ensure that the evaluating standards in the unfair competition law are harmonised in the individual Member States.

2. Our association has already expressed the opinion in various previous statements that it would be desirable and also legally possible, making use of the instrument of a directive, to create a uniform European unfair competition law (the standardisation of the trade mark law through RiLi 89/104/EC, for instance, is an encouraging example.)

The unfair competition law not only serves the purpose of consumer protection, but also the protection of the competitor and the public good.

The directive understandably confines its attention to the relationship between companies and consumers (B2C) and merely concerns itself with those facts which touch the economic interests of the consumers. This approach does not go far enough.

Comparative legal investigations on the present status of the law on unfair competition in the Member States of the EU (cf. in particular, *Schricker/Henning-Bodewig*, WRP 2001, 1367 pp.) have shown that the competition law is regarded as an independent area of the law in many Member States. In the majority of Member States, the competition law exclusively protects neither consumer interests (above all, the interest not through unfair practices to be persuaded to make a purchasing decision which was not really intended), nor exclusively the interests of the competitor (i.e. his interest not to lose customers or own marketing opportunities through unfair methods of the competitor). On the contrary, there is at least agreement that competition law pursues several purposes at the same time, namely protection of the competitor, protection of the consumer and promotion of the general interest.

This understanding is also expressed in § 1 of the government bill for a future German law against unfair competition which should be worded as follows:

"This law serves the protection of the competitors, the consumers as well as the other market participants against unfair competition. It simultaneously protects the interest of the general public in an undistorted competition."

In our opinion this approach is in harmony with the previous Community law. Thus, the Directives 84/450/EEC and 97/55 EEC are also based on these three groups to be provided with protection (cf. there Art. 1).

3. The association therefore regards it as a backward step compared to the Community law already achieved, when the directive on unfair commercial practices now confines itself exclusively to the B2C area. It can be forecast that this approach would not accomplish the goal striven for by the green paper of a simplification of the law, but would even provide a boost for further fragmentation. This applies similarly to the material law and to the questions of the enforcement of the law.

a) It is a well-known fact that many of the incriminated practices in the directive on unfair commercial practices are two-sided, i.e. they have both a misleading effect on the consumer and one which causes damage to the competitor. Should a supplier, for example, mislead with respect to the commercial origin ("Parma Ham" or "Dresdner Stollen"), then this can simultaneously mislead the consumer who makes his purchasing decision in confidence about the correctness of the information, and cause damage to the suppliers of the original products which actually come from the Parma region or from Dresden. Both "victims" of the unfair behaviour should have structurally identical legal instruments at their disposal.

It is to be feared that a directive which confines itself to the B2C area and the claims the country of origin principle (more about this later), could lead to an alarming splitting of the previously uniform regulations: for the same facts of the matter - depending upon who was affected and therefore entitled to the claim as the proper party - there would be differing legal regulations. Possibly

this would even lead to the result that one and the same set of facts in the case of border-crossing conflicts, on the one hand, must be judged under the law of the country of origin (if the consumer takes action) and, on the other, would have to be judged under the law of the marketplace (if the competitor complains).

- b) A harmonised unfair competition law must provide adequate implementation structures. In most Member States it has been shown that, in particular, the entitlement to the claim of the competitors in many sections of the unfair competition law simultaneously serves the purpose of asserting consumer interests. Due to their proximity to the market, their financial power and their economic own interest as damaged competitors, the competitors are particularly effective when it is a matter of terminating unfair behaviour. This assessment is also shared by the consumer protection associations. We would see it as a long-term unfavourable "congenital defect" of the harmonisation of unfair competition law in Europe, if the directive were to confine itself to the B2C area and ignore the effects on B2B of the self-same unfair behaviour.

I. The Internal Market clause of Art. 4, country of origin v. marketplace

According to Art 4 Par. 1 of the proposal, traders must merely observe the legal provisions of that Member State in which they are themselves established. The fairness of the commercial practices of a company that has its corporate headquarters in country A, but advertises to customers in country B, should therefore, according to this concept, only be judged on the basis of the law of the native country or country of origin.

- 1. This regulation already seems counterproductive under the aspects of consumer protection. In the green paper, the responsible Directorate-General had still

supported the **market place principle** which said that the trader must observe the law of those states in which the commercial practices being considered are applied.

The **country of origin principle** propagated in the directive tends to leads, in contrast, to a less precise consideration of the consumers' interests and to a lowering of the level of protection. Whether a commercial practice is unfair and how it is interpreted in the respectively relevant market can, in our opinion, be best judged "on the spot". The market place principle can take account on a far greater scale of the knowledge, habits and preferences of the local marketing and consumer circles.

The courts which, at should examine the impairment of the consumer protection interests, in particular, and the observation of the professional to exercise care in general at the respective market place, would be faced with the problem, given the introduction of the country of origin principle, of applying the law of another member state. The prevention of anti-competitive behaviour is usually an urgent matter. The interim injunction is, therefore, often the most suitable instrument in this area of the law. Injunction proceedings would be unbearably slowed down and made more expensive if in each case the law of another member state must be established.

2. Even if one assumes that ideally the directive one day will lead to a complete harmonisation of the unfair competition law in the Member States, the enforcement of the law would according to the market place principle would be far more effective and more flexible because the courts in the country of the commission of an offence or market place could apply the much more accessible local law.

We do not fail to appreciate that the country of origin principle is proposed in the draft in order to encourage traders to also implement sales promoting measures in other Member States, which they currently possibly avoid due to the uncertainty of the unfair competition law in these other states. These suppliers may indeed be

more inclined to risk the step over the border if they can rely on the fact that they will only be measured by the known standards of their own law.

However, the complexity of the unfair competition law would permanently decrease following a full harmonisation, so that, at the latest then, the disadvantages of the country of origin principle would clearly outweigh its advantages. We urgently recommend adherence to the market place principle. Only this really serves the intended consumer protection. The consumer will, incidentally, even then only turn to suppliers from other Member States if he can depend on the fact that he can defend himself against possible unfair practices of such suppliers with the help of the unfair competition regulations which are valid in his own Member State.

Finally it must be pointed out that the international civil law classifies competition law as tortious law. The draft of an ordinance on international tortious law which was presented in June 2003 (Rome II-VO) provides for a special connection for the international competition law in such a way, that the market place shall be valid (Art. 6:

“In the case of a non-contractual obligation resulting from unfair competition or unfair practices the law of that State shall be applied in which the unfair competition or the unfair practices impair or have impaired the competitive relations or the collective consumer interests.”).

We regard this approach as worthy of preference and correct. Should the current concept of the proposed directive be retained, the consequence would be that under certain circumstances

due to the juxtaposition of the country of origin and the market place principles two different national systems of laws (albeit subjected to harmonisation) as well as

due to the not quite congruent approaches in the directive on unfair

commercial practices, on the one hand, and in the misleading advertising directive, on the other, two different levels of protection

must be applied by the courts involved in the enforcement of the law.

III. Individual regulations

1. Art. 2: Definitions

a) Article 2 e): “Commercial practice” every connected with the promotion ...

It is questionable whether or not actions which only indirectly serve the purpose of sales promotion, prima facie, however, pursue another purpose for example, the self-portrayal of the company in the media, can also damage the consumer (namely in the area of misleading). The word “directly” should be dropped.

b) Article 2 lit. j): Professional diligence

This term awakens associations with measures of blame (cf. § 276, Par. 2 BGB). "Professional diligence" plays a central role in the general clause (§ 5, Par. 2). According to it, “what contradicts the professional obligation to exercise due care” is unfair. By definition, this should be determined according to the usual commercial practice in the field of activity of the trader. Questions of blame, in other words, rightly do not play a role. Whether it makes sense, however, to invest what is usual in the sector with normative quality seems doubtful to us. This method of regulation complicates the assumption of unfair competition, if unfair commercial practices are on the agenda in a trade and therefore "usual". New commercial practices can thus hardly be judged, as there is not yet any usual trade or sector practice.

The approved definition of Art 10 Par. 2 PVÜ relates to “honest practices in commerce or trade”, in order to produce such an objectified standard. It would be desirable that it is made clear in suitable form, whether the term "professional duty to exercise care" in its core represents this concept.

For the reasons already mentioned, the second bullet point of Art. 5 Par. 2 is too tight. The concept of unfair competition should also here take into account the approved three areas of protection. Unfair competitive practices can have an effect to the disadvantage of the consumer, the competitor or the other market participants. The exclusive point of contact with the relevant effect on the economic behaviour of the average consumer is inappropriate.

c) Art. 2 lit. k): Invitation to purchase

Should a commercial communication of a trader be addressed to an indefinite large number of potential customers, under the terms of civil law, as a rule, this cannot be seen as representing a contractual binding offer, but rather an “invitatio ad offerendum”. This Invitatio is now first of all defined in terms of competition law. Art. 2 is lit. K is quite wide. Should every advertisement of the trade which names describes or shows the products and advertises a price also represent an “invitation for the submission of an offer”, because the courted consumer with the advertisement in his hand, can visit a store of the advertiser in order to purchase the product advertised there? The reply to this question has serious consequences for the trader because, for example, per se prohibitions (Annex 1 – misleading commercial practices Nos. 3 and 4) are linked with this and the crossing of the threshold from the general commercial communication to the Invitatio triggers off a considerable intensification of the burden of information for the advertiser (cf. e.g. Art. 7, Par. 3).

2. Art. 5: Prohibition of unfair commercial practices

- a) The general clause of Art. 5 Par. 2, is illustrated by examples described in detail in Par. 3. Via Art. 5 Par. 3 lit. a), one reaches Art. 6 and 7 with listed descriptions of groups of cases of misleading commercial practices, via Art. 5 Par. 3 lit. b) to Art. 8 or 9, where inadmissible aggressive commercial practices are described. This method of regulation is to be welcomed on principle because, on the one hand, it simplifies the application of the law in standard cases, on the other, with the general clause, however, a subsidiary clause of an enactment is offered which helps to get a grip on unusual or future new patterns of behaviour.
- b) Art 5 Par. 4, refers finally to an annex 1 which includes a (black) list of commercial practices which under all circumstances should be regarded as unfair. Here, in other words, unconditional prohibitions are expressed which theoretically do not leave any possibility of valuation for the applicants of the law.

The list of annex 1, however, can certainly be improved upon, which will be shown on the basis of several examples.

aa) Strict prohibitions: “misleading commercial practices.”

- (1) Here item (3) stands out. In our opinion, this clause contains so many undefined legal conceptions that these facts of the matter are not suitable for a quite strict prohibition (“adequate reason for the assumption”, “this or an equivalent product”, “reasonable with respect to the product and the offer price”). The cases of the loss leaders or the insufficient stocking regulated here should, therefore, only appear as examples of rules in Art. 6.
- (2) In group (5), the trader is reproached for having "falsely" stated to consumers that the product offered will only be available for a very limited period of time. Should this per se prohibition also apply if the trader has made this

statement in good faith that the goods would sell out quickly, but this has not then happened?

- (3) In accordance with (12) it is inadmissible per se to make use of the term “liquidation sale” if the trader is not in fact in the process of ceasing to trade. In Germany, the term “liquidation sale” is also commonly used if extraordinary cases of damage, such as fire, water, storm or even an approved reconstruction compel the trade, at all events for the phase of construction or the restoration, to sell off the existing merchandise. All these cases would be forbidden per se in future because a closure of the business was obviously not intended.

bb) Prohibition of “aggressive commercial practices”

The list of “aggressive commercial practices” contained in annex 1 appears to us to be too narrowly formulated.

For example, item (3) could, under certain circumstances, be interpreted e contrario to mean that what are usually unwanted approaches via telephone, fax and e-mail should not be regarded as unfair, because the additional operative fact “persistent” is not fulfilled. Here there is a contradictory valuation to Directive 2002/58/EEC (Data Protection Directive for Electronic Communication). As is well known, this follows the approach of previous consent (opt.-in, cf. Art. 13 of the Directive: Unsolicited news). The wording of the prohibition of aggressive commercial practices falls well behind this level of protection on this point.

In general, the individual facts of the matter of annex 1 “misleading commercial practices” should - if necessary, on the basis of comparative law studies - be thoroughly revised once again.

3. Art. 6: Misleading actions; reversing the burden of proof

- a) Based on the ground for consideration 69 in combination with Art. 6 Par 1 lit. f), it follows that it is intended to impose the burden of proof on the trader for the correctness of his product-related claims). Apart from the fact that the term “claim” in Art. 6 Par. 1 lit f) goes even further than “allegation of fact”, this quite general reversal of the burden of proof is dubious.

The misleading advertising directive (there Art. 6) only provides for a corresponding reversal of the burden of proof in individual cases, not as a rule. Art. 6 Par. 1 lit. f) in the version now presented would mean that an advertisement with correct allegations of fact about a product must always be prohibited as deceptive if the trader could not prove the correctness of his statements). In our opinion, it should be made sure, on the other hand, that – as within the scope of the misleading advertising Directive and as already planned in German law – a more flexible handling of the burden of presentation and proof remains possible.

- b) The difference between Art. 6 Par. 1, and Art. 6 Par. 2, remains unclear.

Art. 6 Par. 1 requires at least that a business practice most probably could cause the average consumer to make a business decision which he otherwise would not have taken, § 6 Par. 2 only goes as far as to say that the business practice “in the actual case” is suitable to cause the average consumer to make a business decision which he otherwise would not have made. Does this say anything different to Art. 6 Par. 1? The individual cases then mentioned in Par. 2 are others than in Par. 1. We get the impression that the case groups of Par 2 lit. a) to c) could and should also be ordered under a major premise standardised with paragraph 1.

4. Art. 7: Misleading omission

a) Art. 7 Par. 1:

Art. 7 Par. 1 is formulated like a general clause. It is regarded as deceptive business practice if the trader withholds essential information from the consumer which he would have needed. This open fact of the matter is of little practical use to the advertising business and will lead to uncertainty, possibly to a flood of information ultimately only confusing the consumer.

If the advertising is so concrete that it fulfils the definition “request for the submission of an offer”, then Art. 7 Par. 3 automatically requires the revelation of all essential information that is listed in detail in lit. a) to d). Via Art. 7 Par. 4 and 5, all everyone information requirements defined in Community law should be valid as essential. This appears to mean that even the smallest violation of an information obligation leads per se to the anti-competitive nature of the corresponding advertising measure. We do not regard this as appropriate. Or should also in these cases, an examination of relevance in the sense of Art. 7 Par. 1, be conducted? It would also be desirable that clarification be provided that information in the individual case is not being “withheld”, if although it was not conveyed in the advertising measure, the consumer is provided with a suitable way to obtain this information (Internet, toll-free phone number etc.).

b) Art. 7 Par. 2:

Art. 7 Par. 2, treats unclear, incomprehensible and ambiguous information as misleading through omission. In fact in this respect it is probably a case of active deception, which should rather be covered by Art. 6.

If a commercial offer disguises itself as private action or as not commercial charity, then one can understand this as a failure to inform about the commercial purpose of the action. Actually, however, it would seem more reasonable to regard this practice as an active deception about the company of the advertiser.

- c) In Art. 7 Par. 3 it is clarified, that commercial practices prior to a commercial transaction can only then be unfair on grounds of withholding essential information, if the advertising was already so concrete that it fulfilled the definition of Art. 2 lit. k "Request for the submission of an offer". By definition, this fact of the matter only exists if in the commercial communication major features of the product and the price of the product are already indicated. Anyone who advertises essential qualities of the product, is obliged, in other words, to name the most important features of the product. It almost appears that a definitive vicious circle has been reached here.

Must the information about the most important features of the product be revealed in the context of the advertising without being requested (push) or does it suffice if the information is easily obtainable for the customer (pull, e.g. via reference to an Internet presentation)?

1. Art. 8 and 9: Aggressive commercial practices

- a) Article. 8 defines like a general clause, when a business practice is to be seen as aggressive, then namely, if the consumer's freedom to make a decision or to act is impaired through the three alternatively mentioned means, through harassment, coercion or undue influence. Art. 9 now mentions aspects which the applicant of the law should take into consideration when assessing the commercial practice. It would make sense to merge Art. 8 and 9 into a single Article. In a first paragraph, the general

clause should be contained, in a second paragraph, the aspects of Art. 9 could be presented. Art.9 lit. must at all events be examined and evaluated, Art. 9 b) to e) meanwhile are descriptions of special situations which should rather be formulated as separate examples of the existence of an aggressive commercial practice.

- b) Finally, the following should be considered: the proposal of a regulation on sales promotion in the Internal Market (COM (2001), 546) aims at the liberalisation of sales promotion tools, such as discounts, premiums and free gifts. In the application of the law, it could lead to incongruencies en if these particular sales promotion measures were to be seen as inadmissible influencing measures in the sense of Art. 8 of the draft Directive. Although Art. 3 Par. 5 provides for a priority of special legal provisions. Should the ordinance on sales promotion attain legal force, it would make sense, however, to expressly mention this legal provision, because the examples quoted in consideration 71 as examples of permissible gifts and premiums could otherwise tend to be understood to mean that the Directive on unfair commercial practices permitted much less that the ordinance on sales promotion.

6. Article 11: Enforcement

Here it would be desirable that the competitors' right to sue is expressly mentioned as well. Also competition associations (organisations for the promotion of commercial interests) should, in addition to consumer associations or qualified bodies in the sense of Art. 4 of the Directive 98/27/EEC should have a right to take action.

Overall, we are of the opinion that the proposed Directive must be positively judged in that it strives for harmonisation of the unfair competition law and wants to counteract a further particularisation of the relevant regulations. However, in its concrete formulation it will lead in its turn - particularly due to the interaction of two elements, namely the restriction to the

relationship between enterprises companies and consumers and through the "Internal Market clause" (in other words, the country of origin principle) - to an unnecessary fragmentation which in many cases, will tend to hinder the legal enforcement by companies and associations as well as the consideration of the consumer's interests rather make it easier. A harmonisation of the project with relevant other norms and projects of the Community law appears essential to us. Irrespective of this there is potential for improvement on a whole series of individual questions.

Dr. Kunz-Hallstein
President

Dr. Loschelder
Secretary-General