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9

Unfair Competition Law[1]

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Summary

1. Introduction. — 2. Substantive Unfair Competition Law. — 3. Codification of Unfair Competition in the Member States, 3.1. The law of unfair competition as an independent area of law, 3.2. Fragmentation of the substantive provisions — 4. International Sources of Unfair Competition Law, 4.1. The Paris Convention, 4.2. European law regulating the law of unfair competition. — 5. Plaintiffs, 5.1. Competitors, 5.2. Consumers, 5.3. Business associations, 5.4. Consumer associations, 5.5. State authorities like consumer ombudsman, OFT etc, 5.6. Public Prosecutor. — 6. Objects of Claims, 6.1. Injunction or prohibition, 6.2. Elimination, 6.3. Preventative injunction order, 6.4. Damages. — 7. Out-of-court settlement, 7.1 Out-of-court settlement of disputes between the parties, 7.2. Out-of-court dispute resolution through third parties (arbitration, mediation etc.), 7.3. Dispute resolution through self-organization—ASA, CAP etc. — 8. Conclusion.

1. Introduction

European integration is making progress; the Treaty of Lisbon has been in force for several years now and scholars are discussing a European Civil

1. A more detailed analysis can be found in Möllers/Heinemann (eds.), The Enforcement of Competition Law in Europe, Cambridge 2007.

Code.[2] In the field of unfair competition law, there are only very few directives and one is tempted to use F. Rittner's words which he once used to describe the law of contract: European directives create only "islands" of harmonized law[3] within each nation's laws and those islands exist without any connection between them.[4] Accordingly, the law of unfair competition is still based on many sources and very often overlaps with consumer protection law, contract law and intellectual property law.

Because of differing traditions in the Member States, unfair competition law has only been marginally harmonized. For example, in the different European directives, courts and administrative agencies are equally designated as competent enforcement authorities. Moreover, additional self-regulation by the countries is allowed. This form of harmonization leaves everything as it was before. The sanctions are numerous and as disparate as the provisions dealing with the material aspects.[5] The following article is based on a project that analyzed the law of fifteen Member States on a comparative law basis. The aim of the project was to examine the advantages and the disadvantages of the different methods of enforcement of competition law.[6]

2. Substantive Unfair Competition Law

All modern legal systems offer protection against unfair competition, i.e., against "any act of competition contrary to honest practices in industrial or

2. European Parliament of May 26, 1989, OJ C 158, 400, (1992) 56; Action Plan of the European Communities of March 15, 2003, COM (2003) 68 final = OJ C 63, 1; European Parliament of October 11, 2004, COM (2004) 651 final; Beale, The European Commission's Common Frame of Reference Project: A Progress Report, 2 Eur. Rev. Contract L. 303 ff. (2006); Flessner, Der Gemeinsame Referenzrahmen im Verhältnis zu anderen Regelwerken, 15 ZeuP 112 ff. (2007); Schulze, Die "Acquis-Grundregeln" und der Gemeinsame Referenzrahmen, 15 ZEuP 731 ff. (2007). See www.acquis-group.org.

3. Rittner, Das Gemeinschaftsprivatrecht und die europäische Integration, 50 JZ 849, 851 (1995).

4. This is the analysis for the law of unfair competition of the European Commission in its Green Paper on EU Consumer Protection of October 2, 2001, COM (2001) 531 final.

5. Beater, Unlauterer Wettbewerb, Munich 2011, notes 649 ff.

6. The project of the Common Core of European Private Law is published as Möllers/Heinemann, *supra* note 1. For details of the Common Core of European Private Law cf. Bussani/Mattei, The Common Core Approach to the European Private Law, 3 Colum. J. Eur. L. 339 ff. (1997); see www.jus.unitn.it/dsg/common-core.

commercial matters",[7] in short, against "dirty tricks".[8] Common features of the substantive provisions are readily discernible in the law governing comparative advertisement harmonized by Directive 97/55/ECH.[9] Misleading advertisement of products was dealt with in Directive 84/450/EECH;[10] unfair commercial practices are mentioned in Directive 2006/29/ECH.[11] Moreover, deception concerning a product's novelty does not only concern the law of unfair competition but also the Directive on the Sale of Consumer Goods, Directive 99/44/EC.[12] Misleading advertisements are also held to be illegal. The degradation of a competitor is considered inadmissible in all Member States, although this has not yet been harmonized on a European level. But the act of denigration has been regulated in art. 10bis para. 3 of the Paris Convention for the Protection of Industrial Property (PC).

3. Codification of Unfair Competition in the Member States

3.1. The Law of Unfair Competition as an Independent Area of Law

In most Member States, the law of unfair competition is considered to be a separate area of law. In Germany, a blanket clause was introduced to the UWG in 1907 because the courts refused to apply the general tort claim of sec. 823 BGB to curb acts of unfair competition.[13] Many countries

7. For art. 10^{bis} PC.

8. Chaffee, Unfair Competition, 53 Harv. L. Rev. 1289 (1940).

9. Directive concerning misleading and comparative advertising of 10.9.1984, OJ L 250, 17, amended by Directive 97/55/EC of June 6, 1997, OJ L 290, 18, corrected by Corrigendum OJ L 194, 54.

10. Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising of 10.9.1984, OJ L 250, 17, cf. Art. 3 lit. a): "features about availability and quantity".

11. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC of 11.5.2005, OJ L 149, 22.

12. Directive 2005/29/EC concerning unfair commercial practices, art. 2 para. 2 lit. d)., now also art. 7 para. 1 lit. a) and annex 1 no. 5.

13. The Supreme Court of the German Reich reasoned that the legislation had established trademark law and therefore only those affected by it had to be protected against unfair competition, RGZ 3, 67 (68)—"Apollinaris"; RGZ 18, 93 (99)—"Van Houten"; RGZ 20, 71 (75)—"Benecke".

later adopted Germany's[14] "big blanket" clause as a role model. It can be found in the laws of Austria,[15] Denmark,[16] Finland,[17] Sweden,[18] Belgium,[19] Luxembourg,[20] Spain,[21] Portugal,[22] Greece[23] and Switzerland.[24] Such a general clause allows the courts to concretize the remedies against acts of unfair competition. Over the course of the last 100 years, the courts took upon developing and defining typical cases of unfair competition.[25] In France,[26] Belgium[27] and the Netherlands,[28] cases of unfair competition are solved by applying the general civil law provision for torts. Italy has introduced a separate general clause for unfair competition in its *Codice civile*.[29] Meanwhile, a blanket clause has also been introduced at the European level.[30] Great Britain and Ireland do not have a codification or a blanket clause covering acts of unfair competition. Both legal systems only know a series of individual provisions dealing with certain acts of unfair competition (e.g. "passing off" or "libel and slander").[31]

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14. Former UWG, §1; now UWG, §3. In Germany, the blanket clause has been broken down into a so-called "small" blanket clause alongside the codification of typical cases in UWG, §§ 3–7.

15. UWG, §1.

16. MFL, §1.

17. KSL, chp. 2 § 1 para. 1 and SopMenL § 1.

18. MFL, Sec. 4 para. 1.

19. LPC, art. 93, 94.

20. Loi du 27 novembre 1986 réglementant certaines pratiques commerciales et sanctionnant la concurrence délyale, art. 16.

21. LPC, art. 5; LGP, art. 6 b.

22. CPI, former art. 260.

23. Law of Unfair Competition, art. 1.

24. UWG, art. 2.

25. One can find examples in Baumbach/Hefermehl, Wettbewerbsrecht, 22nd ed., Munich 2001, on several hundred pages. These annotations will clearly change because of the regulation of typical cases in UWG, § 4. In the new edition the annotations to sec. 3 are reduced to 20 pages, cf. Köhler, § 3, in Hefermehl/Köhler/Bornkamm (eds.), Wettbewerbsrecht, 24th ed., Munich 2006.

26. Code civil, art. 1382.

27. Loi sur les pratiques du commerce et sur l'information et la protection du consommateur, art. 93 f.

28. BW, art. 6:162.

29. *Codice civile*, art. 2598 no. 3.

30. See Art. 5 of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC of May 11, 2005, O.J. L 149, 22.

31. Weatherill, United Kingdom, in Schulze/Schulte-Nölke (eds.), Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Precontractual Commercial Practices and the Handling of Consumer Complaints by Business, 2003, at

3.2. *Fragmentation of the Substantive Provisions*

One must be aware, however, that even among countries that share the same big blanket clause, similarities in the law of unfair competition are rather limited. Only very few Member States have their own codification for unfair competition law (i.e., Germany, Austria, Sweden, and Denmark). Even in these states, general civil and criminal law provisions have to supplement the codification. In most other states, the law of unfair competition is spread out in several acts. Some countries restrict the scope of unfair competition law but widen the scope of consumer protection law at the same time. For example, in Anglo-American countries (in particular, the United Kingdom and the U.S.) and in the French legal system (i.e., in France,[32] Belgium, Italy and the Netherlands) competitors are protected by some limited tort provisions, whereas consumers are protected by special consumer protection law (which exist in France, Italy, Finland, Spain, Portugal, Hungary and the U.S.).

4. International Sources of Unfair Competition Law

4.1. *The Paris Convention*

More than 100 years ago, the law of unfair competition was already dealt with in one of the great international treaties on the protection of intellectual property: the Paris Convention for the Protection of Industrial Property of 1883 (PC).[33] In the PC, which has been adopted by more than 170 states (among them all Member States of the EU), each signatory nation binds itself to assure "effective protection against unfair competition" to the nationals of the other parties to the treaty.[34] The Paris Convention prohibits three specific types of unfair competition: all acts of such a nature as to create confusion with the company, goods or activities of a competitor; false allegations that discredit the competitor; and indications or allegations that are liable to mislead the public as to the nature or qualities of the goods. The treaty does not, however, further elaborate on these types of unfair competition. The remedies

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ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf, I.2b.

32. Monfort, France, in Schulze/Schulte-Nölke (eds.), *supra* note 31, 1.

33. For further information see www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

34. See PC, art. 10bis.

stay vague as well, since art. 10ter of the PC only requires the parties to implement "appropriate legal remedies to effectively repress" all acts of unfair competition. The PC has had an enormous influence on the blanket clauses of some countries, such as Belgium, Luxembourg, Portugal, Finland, Italy or Spain. However, since the Convention only forces the parties to the treaty to offer foreigners the same protection as their own nationals[35] and since the description of the acts of unfair competition is vague, the desired effect of harmonization has never been achieved.[36]

4.2. European Law Regulating the Law of Unfair Competition

Until recently, there was no common European law of unfair competition. Only some areas had been harmonized. There are three directives that have had a strong impact on the law of unfair competition. The Misleading Advertising Directive 84/450/EEC sets forth rules regarding misleading advertisements. However, it only sets a minimum standard of harmonization.[37] Therefore, in this area, the law of the Member States is still most relevant. The Misleading Advertising Directive 84/450/EEC was supplemented by the Comparative Advertising Directive 97/55/EC. It must be noted that this directive does not allow for a deviation by national provisions.[38] These directives[39] protect the interests of consumers as well as competitors and the general public (art. 4 para. 1). In 1998, the Product Price Directive 98/6/EC[40] was introduced. The Injunction Directive 98/27/EC[41] regulates the ability of consumer associations to sue.

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35. Henning-Bodewig, Europäisches Wettbewerbsrecht—Eine Zwischenbilanz, 104 GRUR Int. 389, 390 (2002).

36. Henning-Bodewig, in Schricker/Dreier/Kur (eds.), Geistiges Eigentum und Innovation, Berlin 2001, 125, 133; Köhler/Lettl, Das geltende europäische Lauterkeitsrecht, der Vorschlag für eine EG-Richtlinie über unlautere Geschäftspraktiken und die UWG-Reform, 48 WRP 1019, 1020 (2003).

37. Directive 84/450/EEC, modified by Directive 97/55/EC, *supra* note 9, art. 7 para. 1.

38. Directive 84/450/EEC, modified by Directive 97/55/EC, supra note 9, art. 7 para. 2 See ECJ C-44/01, (2003) 105 GRUR 533 (536) notes 43 f.—*Pippig v. Hartlauer.* This is a case of so-called full harmonisation which forbids Member States to enact deviating national provisions, see Craig/de Burca, EU Law, 3rd ed., Oxford 2003, chp. 3.2.(c).

39. *Supra* note 9.

40. Directive 98/6/EC of on consumer protection in the indication of the prices of products offered to consumers as of February 16, 1998, OJ L 80, 27.

41. Directive 98/27/EC on injunctions for the protection of consumers' interests of May 19, 1998, OJ L 166/51; for an analysis of the first case under this directive cf. Rott/von

Other directives are also relevant to the law of unfair competition. One such directive, Directive 97/36/EC, amends Directive 89/552/EEC concerning the pursuit of television broadcasting activities[42], Directive 92/28/EC on the advertising of medicinal products for human use,[43] Directive 99/44/EC on the sale of consumer goods,[44] Directive 97/7/EC on distance contracts and Directive 2000/31/EC on e-commerce.[45]

On June 18, 2003, the Directorate-General for Health and Consumer Protection issued a proposal for a directive concerning unfair commercial practices.[46] This proposal uses the ideas developed in the Green Paper on EU Consumer Protection of October 2, 2002.[47] In the area of business-to-consumer (B2C) transactions, it protects consumers by introducing clearly defined prohibitions. Furthermore, a general clause forbids unfair commercial practices (art. 5). In particular, misleading actions and omissions, aggressive commercial practices, the use of harassment, coercion, and undue influence are forbidden.[48] Moreover, art. 4 para. 1 introduces the principle of mutual recognition. In 2005, Directive 2005/29/EC concerning unfair commercial practices was passed. Finally, one has to take into consideration the Regulation (EC) No. 2006/2004 on consumer protection cooperation.[49] This regulation stipulates that in cases of cross-border infringements, supervision and enforcement is administered by public authorities.

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der Ropp, Stand der grenzüberschreitenden Unterlassungsklage in Europa, 9 ZZP Int 3 (2004).

42. Directive 97/36/EC of June 30, 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202, 60.

43. Council Directive 92/28/EEC on the advertising of medicinal products for human use of 31.3.1992, OJ L 113, 13.

44. Directive 1999/44/EC of 25.5.1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 12, (1999) 52 NJW 2421; regarding Directive 1999/44/EC, art. 2 para. 2 lit.(d).

45. Directive 2001/31/EC of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 1.

46. COM (2003) 356 final.

47. Green Paper on EU Consumer Protection of October 2, 2002, COM (2001) 531 final, BR-Drs. 851/01; Follow-up Communication to the Green paper on Consumer Protection of June 11, 2002, COM (2002) 289 final.

48. Unfair Commercial Directive 2005/29/EC, *supra* note 11, art. 6–8.

49. Regulation (EC) No. 2006/2004 of 27.10.2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364, 1.

5. Plaintiffs

If unfair competition law is infringed, different plaintiffs might be able to sue. The laws of the Member States differ widely on this subject.

5.1. Competitors

It is very advantageous if competitors have a right to sue since they constantly survey the market and thus know best if infringements occur. A disadvantage, however, lies in the fact that competitors very often refrain from legal proceedings because they fear that they will then have to face claims of retaliation. As minor and major infringements are relatively widespread, this incentive can easily outweigh the above-mentioned advantage.

5.1.1. Rights of Claim Limited to Actual Legal Infringement

In Germany, the UWG[50] limits the right of claim to competitors: that is, enterprises which are in competition with the infringer, such as suppliers or buyers of goods or services, sec. 2 no. 3 UWG. In Sweden, competitors have a right to take steps to stop continuation of future similar advertisements through injunctions.[51] To have standing, the competitor must be concerned by the violator's action.[52] In Denmark, competitors may bring an action before the courts if they are directly affected by the advertising and have sufficient legal interest in instituting proceedings in court. In order for a competitor to bring a claim against the infringer in Spain, his economic interests must be harmed or menaced by an unfair act as established in art. 19 para. 1 LCD. The burden of proof lies with the plaintiff, who must prove that the unfair act has been committed and has affected his or her interests. In France, the competitor can only sue in cases of art. 1382, 1383 cc. He or she has to prove fault, causation, and damage. However, claims under art. 1382 cc are rare.[53] In Italy, competitors can also pursue a tort claim under art. 2598 *codice civile*.[54]

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50. BGBl. 2004 I, 1414.

51. This ensues from MFL, sec. 39.

52. Beside an order to cease and desist, the competitor can file an information order in Sweden.

53. Dreier/von Lewinsky, *Frankreich*, in Schricker (ed.), Recht der Werbung in Europa, Baden Baden 1995, note 82.

54. Corte di Appello di Roma, September 23, 1985.

5.1.2. Broad Rights of Claim

In Austria, competitors are entitled to claim an injunction under sec. 2, 14 para. 1 UWG. Competitors have the right of claim regardless of whether they are commercially affected by the confusing advertisement. The right of claim is similarly broad in Portugal. Individual trade competitors can take measures against the misleading advertisement under art. 260 lit. (e) CPI, which protects both competitors as a whole and individual competitors.

5.1.3. Lack of Right to Claim or Little Practical Relevance

In some countries, the right of claim is seldom exercised by the competitor. In Finland, cases are usually brought forward only by direct competitors. In legal literature, this right has also been limited but the interpretation has been relatively wide (for example an association representing supermarkets and market owners had legal standing in a case regarding the marketing of soap). Thus, trade can be affected even if there is no evidence of a loss of sales etc. or any contact between the claimant and the tradesman whose practices are claimed to be contrary to the SopMenL. In addition, competitors do not have a right of claim in all areas. In the U.S., competitors may not claim against unconformity with the FTCA. In the United Kingdom, competitors, to the extent that the CMAR 1988 is involved, only have the opportunity to file a complaint to the OFT under reg. 4 (1) of the CMAR 1988. They can also complain to the Advertising Standards Authority. Only if tort case law applies, competitors may claim directly.

Under the Misleading and Comparative Advertising Directive 84/450/EEC, 'persons or organizations regarded under national laws as having a legitimate interest' can impose the prohibition on misleading advertisement.[55] In order to do this, the Injunction Directive 98/27/EC designates only qualified institutions as claimants but not the competitor. The extension of claim opportunities to every competitor (formerly in Germany, now in Poland and Portugal), however, brings opportunities and risks. Like associations or the state, the competitor can become the agent of third parties. Undertakings with a strong market position could abuse the right of claim in order to further strengthen market power. Conversely, a right of claim does not further assist in the enforcement of unfair competition law if the legal infringement is directed at the consumer. This would be the case with the harassment or canvassing of customers. Therefore, the competitor's possibility of claim, not seen as a complete solution, is not wholly unfounded. As a result, it requires

55. Misleading and Comparative Advertising Directive 84/450/EEC, *supra* note 9, art. 4 para. 1 subpara. 2.

sensible augmentation. This could be accomplished for example through a right of claim for consumer associations or supervision by the authorities. Finally, the question should be asked whether the competitor should be given more attractive claim objects, such as various forms of damages.

5.2. Consumers

It seems adequate to also grant consumers a right of claim since they directly suffer from the infringements. But one has to note that such right might rarely be used since most infringements are only of minor importance for individual consumers and the calculation of actual damages can give rise to enormous difficulties.

5.2.1. No Right of Claim

In some Member States, consumers have no right of claim, for example in the United Kingdom, Poland and Hungary. In Germany, a general right of claim for consumers was hotly discussed some thirty years ago,[56] but could not be agreed upon.[57]

5.2.2. Extensive Rights of Claim

Numerous[58] other states, however, have rights of claim for consumers, for example Denmark,[59] Spain,[60] Italy, and Greece. The consumer right of claim in Denmark is surprising to the extent that the Danish public law regulation by a consumer ombudsman is already highly developed. In addition, there is an individual right of claim in Switzerland.[61] Under Belgian[62] and Dutch law,[63]

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56. See the evidence in Beater, *supra* note 5, § 28 notes 6.

57. See Köhler, in Hefermehl/Köhler/Bornkamm, *supra* note 25, § 1 note 34; Möllers, Unlauterer Wettbewerb, 168 ZHR 225, 229 (2004).

58. Slightly misleading in this respect, Beater, *supra* note 5, § 28 notes 6, who asserts an exclusive right for consumers in Switzerland to sue.

59. MFL, Sec. 19 para. 1.

60. LCD, art. 19 and LGP, art. 27.

61. UWG, art. 10 para. 1: "consumers are entitled to actions according to art. 9, if their economic interests are threatened by unfair competition"; see Knaak/Ritscher, Schweiz, in Schricker (ed.), *supra* note 53, notes 322 ff.

62. LCP, art. 94 as well as art. 1382 cc; see Henning-Bodewig, *Belgien*, in Schricker (ed.), *supra* note 53, notes 515 ff.

63. According to the tort law general clause art. 6: 162 Burgerlijk Wetboek—*BW* ("Civil Code"); Henning-Bodewig/Verkade/Quaedvlieg, *Niederlande*, in Schricker (ed.), *supra* note 53, note 619.

the consumer can bring claims for cessation and damages. The right of claim for consumers in France is extensive due to the special protection of the Consumer Code. It is exercised mostly in cases of illegal advertising. In Italy, the consumer may have a cause of action under the general regime of consumers' rights. It states that consumers have, inter alia, the fundamental right to adequate information and fair advertising, as well as the right to fairness, transparency, and equity in contractual relationships concerning goods and services.[64]

5.2.3. Narrowly Limited Cause of Action—unfair Competition Circumstances as Protective Tort Laws

A median approach is taken by states which regard some competition law norms as protective tort laws providing an implied right of action. The damages can then be claimed under general tort law. Countries such as France, Italy, Belgium and the Netherlands, whose tort law includes a broad general clause by means of which unfair competition law is partially integrated into general tort law, obviously do not need to discuss the protective extent of unfair competition clauses.

Most Member States recognise a cause of action for consumers. The prolonged denial of a right of claim for consumers in Germany is therefore surprising. In legal literature, such a claim is often denied on the basis that sec. 1 and 3 UWG only protect the general public. This corresponds to the fact that the consumers' right of cancellation under sec. 13a UWG was abolished in Germany in 2004 due to its lack of practical relevance.[65] These arguments are, however, rather imprecise and of limited persuasiveness. Numerous jurisdictions expressly emphasize that consumers should be protected through unfair competition law. That consumers have no right of claim because of neglect[66] indicates an extremely cynical approach to law. It confuses standing and claim objectives. If, for example, consumers were given a more effective claim objective, such as the minimum damage provision found in the U.S., they would be more likely to exercise their right of claim.

5.3. Business Associations

Business associations are another promising plaintiff since they are able to combine the interests of several infringed parties and the various possible

64. D. lg. 206/2005, art. 2, par. 2, lit. (c).
65. Begr. RegE UWG, BT-Drs. 15/1487, p. 14.
66. Cf. Beater, *supra* note 5, § 28 notes 7 ff.

claims can be pursued together. However, in practice, these possibilities are not actively pursued very often and there is a distinct reluctance to sue.

5.3.1. Broad Rights to Claim

In Austria, private associations for the protection of competition can claim for an injunction, sec. 2, 14 para. 1 UWG. Pursuant to sec. 14 para. 1 UWG, a cessation claim can also be brought by some federal organizations. Similarly, in Poland, state or regional organizations may claim if their tasks according to charter include the protection of the interests of enterprises. In Sweden, individual enterprises as well as associations of businesses have a right to sue. In Finland, even an organization representing these businesses would have a right to bring a case in the market courts because practices contrary to fair trade can affect all businesses in the branch. Competitors and consumer associations can ask the market court to forbid certain marketing and demand it not to be renewed, only if the ombudsman has refused to bring the case forward. Since sec. 19 para. 1 MFL only requires a legal interest to be shown, business associations in Denmark can file suit as well. Under French law, professional associations can bring claims for damages and injunction before civil and criminal courts. In Italy, art. 2601 *codice civile* states that in cases in which unfair competition is harmful towards an entire category of businesses, trade associations representing such businesses may take legal action against such acts.

5.3.2. Lack of Right to Claim

In England, trade associations do not have a legal right to claim in a representative capacity. Historically, only the injured party could claim, if at all. Only in recent times have consumer associations been accorded additional rights.[67]

5.3.3. Limited Rights to Claim

The German legislature limited the ability of associations to sue for the promotion of trade interests according to the UWG. Under sec. 8 para. 3 no. 2 UWG, a business association can only file suit if it has a significant number of business members and sufficient personnel and material resources. The business association cannot file suit abroad and foreign associations cannot file claims in Germany. In addition, enforcement of the claim may be abusive. This may be the case if the principal purpose of the claim is to enable recovery

67. Consumer associations have been granted the right to sue by Directive 98/27/EC on injunctions.

of the costs for legal proceedings: sec. 8 para. 4 UWG. In Portugal, business associations can sue competitors in unfair competition cases if a whole group of competitors is attacked.

The requirements of the Misleading and Comparative Advertising Directive 84/450/EEC are vague. The group of persons with rights of claim includes persons or organizations that have a legitimate interest in the enforcement of claims.[68] In contrast, the Injunction Directive 98/27/EC designates qualified entities but limits these to the protection of the collective consumer interests.[69] This way, a Member State is free to decide whether it allows competition associations as claimants. All states except for the United Kingdom have decided in favour of this. Several arguments support further rights of claim. If it is true that competitors have the best knowledge of the admissibility of competition measures, this will also apply to trade associations. They can most likely react more quickly than the authorities or have perhaps more financial resources than individual competitors or consumer associations. Moreover, a competitor will not always be willing to bring claims against an infringer.[70] If the competition associations are actively engaged in alternative dispute resolution, supplementary rights of claim are the logical consequence in order to make their actions effective. It is surprising that in Great Britain, the CAP surrenders disputes to the OFT[71] rather than pursuing them itself. Decisions by administrative authorities have the disadvantage that they are subject to judicial review.[72] A legal dispute can be extraordinarily complex as the regulation of the ASA often proceeds via the OFT and the courts. A degree of inefficiency is inevitable. Therefore, alongside consumer associations, trade associations should also be accorded rights of claim in the future.[73]

5.4. Consumer Associations

A controversial topic is the consumer associations' ability to sue. Here, the influence of European law is noticeable.

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68. Misleading and Comparative Advertising Directive 84/450/EEC, *supra* note 9, art. 4 para. 1 subpara. 2.

69. Injunction Directive 98/27/EC, *supra* note 41, art. 3 lit.(b) and art. 1 para. 1.

70. Büscher, § 8, in Fezer (ed.), Lauterkeitsrecht, 2nd ed., Munich 2010, note 241.

71. Cf. sec. 61.10 of the British Code of Advertising, Sales Promotion and Direct Marketing.

72. Cf. Misleading and Comparative Advertising Directive 84/450/EEC, *supra* note 9, art. 4 para. 3 subpara. 2.

73. With the same result but without explanation cf. art. 7 of their draft in Micklitz/Keßler, Europäisches Lauterkeitsrecht, 50 GRUR Int. 885, 901 (2002).

5.4.1. Reasons for Lack of Attractiveness—novelty, Subsidiarity, Lacking Financial Means

Under the Misleading and Comparative Advertising Directive 84/450/EEC, either persons *or* organizations with a legitimate interest under national law can already file a claim.[74] With the formulation of legitimate interest, the possibility was already introduced that consumer associations proceed against infringements. An association's claim was thus not necessarily involved as Member States retained the possibility to institute an administrative procedure against the infringements alongside proceedings in court.[75] The Injunction Directive 98/27/EC designates qualified entities as entitled to claim alongside independent public bodies and also consumer associations.[76] However, legal harmonization was again undermined to the extent that Member States can decide whether they include consumer associations alongside independent public bodies. They may decide between consumer associations and public bodies.[77] In addition, the Injunction Directive 98/27/EC expressly does not apply to comparative advertising and the Product Price Directive 98/6/EC.[78]

Despite the fact that the legal framework for consumer association claims has been introduced in all Member States of the European Union, the results have been disappointing. With the exception of France, there is almost no Member State in which consumer associations play a significant role. Various reasons can be given. In Italy and England, for example, consumer associations and their right of claim did not exist prior to the Injunction Directive 98/27/EC. There is, therefore, no tradition supporting the European law on consumer associations. In Sweden, there is no single recent case in which a consumer association has brought an action of its own in the courts under the MFL. This is primarily the case due to the existence of the state system including a consumer ombudsman and a consumer agency, which normally take care of consumer interests.[79] A comparable situation exists in Finland and Denmark. In addition, the right of claim is partly subsidiary in that it

74. Misleading and Comparative Advertising Directive 84/450/EEC, *supra* note 9, art. 4 para. 1 subpara. 2.

75. Incorrectly A. Beater, Europäisches Recht gegen unlauteren Wettbewerb—Ansatzpunkte, Grundlagen, Entwicklung, Erforderlichkeit, 11 ZEuP 36 (2003), on the assumption that there is a duty to establish the possibility of a legal action taken by an association in the Misleading and Comparative Advertising Directive 84/450/EEC.

76. Injunction Directive 98/27/EC, *supra* note 41, art. 3 lit. (a) and (b).

77. Injunction Directive 98/27/EC, *supra* note 41, art. 3 lit (a): 'and/or'.

78. See Injunction Directive 98/27/EC Annex; correctly Beater, *supra* note 75, 37.

79. Bernitz, Sweden, in Schulze/Schulte-Nölke (eds.), *supra* note 31, 7.

only applies if the consumer ombudsman does not file suit himself.[80] In Germany, an association claim for consumer associations was not introduced until 1965.[81] Usually, only undeniable infringements are pursued.[82] According to sec. 10 § 4–2 UWG, the consumer syndicates filing an action can only request to be reimbursed by the *Bundesamt für Justiz* (Federal Office of Justice) for the fees necessary to raise the claim. A complete reimbursement is only possible after winning the action. If the syndicate loses, it not only has to pay the preparatory costs, court and attorney fees but is also required to pay the opponent party's attorney fee. These procedural risks lead to the associations' rare use of skimming actions[83]. As an incentive for syndicates and other qualified institutions to raise a claim and to ensure sufficient re-financing, they should in the future benefit from the skimmed-off profits as well. A relative participation, measured by a certain percentage, would be an appropriate solution, adding an absolute cap[84]. The high potential for abuse and the evolvement of a "trial industry" can be met efficiently by limiting the number of institutions with standing and determining pre-set criteria for awarding it.

Consumer claims are sometimes financed by competitors. This way, they conceal themselves behind consumer claims.[85] According to recent data, consumer associations are starting to take a more active role.[86]

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80. E.g. in Finland, Kumottu 1528/2001, § 4

81. Beater, *supra* note 5, note 2615.

82. Tonner, Verbraucherschutz im UWG und die UWG-Reform von 1986, 40 NJW 1917, 1922 (1987), referring to a study of von Falckenstein, Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände, Köln 1977, 506.

83. Rott, Kollektive Klagen von Verbraucherorganisationen in Deutschland, in Casper et al. (eds.), Auf dem Weg zu einer europäischen Sammelklage?, Munich 2009, 259, 273 ff.

84. Wagner suggests a 50% quota with an absolute cap at 10 million Euros, requiring the successful syndicate to share the skimmed profit with a non-profit organization or the treasury, Wagner, Neue Perspektiven im Schadensersatzrecht—Kommerzialisierung, Strafschadensersatz, Kollektivschaden, in Casper et al. (eds.), *supra* note 83, 41, 50 ff.

85. Nordemann et al. (eds.),Wettbewerbs- und Markenrecht, 9th ed., Würzburg 2003, note 73; Schricker, Hundert Jahre Gesetz gegen den unlauteren Wettbewerb—Licht und Schatten, 44 GRUR Int. 473, 478 (1996), regarding trade associations; Jennes/Schotthöfer, Germany, in Maxeiner/ Schotthöfer (eds.), Advertising Law in Europe and North America, 2nd ed., The Hague, 1999, 203.

86. German consumer associations claim that they record 80% of the relevant cases, cf. statement of Verbraucherzentrale Bundesverband e.V. in front of the law panel of the European Parliament, February 19, 2004, cf. www.thomas-moellers.de. The legislators point out that consumer associations only moderately used their right to sue, Begr. RegE, UWG, BT-Drs. 15/1487, 42.

5.4.2. Mistaken Enhancement of Attractiveness: Surrender of Profits

The German legislature intended to close a gap in the law[87] by introducing a new claim for the surrender of profits in sec. 10 UWG. If profits are gained at the expense of a number of customers, a claim from associations may be brought in the interest of the state.

The claim for the surrender of profits is of doubtful value to consumer associations. Extensive rights of discovery are necessary to determine the profits. In addition, the consumer association bears the risks of the proceedings' falling in favour of the state. However, precisely the opposite is required in order to strengthen consumer associations. Finally, it is not apparent why the state should reap the profits in Germany. For this reason the act has been described as foolish.[88]

5.4.3. Increasing Attractiveness: Class Actions, Claim for Immaterial Losses, Consolidated Proceedings

In Sweden and France, there is not only a right of claim for consumer associations but also class actions by consumers. In addition, on January 1, 2003, a new act came into force which allows for a group of consumers with the same interest to file a group action. That act, however, is applicable if a group of consumers raises a number of similar claims which fall within the jurisdiction of ordinary courts under the general rules of the Code of Civil and Criminal Procedure. Such an action will require that the members of the group have similar reasons for their actions and that their claims cannot be satisfied equally well on an individual basis. Under sec. 5 MFL, it is provided that organizations may bring a group action in which the organization promotes the interests of consumers or employees. In France, these representative actions in the legal literature are seen as a form of class action. However, the French principle of procedural law is respected, stating that no one can bring a claim via another person. Thus, an action always requires the mandate of at least two consumers. Art. L 422–1 et seq. CCons expand the possibility of representative claims for damages which arise for several consumers against the same enterprise for a common reason, so long as at least two of the injured parties

87. Begr. RegE, UWG, BT-Drs. 15/1487, Begr. zu § 10, 23.

88. Stadler/Micklitz, Der Reformvorschlag der UWG-Novelle für eine Verbandsklage auf Gewinnabschöpfung, 49 WRP 559, 562 (2003). For a contrary view see the prognosis by Sack, Der Gewinnabschöpfungsanspruch von Verbänden in der geplanten UWG-Novelle, 49 WRP 549, 555 (2003), fearing that professional associations for the surrender of profits might develop and assert the reimbursement of their expenses.

have commissioned the action. Consumer associations can bring criminal proceedings for damages through the civil action. In 97.4 per cent of all cases, consumer associations have directly participated in the criminal proceedings initiated by the authorities.[89] Often, however, only one symbolic Euro is awarded.[90] In Denmark, the consumer ombudsman can enforce different compensatory claims in one procedure. Finally, there is the consumer association claim for immaterial loss in Greece (art. 10 para. 9 lit. (b) 2251/1994).[91] In Portugal, consumer agencies can claim compensation even if they are not directly injured.

It appears questionable whether the priority of the consumer ombudsman in relation to consumer associations is in conformity with European law. In order for this to be the case, the consumer ombudsman would have to be a person or organization pursuant to the Misleading and Comparative Advertising Directive 84/450/EEC. The concept of "person" could be challenged in that it requires a natural person. In addition, the consumer ombudsman cannot be an organization. Such an understanding is, however, clearly too narrow, as the Injunction Directive expressly designates independent public bodies as claimants. This includes the Swedish Consumer Ombudsman or the English Director of Fair Trading.[92] From the European point of view, it is correct that public law bodies proceed against the infringement first and only afterwards can consumer associations file a claim. In Sweden, where the consumer ombudsman is an active participant, the extension of competencies of consumer associations was therefore looked upon as rather superfluous.[93] In addition, public law proceedings, as shown by experience in France and Portugal, are actually successful. In Germany, the limited financial equipment of consumer associations has been criticized.[94] To this extent, the right of claim for consumer associations is not satisfactory. This constitutes an *implementation deficit* because the Injunction Directive 98/27/EC imposes an obligation

89. Puttfarken/Franke, Die action civile der Verbände in Frankreich, in Basedow/Hopt/Kötz/Baetge (eds.), Bündelung gleichgerichteter Interessen im Prozess, Tübingen, 1999, 182.

90. Keßler/Micklitz, Harmonisierung des Lauterkeitsrechts, Baden Baden 2003, 121 ff.; Puttfarken/Franke, *supra* note 89, 149,152 ff.

91. Papathoma/Baetge, Die Verbandsklage im griechischen Recht, in Basedow/Hopt/Kötz/Baetge (eds.), *supra* note 89, 187, 201.

92. Baetge, Das Recht der Verbandsklage auf neuen Wegen, 112 ZZP 329, 337 (1999).

93. Doeffel/Scherpe, Grupptalan—Die Bündelung gleichberechtigter Interessen im schwedischen Recht, in Basedow/Hopt/Kötz/Baetge (eds.), *supra* note 89, 429, 439.

94. See the findings by Schricker, Möglichkeiten zur Verbesserung des Schutzes der Verbraucher und des funktionsfähigen Wettbewerbs im Recht des unlauteren Wettbe werbs, 139 ZHR 208, 233 (1975).

that either consumer associations or public law bodies can proceed against anticompetitive conduct. The legal situation in the United Kingdom is even less satisfying. Consumer associations and other institutions entitled to submit cessation claims do not enjoy any privileges with regard to the risk of costs. This is seen as a welcome limitation on their activities by the Department of Trade and Industry.[95] It also constitutes an implementation deficit in the UK if the consumer associations cannot claim or may claim only in a subsidiary capacity while the OFT—in contrast to the relevant institutions in Nordic states—performs its regulatory tasks inadequately.

In order to reduce the risk of liability of consumer associations, a guarantee fund has been suggested.[96] In addition, a right of claim for consumer associations on the basis of comparative advertising and the Product Price Directive 98/6/EC should be created. In its recent proposal on a codified version of the Injunction Directive, Directive 97/55/EC appears in the annex, but the Product Price Directive 98/6/EC does not.[97]

5.5. *State Authorities Like Consumer Ombudsman, OFT etc.*

A distinctly different approach is the prosecution of infringements by state authorities. In the European Union, three separate models can be distinguished. Only a few Member States have no regulation by public law structured authorities. These include Germany, Luxembourg, and Austria.[98]

Most states, on the other hand, have established state authorities for the regulation of infringements of unfair competition law. These include above all the Nordic states, Sweden, Finland and Denmark, with a consumer ombudsman. In the field of unfair competition in Sweden, there is a public consumer agency, *Konsumentverket*, which is responsible for ensuring that the public policy for consumers is practiced. One of the authority's responsibilities is to make sure that the consumers have a strong position on the market. The director general for this consumer authority has another function as

95. Rott, The Protection of Consumers' Interests After the Implementation of the EC Injunctions Directive Into German and English Law, 24 J. Cons. Pol'y 429 f. (2001) with further proof.

96. Schricker, *supra* note 94, 243.

97. Proposal for a Directive of the European Parliament and of the Council on injunctions for the protection of consumers' interests (codified version) of May 12, 2003, COM (2003) 241 final, Annex I No. 1.

98. Regulation Proposal on consumer protection cooperation, COM (2003) 433 final in reasons 3.1.2.

well: He is the Consumer Ombudsman. The Consumer Ombudsman represents consumer interests in relation to businesses and pursues legal action on behalf of the consumers' interest. The Consumer Ombudsman is responsible for ensuring that companies abide by the laws and regulations in the field of consumer protection and ensures that consumer rights are respected. He or she is empowered to take legal action against companies that violate market laws and may bring cases to specially designated courts. The office is linked with an old tradition of ombudsmen in Sweden. The Consumer Ombudsman may file a claim for an injunction or an information order. Moreover, the Consumer Ombudsman has, according to sec. 39 MFL, the primary competence to take action concerning administrative fines. The reason for this is that administrative fines are punitive in character. In Finland, the Ombudsman can ask the Market Court to forbid the violator's advertising and demand it not to be renewed. According to § 19 MFL, in Denmark, the Consumer Ombudsman is competent to institute proceedings with the aim of having issued an injunction.

Finally, there are a number of countries in which public law does not necessarily dominate but has a field of application alongside the civil law procedure. These include not only Poland, the United Kingdom, France, Italy, Spain and Portugal, but also the U.S. and Switzerland. In Poland, there is a president of the Urząd Ochrony Konkurencji i Konsumentów (Office for Competition and Consumer Protection) and a consumer ombudsman. Both have a right of claim pursuant to art. 19.1 no.3 and 4 u.z.n.k. In the United Kingdom, part II of the Fair Trading Act 1973 authorizes the director general to issue orders dealing with particular consumer trade practices that may from time to time raise concern. In previous years, however, only three such orders of limited significance were handed down.[99] The filing of orders against individual rogue traders under part III in cases of persistent unfair conduct which is detrimental to the consumer, was only successful to a limited extent. In practice, this was only utilized if the trader engaged in conduct which was unlawful under an existing provision of civil or criminal law.[100]

In France, the intervention of the state is also limited to the application of the CCons. However, this is a typical criminal procedure. For all other cases of unfair competition in common law, a competent administrative authority does not exist. Where the field of consumer protection and the provisions of the consumer code are concerned, the DGCCRF and the food directorate

99. SI 1976/1813; SI 1976/1812 and SI 1977/1918.

100. Weatherill, *supra* note 31, I.1.(a).

general of the Ministry of Agriculture and the metrology department of the Department of the Ministry of Industry are authorized to establish breaches. In Italy, the powers of the *Autorità Garante della Concorrenza e del Mercato* stem from lgs. 74/1992, which regulates comparative and misleading advertising. In Spain, competent administrative bodies are also entitled to bring a claim against the advertiser on the grounds of art. 25 LGP. As far as the LPG is concerned, the competent administrative body, the consumer association and the affected individual or corporation are allowed to request that the advertiser cease or rectify its unlawful publication. The advertiser must inform them of its intention to cease or rectify, so that if the advertiser does not proceed to answer the request or answers in the negative, an action can be brought before the ordinary civil courts. In Portugal, the public authority competent to monitor the legality of advertising is the *Instituto da Defesa do Consumidor* (National Consumer Protection Institution).[101] This institution defends all consumers for the public benefit. It is the Portuguese authority that monitors the observance of advertising standards and can apply administrative sanctions, such as fines and other ancillary sanctions. The institution can also apply other corresponding decisions such as compelling publication of corrections in the same newspaper.

Public authorities are able to pursue infringements when consumers or competitors have no incentive to file claims. Thus, gaps in enforcement can be closed. Furthermore, state authorities are able to turn to public law for measures like orders to reveal information. As with all state actions, the risk that prosecution will be ineffective is undeniable. Moreover, these actions seem to contradict the notion of state intervention only upon remedy of market failures.

5.6. Public Prosecutor

Proceedings by a public prosecutor offer the advantage of allowing penalties which are often difficult to enforce under civil law. However, it must be acknowledged that in most cases, criminal proceedings are too severe a reaction to most infringements of unfair competition law.

5.6.1. The Enforcement of Infringements Against Unfair Competition Law through Criminal Law Means

In France, bringing a criminal action requires an application to the *Procureur de la République.* In the field of misleading advertisement, the director-

101. LDCons, art. 21 and Decreto-Lei n. 234/99 de 25 de Junho, art. 1; CPI art. 38.

ate general for competition, consumer protection and fraud prevention (DGCCRF), the food directorate general of the Ministry of Agriculture and the metrology department of the Ministry of Industry are authorized to establish breaches of articles L 121–8 and L 121–9 of the CCons (art. L 121–2 CCons). In French law, it is also possible to append a civil damages claim to the criminal prosecution, the so-called *partie civile*. Abuse of a person's vulnerability in certain situations, such as home visits or canvassing by telephone or fax[102], constitutes an offence punishable by imprisonment between one and five years and/or a fine of €9,000. The criminal law nature of advertising law has forced the French Parliament to adopt a multitude of individual regulations to comply with the rule of law requirement *nulla poena sine lege* (no punishment without law).

5.6.2. Criminal Law as the Exception

To an extent, the arguments against criminal proceedings are identical with those against public law monetary fines. The principle of "no punishment without law" requires that the infringer knows of the legal duty and the penalty for its infringement. However, unfair competition law is intrinsically such that all forms of conduct cannot be adequately prescribed. Hence, several Member States provide for a general clause in their unfair competition laws. Even with these general clauses, the legal duty often cannot be determined in advance. Therefore a penalty is only possible in particular cases; as demonstrated by Swedish and French law.[103] In addition, the "no punishment without law" principle means that extension of the scope of an offence is not possible through analogy.[104] On the other hand, criminal proceedings allow penalties, in particular fines, which are often difficult to enforce under civil law. Administrative law proceedings must, when in doubt, be subject to judicial review. Criminal proceedings by contrast are judicial proceedings from the beginning. They are therefore generally shorter than administrative law proceedings. Ultimately, the inquisitorial and investigative principle of criminal law proceedings is decisive. State bodies monitor the legal infringement. If a private claimant can join in the proceedings, then enforcement is made significantly easier for him or her. Consolidated proceedings are thus acknowledged in a number of states such as Germany, France, Italy and Portugal.

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102. CCons., art. L 122–8 ff.

103. CCons., art. L.213–1; Dreier/von Lewinsky, *supra* note 53, note 10.

104. For UWG, sec. 16 (former UWG, sec. 4) see e.g. OLG Stuttgart (1981) 83 GRUR 750—'statt Preise'; BGH (2002) 55 NJW 3415.

Overall, more arguments exist against criminal proceedings than in favour of them. Above all, the principle of certainty and the infringement's lack of severe injury render criminal proceedings less credible. The minimal role of criminal proceedings in most Member States (with the exception of France) is therefore understandable. Consequently, the Portuguese legislature, in its amendment of the CPI, has reclassified the unfair competition infringement as a breach of a regulation rather than a criminal offence. Criminal law would thus seem to be appropriate only when the hard core of unfair competition law has been violated, for example by defamation of competitors as provided in art. 10bis Paris Convention or sec. 16 UWG (ex-sec. 4 UWG). Because all Member States provide for such an offence, a corresponding public law or criminal law fine should be considered. This, however, would not solve the problem to the extent that the EU is competent to impose penal sanctions.[105]

6. Objects of Claims

6.1. Injunction or Prohibition

Injunctions are the most important means in fighting infringements of unfair competition law. However, with the lack of enforcement, the old saying "infringement is always worthwhile" must still hold true.

6.1.1. Content of the Injunction or Prohibition

In most Member States, the most important legal remedy is that unlawful advertising is not repeated in the future. This so-called "claim for an injunction" is usually a civil law procedure as found in Germany, Austria, or Poland. If there is supervision by an authority, as for example by the Consumer Ombudsman in Sweden, Finland and Denmark, or the OFT in England, then the prohibition is equivalent to the civil law injunction order.

The European legislature harmonized the cessation claim with the Misleading and Comparative Advertising Directive 84/450/EEC by encouraging enforcement of the cessation of confusing or inadmissible comparative advertising. Cessation can be enforced through the courts or administrative

105. See e.g. Satzger/Weiß, art. 67 AEUV, in Streinz (ed.), EUV/AEUV, 2nd ed., Munich 2012, notes 18 ff.

authorities.[106] The claim for an injunction and prohibition are aimed at the same legal remedy: the cessation of unlawful conduct. As a result, it will come as no surprise that all Member States know this legal remedy. In the United Kingdom, for example, reg. 4(3) CMAR establishes the priority of complaints coming to the local standards authority[107] as well as the priority of the self-regulatory mechanisms of the advertising standards authority,[108] which have traditionally played an important role in the control of advertising in England.[109]

On the other hand, it may be said that the Misleading and Comparative Advertising Directive 84/450/EEC nominates the self-regulatory bodies, but emphasizes that they may only act along with court or administrative proceedings. In fact, the standards applied by the ASA are regarded as higher than the legal requirements. To the extent that no further harmonization of substantive law has taken place, self-regulatory bodies are allowed to continue monitoring the advertising infringement.

6.1.2. Easing of Substantive Burden of Proof

In addition, the Misleading and Comparative Advertising Directive 84/450/EEC has harmonized the requirements for a claim. The cessation of unlawful conduct can also be required without proof of either fault of the advertiser or loss by the claimant.[110] This factual requirement, which is still necessary in general tort law, is no longer mandatory and clearly eases pursuit of a claim. In essence, the claim of misleading circumstances by the advertiser must be proven by the claimant. Art. 6 lit. (a) of the Misleading and Comparative Advertising Directive 84/450/EEC gives courts and administrative authorities the authority to require the advertiser to furnish evidence of the factuality of its advertising. This happens when the court, taking into account the legitimate interest of the advertiser and any other party to the proceedings, determines that such a requirement appears appropriate on the basis of the circumstances of the particular case. Should this evidence be insufficient,

106. Misleading and Comparative Advertising Directive 84/450/EEC, *supra* note 9, art. 4 para. 2 s. 1 indent 1.

107. See Macleod, Consumer Sales Law, London 2002, 268.

108. Ibid., 3.

109. *Director General of Fair Trading v. Tobyward Ltd. and another* [1989] 2 All ER 266. Cf. also Scott/Black, Cranston's Consumer and the Law, 3rd ed., Cambridge 2000, 61.

110. Misleading and Comparative Advertising Directive 84/450/EEC, *supra* note 9, art. 4 para. 2 s. 1.

the factual claim could be seen as incorrect.[111] The legal harmonization imposed by the directive, however, is subject to several uncertain legal concepts. The reversal of the burden of proof depends on the circumstances of the particular case; it must be reasonable and ultimately subject to a balancing of the interests of the advertiser and other participants in the proceedings. It may therefore come as no surprise that the implementation of the directive has not eased the burden of proof in the various Member States.

6.1.3. Knowledge of the Claim Requirements through Information Entitlement

The requirements needed to make a "claim for injunction" are also easily proven provided the claimant is aware of them. The United Kingdom has not yet recognised an easing of the burden of proof. However, the pre-trial discovery procedure does facilitate civil law disputes. Discovery obliges parties to disclose all documents including papers, draughts, diary entries, notes, software, tapes or film, which are in any way relevant to the matters at issue in the action and are, or have, at any time, been in the possession, custody, or power of the parties to the proceedings.

The possibility of administrative authorities gaining information on the conduct relevant to competition issues is of particular interest. Swedish,[112] Finnish,[113] and Danish[114] laws actually oblige the business party to provide information to the consumer ombudsman on request. The obligation is sanctioned by a fine should the enterprise fail to fulfil the information requirement.

6.1.4. Threat of Administrative Fines or Criminal Fines

The threat of administrative or criminal fines is not expressly regulated by European law. However, in almost all states, there are sanctions for cases in which the prohibition or cessation order is not observed. In Germany, for example, the cessation claim may be supported by an administrative fine of up to €250,000,[115] and in Austria with fines of up to €100,000.[116] Similarly in

111. Misleading and Comparative Advertising Directive 84/450/EEC, *supra* note 9, art. 6 lit b).

112. MFL, § 11.

113. Act on the National Consumer Administration, § 4 para. 1 s.1.

114. MFL, § 15 para. 2 in connection with § 22 para. 2.

115. ZPO, § 890 para. 1 s. 2.

116. EO, § 355 para. 1.

Sweden,[117] Finland[118] and Denmark,[119] an injunction may be combined with the threat of a fine. Fines are also possible in France, Italy and Portugal. By contrast, British court action is seen only as a last resort. The OFT can only sue for an injunction. If a court order is breached, the OFT has to sue again.

The threat of a fine should be harmonized at the European level. The General Enforcement Order of Misleading and Comparative Advertising Directive 84/450/EEC art. 4 stating that each 'Member State shall ensure that there are adequate and effective means to combat misleading advertising' would do just that and thus for the first time become truly effective.

6.2. Elimination

A claim for elimination is a sensible addition to a claim for an injunction as it allows for the elimination of the negative effects of an infringement. As has already been stated for injunctions, however, far too many infringements are still not prosecuted.

A claim for elimination is recognised in almost all Member States either by statute or judge-made law. This applies not only to Germany, Austria, Sweden, Finland, Denmark, Spain and Portugal, but also to Poland and Hungary. In France, the court can order the publication of the judgment and may in addition order the publication of one or more corrective statements.[120] In Italy, according to art. 2599 *codice civile*, any judicial decision finding infringement of art. 2598 *codice civile* may order the defendant to desist from the illegal behaviour and issue any further measure necessary to eliminate its effects.

Under the Misleading and Comparative Advertising Directive 84/450/EEC, the elimination claim is subject to two restrictions. First, as an optional clause, it is dependent on implementation in the Member States. Second, the elimination, which is the publication of a corrective declaration, is not expressly provided for. In general, it is only a subsidiary aspect.[121]

The elimination may typically go further than cessation of unlawful advertising,[122] because the elimination order can remove the legal consequences of an unlawful position and thereby restore the lawful position. The publica-

117. MFL, Sec. 5.

118. SopMenL, § 6 para. 1 s. 2; KSL, Kap. 2 § 7 para. 1 s. 2.

119. MFL, § 22 para. 1.

120. CCons., article L 121–4.

121. Art. 4 para. 2 subpara. 3 indent 2.

122. See Teplitzky, Wettbewerbsrechtliche Ansprüche und Verfahren, 8th ed., Cologne 2002, § 22 note 6.

tion of a corrective statement, while certainly being an important subsidiary case for general elimination, is still merely a subsidiary aspect. An elimination order can for example be directed at the removal of posted brochures or the destruction of unlawfully labelled goods and/or machinery produced in violation of commercial secrets. For this reason, the two limitations under the Misleading and Comparative Advertising Directive 84/450/EEC should not be maintained. This way, the elimination claim would be introduced on a European level and an elimination order would generally be held admissible and not be limited to the corrective declaration.

6.3. Preventative Injunction Order

In Germany, the claim for a preventive injunction was developed by the courts[123] and has become recognised as customary law. The threat of harm is not a requirement.[124] Under Polish law, the preventive cessation claim is less clearly developed than in Germany and Austria. There are, however, authors who affirm such a claim provided there is potential danger of a legal infringement. In France, art. 808, 809, 872 and 873 NCPC gives the power to the President of the Commercial Tribunal (*tribunal de commerce*) to take measures to prevent imminent damage or order clearly illegal conduct to cease (*trouble manifestement illicite*). In Italy, the preventive cessation claim is possible provided imminent potential danger of a legal infringement. In case of delay, the requirement of serious and irretrievable loss to the plaintiff may be considered *in re ipsa*. In Spain, the plaintiff is also entitled to apply to the civil courts to take all necessary measures to prevent infringement, and in particular, to remove the infringing goods from commercial trade. The preventive injunction claim is also known in Portugal, where there are certain conditions that must be observed in order to file this preventive claim: the fear of a severe violation (infringement of right) and the difficulty of cure after the violation of the right. The preventive claim must be urgent (art. 382 CPC) and it must be possible for the court to determine the application of a compulsory monetary sanction (art. 384 para. 2 CPC). Subsequently, the claimant must fulfil the requirement of taking a principle action against the competitor after a month's delay (art. 389 CPC).

Consequently, numerous states provide for the preventive injunction claim, for example Germany, Austria, Portugal, France, Italy and Spain. The requirement is the imminent threat of unlawful anticompetitive conduct. In

123. RGZ 101, 335, 339; BGHZ 2, 394, 395, (1952) 54 GRUR 35—"Wida-Ardia".

124. Teplitzky, Ansprüche und Verfahren, 9th ed., Berlin 2007, chp. 9, note 7.

contrast, in the Member States in which the preventative cessation claim is denied, surprising results can appear. Under Swedish constitutional law, there is an unconditional prohibition on censorship of published announcements prior to release (Freedom of Print Act 1949). The freedom of print has actually been limited in regards to commercial announcements, the publishing of which may be limited by way of governmental acts. This is the legal basis for accepting the limitations laid down by the MFL. Still, the exception of commercial announcements from the constitutional freedom of print does not cover the prohibition against censorship prior to publishing. This constitutional right makes it impossible in Sweden for all state and governmental institutions, including the courts, to examine the content of an announcement, whatever its nature, prior to its publication. The legal position in Finland is identical: It is impossible to react in a legally binding manner to an advertisement campaign before it has begun because the SopMenL only deals with actions that have already been committed. The conflict with freedom of the press is also seen in the United Kingdom. In practice, courts have always been very reluctant to order an injunction in libel cases, at least in interlocutory proceedings, and they have not done so if the defendant intends to plead justification.[125] In fact, it was easier to obtain an injunction order in malicious falsehood cases since damages are, in such cases, inevitably difficult to calculate, occur some time after the event, and may not be adequate.[126]

Thus, the legal position in Sweden, Finland and the United Kingdom is not in conformity with European law. Member States denying the preventative cessation claim on the grounds of freedom of press violate the requirements of the Misleading and Comparative Advertising Directive 84/450/EEC.

6.4. Damages

Damage claims represent financial detriment to the enterprise. They limit the freedom of the advertiser in a more noticeably forceful way than injunctions or prohibitions. But very often damages cannot be calculated and thus not be awarded.

6.4.1. Enforcing the Claim for Damages

The claim for damages is recognised in all Member States. Compensation for harm is accorded by the general principles of the law of obligations so that

125. See *Schering Chemicals Ltd. v. Falkman Ltd. and Others,* [1982] *Q.B.* 1 (17 f.), per Lord Denning M.R.; *Kaye v. Robertson & Another,* [1991] *F.S.R.* 62, 67.

126. See *Kaye v. Robertson & Another,* [1991] *F.S.R.* 62, 68.

there are no peculiarities. However, in Sweden and Finland, civil law damages are hardly ever awarded in practice. In most jurisdictions, among them Germany, Austria, Portugal and Italy, the claim for compensation of harm fails because the loss of profit is difficult to prove. This is appropriately discussed in terms of *probatio diabolica*.[127] Even in the U.S., a country known for liability in all areas of life, damages claims are still unusual. Where the extent of past pecuniary injury can be established with sufficient certainty, compensatory damages may be recovered. Proving these damages constitutes the biggest hurdle to damages awards.

6.4.2. Surrender of Profits

The surrender of profits by the infringer is recognised as the object of claims in numerous states. In practice, such claims for the surrender of profits are of limited significance. This is first of all due to the fact that either the corresponding harm must be proven (Poland) or that the profit, similarly to the harm of the injured party, is often difficult to establish and, accordingly, to quantify. In Sweden, the surrender of profits is also of a theoretical nature because the defendant's profit is very difficult to prove. Therefore, a claim requiring the surrendering of profits must usually be joined with a discovery claim in order to be effective. However, the discovery claim is also of limited use and in Greece and France, has only had limited effect as yet.

In addition, the difficulty is of course to ensure that the profit was made entirely through the infringement alone. The profit can only seldom be explained mono-causally in terms of an unfair conduct leading to the persistence of evidentiary problems.[128] Therefore, the claimant in England or Germany has, at best, only a partial claim to profits. Ultimately, actual profits are difficult to prove. It remains unclear which damages can be deducted.[129]

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127. In Denmark, a company was convicted due to the fact that it had marketed bookcases, which was considered by the court to be an imitation of a bookcase marketed by a competitor. As to the question of compensation/ damages, the victim sued for DKK 10 million, the High Court awarded compensation amounting to DKK 6 million, but the Supreme Court reduced the compensation to DKK 3 million—without clarifying the basis for this reduction. The profits of the wrongdoer were assumed to be approximately 20 million DKK but the Supreme Court was apparently convinced that to some extent the companies were not targeting the same group of customers. Therefore, there is no direct causation between the turnover of the wrongdoer and the loss of the victim, see Danish Weekly Court reports 2004, 1085.

128. Sack, *supra* note 88, 554.

129. According to UWG, § 10 para. 2, the claim of skimming off profits is reduced by the benefits that the injuring party produces to third parties. This may lead to the awk-

Also, a claim by associations to surrender profits, as under § 10 UWG, does not seem to be the ultimate solution. The time-consuming nature of the procedure is correctly acknowledged because the defendant's profits must first be identified in the accounts.[130]

Thus, it must be realized that gaps in the law are likely to remain regarding claims for the surrender of profits even if harmonized on the European level.

6.4.3. Enforcement of a Comparable Licence Fee

The licence fee is known in a number of states such as Germany, Poland, Denmark, Italy, Spain, and Portugal. Also in jurisdictions which protect injured parties through trademark law, for example Austria or England, there is reliance on the licence fee. In terms of the amount, German law awards what the parties would have agreed to in a fictitious licensing agreement.[131] In the majority of cases, a one-off licence is assumed. In practice, the licensing fee usually amounts to between one and five per cent; occasionally more in individual cases.[132]

6.4.4. Civil Law Fines—Punitive Damages

In American law, the concept of damages is markedly more flexible than in European law. It is possible not only to compensate tangible harm but to award punitive damages in cases of particularly objectionable conduct. The United Kingdom, for example, recognises the possibility of this. In addition, the state attorney general may enforce civil law damages.

6.4.5. Assessment of Damages

Where civil law or criminal law fines are rejected due to their punitive nature, composite calculation of damages may instead be considered. In Poland, the court shall assess damages in accordance with its own views according to art. 322 k.p.c. If in cases for compensatory damages, unjust enrichment, etc., the precise calculation of damages is impossible or at least very difficult, this view will be based on careful consideration of the case's circumstances. In France, damages can be claimed at civil law under art. 1382 cc (*action en responsabilité civile*). If the infringement is also sanctioned

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ward result that a claim fails during trial, as the injuring party performs to a third party. Cf. Sack, *supra*, note 88, 553 f.; Stadler/Micklitz, *supra* note 88, 561 f.

130. Ohly, Vereinigtes Königreich von Großbritannien und Nordirland, in Schricker (ed.), *supra* note 53, note 172.

131. Piper/Ohly/Sosnitza, UWG, 5th ed., Munich 2010, § 9 note 16 f.

132. BGH (1991) 93 GRUR 914, 917—"Kastanienmuster".

criminally, the damages may additionally be claimed under the *action civile*. This claim may be pursued not only in the civil courts but also by way of a consolidated procedure in the criminal courts (*constitution de partie civile*).[133] The amount of compensation (*dommages-intérêts*) is assessed at the discretion of the judge. Assessment of damages is also possible in Portugal, and is recognised in Switzerland.[134]

In Greece, a claim for damages aims at compensation and not at sanctioning.[135] In the U.S., minimum damages and treble damages are also clearly distinguished from punitive damages. A statutory penalty is necessary to motivate customers to enforce the statute.[136] Statutory minimum damages are intended to encourage private litigation, and courts should award such damages whenever authorized to do so. The underlying idea is to award damages to the claimant, to deter violations and to encourage an out-of-court settlement.[137]

On the other hand, loss suffered by collective consumer interest is diffuse because the construction of a collective interest liberated from individual interests can be easily overloaded with social objectives. Also, the assertion that a consumer association can suffer damages is objected to by some.[138] However, this objection should not be upheld. Without doubt, such groups are eligible to protection. An extension of the concept of damage would have the advantage, over an assessment of damage, of being founded on more precise legal principles. One would not leave to the judge the rather intangible assessment of damage but link it to concrete criteria. This would mean providing further individual criteria to justify the award of damages. Three approaches are given here.

On the one hand, the individualistic character of civil law could be further developed. If the loss of the claimant and the profit or gain of the infringer cannot be proven, one should verify the other persons and objects falling within the protective scope of unfair competition law. These are usually the

133. Dreier/von Lewinsky, *supra* note 53, note 363.

134. Regarding UWG, art. 9 para. 3; see Knaak/Ritscher, *supra* note 61, note 340.

135. Karakostas, Prostasia tou katanalote: N. 2251/1994, Athens 1997, 208ff.; Papathoma-Baetge, *supra* note 91, 187, 202.

136. *Kaplan v. Democrat & Chronicle*, 698 N.Y.S.2d (App. Div. 1999).

137. *Refuse & Environmental Sys., Inc. v. Industrial Services*, 932 F.2d 37 (1st Cir. 1991).

138. Hopt/Baetge, Verbandsklage und Gruppenklage, in Basedow/Hopt/Kötz/Baetge (eds.), *supra* note 89, 11, 45.

competitor, the consumer, and competition itself.[139] Normally, it can also be determined against whom the intervention was carried out. Therefore, it would be conceivable to extend the actual concept of harm and, for example, to award damages for infringement of personal rights of the consumer. This would correspond to the legal position in Switzerland, where damages for immaterial loss can be awarded under art. 49 OR, for example for trade libels or imitation.[140] A similar approach is chosen by other Member States which emphasize that the consumer has a right to "adequate information and fair advertising". This formulation is found in Italian law. A tort claim is considered possible for a legal infringement.

Numerous authors raise the question of how the actual level of damages is to be measured. This requires making the loss concrete. Greek courts take into account the severity of the harm to the legal order by the unlawful conduct, the size of the defendant's enterprise and above all, the annual turnover as well as the requirement of general and particular care.[141] In addition, the profits gained as a result of the legal infringement may be considered. In the meantime, the Greek jurisdiction has also begun to make this claim concrete.[142]

Finally, the U.S. approach of minimum damages should be considered. The above-mentioned jurisdiction of the German Federal Constitutional Court would not apply in this case because the amount of damages would be noticeably less than punitive damages. If, as in the U.S., minimum damages were laid down by the legislature, they would be foreseeable and would act as a deterrent.

In effect, if the concept of damages is extended, anticompetitive conduct could be recognised more easily than in case of a prohibition or the establishment of actual harm. This way, the criticism could be countered that anticompetitive conduct is always worthwhile for the infringing party. It is therefore conceivable to implement this with severe legal infringements as an additional remedy.

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139. Cf. e.g. UWG, § 1: This law serves the protection of competitors, consumers and other participants of the market from unfair competition. It protects the interest of the public and fair competition.

140. Knaak/Ritscher, *supra* note 61, note 341.

141. Consumer protection law 2251/1994, art. 10 para. 9 lit. b). A translation may be found in (1996) 44 GRUR Int. 897.

142. See the pointers by Papathoma/Baetge, *supra* note 91, 187, 205 ff.

7. Out-of-Court Settlement

There are different ways of settling disputes between parties without resorting to court proceedings. These methods offer the possibility of dispute settlement more quickly and relieve the judiciary as well. However, in some Member States, out-of-court settlements are still not very common and not accepted as equal. The various possibilities for out-of-court legal protection are often lumped together. One should distinguish between settlement by the parties without involvement of third parties, out-of-court dispute resolution through third parties and dispute resolution in the course of self-administration.

7.1 Out-of-Court Settlement of Disputes Between the Parties

7.1.1. Notice of Violation by a Competitor or an Association

The notice of violation (*Abmahnung*) has a central place in German advertising law. Approximately 90 per cent of all advertising disputes are settled by this procedure without resort to the courts.[143] The award of costs encourages parties who feel aggrieved by competitors' advertising to consult attorneys and undertake legal action. The notice of violation is also known in Sweden. It serves the purpose of making the opposing side aware of the situation. Potential defendants who continue contested behaviour after receiving a warning risk being found as having acted intentionally. Under French law, it is not mandatory to first admonish the competitor. Nevertheless, it is usual to do so prior to serving him with a *mise en demeure* because of the advantage of either avoiding legal action or at least assisting in proof of intention. In Germany, Denmark, and Spain, it is important for legal costs whether the affected party has previously served a notice of violation on the infringer.

The notice of violation is known in a number of Member States and in the U.S. In Germany, it terminates over 90 per cent of all disputes. The enforcement of relief against the unfair competition methods in Germany has been described as "probably the most effective" system of advertising control.[144] It has the advantage of enabling a rapid reaction to the legal infringement because no third parties need to be involved in the court or out-of-court proceeding. In addition, legal proceedings are avoided,[145] so that the conflict can be settled more quickly.

143. Büscher, *supra* note 70, § 12 note 2; Jennes/Schotthöfer, *supra* note 85, 203, 228.
144. Jennes/Schotthöfer, *supra* note 85, 203.
145. Bornkamm, in Hefermehl/Köhler/Bornkamm, *supra* note 25, § 12 note 1.5.

However, the notice of violation and the related claim for recovery of expenses are not a universal cure. The notice of violation does not apply if there is no claimant, as is the case in Germany and many other Member States if the consumers lack a right of claim. Ultimately, it does not help the injured party but rather, in general, the attorney.[146] In Germany, it took over thirty years to prevent abuse by professional associations. Even now, the limits of admissible expenses are far from being explored to their full extent. Recently, problems in the course of the calculation of expenses for the disgorgement of profits came to light.

7.1.2. Complaint Procedures

Art. 6 para. 2 and 3 of the Proposal for Regulation of Marketing requires that the consumer institutes complaint proceedings and that the consumer receives a response to the complaint without cost within four weeks of filing it. Such a measure is helpful to the consumer because it is cost-free. This will be preferable, no doubt, to court proceedings. On the other hand, however, it must be established whether there is a disproportionate burden on the opposite side, as the legal duty is directed not only towards larger enterprises, but also to any contractor. Nevertheless, the above experiences of various Member States have made clear that no flood of claims needs to be expected. Thus, such a complaints procedure, which does not involve third parties, should essentially be welcomed.

7.2. Out-of-Court Dispute Resolution Through Third Parties (Arbitration, Mediation, etc.)

Germany approaches out-of-court dispute resolution through third parties under sec. 15 UWG, a novelty that has increasingly been welcomed. Austria has no legal regulation for private mediation, although it does exist in individual areas for voluntary dispute resolution of limited importance. Polish law recognises only general regulations on dispute resolution. If such proceedings are instituted, however, the parties are bound by the decision.

In France, by contrast, no compulsory mediation procedures are prescribed by general civil or procedural law in cases of torts. In competition matters, it is more common for individual consumers or consumer associations to start professional mediation proceedings. In consumer law, one can

146. The competitors have to self-execute their rights, see the proof in Brüning, §12, in Harte-Bavendamm/Henning-Bodewig (eds.), UWG, 2nd ed., Munich 2009, note 85.

distinguish between the direct and indirect resolution of conflicts, either via a *mise en demeure*, sent directly to the infringer, or via mediation, arbitration or conciliation methods. There are no special rules for mediation in Spanish unfair competition law. Arbitration is only possible if the parties involved agree on it in the dispute (art. 1 Arbitration Act). It should be noticed that in Spain, the Asociación de Autocontrol de la Publicidad (Association for the Self-Regulation of Commercial Communication) works as an extra-judicial body to settle disputes which arise from the application of the Codes of Conduct based on the ICC International Code of Advertising Practice. In Portugal, the proceedings of voluntary arbitration are completely optional, depending on the agreement of the parties. Arbitration still plays no significant role in the resolution of competitors' conflicts, as there is a lack of confidence in the ability of arbitration procedures to resolve these kinds of problems. Consequently, arbitration is rare, as it always depends on the parties' agreement.

In contrast, Sweden, besides the Consumer Agency and the Consumer Ombudsman, also uses the ARN (*Allmänna Reklamationsnämnd*—Consumer Complaints Board), which resolves disputes by means of issuing recommendations. The ARN issues about 4,000 recommendations per year. It has therefore been established as an easy and effective form of arbitration for disputes between consumers and commercial enterprises. The decisions of the ARN are not legally binding, but to a great extent, Swedish businesses feel obliged to respect the tribunal's recommendations. In 75 per cent of all cases, the recommendation is complied with.

The use of out-of-court procedures through third parties, though legally possible, is not particularly accepted in Austria and Germany. This may be because they are difficult to classify. The disadvantage is that such procedures can usually only be instituted with the agreement of both parties. Sanction mechanisms are similarly weak. Settlement and publication of the decision on the other hand require an agreement of both parties. However, it is more appropriate to immediately gain the declaration of a court than that of an out-of-court dispute resolution institution. In Germany, notices of violation costs that have already been incurred also encourage a court decision.

The differences in legal cultures are revealed here. In Sweden, acceptance is based on the fact that business parties are not of a litigious mentality.[147] In contrast, in Germany, mediation is not widespread perhaps because only a

147. The former MFL mainly consisted of criminal offences, with the result that a businessman would have had to report his competitor at the public prosecutor's office, cf. Treis, Recht des unlauteren Wettbewerbs- und Marktvertriebsrecht in Schweden, Cologne 1991, 7.

legal decision is accepted by many citizens. In other states, the solution through self-regulation is of greater importance than out-of-court dispute settlement through third parties.

7.3. *Dispute Resolution Through Self-Organization—ASA, CAP, etc.*

In Germany, codes of conduct have been developed by the *Deutscher Werberat* (German Advertising Council),[148] a self-regulating institution created by the *Zentralausschuss der Werbewirtschaft* (Central Committee of the German Advertising Industry). However, dispute resolution through voluntary procedures has remained undeveloped.[149] For example, in Germany, the notice of violation with an associated claim for the recovery of expenses is preferred.

In several Member States, there are voluntary dispute resolution mechanisms, for example in the United Kingdom, France, Italy, Spain and Portugal, as well as the United States. The customary sanctions are the publication and the associated stigma of unfair competition measures, as well as possible exclusion from the association. In addition, in the United Kingdom, the media, contractors and service providers may withhold their services or deny access to rental. Adverse publicity, which acts as a deterrent, may result from rulings published in the ASA monthly report. Preventative or trading sanctions may be imposed. Recognition may be revoked by the medium's, advertiser's, promoter's or agency's professional association. This could be followed by a service provider and financial incentives provided by trade, professional or media organizations also being withdrawn or temporarily withheld.

In France, some of them even have the power to pronounce injunctions in case of non-conformity with their statements. This is the case, for instance, with the Committee for Advertising on Radio and Television, whose injunctions and penalties are regulated by the *Conseil d'État* and the BVP. It can summon its members to justify, or put an end to, any prohibited advertising under threat of eventual exclusion from the association. In the end, the BVP might be admitted as joint claimant. Since membership is often a criterion in selecting an advertising agency, expulsion from the BVP for unfair competition, including for non-observance of its recommendations, is the only sanction to be

148. Cf. www.interverband.com/dbview/owa/assmenu.homepage?tid=69392&fcatid.

149. von Hippel, Verbraucherschutz, 40 RabelsZ 513, 521 (1976); Tonner, *supra* note 82, 1921; the advertising council has only decided 135 cases on its own between 1993 and 2002. See the data in Käser, Effizienz des Rechtsschutzes, Augsburg 2003, 259.

taken seriously. In Italy, the panel can order cessation and publication. Nevertheless, the panel has no power to award damages; an action for damages may be filed to the ordinary courts before or after the panel has issued its decision. Such a decision (as well as decisions by the *Autorità Garante*) may assist the plaintiff's proving that the advertisement is misleading. Self-disciplinary judgments are highly effective since most advertising media (including most of the important newspapers and magazine publishers as well as TV and radio broadcasters) will refuse further publication of an advertisement that has been banned by the panel. The significance is thus very high, with 80 per cent of the features concluded through self-regulation of advertisers and a success rate for filed complaints over 75 per cent. In addition, self-regulation is widespread in Spain and Portugal.[150]

Self-regulation tends to be ineffective if it only applies to a few cases or, as in Germany, to cases which are given to associations. In addition, it is a very blunt instrument where only a small circle belongs to the association or where sanctions cannot be enforced.[151] In addition, it is frequently the case that no damages are awarded. Often the out-of-court procedure is only preliminary to court proceedings. Finally, conflicts of interest are feared.[152] Numerous arguments, however, support dispute resolution through self-regulation. An amicable settlement facilitates cessation, the usual case under unfair competition law. Surprisingly, it seems that voluntary proceedings are often superior to out-of-court dispute resolution proceedings provided for by law. This is because these sanctions mechanisms, such as publication or exclusion from the association, are often more powerful than those proceedings suggested by law. A company has appropriate substantive expertise. In addition, it can react quickly, as for example in Italy or the United Kingdom. Procedural costs can therefore be reduced and the procedure's length be shortened.[153] If, as a result of overstretched state finances, ways to save costs are looked for, one must also ask whether every trivial case must be dealt with before the courts.

150. *Código de Ética na Publicidade* (Code of Fair Practices in Advertising).

151. Regarding these two accusations of the Director General of Fair Trading, see Director's General Report for 1982, 1983 HCP, 11; also Harvey/Parry, The Law of Consumer Protection and Fair Trading, 6th ed., Oxford 2000, 361 f.; the last argument is also called upon by Oughton/Lowry, Textbook on consumer law, 2nd ed., London 2000, 50 f.

152. Beater, *supra* note 75, 49 f.

153. Recommendation 98/257/EC reason for consideration 5.

8. Conclusion

In conclusion, the most important result is that there is a wide variety of methods for enforcement in the Member States. Penal and civil law sanctions can be found as well as methods of public law enforcement. However, all three possibilities are never used to the same degree in any single member state. Rather, in each country, one field of enforcement is emphasized. This analysis shows that no single method of enforcement is superior to the other, but that they are equal in their effectiveness. If deficiencies occur, increasing the methods of enforcement should seriously be considered. An example could be a more forceful use of supervision by public authorities guaranteeing that infringements inflicting only minor harm on each individual are pursued. Regulation 2006/2004 on consumer protection cooperation introduces the supervision by public authorities for cross-border infringements. For Germany, this is a new development: so far, only few areas of law have been supervised by public authorities.[154]

Several measures should be considered when looking at possible improvements of enforcement, e.g. the introduction of a class action for consumers, empowering them to pursue their rights and freeing them from their dependency on consumer associations.[155] Furthermore, the right to start civil proceedings for individual consumers should be introduced throughout the EU. The fear that this would open the floodgates has been proven unfounded by those countries that already offer such a possibility.

Threat of fines and elimination should be introduced on the European level without any optional clauses. Finally, the claim for damages should be made easier. Without effective damages awards,[156] the old saying will stay true that an infringement of unfair competition law is always worthwhile since no severe sanctions are to be feared.

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154. E.g. WpHG, § 36b in the field of financial services, see Möllers, § 36b, in Hirte/Möllers (eds.), Kölner Kommentar zum WpHG, Cologne, 2007.

155. In capital market law such a possibility was recently created by the Kapitalanlegermusterverfahrensgesetz (KapMuG); see Möllers/Weichert, Das Kapitalanleger-Musterverfahrensgesetz (KapMuG), (2005)58 NJW, 2737 f., with further references.

156. One could consider to award so-called triple damages as it is possible in the USA, see Sheldon/ Carter, Unfair and Deceptive Acts and Practices, 5th ed., Washington 2001, 624; Pridgen, Consumer Protection and the Law, New York 2003, 397 ff.

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