

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**



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**Internal Market and
Consumer Protection**



**State of play of the implementation of
the provisions on advertising in the
unfair commercial practices legislation**

IMCO



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation

This document was requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO).

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Original: [EN]
Translation: [DE, FR]

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Manuscript completed in July 2010.
Brussels, © European Parliament, 2010.

This document is available on the Internet at:
<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>

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LIST OF ABBREVIATIONS

- BGBI.** Federal Law Gazette
- cf.** compare
- CMLR** Common Market Law Review
- DCFR** Draft Common Frame of Reference
- EBLR** European Business Law Review
- ed(s).** Editor(s)
- e.g.** for example
- CJEU** Court of Justice of the European Union
- et sequ.** and following (pages)
- E.L. Rev.** European Law Review
- GRUR Int** *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*
- MLR** Modern Law Review
- No.** number
- OFT** Office of Fair Trading
- p(p).** page(s)
- SMEs** Small and medium-sized enterprises
- UCPD** Unfair Commercial Practices Directive
- WRP** *Wettbewerb in Recht und Praxis*

1. THE STATE OF PLAY OF THE IMPLEMENTATION OF THE PROVISIONS ON ADVERTISING IN THE UNFAIR COMMERCIAL PRACTICES LEGISLATION (UCPD)

KEY FINDINGS

- All Member States have implemented the Unfair Commercial Practices Directive (UCPD), but not all of the new provisions in the implementation laws have been tested yet. In some Member States court decisions are still rather limited and it is too early for a final evaluation of the UCPD.
- The technical choices made differ dramatically. The implementation of the UCPD can be found in civil codes, acts against unfair competition, consumer law codes and specific regulations copying out the UCPD. In addition, not only the place where the UCPD has been implemented, but also how it has been implemented (e.g. implementation of definitions and of Annex I), differs. This makes it difficult for consumers, enforcement agencies and businesses alike to find the relevant piece of legislation.

1.1. Introduction

The Unfair Commercial Practices Directive (UCPD)¹ was adopted in May 2005 and had to be implemented by Member States into national law by 12 June 2007. It was applicable by 12 December 2007. However, some Member States – e.g. Finland, Germany and the UK – have been late in implementing the UCPD. At the time of the preparation of this paper all Member States have implemented the Directive.

1.1.1. Scope of the Directive

The objective of the UCPD is to fully harmonise the law on unfair commercial practices harming consumer economic interests,² including misleading advertising, as the different national approaches³ to regulate that field of law cause uncertainty and create many barriers affecting businesses and consumers.⁴ The UCPD only concerns unfair commercial practices harming consumers' economic interests. Therefore, it does not address legal requirements for commercial practices related to taste and decency⁵ nor does it deal with commercial practices in business-to-business (B2B) relations. Thereby, it also "indirectly protects legitimate businesses from their competitors who do not play by the rules of this Directive and thus guarantees fair competition in fields coordinated by it."⁶ The UCPD provides for a full harmonisation.

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council.

² Article 2 lit. d UCPD defines business-to-consumer commercial practice as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers."

³ Cf. for the state of the law before the implementation of the UCPD a study coordinated by Schulze and Schulte-Nölke for the European Commission. The study is available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf.

⁴ Cf. Recital 4 of the UCPD.

⁵ Cf. Recital 7 of the UCPD.

⁶ Cf. Recital 8 of the UCPD.

Therefore Member States are bound by the rules set out by the UCPD and are no longer allowed to have stricter (meaning: more favorable for the consumer) rules.⁷ However, as already mentioned, the Directive has only a limited scope: Besides the already noted restrictions it is *inter alia* without prejudices to individual actions brought by those who have been harmed by an unfair commercial practice, to Community (now: Union) and national rules on contract law, on intellectual property rights, on the health and safety aspects of products, on conditions of establishment and authorization regimes – including those rules which, in conformity with Community law, relate to gambling activities – and to Community competition rules and the national provisions implementing them.⁸ In addition, under Article 3 Nr. 5 of the UCPD, Member States are allowed “to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective.”

1.1.2. Structure of the UCPD

The UCPD contains a “big” general clause, two “small” general clauses and a list of unfair (misleading and aggressive) commercial practices which are in all circumstances considered unfair.

Under the general clause (Article 5), unfair commercial practices are prohibited. According to Article 5 (2), “a commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.”

The two small general clauses prohibit misleading commercial practices (misleading actions and misleading omissions, Article 6 and 7) and aggressive commercial practices (Article 8 and 9). Therefore the general clause has the function of a safety net:⁹ It is applied only if the commercial practice under examination is neither unfair under Annex I of the UCPD nor under one of the two small general clauses.

1.1.3. Scope of the paper

This briefing paper provides a preliminary analysis of the implementation, application and enforcement of the UCPD with a special focus on misleading advertising. The paper in particular takes into account the state of the law in Germany, Austria and the United Kingdom and the information provided by German and UK enforcement agencies. In addition, information provided by enforcement agencies and/or self-regulatory bodies from Finland, the Netherlands, Italy, Ireland, Poland and Spain has been taken into account.

⁷ By contrast, the Directive on misleading advertising provided only for a minimum harmonisation; however, comparative advertising has been regulated in a final way cf. CJEU 8.4.2003, C-44/01 Pippig. Since the adoption of the UCPD, both Directives apply only to B2B relations and have been codified into Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

⁸ Cf. Recital 9 of the UCPD.

⁹ Cf. Micklitz, The General Clause on Unfair Practices, in Howells/Micklitz/Wilhelmsson (eds.), European Fair Trading Law. The Unfair Commercial Practices Directive, 2006, p. 83, p. 86.

1.2. Implementation approaches in the Member States

The technical choices Member States made in order to implement the UCPD differ dramatically:¹⁰ Some Member States have implemented the UCPD in existing codifications, e.g. in their acts against unfair competition (Germany¹¹, Austria¹², Denmark¹³, Spain¹⁴, Sweden¹⁵), in their consumer law codes (France¹⁶, Italy¹⁷, Bulgaria¹⁸, Czech Republic¹⁹, Malta²⁰), in their civil codes (the Netherlands²¹) or in special existing acts (Belgium²², which implemented the UCPD in the Act on Trade Practices and the Information and Protection of Consumers). Other Member States have implemented the UCPD by passing a regulation which basically copies out the UCPD (UK²³, Portugal²⁴, Romania²⁵, Hungary²⁶, Cyprus²⁷, Poland²⁸, Slovenia²⁹, Slovakia³⁰, Estonia³¹, Ireland³², Luxembourg³³, Latvia³⁴, Lithuania³⁵, Greece³⁶, and Finland³⁷).

¹⁰ All implementation laws – besides the Finnish one and the one from Lithuania – are accessible at <http://ec.europa.eu/consumers/rights/>. The Finnish implementation law can be accessed at <http://www.finlex.fi/fi/laki/alkup/2008/20080561>.

¹¹ Bekanntmachung der Neufassung des Gesetzes gegen den unlauteren Wettbewerb, BGBl. I 2008, p. 2949 ; cf. e.g. Köhler, Die Umsetzung der Richtlinie über unlautere Geschäftspraktiken in Deutschland, in Augenhöfer (ed.), Die Europäisierung des Kartell- und Lauterkeitsrechts, 2009, pp. 101-116.

¹² 79. Bundesgesetz, mit dem das Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG geändert wird, BGBl. I 2007/79, 13.11.2007; cf. Koppensteiner, Das UWG nach der Novelle 2007, in Augenhöfer (ed.), Die Europäisierung des Kartell- und Lauterkeitsrechts, 2009, pp. 85-100.

¹³ Notification regarding unfair marketing in consumer relations, BEK nr 1085, of 25 September 2007.

¹⁴ Ley 29/2009, de 30 de diciembre, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios.

¹⁵ Regeringen överlämnar denna proposition till riksdagen, Prop. 2007/08:115, of 6 March 2008.

¹⁶ Loi no. 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs and Loi no 2008-776 du 4 août 2008 sur la modernisation de l'économie (articles 83 et 84).

¹⁷ Decreto legislativo 2 Agosto 2007, n. 146; cf. de Cristofaro (ed.), Pratiche Commerciali scorrette e codice del consume, 2008.

¹⁸ Law amending the Consumer Protection Law of 8 September 2007.

¹⁹ Act No. 250/2007 Coll. of Laws, on Consumer Protection and on Change of Act of the Slovak National Council No. 372/1990 Coll., on Minor Offences, as amended.

²⁰ ACT No. II of 2008 to amend the Consumer Affairs Act and to make amendments to other laws of 29 January 2008.

²¹ Staatsblad 2008 397, Wet van 25 september 2008 tot aanpassing van de Boeken 3 en 6 van het Burgerlijk Wetboek en andere wetten aan de richtlijn betreffende oneerlijke handelspraktijken van ondernemingen jegens consumenten op de interne markt and Staatsblad 2008 398, Besluit van 6 oktober 2008 tot vaststelling van het tijdstip van inwerkingtreding van de wet van 25 september 2008 houdende aanpassing van de Boeken 3 en 6 van het Burgerlijk Wetboek en andere wetten aan de richtlijn betreffende oneerlijke handelspraktijken van ondernemingen jegens consumenten op de interne markt.

²² Loi relative aux pratiques du marché et à la protection du consommateur du 6 avril 2010 (initially the UCPD was implemented in June 2007 ; however, the law had to be amended after a decision by the CJEU, cf. below chapter 2).

²³ The Consumer Protection from Unfair Trading Regulations 2008, SI 2008 No. 1277 of 26 May 2008 and Trade Description - The Business Protection from Misleading Marketing Regulations 2008, SI 2008 No. 1276 of 26 May 2008.

²⁴ Ministério da Economia e da Inovação-Estabelece o regime aplicável às práticas comerciais desleais das empresas nas relações com os consumidores, ocorridas antes, durante ou após uma transacção comercial relativa a um bem ou serviço, transpondo para a ordem jurídica interna a Directiva n.º 2005/29/CE, do Parlamento Europeu e do Conselho, de 11 de Maio, relativa às práticas comerciais desleais das empresas nas relações com os.

²⁵ Act No. 250/2007 of 28 December 2007, Decreto-Lei no. 57/2008 de 26 de Março.

²⁶ 2008. évi XLVII. Törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról and 2008. évi XLVIII. törvény a gazdasági reklámtévékenység alapvető feltételeiről és egyes korlátairól.

²⁷ Law on the Control of Misleading and Comparative Advertising of 18 July 2007 and Law on the Unfair Commercial Practices from Businesses to Consumers of 18 July 2007.

²⁸ Law on Prevention of Unfair Market Practices of 23 September 2007.

²⁹ Law on the Protection of Consumers against Unfair Commercial Practices of 15 June 2007.

³⁰ Act No. 250/2007 Coll. of Laws, on Consumer Protection and on Change of Act of the Slovak National Council No. 372/1990 Coll., on Minor Offences, as amended of 9 May 2007.

³¹ Act amending Consumer Protection act and Law of Obligations Act of 11 October 2007.

³² The Consumer Protection Act 2007, No 19 of 2007. In spite of this name, it does not regulate consumer law in general but only copies out the UCPD.

³³ Loi du 29 avril 2009 relative aux pratiques commerciales déloyales, A - N° 88 / 30 avril.

³⁴ Negodigas komercprakses aizlieguma likums of 12 December 2007.

³⁵ Law No X-1409 of 21 December 2007.

The decision for one or the other technique seems to have been influenced by the history of the law governing unfair commercial practices. Member States like Germany or Austria which had acts against unfair competition law from as early on as 1909 and 1923 respectively, have transposed the UCPD in those acts. In Member States in which the law governing unfair commercial practices had not been codified before the UCPD, the UCPD was implemented by a regulation. However, some Member States which do have an act against unfair competition as well as a consumer code have still opted for an implementation by regulation. This decision seems also to be influenced by the idea that an implementation by a regulation just copying out the UCPD ensures the UCPD is implemented correctly and spares the legislature the work of systematically embodying the UCPD in national codes. It has to be noted that the implementation of the UCPD by a regulation without examination of whether existing laws are in harmony with the Directive does not necessarily ensure a correct transposition of the law. The UK legislature repealed or revised a large number of pieces of legislation in order to ensure a thorough implementation of the UCPD.³⁸

As noted above, the UCPD applies only to B2C commercial practices. Most Member States have chosen to implement the UCPD only with this narrow scope. This statement is true with regard to Member States which implemented the UCPD by regulation as well as for those which implemented the UCPD in the consumer law codes. However, England has implemented the UCPD in a regulation applying only to B2C relations,³⁹ but has passed a second regulation with a similar content, which applies to B2B relations.⁴⁰ In the Netherlands, the law transposing the UCPD applies only to B2C relations but the UCPD has also influenced the code of conduct issued by the Dutch advertising self-regulatory body which applies to B2B relations as well. In e.g. Germany and Austria the respective legislatures have opted to retain the “unified approach”⁴¹ of the national acts against unfair competition. Some of the new provisions, however, apply only to B2C situations (e.g. in Germany the transposition of Annex I of the UCPD applies only to commercial practices aimed at consumers).⁴² In Belgium, the UCPD has been implemented into the Act on Trade Practices and the Information and Protection of Consumers. Despite the broad scope of this act, some provisions – like before the implementation – apply only to B2B, some only to B2C relations. In France, the UCPD has been implemented into the consumer law code. However, the provisions within this code dealing with misleading advertising apply to B2B relations as well.⁴³

The different choices made by Member States make it difficult for businesses and consumers as well as enforcers in cross-border situations to access the relevant piece of legislation. In addition, most national laws implementing the UCPD are not available in English. As some Member States have different layers of law dealing with unfair commercial practices (act against unfair competition, consumer law codes, advertising codes, single statutes transposing the UCPD) it might also be difficult to find out about the interactions of these different provisions in national cases, especially since the personal scope of these provisions varies. In addition, Annex I of the UCPD has also been implemented in different

³⁶ Amendment and completion of Law 2251/1994 “Protection of Consumers,” as applies – Incorporation of directive 2005/29 of the European Parliament and Council. The implementation law also regulates issues of health and safety, cf. Henning-Bodewig, *Die Bekämpfung unlauteren Wettbewerbs in den EU-Mitgliedstaaten: eine Bestandsaufnahme*, GRUR Int 2010, p. 273, p. 278.

³⁷ 561/2008 Annettu Helsingissä 29 päivänä elokuuta 2008.

³⁸ Cf. Collins, *Harmonisation by Example: European Laws against Unfair Commercial Practices*, (2010) 73 (1) MLR p. 89, pp. 92 et sequ.

³⁹ Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

⁴⁰ Business Protection from Misleading Marketing Regulations 2008 (BPRs). However, the BPRs do not contain a general clause and its objective is to implement the Directive on misleading and comparative advertising.

⁴¹ The term “unified approach” in this paper means a set of rules of law which apply to B2B as well as B2C relations, cf. for this term also Schulte-Nölke/Busch, *Briefing Note IP/A/IMCO/NT/2008-16*, p. 3, p. 6.

⁴² Cf. § 3 (3) and the Annex to the German act against unfair competition. After the implementation of the UCPD into Austrian law e.g. § 1 (1) of the Austrian act against unfair competition differentiates between B2C and B2B relations.

⁴³ Article L121-1-III Code de la consommation.

ways which makes it even more difficult for stakeholders to be aware of the state of the law.⁴⁴

Finally, some Member States have not implemented the crucial definitions provided by Article 2 of the UCPD or the implementation laws do not explicitly list the information requirements set out in Article 7 (5) of the UCPD.⁴⁵

⁴⁴ Schulte-Nölke/Busch, Briefing Note IP/A/IMCO/NT/2008-16, p. 12. Cf. also the overview provided by Keirsbilck, Towards a Single Regulatory Framework on Unfair Commercial Practices? EBLR 2009, pp. 507-563.

⁴⁵ Article 7 (5) of the UCPD states: "Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material."

2. PROBLEMS WITH APPLICATION AND ENFORCEMENT AT NATIONAL LEVEL

KEY FINDINGS

- There is uncertainty about the interpretation of the UCPD, especially with regard to the vague terms used in the general clause and also in some of the commercial practices banned under Annex I.
- Despite the disclaimer in Article 3 (3) of the UCPD, the Directive does affect national contract law. This is true in particular for Article 7 of the UCPD which regulates misleading omissions.
- The limited personal scope of the UCPD (it applies only to B2C commercial practices) leads to a fragmentation of law which makes it difficult for enforcement agencies, consumers and businesses alike to access the relevant piece of law (or in case of businesses to obey it).
- Despite the full harmonization clause, the UCPD so far does not achieve its aim to create a fully harmonized law of unfair commercial practices. On the one hand, this is due to the limited scope of the Directive and the choices the UCPD leaves to Member States with regard to certain questions. On the other hand this is owed to the different architecture of implementation of the Directive in national laws, the limited time since its implementation and the not yet decided open questions regarding its application.
- It is still too early for a final assessment of enforcement problems at national level. As for now, the following conclusions can be drawn:
 - The UCPD has so far not led to harmonisation of the national enforcement systems which can constitute an obstacle to cross-border enforcement.
 - The UCPD does not oblige Member States to introduce a right to redress for the individual consumer. Despite the lack of a specific right to redress for individual consumers, in most Member States consumers might have a right under national civil law. However, the specifics and the requirements for such a right are often unclear. Therefore the introduction of a specific right to redress (and a mechanism to enforce it collectively) could be considered.
 - To ensure effective enforcement (which compensates targets of unfair commercial practices and deters businesses), Member States could be obliged to have a range of sanctions (undertakings, injunctions, skimming-off procedures or claims for damages for enforcement agencies, criminal fines) available to enforcement agencies in addition to a right to redress for individual consumers. It appears to be more important to ensure the existence of such a broad range of sanctions as the way enforcement agencies are constructed (public authorities or private organisations).

2.1. Introduction

This chapter deals with problems with application and enforcement of the UCPD at the national level. It will discuss the following issues, which all depend to a certain degree on each other:

- Legal uncertainty
- Burden of proof
- Full harmonisation
- Effects of the UCPD on B2B relations and contract law
- Enforcement of the UCPD

2.2. Legal uncertainty

If and what kinds of problems result from the implementation of the UCPD seems to be influenced by the way the given Member State had regulated unfair commercial practices before the implementation of the Directive.⁴⁶ For example, the interviewed German agencies stated that there are generally no problems with the application of the Directive as Germany has known a highly developed act against unfair competition before. However, the view was expressed that - as with every change in legislation - there exists uncertainty concerning the interpretation of the UCPD. As an example no. 28 of Annex I was named, which does not provide for a legally binding definition of "child". On the contrary, general clauses and principle-based legislation are rather uncommon in the UK legal system.⁴⁷ Consequently, in the opinion of the Office of Fair Trading (OFT), as well as the UK consumer organisation Which?, the principles-based nature of the UCPD led to more flexibility at the cost of some initial legal uncertainty, while the black list helps to provide a safeguard for enforcers.

Generally there was agreement among the interviewed stakeholders that legal uncertainty exists with regard to the application of the UCPD. Uncertainty might especially arise from the rather vague terms used in Article 5 of the UCPD (e.g. professional diligence) and the wording of some of the commercial practices listed in Annex I. Concern was expressed that it is difficult to meet the burden of proof with regard to aggressive practices and the unfair commercial practices listed in the black list. In the view of some stakeholders the black list did not prove as successful as expected. The application of the UCPD seems also to be influenced by matters of taste and decency, even though the UCPD does not cover those questions: Which practices are actually considered aggressive might be influenced by the standards of taste and decency and those standards might vary from Member State to Member State.

Fewer concerns were expressed by the interviewed enforcement agencies with regard to the provisions of the UCPD regulating misleading advertising (Articles 6, 7). This might be due to the fact that all Member States had some prior experience with regard to the Directive on misleading advertising. It is still too early to draw the conclusion that the application of Article 6 and 7 works well. In many Member States those provisions have not been tested before court. It is predictable that especially Article 7 (misleading omissions) will cause uncertainty (Briefing Paper on Misleading Advertising on the Internet).

⁴⁶ It has been noted rightly that "the significance of unfair competition law varies from one country to another. Whereas in some countries, such as Germany, it is seen as one of the most effective commercial laws, in other countries, such as the United Kingdom, it leads a rather shadowy existence," cf. preface to Hilty/Henning-Boewig, *Law Against Unfair Competition. Towards a New Paradigm in Europe?* 2007.

⁴⁷ Cf. e.g. Collins, *Harmonisation by Example: European Laws against Unfair Commercial Practices*, (2010) 73 (1) *MLR* p. 89, p. 93 and 96; Howells, *The end of an era – implementing the Unfair Commercial Practices Directive in the United Kingdom: punctual criminal law gives way to a general criminal/civil law standard*, *Journal of Business Law* 2009, p. 183, p. 186.

In addition, national courts or enforcement agencies might apply the average consumer test differently when dealing with misleading advertising.⁴⁸

It was also noted by the Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband, VZBV*) that the UCPD – though introduced into the German UWG and generally sticking to the “unified approach” – had led to some different rules for consumers and businesses. Particularly the blacklist has not led to more certainty.

Generally the guidance⁴⁹ published by the European Commission was welcomed. Some stakeholders published guidance themselves to provide help and information to consumers as well as businesses.⁵⁰ Those national guidelines might be helpful for ensuring a uniform application of the UCPD within one Member State, but do not contribute to a uniform application within the EU. The introduction of an official database, collecting decisions by national courts and enforcement agencies and making them available in English, will be crucial to foster a uniform application of the UCPD. Such a database is currently established by the European Commission and shall be available from October 2010 onwards.

In addition, the issuing of further guidelines for the interpretation of the UCPD by the European Commission could be considered. Otherwise, a uniform application of the UCPD will not be reached unless the Court of Justice of the European Union (CJEU) has decided several cases.

2.3. Burden of proof

There was agreement between the interviewed agencies that the fact patterns described in Annex I of the UCPD are difficult to prove. The German VZBV named as examples No. 17 and 18 of Annex I, all dealing with misleading unfair commercial practices. These provisions require that “false information” is provided. According to the VZBV it is difficult to prove that the given information was false. Therefore this is no facilitation compared with the former legal situation. The UK consumer organization “Which?” has detected a certain reluctance of enforcers in the UK to bring cases under (the regulations implementing the) UCPD (CPRs) as result of the legal uncertainty and inexperience with principles-based regulation. Obtaining the necessary proof can also be problematic. “Which?” explicitly referred to aggressive unfair commercial practices and the difficulty to prove that the business acted aggressively in individual cases. The OFT also mentioned the difficulty to prove aggressive behavior of businesses as consumers might be intimidated by the businesses behavior and therefore reluctant to take any action against the business. In the view of the OFT, this problem, however, is not created by the UCPD. The OFT pointed out that burden of proof problems with regard to aggressive commercial practices might often be solved only with the help of a third party witness.

With regard to misleading advertising, burden of proof seems to be less of a problem as in most cases the misleading advertisement (e.g. misleading pricing information on the internet) will be available for examination by enforcement agencies.⁵¹

⁴⁸ Cf. Wilhelmsson, *The Average European Consumer – A Legal Fiction?* in Wilhelmsson (ed.), *Private law and the many cultures of Europe*, pp. 243-265.

⁴⁹ Commission staff working document. *Guidance on the implementation / application of Directive 2005/29/EC on unfair commercial practices*, 3.12.2009, SEC (2009) 1666.

⁵⁰ Cf. the guidance published by the OFT and the UK Department for Business, Innovation and Skills which is available online at http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf.

⁵¹ With regard to the burden of proof Article 12 of the UDCP states: “Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11: (a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case; and (b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.”

2.4. Full harmonisation

The full harmonisation clause of the UCPD requires Member States to adapt their national laws to the UCPD and to prevent any differentiation from the standard set by the Directive. The implementation process therefore requires not only the implementation of the UCPD but also the amendment of existing national laws if they are in violation of the UCPD. It remains subject to further examination if all Member States have succeeded in doing so. So far, the CJEU had to deal with three preliminary proceedings concerning the failure of Member States to adopt national law to the UCPD.⁵² In these three preliminary proceedings the CJEU had/has (one of the preliminary proceedings is still pending) to decide if national provisions prohibiting combined offers⁵³ in all circumstances violate the UCPD. The CJEU qualified such prohibitions as violations of the UCPD: As the UCPD provides for a full harmonisation only unfair commercial practices listed in Annex I (the "black list") shall be regarded as unfair under all circumstances. All other commercial practices are only unfair if they fall under one of the general clauses. There might be more Member States in which such provisions exist or other provisions in national laws which are not in accordance with the UCPD, taking into account its full harmonisation standard. For example the Finnish enforcement agency⁵⁴ stated that combined offers are also prohibited under all circumstances. Finland will have to abolish this provision in order to meet the requirements set out by the UCPD.

It has to be noted that despite the full harmonization clause the UCPD so far does not achieve its aim to create a fully harmonized law of unfair commercial practices. On the one hand, this is due to the limited scope of the Directive and the choices the UCPD leaves to Member States with regard to certain questions. On the other hand this is due to the different architecture of implementation of the Directive in national laws, the limited time since its implementation and the not yet decided open questions regarding its application.⁵⁵

2.5. Effects of the UCPD on B2B relations and contract law

The still pending (Austrian) preliminary proceeding demonstrates another problem which may arise from the implementation of the UCPD in some Member States: The Austrian provision which prohibits complimentary bonuses with periodicals and newspapers (§ 9a of the Austrian act against unfair competition) also addresses B2B relations. Furthermore, before the CJEU, the Austrian Government has argued that the aim of § 9a UWG is not only the protection of consumers but also the protection of small competitors and maintaining press diversity. As noted, the UCPD does not address B2B relations. However, protecting consumers from unfair commercial practices may also protect businesses dealing fairly. As the UCPD provides for a harmonised standard, Member States are not allowed to have stricter rules. Therefore it can be anticipated that the CJEU will find that § 9a of the Austrian UWG violates the UCPD.⁵⁶ However, the Austrian legislature would be able to prohibit combined offers in B2B relations as B2B relations are not within the scope of the UCPD.

⁵² CJEU 23.4.2009, C-261/07 and C-299/07 VTB-VAB NV and Galatea BVBA; CJEU 14.1.2010, C-304/08 Plus (combined offers – promotional prize competitions); Advocate General's Opinion of 24.3.2010, C-540/08 Mediaprint (complimentary bonuses with periodicals and newspapers). Pliakos/Anagnostaras, Harmonising national laws on commercial practices: sales promotions and the impact on business to business relations, E.L. Rev. 2010, 35 (3), pp. 425-435. Cf. also CJEU 11.3.2010, C-522/08 (the UCPD was not yet applicable in that case but the CJEU referred to the combined decisions VTB-VAB NV and Galatea BVBA).

⁵³ A combined offer exists where the acquisition of a product or service is tied to the acquisition of another product or service.

⁵⁴ The term "enforcement agency" is used in a broad sense and applies to (public law) enforcement authorities as well as (private law) organisations.

⁵⁵ Cf. e.g. Schuhmacher, The Unfair Commercial Practices Directive, in Hilty/Henning-Bodewig, Law Against Unfair Competition. Towards a New Paradigm in Europe? 2007, p. 127, p. 131. For a more positive view cf. Collins, Harmonisation by Example: European Laws against Unfair Commercial Practices, (2010) 73 (1) MLR p. 89, p. 117.

⁵⁶ Cf. in this direction already the opinion of General Advocate Trstenjak of 24 March 2010, Rs. C-540/08 Mediaprint.

Therefore Member States can regulate B2B relations more strictly than B2C relations. This result shows the difficulties Member States experience when forced to implement fully harmonising directives which only apply to B2C relations.⁵⁷

It has been noted by some stakeholders that especially SMEs might just as well be a target of unfair commercial practices, including misleading advertising, as consumers. For example, businesses are often the target of so-called "directory companies."⁵⁸ Such practices are banned by No. 21 of Annex I of the UCPD. Despite the fact that commercial practices can be regarded as misleading under Directive 2006/114/EC, it would be an option to return⁵⁹ to a unified approach in European law against unfair commercial practices. A unified approach could help to protect those who are targeted by unfair commercial practices, no matter if the target is a business or a consumer. It could also help to reduce the fragmentation of the law which can be experienced after the implementation of the UCPD in most Member States. A unified set of laws for B2B as well as B2C relations could help national enforcement agencies and courts applying the law as well as businesses to obey the law.

The OFT expressed a wish for more clarity regarding at what point the status of a consumer ends, e.g. concerning the opening of a business⁶⁰ or the status of a "power seller" at ebay.⁶¹

As already noted Article 3 (3) of the UCPD states that it is without prejudice to contract law, while at the same time stating that it is applicable before, during and after a commercial transaction. Because of this apparent contradiction it has been argued that the UCPD will have some effect on the national law of contract, especially with regard to pre-contractual information duties.⁶² In particular Article 7 of the UCPD which prohibits misleading omissions and thereby (indirectly) introduces a duty to inform constitutes a novelty for many laws of contract. Art. 7 of the UCPD has already influenced Article II.-3:102 of the Draft Common Frame of Reference (DCFR),⁶³ which is based on this provision. A failure to fulfill those information requirements under the DCFR entitles the other contracting party to seek contractual remedies (Article II.-3:107).⁶⁴

⁵⁷ For the current discussion on the full harmonisation approach in European consumer law cf. e.g. Gsell/Herresthal (eds), *Vollharmonisierung im Privatrecht*, 2009; Smits, *Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights*, *European Review of Private Law* 2010, pp. 5-14.

⁵⁸ Cf. Civic Consulting, *Study on Misleading Practices of 'Directory Companies' in the context of current and future internal market legislation aimed at the protection of consumers and SMEs*, IP/A/IMCO/FWC/2006-058/LOT4/C1/SC6.

⁵⁹ Before the amendment required by the UCPD the Directive on misleading and comparative advertising protected consumers, businesses and the general public alike.

⁶⁰ According to CJEU 3.7.1997, C-269/65 *Benincasa*, a person setting up a new business shall not be regarded as consumer. The background of this decision, however, was not the interpretation of a consumer law directive but the Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters (in force at that time).

⁶¹ The OFT stresses the point that this view does not mean it would like to broaden the personal scope of the UCPD. For more details, see Briefing Paper on Misleading Advertising on the Internet.

⁶² Cf. e.g. Whittaker, *The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws*, in Weatherill/Bernitz (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques*, 2007, pp. 139-159; Twigg-Flesner, *Pre-Contractual Duties – From the Acquis to the Common Frame of Reference*, in Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law*, 2. edition, 2009, p. 95, pp. 106 et sequ.; Busch, *Informationspflichten im Wettbewerbs- und Vertragsrecht: Parallelen in UWG und BGB*, 2008; Augenhöfer, *Ein „Flickenteppich“ oder doch der „große Wurf“? – Überlegungen zur RL über unlautere Geschäftspraktiken*, *Zeitschrift für Rechtsvergleichung* 2005, p. 204, p. 207.

⁶³ Cf. notes to Article II.-3:102 (Specific duties for businesses marketing to consumers), Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group) (ed.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition*, 2009, p. 206. The final outline edition (without notes) of the DCFR is available online http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf. For a future European contract law cf. also the Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, 1.7.2010. The paper is available at http://ec.europa.eu/justice_home/news/consulting_public/0052/consultation_questionnaire_en.pdf.

⁶⁴ Cf. also Articles 2:202 and 2:207 of the Acquis Principles, Research group on the existing EC private law (Acquis group) (ed.), *Principles on the existing EC contract law (acquis principles)*. Contract II, 2009.

2.6. Enforcement

2.6.1. Enforcement of the UCPD

Enforcement systems within Member States range from civil-law-based systems (e.g. Germany, Austria) to administrative law systems (e.g. England) and to systems combining both elements.⁶⁵ Within the group of Member States relying on civil law sanctions, the question if consumers and competitors have a right to action is answered differently. Under Article 11 of the UCPD, Member States can choose to give individual consumers (and/or competitors) a right to redress but are not bound to do so. For example, under section 74 of the Irish Consumer Protection Act 2007⁶⁶ implementing the UCPD, individual consumers have a right to redress (claim for damages, including exemplary damages). Also in Poland the law implementing the UCPD gives the individual consumer standing before civil courts.⁶⁷ The specifics of enforcement in Member States are highly complex and cannot be dealt with in detail in this paper. In addition, the UCPD and the implementation laws are still regarded as new by enforcement agencies and some of the provisions have not been tested yet. Therefore it remains to be seen if there are particular enforcement problems. Finally, in some Member States disputes are solved out of court⁶⁸ and consequently hardly any published court decisions are available.

Despite these limitations, it can be noted that the UCPD has not led to any harmonisation of national enforcement systems. As Article 11 UCPD leaves much discretion to the Member States this does not come as a surprise. It may be owed to the procedural autonomy of the Member States and the question of whether and to what extent the EU has competence to regulate procedural issues. These huge differences in national enforcement systems could provide obstacles to cross-border transactions as neither consumers nor competitors will know whether they have a right to redress under the applicable law or not. With regard to the cooperation of different enforcement systems Regulation (EC) No. 2006/2004 on consumer protection cooperation provides a legal basis for the cooperation between such agencies. According to a report of the European Commission the regulation has led to more efficiency with regard to cross-border enforcement, but it has certain shortcomings.⁶⁹ Some of the interviewed stakeholders still find cross-border disputes difficult to deal with *inter alia* due to language problems and problems to locate the business which is violating the UCPD.

Generally, several public law enforcement agencies claimed a lack of resources and consequently an inability to monitor all relevant commercial practices.

⁶⁵ Cf. Henning-Bodewig, Die Bekämpfung unlauteren Wettbewerbs in den EU-Mitgliedstaaten: eine Bestandsaufnahme, GRUR Int 2010, pp. 273-287; Möllers/Heinemann, The enforcement of competition law in Europe, 2007; cf. also the country reports in Harte-Bavendamm/Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2. edition, 2009, pp. 275 et sequ.

⁶⁶ The act is available online at <http://www.oireachtas.ie/documents/bills28/acts/2007/a1907.pdf>.

⁶⁷ Henning-Bodewig, Die Bekämpfung unlauteren Wettbewerbs in den EU-Mitgliedstaaten: eine Bestandsaufnahme, GRUR Int 2010, p. 273, p. 285. Consumers in Bulgaria (p. 287), Sweden (p. 282), Belgium (p. 275), Greece (only with regard to direct marketing, p. 278), Lithuania (p. 284), Latvia (p. 284) have legal standing as well. It seems, however, that in some of these countries the right exists only theoretically.

⁶⁸ "Out of court" does not refer to an Alternative Dispute Settlement procedure, but rather to the intention of enforcement agencies to seek undertakings.

⁶⁹ Report from the Commission to the European Parliament and to the Council on the application of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), 2.7.2009, COM (2009) 336 final.

Enforcement in Germany and the UK

In Germany, the enforcement system is based on civil law: Enforcement of the act against unfair competition (UWG) is the task of competitors, trade associations, consumer organisations and chambers of commerce which can bring claims before civil courts.⁷⁰ The most active organisations combating unfair commercial practices are the *Wettbewerbszentrale*⁷¹ and consumer organisations. Under § 8 UWG, all named parties can bring an injunction (*Unterlassungsanspruch*)⁷² and a claim to stop the unfair commercial practice (*Beseitigungsanspruch*). Consumers as well as competitors can submit a complaint to the *Wettbewerbszentrale* (consumers also to consumer organisations). Before bringing an action before court plaintiffs will try to get an undertaking signed by the business to amend or cease the unfair commercial practice.⁷³ Competitors can also bring a fault based claim for damages (§ 9 UWG). In 2004, when a new German act against unfair competition law was adopted, there was discussion on whether a right to redress for the individual consumer should be introduced.⁷⁴ The legislature decided against it and when implementing the UCPD it did not introduce such a right either. According to some legal scholars the German act against unfair competition has to be qualified as a protective act (*Schutzgesetz*) as according to § 1 UWG the act explicitly aims at the protection of consumers.⁷⁵ Consequently, consumers would be allowed to claim damages under § 823 (2) of the German civil code (BGB). To foster the collective interests of consumers, the legislature has introduced a new skimming off of profits procedure (*Gewinnabschöpfungsanspruch*).⁷⁶ According to § 10 UWG the profit made by violating §§ 3 and 7 UWG can be skimmed off by trading organisations, consumer organisations and chambers of commerce, if the business has acted with intent. If this procedure is successful, the organisation has to hand out the profit to the federal budget. Due to the requirement to prove intention and to calculate the profit and the fact that the organisation bears the risks of losing in court (in which case it has to pay the court fees), while even if successful, it will not keep any profit. As a consequence § 10 UWG has not been applied (successfully) in practice very often. Although no individual right to redress was established, the consumer might still have access to general civil law remedies.⁷⁷

⁷⁰ The enforcement system in Austria is rather similar to the German system, cf. Prunbauer/Seidelberger, *Die Wettbewerbsfibel*, 2007, pp. 173 et sequ. There exist some administrative law provisions, but they are not of any significant practical importance (for Germany cf. § 20 UWG). The Austrian Supreme Court (*Oberster Gerichtshof*, OGH) has in one decision rightly decided that consumers also have a claim for damages if they suffer damage as result of a violation of the UWG, cf. OGH 24.2.1998, 4 OB 53/98t.

⁷¹ The *Wettbewerbszentrale* (Zentrale zur Bekämpfung unlauteren Wettbewerbs, Centre for Protection against Unfair Competition) is an independent institution of the German industry and supports the self-responsibility of companies towards a fair and functioning market. However, as it has standing before court it shall not be confused with advertising self-regulatory bodies.

⁷² Qualified entities under the Injunction Directive [Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version)] can bring an injunction, too.

⁷³ For details cf. Köhler/Bornkamm (eds.), *Kommentar zum Gesetz gegen unlauteren Wettbewerb*, 2009, 28. edition, § 8 no. 1.3. Organisations also have the power to request certain information under § 8 UWG, § 12 *Unterlassungsklagengesetz* (act on injunctions).

⁷⁴ Cf. e.g. Fezer, *Das wettbewerbsrechtliche Vertragsauflösungsrecht in der UWG-Reform*, WRP 2003, 127-147.

⁷⁵ Cf. for references Augenhofer, *Individualrechtliche Ansprüche des Verbrauchers bei unlauterem Wettbewerbsverhalten des Unternehmers*, WRP 2006, p. 169, p. 176.

⁷⁶ Cf. e.g. Alexander, *Schadensersatz und Abschöpfung im Lauterkeits- und Kartellrecht*, 2010, pp. 501 et sequ.

⁷⁷ For an overview cf. Augenhofer, *Individualrechtliche Ansprüche des Verbrauchers bei unlauterem Wettbewerbsverhalten des Unternehmers*, WRP 2006, pp. 169-178.

In the UK, the structure of the enforcement system is rather different from the German civil law system. The main enforcement agency is the Office of Fair Trading (OFT). The OFT is the UK's consumer and competition authority.⁷⁸ It shares, however, its powers with sector-specific regulators (for example the Financial Services Authority) and also, in consumer protection enforcement, with the local authority Trading Standards Services.⁷⁹ The OFT is a non-ministerial government department. The sanctions available to the OFT includes undertakings and court orders (injunctions)⁸⁰ as well as criminal prosecution.⁸¹ The violation of almost all of the provisions of the regulation implementing the UCPD (CPRs) constitutes a criminal offense at the same time. Competitors do not have a direct right to redress. The UK Government has proposed a Civil Sanctions Pilot. This would allow the OFT to bring the following sanctions for all criminal breaches of the CPRs:⁸² accept enforcement undertakings; issue stop notices; impose fixed monetary penalties; impose variable monetary penalties; issue compliance and restoration notices requiring traders to take actions to stop breaches or to restore consumers to the pre-breach situation. In addition, in the UK there is currently an ongoing discussion if a right to redress for the individual consumer shall be introduced.⁸³ The consumer might already have some rights under the existing UK law system, but the details of such rights do not necessarily correspond to the provisions of the UCPD.⁸⁴

2.6.2. Options for improving enforcement

The current discussion in the UK (cf. the box above) shows two aspects which might be crucial for improving enforcement in order to ensure that consumers who have suffered a loss as a consequence of a violation of the UCPD would be compensated and that businesses are deterred from unfair behaviour.

It may be considered if an individual right to redress for consumers should be introduced into the UCPD. Otherwise, individual consumers who are tricked into a contract by unfair commercial practices or otherwise suffer damages as a consequence of the breach of the UCPD might be bound by the contract and will not necessarily get compensation for the damage suffered. However, the right to redress of the individual consumer might be only part of a larger enforcement system.

⁷⁸ Cf. 1 of the Enterprise Act 2002 (http://www.opsi.gov.uk/acts/acts2002/ukpga_20020040_en_1). The Italian Autorità Garante della Concorrenza e del Mercato (<http://www.agcm.it/>) and the Polish Office of Competition and Consumer Protection (http://www.uokik.gov.pl/consumer_protection_in_poland.php#) are also in charge of enforcing consumer law as well as competition law.

⁷⁹ Cf. Howells, The end of an era – implementing the Unfair Commercial Practices Directive in the United Kingdom: punctual criminal law gives way to a general criminal/civil law standard, *Journal of Business Law* 2009, p. 183, p. 191.

⁸⁰ For the requirement that the trader harms « collective interests of consumers » cf. Collins, Harmonisation by Example: European Laws against Unfair Commercial Practices, (2010) 73 (1) *MLR* p. 89, p. 112; Howells, The end of an era – implementing the Unfair Commercial Practices Directive in the United Kingdom: punctual criminal law gives way to a general criminal/civil law standard, *Journal of Business Law* 2009, p. 183, p. 192.

⁸¹ Cf. part 8 of the Enterprise Enforcement Act 2002. Competitors might under certain circumstances also be able to bring a claim under criminal law. In Germany and Austria, some unfair commercial practices (scams) might be qualified as fraud under the criminal code if they meet certain criteria (cf. also § 16 of the German UWG). Under the CPRs, in contrast to fraud under German and Austrian law, most of the offences are strict liability offences, cf. Howells, The end of an era – implementing the Unfair Commercial Practices Directive in the United Kingdom: punctual criminal law gives way to a general criminal/civil law standard, *Journal of Business Law* 2009, p. 183, pp. 192 et sequ.

⁸² <http://www.dius.gov.uk/Consultations/civil-sanctions-pilot?cat=closingsoon>.

⁸³ http://www.lawcom.gov.uk/misrepresentation_commercial.htm.

⁸⁴ Collins, Harmonisation by Example: European Laws against Unfair Commercial Practices, (2010) 73 (1) *MLR* p. 89, pp. 113 et sequ.; cf. also http://www.lawcom.gov.uk/docs/misrepresentation_short.pdf, especially p. 6.

It has to be taken into account that consumers often suffer low damages, often do not know about their rights⁸⁵, and – taking into account the costs and uncertainty of legal proceedings – will refrain from filing a claim in court. Therefore it is an option to introduce means of collective redress,⁸⁶ enabling consumers (as well as businesses) to bring group actions.⁸⁷ However, group actions will not reduce the unwillingness of consumers to bring a claim if the individual damage suffered is only rather small.

Consequently the second aspect which might be considered further is the range of sanctions available to enforcement agencies. Besides injunctions and undertakings, it might prove helpful if national enforcement agencies (private organisations or administrative authorities) can also bring claims for damages (in case the damages suffered are too small that individual consumers would bring a claim) or that an effective skimming off profits procedure is in place. With regard to rogue traders, criminal sanctions could be considered. Other useful sanctions might be the possibility to impose on-the-spot fines for offences relating to price display and the ability to “name and shame” unfair businesses. With regard to minor violations of the UCPD it seems to be an option to think about a more developed cooperation between advertising self-regulatory bodies and enforcement agencies.⁸⁸

⁸⁵ Campaigns to raise consumer awareness are therefore of great importance as well.

⁸⁶ For the current discussion see the Green Paper on Consumer Collective Redress, COM (2008) 794, 27.11.2008 and the White Paper on Damages Actions for Breach of the EC antitrust rules, COM (2008) 165, 2.4.2008; for references cf. e.g. Hodges, The reform of class and representative actions in European legal systems, 2008. Cf. also the study carried out for the European Commission by Civic Consulting, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, 2008.

⁸⁷ In the same direction e.g. Howells, The end of an era – implementing the Unfair Commercial Practices Directive in the United Kingdom: punctual criminal law gives way to a general criminal/civil law standard, *Journal of Business Law* 2009, p. 183, p. 193.

⁸⁸ See Briefing Paper on Misleading Advertising on the Internet.

3. THE ROLE OF NATIONAL ADVERTISING SELF-REGULATORY BODIES

KEY FINDINGS

- It seems that Member States do not take into account national advertising self-regulatory bodies in the implementation process, but those bodies rather adopt their codes of conduct after the transposition of the UCPD.
- The scope of codes issued by self-regulatory bodies might vary. For example, in Germany and Austria the main focus of self-regulatory codes seems to be on questions of taste and decency, which are not covered by the UCPD.
- Self-regulatory codes could help to create a uniform law for B2B and B2C relations by implementing principles of the UCPD for B2B relations.

National advertising self-regulatory bodies exist in most Member States of the EU and there exists a European umbrella organisation of advertising self-regulatory bodies.⁸⁹ However, the importance of national advertising self-regulatory bodies differs from one Member State to another. Advertising self-regulatory bodies have historically played a more important role in Member States which – before the implementation of the UCPD – did not have a developed set of laws dealing with unfair competition (e.g. UK⁹⁰, Ireland).⁹¹ Self-regulation has played a less significant role in Member States which have a developed act dealing with unfair commercial practices. The more developed the legal framework, the smaller the scope left for self-regulation.

It seems that even in Member States in which self-regulation is of special significance, the legislature did not take the role of advertising self-regulatory bodies into account in any particular way when implementing the UCPD. It is rather after the implementation process was completed, e.g. the UK advertising self-regulatory body amended its code several times to ensure its compliance with the UCPD. The latest code will be applicable from September 2010 onwards.⁹²

The scope of the self-regulatory codes might vary: For example, in Austria the code issued by the advertising self-regulatory body does (*Werberat*)⁹³ does not take into account misleading advertising (or more generally, misleading commercial practices) but contains only rules concerning taste and decency (e.g. on advertising disrespectful to women or glorifying violence). Also the German advertising self-regulatory body (*Werberat*)⁹⁴ primarily deals with questions of taste and decency.⁹⁵

⁸⁹ <http://www.easa-alliance.org>. According to European Advertising Standards Alliance (EASA), national advertising self-regulatory bodies (SROs) as understood by the EASA charter, and recognized by the criteria of the EU advertising Roundtable report, are currently present in 22 Member States (with Cyprus to soon have one too). Malta, Latvia, Estonia, and Denmark, have advertising self-regulation of some form, but not an 'SRO' as defined by EASA.

⁹⁰ Cf. for the questions, whether a specific field of law with concern to unfair competition existed in the UK (before the implementation of the UCPD) Davis, Unfair Competition Law in the United Kingdom, in Hilty/Henning-Bodewig, Law Against Unfair Competition. Towards a New Paradigm in Europe? 2007, pp. 183-198. For advertising self-regulation in the UK in contrast to the German system cf. Jergolla, Die britische Werbeselbstkontrolle anhand des Advertising Code – eine Gegenüberstellung mit der Rechtslage in Deutschland, WRP 2003, pp. 431-449.

⁹¹ Advertising self-regulation seems to play also an important role in the Netherlands and Italy, cf. Henning-Bodewig, Die Bekämpfung unlauteren Wettbewerbs in den EU-Mitgliedstaaten: eine Bestandsaufnahme, GRUR Int 2010, p. 273, p. 277, p. 276.

⁹² <http://bcap.org.uk/The-Codes/New-Advertising-Codes.aspx>.

⁹³ www.werberat.at.

⁹⁴ www.werberat.de.

⁹⁵ www.werberat.de.

It has to be taken into account that some of the rules primarily issued to ensure decent advertising may also fall in the scope of the UCPD. For example, the German code of the self-regulatory body contains provisions dealing with advertising especially aimed at children. A similar rule can also be found in Nr. 28 of Annex I of the UCPD. In contrast to the German and Austrian systems, the UK code of conduct, for example, has a broader scope, also regulating misleading advertising. However, the UK code at the moment does *inter alia* not cover advertisements on the businesses' own homepage.⁹⁶

The degree of importance of the self-regulatory advertising body seems to depend on the following factors:

- Is misleading advertising covered by the code of conduct?
- Does the consumer or business have to pay a fee in order to start a complaint?
- May the consumer or business starting a complaint remain anonymous?
- How effective is the enforcement system?
- How well does the advertising self-regulatory body cooperate with enforcement agencies?

The effectiveness of the enforcement system will be influenced by the degree of interdependence between the board members and the members of the self-regulatory bodies and the variety of sanctions available to the self-regulatory body.⁹⁷ It seems that the interaction between the self-regulatory bodies and enforcement agencies is working rather well.⁹⁸ Self-regulatory bodies will refer cases to enforcement agencies and vice versa if the other body will be more suitable to deal with the case.

It should be noted that such a system cannot work with regard to so-called rogue traders. Such rogue traders first of all are not likely to sign any code of conduct and secondly will not be willing to cooperate with self-regulatory bodies at all. Therefore, more severe sanctions than self-regulatory bodies have at hand are required.

From the interviewed enforcement agencies, only the Finnish consumer agency has expressed concern that the self-regulatory body does not have the means for effective enforcement or is even willing to go after businesses using unfair advertising as those businesses are members of the self-regulatory bodies.

With regard to the UCPD the Polish advertising self-regulatory body has stated that some businesses have become reluctant to sign a code after the implementation of the UCPD: Under 6 (2) lit. b of the UCPD "non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound," might be a misleading commercial practice, "where: (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code."⁹⁹ Businesses, in the view of the Polish self-regulatory advertising body, have the feeling that they are worse off if they sign the code and have to fear legal actions, compared to traders not bound by the code.

⁹⁶ <http://www.asa.org.uk/Regulation-Explained/What-we-cover/Complaints-outside-remit.aspx>. There also exist different self-regulatory bodies (and consequently different codes of conduct) for different sectors, details varying in each Member State.

⁹⁷ It seems especially important that self-regulatory bodies have the power to advise the media to refuse the advertisement, which violates the code (and the media responds to such advice).

⁹⁸ In Germany, for example, the advertising self-regulatory body (*Werberat*) is even a member of the trade association most actively involved in the enforcement of unfair competition law (*Wettbewerbszentrale*).

⁹⁹ Cf. also No. 1 and 2 of Annex I of the UCPD.

Generally the UCPD and advertising self-regulatory can complement each other as codes of conduct may expand the content of the UCPD to B2B relations. This is e.g. the case in the Netherlands. Advertising self-regulatory bodies could – and to a certain degree already do – help to prevent unfair commercial practices in the first place by promoting compliance with the codes and by issuing guidelines.

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