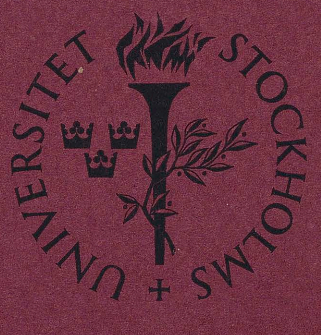
Fair Trading Law in Flux?

National Legacies, Institutional Choice and the Process of Europeanisation

Antonina Bakardjieva Engelbrekt



Juridikbok.se

Denna digitala version av verket är nedladdad från juridikbok.se.

Den licens som tillämpas för de verk som finns på juridikbok.se är **Creative Commons CC BY-NC 4.0**. Licensvillkoren måste följas i sin helhet och dessa finner du här https://creativecommons.org/licenses/by-nc/4.0/legalcode.sv

Sammanfattningsvis innebär licensen följande:

Tillstånd för användaren att:

• Kopiera och vidaredistribuera materialet oavsett medium eller format

• Bearbeta och bygga vidare på materialet

Villkoren för tillståndet är:

• Att användaren ger ett korrekt erkännande, anger en hyperlänk till licensen och anger om bearbetningar är gjorda av verket. Detta ska göras enligt god sed.

• Att användaren inte använder materialet för kommersiella ändamål.

• Att användaren inte tillämpar rättsliga begränsningar eller teknik som begränsar andras rätt att gör något som licensen tillåter.

Se även information på
https://creativecommons.org/licenses/by-nc/4.0/deed.sv

http://urn.kb.se/resolve?urn=urn:nbn:se:juridikbokse-f45d2

Fair Trading Law in Flux?
National Legacies, Institutional Choice and the Process of Europeanisation

An academic dissertation for a Doctoral Degree in Juridical Science at the Department of Law, Stockholm University, presented for public inspection on Friday, October 24, 2003, at 10:00 am in auditorium 7 in D-building Stockholm University

By Antonina Bakardjieva Engelbrekt
LL. M.

Law Department
Stockholm University
10691 Stockholm

Stockholm 2003
671 pages, ISBN 91-7265-751-0

Abstract

This dissertation explores two distinct models for regulating fair trading in the European Union in terms of institutional choice and design. The first model is that of private ordering where Germany is the main protagonist. The predominant approach is private law oriented, decentralised and with a touch of protectionism. Confidence is vested in ordinary courts as a decision-making institution and in the initiative of private litigants (competitors, consumer and business associations). The second model is that of public ordering, most distinctly represented by Sweden. The approach is centralized, public law oriented and with a touch of paternalism. The model relies on the political process and on specialised public agencies, a Consumer Ombudsman and a Consumer Agency, to shape and enforce the standards of fair trading.

Through the examples of Germany and Sweden, the study considers the advantages and disadvantages of public and private ordering as two main avenues for enforcing fair trading law. Whereas exclusive reliance on private ordering tends to result in under-representation of diffuse consumer interests, a strong emphasis on public-law enforcement may unnecessarily constrain private initiative and pre-empt efficient enforcement. The study therefore argues for a plurality of enforcement avenues and all-sided representation and participation of affected interests.

The dissertation also explores the impact of European integration on the national institutional frameworks of fair trading. It is suggested that both the degree and the direction of influences depend on the compatibility of domestic law with European law, but also on the internally generated pressure for reform. Thus for Germany the process of adapting to European requirements has provoked substantial changes, whereas for Sweden the changes have been relatively modest. In Germany Europeanisation is slowly bringing about a re-conceptualisation of fair trading law on a consumer-oriented basis. In Sweden, conversely, the position of private entrepreneurs has been boosted and the activism of public enforcement bodies reduced. As a general observation, Europeanisation tends to challenge existing institutional symbioses and to increase the pluralism in enforcement.

Fair Trading Law in Flux?

National Legacies, Institutional Choice and the Process of Europeanisation

Antonina Bakardjieva Engelbrekt

Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation
© Antonina Bakardjieva Engelbrekt 2003

ISBN 91-7265-751-0
Print: US-AB, Stockholm

Abbreviations of periodicals **10**

INTRODUCTION **13**
Research topic 18
An institutional approach 20
Goals 22
Structure 24

I STUDYING INSTITUTIONAL CHANGE: ANALYTICAL APPROACH **27**

1 Institutional anaysis in law, social science and economics **27**
1.1 Institutions and institutional analysis in legal scholarship 27
1.2 Sociological approaches to institutions 29
1.3 Economic theory and institutions 30
1.3.1 From a frictionless world to transaction costs economics 30
1.3.2 Institutional economics 34
1.3.2.1 New Institutional Economics 35
1.3.2.2 Comparative institutional analysis 36
1.3.2.3 Historical institutionalism 40
2 The institutional approach in this study **44**
2.1 Institution-centred perspective: the logic of institutional persistence 44
2.1.1 Formal rules, informal constraints, enforcement 46
2.1.1.1 Formal rules 46
2.1.1.2 Informal constraints 47
2.1.1.3 Enforcement 47
2.1.2 Macro-institutional context as a factor for path-dependence 49
2.1.3 Symbiotic relations and lock-ins 49
2.2 Participation-centred perspective: the dynamics of institutional change 49
2.2.1 The choice between decision-making processes as main element of the institutional framework 50
2.2.2 The role of interests and distribution of stakes 51
2.2.3 Majoritarian vs. minoritarian bias in the political process 51
2.2.4 Enforcement design 52
2.3 Merging the institutional and the agency perspective 53
2.3.1 The importance of enforcement mechanisms 55
2.3.2 Adaptive efficiency and participation-centred approach 56
2.4 An institutional perspective on European integration 56
2.5 Cross-country comparison of the effects of European integration 58
2.5.1 The purpose of comparison 58
2.5.2 From comparing rules to comparing institutions 62
2.5.3 The institutional approach and theories of legal change 63
2.6 Methodological aspects 65
2.6.1 Methodological intricacies of contextualism 65
2.6.2 The use of the comparative legal method 66
3 Fair Trading: comparing the market, the political and the judicial process **69**
3.1 Fair trading law as a patchwork area in focus 70
3.2 Ensuring fair trading through the market process 73
3.2.1 Information in the market and the market for information 73
3.2.1.1 Information asymmetry 74

3.2.1.2 Information cost 74
3.2.1.3 Information as public good 75
3.2.2 Problem areas 75
3.2.2.1 Free-riding and undersupply of information 76
3.2.2.2 Advertising and opportunistic behavior 77
3.2.2.3 Market institutions to cope with information and uncertainty 78
3.2.3 The potential role of alternative institutional processes 82
3.3 Fair trading in the political process 83
3.3.1 Interests involved: size and distribution of stakes 84
3.3.2 The costs of information and participation 86
3.3.2.1 Risk for minoritarian or majoritarian bias 88
3.3.2.2 Protectionism and paternalism 90
3.4 Fair trading through the judicial or the administrative process 92
3.4.1 Reliance on the judicial process 94
3.4.2 Reliance on the political/administrative process 97

II NATIONAL PATHS: GERMANY AND SWEDEN COMPARED 101

4 The roots of fair trading institutions in Germany and Sweden 104
4.1 Macro-institutional context 106
4.1.1 Between economic liberalism and interventionism 106
4.1.2 Constitutional constraints 111
4.1.3 The status of private law 116
4.1.4 Interim conclusions 121
4.2 Shaping the institutional framework in Germany 122
4.2.1 The legislative process: evolution and interests involved 122
4.2.2 The substantive rules of fair trading: a general clause approach 125
4.2.3 Enforcement design: the primacy of private ordering 127
4.2.3.1 General civil courts as main decision-making institutions 127
4.2.3.2 Generous litigious possibilities for business associations 128
4.2.3.3 Remedies: injunction and damages 130
4.2.3.4 Cost-efficient procedure 132
4.2.4 The Wettbewerbsverbände as beneficiaries from the institutional framework 132
4.3 Shaping the institutional framework in Sweden 133
4.3.1 Evolution of the legislative process and interests involved 133
4.3.2 Substantive rules: preference for narrowly defined rules 137
4.3.3 Controlled enforcement 140
4.3.3.1 Deciding who decides 140
4.3.3.2 Remedies: emphasis on classical criminal law sanctions 140
4.3.3.3 Conditioned access of business associations to enforcement 142
4.3.4 The shift to self-regulation 143
4.4 The evolving standard of fairness 145
4.4.1 Germany: expansive protection of the competitive *'status quo'* and 'Mittelstand' interests 145
4.4.1.1 From individual rights to 'general interest' objectives, from monism to pluralism 145
4.4.1.2. Fallgruppen (categories of cases) 147
4.4.1.3 The standard of fairness in legal doctrine 157

4.4.2 Sweden: restrictive application of statutory rules vs. dynamic evolution of self-regulation 162
4.4.2.1 Restrictive interpretation of the unfair advertising clause by the judiciary 163
4.4.2.2 No complementary application of tort law 165
4.4.2.3 Dynamic and balanced practice of self-regulatory bodies 168
4.4.2.4 Legal doctrine 171
4.5 Comparative comments 171
4.5.1 Institutional choice 172
4.5.2 Interests in the political process 173
4.5.3 Enforcement design: the costs and benefits of participation 174
4.5.4 The standard of fairness 176
4.5.5 Institutional trajectories and institutional fossils 176
4.5.6 Institutional symbiosis 181
5 The institutional challenge of consumerism: Politicizing private law vs. depoliticizing public law? 184
5.1 The macro-institutional context 186
5.1.1 Between market liberalism, Sozialstaat and social engineering 187
5.1.2 Constitutional constraints 190
5.1.3 The status of private law 197
5.2 The consumerist debate 198
5.2.1 The consumerist debate in Germany 198
5.2.1.1 The political debate 199
5.2.1.2 Legal doctrine 201
5.2.1.3 Institutional implications 205
5.2.2 The consumerist debate in Sweden 205
5.2.2.1 The political debate 205
5.2.2.2 Implications on institutional choice and design 211
5.2.2.3 Implications for legal doctrine 212
5.3 Changing the institutional framework in Germany: incremental change within the institutional core 214
5.3.1 The legislative process: evolution and interests involved 214
5.3.1.1 The 1965 UWG Novelle 214
5.3.1.2 The 1969 UWG Novelle 216
5.3.1.3 The futile reform discussions in the 1970s 217
5.3.1.4 The 1986 UWG Novelle 222
5.3.2 Substantive rules: true vs. false consumer concerns 223
5.3.2.1 The general clause 223
5.3.2.2 Excessive prohibitions of certain promotional techniques 224
5.3.3 Enforcement: the persistence of the choice for private ordering 225
5.3.3.1 The choice between administrative agency and courts 226
5.3.3.2 Right of action of consumer associations 232
5.3.3.3 The cost of prosecution and litigation 241
5.3.3.4 Problems of decentralized decision-making 254
5.3.3.5 Remedies: the debate on damage compensation for consumers 257
5.3.4 Organizations as a bi-product of the institutional framework 260
5.3.4.1 Preserved position of business associations 260
5.3.4.2 Consumer associations as new actors 264

5.4 Changing the institutional framework in Sweden: dramatic change and a new institutional core 267
5.4.1 The legislative process: twists and turns and interests involved 268
5.4.1.1 The Unfair Competition Inquiry Commission (SOU 1966:71) 268
5.4.1.2 The 'velvet revolution' of 1970: marketing a consumer policy issue 269
5.4.1.3 The completion of the regulative framework 272
5.4.1.4 The Guidelines Committee 273
5.4.1.5 Interests in the legislative process 274
5.4.2 Substantive rules: programmatic place of consumer protection concerns 276
5.4.2.1 A consumer-oriented general clause 276
5.4.2.2 Information disclosure 278
5.4.2.3 Special offers 279
5.4.2.4 Annex legislation 279
5.4.3 The design of the administrative process 280
5.4.3.1 Management of the KOV 281
5.4.3.2 Informal procedure and search for voluntary compliance 282
5.4.3.3 Decision-making in individual cases 286
5.4.3.4 Rule-making 289
5.4.3.5 Form of control over agency action 298
5.4.4 Adaptation of the judicial process to the new role of the state 299
5.4.4.1 The design of the judicial process 300
5.4.4.2 Access to the court and costs of litigation 305
5.4.4.3 Remedies: injunctions 310
5.4.5 Institutions as a product of the institutional framework 311
5.4.5.1 The KOV with the KO 311
5.4.5.2 The retreat of voluntary and self-regulatory organisations 312
5.5 The evolving standard of fairness 313
5.5.1 Germany: the persisting prevalence of competitor and *Mittelstand* interests 313
5.5.1.1 Consumer protection as a recognized 'Schutzzweck' in unfair competition law 313
5.5.1.2 Categories of prohibited unfair practices 315
5.5.2 Sweden: shift towards consumer interest considerations 330
5.5.2.1 The information approach to misleading and comparative advertising 331
5.5.2.2 Information disclosure 334
5.5.2.3 The information approach to sales promotions 334
5.5.2.4 Lagstridighetsprincip: a short-cut to enforcement of paternalist legislation 335
5.5.2.5 Protection of particularly 'exposed' consumer groups – socially responsible marketing 336
5.6 Comparative comments 337
5.6.1 Institutional choice 337
5.6.2 Interests in the political process 338
5.6.2.1 Germany: preserved dominance of the Mittelstand and minoritarian bias 338
5.6.2.2 Sweden: catalytic sub-groups and a majoritarian bias 339
5.6.3 Participation opportunities in the process of enforcement 341
5.6.3.1 Germany: the decentralised private model of enforcement 341
5.6.3.2 The mixed administrative- adjudicative model 346

5.6.4 The standard of fairness revisited 354
5.6.5 The influence of the institutional context 358
5.6.6 Path dependence and institutional symbiosis 359

III EUROPEANISATION 363

6 Fair trading in the texture and architecture of Community law 366
6.1 Institutional background 368
6.1.1 Between market-building and market-correction policies 368
6.1.1.1 Unfair competition law as part of the European Economic Constitution 368
6.1.1.2 From the neoliberal to the regulatory state 370
6.1.2 Fair trading in the Community constitutional design 374
6.1.2.1 Community vs. Member State competences 374
6.1.2.2 Legal basis for Community intervention 378
6.2 The evolution of positive European fair trading law 382
6.2.1 Between unfair competition and consumer protection (market building and market correction) 383
6.2.1.1 Unfair competition approach: the Ulmer project (market building approach) 383
6.2.1.2 The consumerist approach (market correcting approach) 385
6.2.2 Substance and form of harmonisation of fair trading law (piecemeal harmonisation) 387
6.2.2.1 Misleading Advertising 388
6.2.2.2 Conditional Liberalisation of Comparative Advertising 393
6.2.2.3 Fair trading in the TV-Directive 402
6.2.2.4 Distance Selling Directive 408
6.2.2.5 Fair trading in the E-commerce Directive 409
6.2.3 Enforcement 414
6.2.3.1 Provisions on enforcement in fair trading directives 415
6.2.3.2 Special provisions on cross-border enforcement 425
6.2.3.3 Informal enforcement-facilitating techniques: information, cooperation, self-regulation 426
6.2.3.4 Targeting Enforcement 429
6.3 Integration through the judicial process 433
6.3.1 Fair trading law and the free movement of goods 434
6.3.1.1 Discriminatory rules on fair trading 436
6.3.1.2 Non-discriminatory rules on fair trading before Keck 437
6.3.1.3 Keck and beyond 440
6.3.1.4 Justifications 443
6.3.2 Fair trading law and free movement of services 447
6.3.2.1 Advertising as a service 447
6.3.2.2 Diverging advertising laws as an obstacle to the free movement of services 448
6.4 Institutional implications 449
7 Institutional adaptation to European integration: Germany and Sweden revisited 452
7.1 Transposing Community directives: exercises in appropriation of European law 453

7.1.1 Transposition of substantive fair trading directives 454
7.1.1.1 Compliance without change: the Misleading Advertising Directive 454
7.1.1.2 Comparative advertising 466
7.1.1.3 Regulating television advertising with an emphasis on children advertising 480
7.1.1.4 Discounts, gifts and other promotional offers 491
7.1.1.5 Protection of the private sphere 496
7.1.2 Changes in enforcement 499
7.1.2.1 Enforcement provisions in substantive law directives 499
7.1.2.2 The Injunctions Directive 500
7.1.2.3 The public/private divide and the evasive scope of national fair trading law 506
7.1.2.3 Implementing or appropriating European law? 520
7.2 Judicial discourses over national institutional legacies 522
7.2.1 The *Verbraucherleitbild* debate: a battle over interests or over concepts? 523
7.2.2 Defending the paternalist state 533
7.2.2.1 De Agostini and the Swedish prohibition of children advertising 534
7.2.2.2 Gourmet and the Swedish prohibition of alcohol advertising 535
7.2.3 Institutional implications 542
7.3 European influences in the turbulence of internally generated reform 545
7.3.1 Germany: reform in the shadow of European integration 546
7.3.1.1 The 1994 UWG Novelle 546
7.3.1.2 Institutional interlocking in a multilevel system of governance 555
7.3.2 Changes in anticipation of European integration: 562
7.3.2.1 The legislative process: the 1995 MFL 562
7.3.2.2 Redesigning the administrative process 567
7.3.2.3 Redesigning the judicial process 570
7.4 Actors and organisations involved in enforcement: change or continuity? 582
7.4.1 Germany 582
7.4.1.1 Wettbewerbsverbände on the defensive? 582
7.4.1.2 Strengthened position of consumer organization 584
7.4.1.3 Governmental Consumer Protection Agency? 584
7.4.2 Sweden 585
7.4.2.1 The changing role of the KO 585
7.4.2.2 Consumer organizations as new actors on the stage? 587
7.4.2.3 Competitors and their associations 589
7.5 Comparative assessment 589
7.5.1. Institutional choice 589
7.5.1.1 Deciding who decides 589
7.5.1.2 Interests in the political process 591
7.5.1.3 Participation opportunities in the process of enforcement 592
7.5.1.4 The standard of fairness 597
7.5.2 Institutional context and path dependence 598
7.5.3 The impact of Europeanisation 600
7.5.3.1 Spheres of influence 600
7.5.3.2 Convergence or divergence in fair trading law 603
7.5.4 Reducing or increasing institutional efficiency? 607

8 Peering into the future: towards a European Fair Trading Law? 609
8.1 The new Commission proposal on comprehensive Community Fair Trading Law 609
8.1.1 The ideology 610
8.1.2 Substantive rules 611
8.1.2.1 General clause 611
8.1.2.2 Specific rules 612
8.1.3 Form of harmonization 613
8.2 Enforcement 614
8.2.1 Enforcement in the Draft Directive 614
8.2.2 The Regulation on Consumer Protection Cooperation 616
8.3 Reactions of Governments and stake-holders 618
8.3.1 The national institutional actors 619
8.3.2 Governments 622
8.4 Diversity and unity in a multilevel system of governance 623

IV SUMMARY OF FINDINGS 627

BIBILIOGRAPHY 637
OFFICIAL DOCUMENTS 662
TABLE OF CASES 666

ABBREVIATIONS OF PERIODICALS

AJCL	American Journal of Comparative Law
BB	Betriebsberater
Bell J. Econ. &Mgmt Sci.	Bell Journal of Economics and Management Science
CLJ	Consumer Law Journal
CMLRev.	Common Market Law Review
CR	Computer und Recht
DB	Der Betrieb
DWiR	Deutsche Zeitschrift für Wirtschaftsrecht
EBLR	European Business Law Review
ELRev.	European Law Review
ELJ	European Law Journal
ERPL	European Review of Private Law
ERT	Europarättslig tidskrift
FT	Förvaltningsrättslig tidskrift
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil
ICLQ	International and Comparative Law Quarterly
IIC	International Review of Industrial Property and Copyright Law
IPRax	Praxis des Internationalen Privatrechts
JCP	Journal of Consumer Policy
JZ	Juristen Zeitschrift
JLE	Journal of Law and Economics
JPE	Journal of Political Economy
JLS	Journal of Legal Studies
JCMS	Journal of Common Market Studies
MA	Markenartikel
MMR	Zeitschrift für Informations- Telekommunikations- und Medienrecht
MLR	Modern Law Review
RabelsZ	Rabels Zeitschrift für ausländisches und Internationales Privatrecht
REDC	Revue européenne de droit de la consommation
SSL	Scandinavian Studies in Law
SvJT	Svensk Juridisk Tidskrift
WRP	Wettbewerb im Recht und Praxis
WuW	Wirtschaft und Wettbewerb
ZEuP	Zeitschrift für europäisches Privatrecht
ZRP	Zeitschrift für Rechtspolitik
ZUM	Zeitschrift für Urheber- und Medienrecht
ZvglRWiss	Zeitschrift für vergleichende Rechtswissenschaft
ZZP	Zeitschrift für Zivilprozess
U. Chi. L.Rev.	University of Chicago Law Review

Other abbreviations

AF	Swedish Advertisers Association (Annonsföreningen)
BGB	Bürgerliches Gesetzbuch (the Civil Code)

BGH	Bundesgerichtshof (Federal Supreme Court)
ECJ	European Court of Justice
GG	Grundgesetz (Basic Law)
ISS	Information Society Services
MFL	Marknadsföringslag (Marketing Practices Act)
MP	Members of Parliament
MD	Marknadsdomstolen (Market Court)
RF	Regeringsformen (Instrument of Government)
IKL	Lagen med vissa bestämmelsen om illojal konkurenslagen
KF	The Swedish Cooperative Union
KOV	Konsumentverket (Swedish Consumer Agency)
KO	Konsumentombudsman (Consumer Ombudsman)
LO	Landsorganisationen i Sverige (Swedish Trade Union Confederation)
NDM	Market Legislation Delegation of Swedish Trade and Industry (Näringslivets Delegation för Marknadsrätt)
NOp	Näringslivets Opinionsnämnd (Swedish Council on Marketing Practices)
NO	Näringsfrihetsombudsmannen (Freedom of Competition Ombudsman)
RB	Rättegångsbalken (Code of Judicial Procedure)
SACO	Sveriges Akademikers Centralorganisation (Swedish Confederation of Professional Organisations
SAF	Swedish Employers' Association (SAF)
SI	Sveriges Industriförbund (the Federation of Swedish Industries)
SKF	Federation of Swedish Retailers (Sveriges Köpmannaförbund)
SkiS	Sveriges Konsumenter i Samverkan (Swedish Consumer Coalition)
SKR	Swedish Consumers' Asscoiation
SRF	Sveriges Reklamförbund (Advertising Association of Sweden)
TDG	Teledienstengesetz (Act on Telecommunication Services)
TF	Tryckfrihetsförordning (Freedom of the Press Act)
TCO	Tjänstemännens Centralorganisation (Confederation of Professional Employees)
TU	Svenska Tidningsutgivareföreningen
UWG	Gesetz gegen den unlauteren Wettbewerb (Act Against Unfair Competition)
UWG-E	Entwurf eines Gesetzes gegen den unlauteren Wettbewerb (Draft Act Against Unfair Competition)
YGL	Grundlag om yttrandefrihet
ZPO	Zivilprozessordnung (Code of Civil Procedure)
ZAW	Zentrale Ausschuss der Werbewirtschaft (Central Board of the Advertising Industries)

INTRODUCTION

The law of fair trading belongs to one of the first realms of economic legislation to arise in the early industrial state. Already in the middle of the 19th century, soon after the establishment of the principle of *laissez faire* across Europe and after the breakthrough of free trade, the first rules on fairness of commercial conduct took shape under hardened conditions of competition.[1] In some countries, like France, these rules emerged as a result of creative judicial interpretation of existing general tort law clauses. In common law countries protection against acts of unfair competition was granted restrictively on the basis of specific nominate torts. In other countries, notably Germany, special statutes on unfair competition were enacted, the first one dating from 1896 and the second one, valid even today, as of 1909.

Irrespective of national idiosyncrasies of legal technique, there was much in common between the different approaches as far as protected interests, purpose and scope of legal rules were concerned. At the centre of attention was protection of the individual trader against unfair methods of competition. There was a relatively broad consensus as to the factual situations to be addressed: The honest trader was not to denigrate the goods and commercial activities of his competitor. He was to rely on his own achievements and not to engage in confusing imitation of goods or commercial activities. He was not to steal the commercial secrets or to induce breach of contract.[2] The French concept '*concurrence déloyal*' neatly illustrated the element of moral disapproval towards these disparate categories of conduct, and acquired international acceptance. The general orientation of this area as belonging to private law, a sort of extension of tort law into the sphere of economic competition, and which was enforceable upon private action by affected competitors, also provided a common denominator between different national approaches. These developments prepared the ground for early international codification of unfair competition law into Arts. 10 *bis* and 10 *ter* of the Paris Convention on the Protection of Industrial Property of 1883.[3]

Almost a century later, the consumer movement of the 1960s and 1970s troubled the otherwise peaceful waters of national unfair competition (fair trading) law. Under real or potential pressures from consumer groups all modern regulatory states undertook some action to integrate the consumer interest into fair trading law. The fact that consumers were indirect beneficiaries from the enforcement of unfair competition laws was generally recognised. Yet the consumerist movement called for broader standards of deception and fairness, demanding that the specific interests of consumers explicitly be taken into account. More importantly, in a dramatic fashion it challenged the institutional and procedural landscape of fair trading law across Europe. New

---

[1] On the history of unfair competition law see Ladas, *Patents, Trademarks and Related Rights*, Vol. 3 (Cambridge, MA: Harvard University Press, 1975), 1676 ff. Schricker, 'Möglichkeiten zur Verbesserung des Schutzes der Verbraucher und des funktionsfähigen Wettbewerbs im Recht des unlauteren Wettbewerbs' (1975) *ZHR*, 139 ff., 208 ff.; Beier, 'The Law of Unfair Competition in the European Community – Its Development and Present Status' (1985) 16 *IIC*, 139 ff.

[2] Schricker (1975), 208 ff., at 209.

[3] Paris Convention for the Protection of Industrial Property, 1883 (PC). Revised at Brussels 1900, Washington 1911, the Hague 1925, London 1934, Lisbon 1958 and Stockholm 1967. Unfair competition was included in the subject-matter of the Paris Convention with the Brussels Revision of 1900, Zweigert/Kroppholler, *Sources of International Uniform Law*, Vol. 3 (Leiden: A.W. Sijthoff, 1973), 129 ff.

institutional arrangements and procedural avenues for giving voice to the consumer interest were deemed necessary.

In respect to institutional and procedural devices the response to similar consumerist pressures produced strikingly different results. Roughly speaking, whereas some countries found it necessary to actively involve the state in the protection of the consumer interest in fair trading, others opted for the preservation of the private-law character of this legal field. In the first category of countries special public agencies were empowered to act as champions for the consumer interest. In the latter category of states it was preferred to entrust the consumer interest into the hands of consumer organisations, while at the same time relying on an indirect beneficial effect for consumers from competitors' suits on unfair competition grounds. Within the confines of this dichotomy a whole myriad of regulatory and enforcement techniques were introduced, with significant variations in the detail.

It was these two basic models and the attendant patchwork of divergent national legal and institutional approaches that in the 1970s formed the background for the first efforts at harmonisation of fair trading law in the – then much smaller – European Economic Community. Already at the beginning of the 1960s an ambitious comparative study of unfair competition laws across Europe was commissioned to the Max Planck Institute of International and Foreign Patent, Copyright and Competition law under the guidance of Prof. Eugen Ulmer.[4] The project culminated in a comprehensive proposal for harmonisation of unfair competition law in Europe in the form of a convention based on a general clause on fair trading. The failure of these early and ambitious attempts to create a common unfair competition law for Europe is notorious. Different authors ascribe it to different factors, but among the reasons indisputably are England's and Ireland's accession to the Community and their diverging view on the limits and tasks of unfair competition law.[5] Another major development was the already mentioned consumerist wave and the growing ambitions of the Community to take an active stand on this topical subject.[6] Thus the only outcome of the harmonisation attempts was the Misleading Advertising Directive of 1984 applying a minimum harmonisation approach.[7]

Meanwhile the situation appears to have changed significantly. Although fair trading law cannot claim central importance to the European project, as an area with clear economic implications, it has been exposed to growing influence by both positive and negative integration.[8] The record of Community acts related to fair trading has become ever more impressive. It suffices to mention the Misleading and Comparative

---

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

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

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

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

[8] Economists have defined 'positive integration' as the creation of equal conditions for the functioning of the integrated parts of the economy and 'negative integration' as the elimination of obstacles to trade. See Molle, *The Economics of European Integration* (Dartmouth: Aldershot, 1990), 11. See below Ch. 6.

Advertising Directive,[9] the Television Without Frontiers Directive[10], the Distance Selling Directive[11] and the recent E-commerce Directive[12] in order to recall that by now important general aspects of fair trading as well as marketing in the most significant media are objects of European legislative initiatives.[13] Moreover, a large number of Community acts govern advertising and marketing in separate industry sectors, like foodstuffs, medicinal products, cosmetics, tobacco, etc.[14] Finally, the Injunctions Directive of 1998 marked the first European agreement on harmonisation, or rather on mutual recognition, of enforcement devices in the consumer protection field, including enforcement of harmonised fair trading rules.[15]

The success of the harmonisation initiatives and the overall significance of European influences on national fair trading law have been differently assessed in the literature and have, moreover, changed course in pace with legal and political developments. The initial reactions to harmonisation were sceptical. Legal scholars and policy makers viewed the Misleading Advertising Directive as remaining wreckage of a crashed ship, and predicted a limited role for the Directive's provisions for national law.[16] With more national adjustments set out to implement the Directive being reported, the assessment has become more balanced.[17] But on the whole harmonisation was regarded as modest. Community acts of more recent date, applying techniques like exhaustive harmonisation and reliance on a country of origin principle, have been seen to adopt a more powerful and effective harmonisation approach. They have, however, been criticised for the poor normative quality of their provisions or questioned in terms of their legitimacy.[18]

---

[9] Directive 97/55/EC amending Directive 84/450, OJ 1997 L 290/18 (Comparative Advertising Directive).
[10] Directive 89/552/EEC, OJ 1989 L 298/23, amended by Directive 97/36/EC, OJ 1997 L 202/60 (Television Directive).
[11] Directive 97/7/EC, OJ 1997 L144/19 (Distance Selling Directive). On specific marketing methods see also Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises OJ 1985 L 372/31.
[12] Directive 2000/31/EC, OJ 2000 L 178/1 (Electronic Commerce Directive).
[13] In the area of general consumer information see also the Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27.
[14] See for instance Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs, OJ 1990 L 276/40; Directive 2000/13/EC on the labelling, presentation and advertising of foodstuffs, OJ 2000 L 109/29; Directive 2001/83/EC on the Community code relating to medicinal products for human use; Directive 1999/45/EC on the classification, packaging and labelling of dangerous preparations, OJ 1999 L 200/1; Directive 2003/33/EC on advertising and sponsorship of tobacco products, OJ 2003 L 152/16 (Tobacco Advertising Directive).
[15] Directive 98/27/EC, OJ 1998 L 166/51 (Injunctions Directive).
[16] Schricker, 'Probleme der Angleichung des Rechts des unlauteren Wettbewerbs' in: Bernstein/Drobnig/Kötz (eds.), *Festschrift Zweigert* (Tübingen: Mohr, 1981), 537 ff.
[17] Schricker, 'Die Bekämpfung der irreführenden Werbung in den Mitgliedstaaten der EG' (1990) *GRUR Int.*, 112 ff.
[18] For a discussion on the efforts for European harmonisation in the area of comparative advertising see Kur, 'Die vergleichende Werbung in Europa: Kurz vor dem Pyrrhussieg?' in: Levin (ed.), *Vennebog till Mogens Kokvedgaard* (Stockholm: Nerenius & Santérus, 1993), 436 ff.; Henning-Bodewig, 'Vergleichende Werbung – Liberalisierung des deutschen Rechts?' (1999) *GRUR Int.*, 385 ff.; Bernitz, 'The EC Directive on Comparative Advertising and its Implementation in the Nordic Countries: Especially in Relation to Intellectual Property' (2002a) 42 *SSL*, 11 ff; Ohly/Spence, 'Vergleichende Werbung: Die Auslegung der Richtlinie 97/55/EG in Deutschland und Großbritannien' (1999) *GRUR Int.*, 681 ff.

The impact of negative integration on national fair trading laws and practices produced a livelier response than that of harmonisation. Following an expansive course of interpretation of the Community rules on free movement, the European Court of Justice (ECJ) frequently questioned the legitimacy and blocked the application of national fair trading rules and regulations. Also here the path has been uneven and subject to controversial evaluation in legal doctrine. Originally Art. 28 (ex Art. 30) of the Treaty of Rome was considered applicable solely to discriminatory national measures on advertising and marketing.[19] With the advance of the 'mutual recognition' approach in the late 1970s, the Court felt authorised to apply the *Cassis de Dijon*[20] line of reasoning also to indistinctly applicable marketing measures. Starting with the *Oosthoek*[21] judgment and notably in the *GB-INNO* ruling,[22] the Court repeatedly qualified also non-discriminatory marketing measures as potential barriers to trade, justifiable only under the narrowly construed public interest considerations '*à la Cassis*'.

This aggressive line of judicial interpretation triggered serious processes of rethinking national fair trading laws in at least some Member States of the Community.[23] In legal doctrine a heated discussion on the constitutional legitimacy of Community influence on national fair trading law was launched, touching upon issues like division of competencies and choice of appropriate decision-making forum.[24] A significant turn in these developments was marked by the *Keck*[25] decision of the ECJ. Advertising and marketing were explicitly qualified as 'selling arrangements' that as a rule should fall outside the scope of Art. 28 (ex Art. 30) EC Treaty and of the *'Cassis de Dijon'* test. The question about the reach of this new principle is, however, still far from settled, especially in the light of the constant influx of new case law and the increasing importance of the Community provisions on free movement of services. New judgements from Luxembourg continue to challenge the ability of national legal systems to cope with uncertainty as the recent *Gourmet*[26] ruling has demonstrated.

Despite these sometimes surprising twists and turns in Community law and practice and the corresponding fluctuations in scholarly opinion, there is a growing consensus that European integration has exerted and continues to exert major impact on national fair trading law. Nowhere else has this view received more attention than in German legal doctrine. Dozens of scholarly articles and a number of monographs have tackled the issue.[27] Legal doctrine in other Member States has not dealt so intensely with the question, but there is general recognition that European law and institutions constitute

---

[19] Cf. Case C-152/78 *Commission v France* [1980] ECR 2299 ff.
[20] Case C-120/78 *REWE v Bundesmonopolverwaltung für* Branntwein ('Cassis de Dijon') [1979] ECR 649.
[21] Case C-268/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575.
[22] Case C-362/88 *GB-INNO-BM* [1990] ECR I-667.
[23] On repercussions of Europeanisation on German unfair competition law, see below Ch. 7.
[24] For a sympathetic view on these influences see Schricker, 'European Harmonisation of Unfair Competition Law – A Futile Venture?' (1991a) *IIC*, 788 ff.; for a critical analysis see Kisseler, 'Das deutsche Wettbewerbsrecht im Binnenmarkt' (1994) *WRP*, 1 ff.
[25] Joined Cases C-267 & C-268/91 *Keck and Mithouard* [1993] ECR I-6097
[26] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products (GIP)* [2001] ECR I-1795
[27] See Dethloff, *Europäisierung des Wettbewerbsrechts* (Tübingen: Mohr Siebeck, 2001); Beater, *Verbraucherschutz und Schutzzweckdenken im Wettbewerbsrecht* (Tübingen: Mohr Siebeck, 2000).

important factors in modern development of national fair trading law.[28] Especially in the light of recent revitalisation of the idea of a general legal framework of fair trading law authors and policy-makers now explicitly refer to a process of Europeanisation of fair trading law.[29]

Opinions diverge when it comes to the legitimacy and desirability of this trend. Quite in the spirit of Ulmer, a number of scholars see fruitful soil for further harmonisation of fair trading law for Europe. They express regret at the failure of the first systematic attempt at harmonisation and are inspired by new all-embracing proposals that aim at a comprehensive solution through a general clause and will mitigate national divergences and idiosyncrasies.[30] In the opposite camp are those who doubt the feasibility of such harmonisation and fear disruptive repercussions on the coherence of national legal and institutional frameworks. At a different level, the debate is even more heated when it comes to assessing the legitimate scope and desirable method of harmonisation. Also here opinions can be classified on a wide scale from principled opposition to harmonisation to moderate concerns regarding the normative quality of European compromise solutions[31] or the policy effects from the selected method of harmonisation. Applying the home country control principle without comprehensive harmonisation of substantive standards is the source of one such concern.[32]

The debate on the European influences over national laws is by no way unique for the area of fair trading law. The pervasive influence of European integration on law, policy-making and institutions of the Member States has been at the centre of a long-standing and intense discussion in both legal and social science. Already in the early stages of European integration, the doctrines of direct effect and supremacy of Community law suggested the powerful potential of the European project to profoundly affect national law and regulative policies. Whereas the focus initially was on the abolition of technical barriers to trade and on shaping of Community competition law – activities firmly anchored in the Founding Treaties – more recent years have witnessed an expansion of European integration to ever wider areas of social and economic regulation and, importantly for this analysis, to core areas of private law and procedural law.[33]

---

[28] More generally for consumer law in Sweden see Olsen, 'Mot en ny konsumtionsrätt?' (2000-01) *JT*, 304 ff., at 308 ff.; Olsen 'Det konsumtionsrättsliga regelverket – en överblick över ett dynamiskt rättsområde' (2001-02) *JT*, 815 ff., at 846.

[29] See Dethloff (2001); *Towards a Hamonised View of Fair Trading in Europe*, Report of the Conference held in Stockholm, 10 March 2002; Micklitz et al., *Study on the Feasibility of a General Legislative Framework on Fair Trading*, Volumes I-II, Institut für Europäisches Wirtschafts- und Verbraucherrecht e.V., November 2000.

[30] See Micklitz/Keßler, 'Europäisches Lauterkeitsrecht. Dogmatische und ökonomische Aspekte einer Harmonisierung des Wettbewerbsverhaltens im europäischen Binnenmarkt' (2002) *GRUR Int.*, 885 ff.; Schricker/Henning-Bodewig, 'Elemente einer Harmonisierung des Rechts des unlauteren Wettbewerbsrechts' (2001) *WRP*, 1367 ff.

[31] Kur (1993).

[32] In respect to integration on the basis of a country-of-origin principle in the E-Commerce Directive concerns have been expressed as to the risk of 'race to the bottom' or 'Delawerisation' of unfair competition law. See Lehmann, 'Rechtsgeschäfte und Verantwortlichkeit im Netz – Der Richtlinienvorschlag der EU-Kommission' (1999) *ZUM*, 180 ff., at 181; Henning-Bodewig, 'E-Commerce und irreführende Werbung' (2001) *WRP*, 771 ff., at 777.

[33] For a comprehensive summary of the debate see Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 *ELJ*, 378 ff.

As in fair trading law, reactions in the field of private law have been mixed, to say the least. There is disagreement on the question of scope and depth of European influence as well as on its normative evaluation. A number of private law scholars simply neglect European law. Taking a narrow view of private law as well as of Europeanisation (equating the latter with harmonised law), these scholars point at the lack of comprehensive Community acts in the field of core private law areas such as contracts, torts, property, inheritance and family law. Such 'reductionism' then justifies a disinterest in European law developments.[34] Another group of scholars, in contrast, regard European law with its insistence on private autonomy and economic freedom as an ultimate acknowledgement of the supremacy of private law in the national legal order. In this view European integration 'has constitutionalised a private-law society' with supremacy over national states.'[35]

Similar divergences are exhibited on the issues of the normative evaluation of the European influence and the desirability of further integration in the area of private law. On the one hand, legal historians and comparative lawyers have advanced an optimistic view, where European integration is perceived as a welcome chance to build a common European Civil Code and thus to make old *ius commune* dreams come true.[36] Others regard it as a return to the 'common core' of European private law.[37] Again, from a comparative law perspective many private law scholars have expressed concerns as to the disintegrative impact of European influences on the coherence of the national legal system and in particular of private law. It is being pointed out that Community measures are often incidental and piecemeal. Consumer policy measures in particular are said to have the form of a patchwork of detailed provisions attached artificially and standing as a foreign body in the otherwise well established and coherent system of national private law, precedent and doctrine.[38] Finally, comparative lawyers of a post-modernist orientation tend to question the feasibility of grand European harmonisation projects. Some postmodernists refute the possibility of a common and harmonised European private law due to insurmountable divergences between the legal cultures of individual states.[39]

---

[34] Joerges (1997), 379.

[35] Joerges (1997), 383.

[36] Zimmerman, 'Civil Code and Civil Law. The "Europeanisation" of Private Law and the Re-emergence of a European Legal Science' (1994/95) *Columbia Journal of European Law*, 63 ff.; Wieacker, 'Historical Models for the Unification of European Law' in: Krawietz/MacCormick/von Wright (eds.), *Prescriptive Formality and Normative Rationality in Modern Legal Systems. Festschrift for Robert Summers* (Berlin: Duncker & Humblot, 1994).

[37] See for instance Lando, 'Principles of European Contract Law' (1992) *RabelsZ*, 261 ff; Basedow, 'A Common Contract Law for the Common Market' (1996) *CMLRev.*, 1169 ff. On the Trento 'common core' project see Busani/Mattei, 'The Common Core Approach to European Private Law' (2002), at http://www.jus.unitn.it/cardozo/home.html.

[38] See for instance Editorial comments, 'On the Way to a European Consumer Sales Law?' (1997) 34 *CMLRev.*, 207 ff.

[39] See Collins, 'European Private Law and the Cultural Identity of States' (1995) 3 *ERPL*, 353 ff.; Legrand, 'European Legal Systems are not Converging' (1996) 45 *ICLQ*, 52 ff.; Legrand, 'Uniformity, Tradition and the Law's Limits' (1996-97) *JT*, 306 ff. From the perspective of autopoietic theory of self-referencial societal systems see Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' in: Snyder (ed.), *The Europeanisation of Law* (Oxford: Hart Publishing, 2000), 243 ff.

RESEARCH TOPIC

This study purports to take a fresh look at the impact of European integration on national law by examining the case of fair trading. In the immediate focus are the fair trading laws in two Member States of the European Union (EU), namely Germany and Sweden. There are two components to this study. On the one hand it consists of an in-depth comparison of the main features of the institutional frameworks of fair trading law in these countries, with an emphasis on institutional choice and enforcement design. The other component of the study is concerned with the influences of European integration on the institutional framework of national fair trading law in the two legal systems.

When I use the term institutional choice I mean the choice between market, political process (legislative and administrative process) and adjudication for dealing with the particular regulative issues associated with fair trading. This fundamental choice is exercised differently in the two countries under analysis, depending, among others, on constitutional law and institutional tradition. In Sweden the emphasis is placed on the consumer interests in fair trading. Thereby, the state has been assigned an active role in protecting consumers against improper and unfair marketing practices. Confidence has been vested in the political process and in specialised public agencies, a Consumer Agency and a Consumer Ombudsman, to shape and enforce the standards of fair trading. Germany is by contrast a prominent example of a country that has consciously avoided setting up new public authorities and bodies. Instead the preference has been for private ordering, building on civil procedure and relying on private consumer and business organisations and on ordinary courts for enforcing the rules against unfair competition. Given the fundamental differences in institutional choice and design, the question of the feasibility of harmonisation projects in this area of law will be addressed.

The concept of fair trading law is in the following used as a broad description of rules and regulations that govern marketing practices with the aim of protecting the interests of competitors, consumers and the general public.[40] Domestic terminology (e.g. 'unfair competition law' or 'marketing practices law'), national classifications of these rules as belonging to criminal, civil or administrative law, and doctrinal views on their systematic unity or disparity, are thereby of secondary importance. The law of fair trading, even when treated in a strictly national context, is often described as an eclectic area, gathering under one roof different conflict situations and responding to disparate interests and policy concerns.[41] Here belong rules on such diverse phenomena such as slavish imitation, misappropriation and disparagement, misleading advertising and comparative advertising, free gifts, rebates and season sales, trade secrets and the bribing of employees. In functional terms a common denominator for many of these disparate rules can be found in that they address commercial

---

[40] This was also the tentative term used for the recently advanced proposal of the European Commission for a general clause on fair trading in European Union. See, Micklitz et al. (2000). Meanwhile the Commission has shown preference for the concept 'fair commercial practices', which only comes to underscore the volatility of the subject matter under analysis.

[41] See Bernitz, *Marknadsrätt* (Stockholm: Jurist och Samhällsvetareförbundets Förlags AB, 1969); Bakardjieva Engelbrekt, A., 'Unfair Competition Law After TRIPs: Yet Another Challenge to Doctrinal Cohesion' (1998) *NIR*, 371 ff.; Micklitz et al. (2000).

communication.[42] The focus in this study will be on rules governing commercial communication in the pre-contractual sphere.

The use of 'fair trading' as a unifying concept in this study is motivated by two factors. On the one hand, there is the desire to avoid concepts that are specific for one of the countries under analysis and will thus be coloured by the historical and institutional environment in this particular state.[43] On the other hand, one of my ambitions is to trace the process of Europeanisation. In recent preparatory work at Community level, the concept of fair trading has been used to denote the area of harmonisation. The latest developments in harmonisation seem to support a renaming of 'fair trading' to 'fair trade practices' law. This only comes to underscore the volatile character of the area and the difficulty to introduce and sustain clear and internationally accepted concepts.

There are several factors that make the area of fair trading particularly interesting for analysis of European influences on national law. As stated above, the law of fair trading has a relatively long history, dating back to the second half of the 19th century. Although not of the same seniority as classical private law disciplines like torts and contracts, it is intimately related with these core areas of private ordering. This allows us to test propositions about the persistence of deeply embedded national institutional constraints and their restraining effect on processes of legal change and of Europeanisation in particular.

Secondly, fair trading is notoriously stretched between private ordering and public regulation. Ever since the intellectual ideas of consumerism received wider recognition in modern welfare states, the protection of diffuse consumer interests has been at least nominally recognised as a policy objective beside the protection of individual competitive interests. Divergent national choices of enforcement procedures, and institutional structures to account for collective interests, reveal shifting conceptions of the role of the state in the market economy and the dividing line between public and private. Finally, laying down standards of fair trading in unambiguous legislative provisions has been a notoriously elusive enterprise. As a result, concretisation of the standards has been shifted to alternative decision-making institutions, like the courts or administrative agencies. The choice of enforcement designs has thus not merely been a technical matter, but has had major impact on the effectiveness and the ideology of the regulative system.

Because the mix of interests and policy objectives integrated in national fair trading laws is so eclectic and procedure and enforcement design play a decisive role, harmonisation at the European level has been a difficult task. In normative terms, the objective of convergence never had a clear appeal. The precise impact of Europeanisation on national fair trading law and the desirability of further harmonisation have been subjects of controversies at both doctrinal and policy level. This calls for closer empirical study of the effects of harmonisation and for finding

---

[42] Commercial communication is a term taken from economic theory and applied in Community policy papers. See Green Paper on Commercial Communication in the Internal Market, COM (1996) 192 final.

[43] In the following, the term 'unfair competition law' will be most often used to signify the German approach to fair trading and 'marketing practices law' – the Swedish one.

more rigorous criteria for a normative evaluation of the impact of European integration on national law.

AN INSTITUTIONAL APPROACH

Legal analyses of European influences in the area of fair trading law have traditionally focused on changes in domestic statutory rules. Such approaches are of course fully legitimate if the focus is on dogmatic (re)systematisation of domestic law in a narrowly defined legal context. Yet, there is a growing consensus that European integration affects national legal systems in complex and less conspicuous ways. It exerts influence on the macro-level of constitutional law and jurisprudence, on institutional structures and procedures as well as on the expectations of actors about the law and about their legal positions. Legal science alone can hardly provide the appropriate tools for describing and explaining these phenomena. I therefore advocate the use of alternative, institutional approaches to the study of Europeanisation in order to capture and conceptualise these otherwise 'invisible' processes of legal change.

The theoretical premises of an institutional approach will be developed in subsequent chapters. Here it suffices to say that the approach is inspired by the already classical contributions to institutional economic theory referred to as 'neo-institutionalism'. On a micro-analytical level I follow a theoretical string in law and economics that has become known as comparative institutional analysis. The concept 'institution' is used in this theory as well as in much general economic theory in a very broad sense referring to the market, the political process and the courts. Whether to defer certain social problems or goals to the free play of market forces, to rely on private adjudication or to seek solution through the political process, including direct regulation and agency involvement, is at the heart of much political and legal decision making. Theorizing in this vein, comparative institutional analysis insists that institutional choices should be based on a careful comparison between the relative advantages and disadvantages of each alternative. As a main factor for this comparative evaluation one should consider the costs and benefits of affected actors for participation in the respective decision-making process, i.e. transaction costs, litigation costs and costs for political participation. The approach is therefore also called participation-centred.[44]

On a macro-analytical level, the participation-centred approach is complemented with a historical institutional perspective as advanced by economic historian Douglass North. Historical institutionalism highlights the role of institutions as humanly devised constraints, whose main function is to reduce uncertainty by providing a structure to everyday life.[45] Institutions thus include formal legal rules, but also informal constraints (such as ideologies and customs) and the enforcement characteristics of both.[46] North highlights institutions' propensity to persist over time. Institutional paths may be followed not because they are efficient but because their change is costly.

---

[44] See Komesar, *Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy* (Chicago, London: The University of Chicago Press, 1994). In its emphasis on participation costs and benefits comparative institutional analysis is of course closely related with transaction cost economics as developed by Roland Coase in his famous, 'The Problem of Social Cost' (1960) 3 *JLE*, 1 ff.

[45] North, 'Institutions' (1991) 5 *Journal of Economic Perspectives*, 97.

[46] On institutions and institutional changes generally, see North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990).

Moreover, institutions tend to produce incentives for the creation of organisations, which then depend on the institutional framework and contribute to the latter's stability (institutional symbiosis). A historical institutional perspective demonstrates that institutional choice is contingent on a historical and institutional context that has been shaped through time and is generally resistant to change.

The concerns underlying historical institutionalism and Komesar's participation-centred approach may be said to converge in the category of adaptive efficiency, used by North. Adaptive efficiency is a category that supposedly applies to normative evaluations of a variety of institutional frameworks. According to North, adaptive efficiency "provides incentives to encourage the development of decentralised decision-making processes that will allow societies to maximize the efforts required to explore alternative ways of solving problems".[47] Arguably by eliciting participation as a central factor for institutional choice Komesar suggests one way of encouraging such decentralised decision-making processes. Originally developed as a concept of economic theory, adaptive efficiency may equally well relate to established categories in constitutional theory, such as representative democracy and access to justice. It is this link between economic, political and legal theory that, I would submit, makes institutional analysis potentially promising for the study of law.

European integration impacts all levels of the institutional framework, changes formal rules as well as shapes new enforcement possibilities and decision-making fora. More importantly, it provides new actors and organisations access to national decision-making processes and thus helps slowly undermine existing attitudes and ideologies. In effect, European integration may break or at least destabilize symbiotic relations between national institutional frameworks and organizations. Such wider implications can be studied only by looking at the national institutional frameworks in their rich complexity.

Another feature that distinguishes this study from previous analyses of Europeanisation of national law is the option for a comparative perspective. This choice is motivated by a desire to draw more general conclusions about the effects of European integration on national law, over and beyond national idiosyncrasies. The choice of countries has been motivated by a variety of factors. Both Germany and Sweden have had a long record of active implementation of fair trading law and pride themselves on the high level of protection of the affected interests. At the same time, the two legal systems represent two distinct ideal types of institutional responses to fair trading on the two far ends of the scale between public and private ordering. Whereas Germany chiefly relies on market-oriented private law enforcement, Sweden provides an example of active public involvement in fair trading with the purpose of protecting the consumer interest. Comparative reflections on the two jurisdictions are in my view facilitated by the fact that they belong to the Continental legal family, in a broad sense.[48] The substantive rules on fair trading are not dissimilar to the point of significantly complicating an assessment of the impact of institutional factors.

---

[47] North, 'Institutional Change: A Framework of Analysis' in: Sjöstrand (ed.), *Institutional Change. Theory and Empirical Findings* (Armonk, New York: M.E. Sharpe, 1993), 35 ff., at 36.

[48] On the peculiar standing occupied by Swedish law see, Zweigert/Kötz, *Introduction to Comparative Law*, 3rd ed. (Oxford: Clarendon Press, 1998) 276 ff. See, however, Strömholm, 'Comparative Legal Science – Risks and Possibilities' in: Suksi, M., *Law under Exogenous Influences* (Åbo: Turku Law School, 1994), 5 ff., at 14.

Most importantly, both Germany and Sweden are members of the EU. They are bound by the Community 'acquis' and are directly exposed to the influence of European integration in many other important respects. Finally, the two countries have taken a high profile in the legislative and policy debate associated with fair trading. German and, more recently, Swedish political representatives, interest groups and experts have arguably been among the most active opinion-builders in the ongoing discussion about the future harmonisation of fair trading law in Europe. Thus, a comparative study may hopefully provide some clues as to the pitfalls and promises of Europeanisation in this area.

GOALS

The study has three more specific research goals: The *first* goal is to provide a dense account of the evolution of national fair trading laws in the two European countries under analysis. By tracing two distinct paths of legal and institutional development I seek to illustrate the problems of institutional diversity and 'path dependence'[49] that arguably plague attempts at closer European integration. National approaches to fair trading regulation differ in their reliance on the market, the political (administrative) process or the courts, each viewed as a complex decision-making institution. Divergences in institutional choice account for different enforcement procedures and for different actors and organisations having an opportunity to influence the emerging standards of fairness. These distinctive institutional features are rarely arbitrarily formed, but often become firmly embedded in a broader institutional environment of formal rules and less palpable informal constraints, such as economic ideas, constitutional and private law doctrines and ideologies. Legal change is consequently viewed as an incremental process, resulting from the tension between the dynamic of changing interests and preferences of affected actors and the constraining effect of institutional legacies.

The *second* goal is to explore, in a comparative setting, the relative advantages and disadvantages of government intervention and private ordering as two distinct avenues for enforcement of fair trading law. In a time of deregulatory pressures the performance of public bodies of all kinds has increasingly come under fire, accused as the source of multiple regulatory failures and inefficiency. It is therefore worth asking whether governmental agencies in the area of fair trading offer any comparative advantage in the enforcement of fair trading laws seen against the background of existing private means of enforcement. A large number of Central and East European States have in the last decade opted for regulation of fair trade models which rely substantially on the involvement of public agencies. Indeed, such trends are not foreign to some Member States of the European Community. Are these institutional choices misguided? And is a model of restrained, informed and efficient action on the part of regulative agencies sustainable?

A comparative study of European fair trading laws can arguably provide rich soil for reflections on the pros and cons of alternative enforcement mechanisms as explicitly in this area many arguments have been brought in defence of private ordering and enforcement. The mere fact that a number of important jurisdictions (such as that of

[49] See North (1990).

Germany) still remain satisfied with basically private law means of enforcement of fair trading rules is already sufficiently provoking. It calls for substantial justification of the very existence of public agencies and public enforcement in this field, let alone the setting up of new ones. In any case there is a need for clear guidelines as to the instances in which governmental intervention might be warranted and as to the form and particular design of intervention.

The *third* goal is to explore, in a comparative manner, the subtle ways in which European Community law and policy influence national institutional choices and institutional frameworks in the Community Member States. In this complex process I suggest that national institutional frameworks play the role of refractors. Refraction is defined in physics as: "the bending of rays or waves of light, heat, sound, or the like when passed obliquely from one medium to another with a different rate of transmission". In a similar manner European influences are 'bent' under different angles as a result of their contact with different national institutional environments. Given the existing institutional diversity on the national level, Community law is inevitably 'refracted' through a different institutional prism and splits into a wide spectrum of influences, often unpredicted or undesired. The extent to which common European rules and policies will induce changes in national institutional frameworks will depend on how deeply actors and organisations are symbiotically related with the existing framework, and on the extent to which European rules challenge the core of national institutions.[50] Rather than moulding national institutional frameworks into a uniform regulatory model, European integration tends to expose instances of 'lock in' and decision-making biases, while rarely radically changing the direction of institutional evolution.

At the same time, Europeanisation should not be seen as one-way street running from the Community to the Member States. As shown in a number of legal and political science studies, it is more plausible to conceive of Europeanisation as a two-way process of dialogue and interaction.[51] This implies on the one hand that national institutional frameworks adjust so that they achieve better representation of national interests and actors at the Community level. On the other hand, national actors and decision-makers, when acting within the European context, inevitably remain influenced by their national institutional environment. Their action at the Community level are often guided by a desire to change perceived national institutional malfunctions, or to the contrary by attempts to bring the Community institutional framework closer to the familiar domestic institutional landscape, not least as a way of reducing information and other transaction costs. This conceptualisation carries a dual message. It is pessimistic in predicting persisting incoherence and imperfection of the European institutional environment, an unwieldy hotchpotch of national approaches. It nevertheless holds a promise of constant interaction and learning, challenging unproductive and inefficient equilibria.

---

[50] Knill, *The Europeanisation of National Administrations* (Cambridge: Cambridge University Press, 2001), 13 ff.

[51] Héritier/Mingers/Knill/Becka, *Die Veränderung von Staatlichkeit in Europa: Ein regulativer Wettbewerb* (Opladen: Leske und Budrich, 1994); Koopmans (1991), 495 ff.

STRUCTURE

The study is organised into three parts. In part one the analytical framework is presented. I first elaborate the theoretical premises by survey of different streams of institutionalism in law, social sciences and economics. The emphasis is placed on institutional economics (Ch. 1). In a second step, I present the institutional approach used in this study. A participation-centred perspective is advanced for analysing the relative advantages and disadvantages of national institutional choices. At the same time a historical institutional perspective is employed to gain insights in the continuity and persistence of legal institutions and their embeddedness in a broader institutional context. The methodological problems associated with comparative and interdisciplinary approaches are discussed (Ch. 2). In a third step, and following Komesar, an abstract analysis of the market, the political process and the judicial process in the context of fair trading is conducted. The basic challenge of fair trading law is seen to lie in the public good properties of information and of associated decision-making. Institutionalization and representation of dispersed low-stake interests is highlighted as a dilemma in all institutional settings, including adjudication and public intervention (Ch. 3).

In part two, a rich description of the institutional framework of fair trading law in Germany and Sweden is provided. The emphasis is on institutional choice and on the design of the preferred mechanisms of enforcement. By tracing the evolution of the institutional framework I inquire into the reasons for particular institutional arrangements and institutional choices, as well as the factors accounting for institutional fixity and flux. Closer scrutiny is devoted to two historical instances: the conception of the specific fair trading institutions (Ch. 4) and the change of the institutional framework under the influence of consumer protection pressures in the 1960s and 1970s (Ch. 5).

In part three, the main elements of the European Community framework of fair trading are described. I identify different levels of pressure for change and adaptation coming from the EU, depending on the form and methods of integration (Ch. 6). I then look back at national law of the Member States and try to gauge the most important influences of European integration on national fair trading law, by way of an institutional perspective (Ch. 7). The immediate purpose is to analyze the most significant changes in national legal rules, in enforcement procedures, but also in the attitudes of relevant actors and organizations arguably triggered by the process of European integration. The study ends with a cursory analysis of the latest developments in the field of fair trading on the level of the EU (Ch. 8) and a summary of findings.

I STUDYING INSTITUTIONAL CHANGE: ANALYTICAL APPROACH

1 INSTITUTIONAL ANAYSIS IN LAW, SOCIAL SCIENCE AND ECONOMICS

The approach taken in this thesis to the study of legal change and Europeanisation is inspired by a dynamic and unwieldy field of social studies that has become known as institutionalism. Naturally, a simple reference to an institutional approach does not say much. The term 'institution' has been used in many different contexts, by many disciplines and with shifting connotations. There is therefore much to be elaborated on the basic terminology and the main premises of the analytical approach employed in this study.

1.1 Institutions and institutional analysis in legal scholarship

The origins of the term 'institution' in legal scholarship go back to Gaius famous distinction between the three institutions of civil law, namely *personae*, *res* and *actiones*.[1] As national law was consolidated in the early modern era, Roman law and its institutions became a model for many advocates of systematization and modernization of existing legal sources. Notably, at law faculties of German universities in the 18th and 19th centuries a vast literature was devoted to 'Institutionen'.

The term 'institution' is by no way foreign to modern legal scholarship either. In a number of analyses of constitutional and administrative law the concept 'institution' is used interchangeably with terms like 'organization', 'organ' or 'agency'. In this narrow and structural sense 'institution' signifies a distinct conglomerate of people and functions, forming a structural unit, with its well-defined place in the mechanism of government. It is, for instance, accepted jargon in European legal studies to talk of the 'institutions' of the European Community when referring to the Parliament, Commission, Council and other decision- and policy-making bodies of the Community.[2] In national law institutions in this structural sense are considered the domain of public, constitutional and procedural law.

On a deeper theoretical level an institutional approach to law is often connected with a general acknowledgment of the need to take into account the broader social, economic and cultural context of legal rules. In this broader sense, theoretical currents in legal scholarship as old and influential as Savigny's Historical School have been regarded as examples of an institutional approach to law.[3] The institutional approach to law so defined has been contrasted to legal positivism, concerned mainly with hermeneutic systemic reasoning with no regard for social environment and effects. Among the most

---

[1] Wieacker, *A History of Private Law of Europe*, English translation by Tony Weir, (Oxford: Clarendon Press, 1995), 330; Andreev, *Rimsko častno pravo* (Sofia, 1975), 75 ff.

[2] See Hartley, *The Foundations of European Community Law* (Oxford: Oxford University Press, 1998).

[3] See in particular v. Savigny's plea for viewing legal rules in their 'organic context' ("organischen Zusammenhang"), v. Savigny, *System des heutigen römischen Rechts I* (1840), 14; cf. Reuter, 'Plädoyer für das institutionelle Rechtsdenken' in: Immenga et al. (eds.), *Festschrift für Mestmäcker* (Baden-Baden: Nomos, 1996), 271.

prominent exponents of an institutional approach to law in contemporary German jurisprudence are such scholars as Karl Larenz[4], Ludwig Raiser[5] und Josef Esser.[6]

At the same time, while rejecting legal positivism, such institutional theories of law have not been particularly successful in presenting a convincing program for an alternative approach, informed by social and economic considerations. In a sense, alternative approaches have mainly been based on intuitive 'contextualisations' of law and legal practice. One has often underestimated or simply ignored the theoretical and methodological difficulties of combining two daunting tasks: on the one hand mastering the 'context' of law and on the other hand providing relevant and meaningful analysis of the normative material that constitutes the core of positive law.

A jurisprudential approach that defines itself as institutional and legal positivist at the same time is the one advanced by Neil McCormick and Ota Weinberger. This theoretical approach emphasizes institutions as human constructs and looks at law and legal rules as institutional facts.[7] Weinberger offers the following understanding of the at the same time enabling and constraining role of institutions:

> Zum Wesen der Institutionen jeder Art gehört es, daß sie Handlungsstrukturen darstellen, sie sind daher immer mit Verhaltensformen (Dürfen, Sollen, Ermächtigen) verbunden, und das ist es gerade, was ihre Rolle im menschlichen Leben ausmacht: sie bieten Handlungsmöglichkeiten und regeln normativ das Verhalten in einem gewissen Bereich. Bloße Definitionsregel können dies keineswegs leisten.[8]

Such an institutional theory is opposed to Hans Kelsen's hierarchical understanding of law as *Sollen* ('ought') and exclusively a product of the will of the norm-creating authority. In contrast to Kelsen's view, legal norms are not perceived as coercive only, but as enabling and constraining human behaviour. At the same time, the authors demonstrate an ambition to reconcile contextualism with legal positivism. In fact, they explicitly declare their approach as legal positivist (cf. the title 'Grundlagen des Institutionalistischen Rechtspositivismus'), but defend a more sophisticated and open-minded brand of positivism than the one familiar from Kelsen's 'pure theory of law'. Consequently, the authors want to avoid drawing too sharp a distinction between ('pure') legal science and socially oriented disciplines such as legal sociology.[9] The study of the social reality in which legal norms exist should in this view be integrated in the definition and the agenda of positive legal science.

> A legal theory, which aims to achieve knowledge of the legal phenomenon – and not to remain at a standstill surveying schemata for logical relations in possible systems –

---

[4] See Larenz, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer-Verlag, 1979).
[5] Raiser, 'Rechtsschutz und Institutionenschutz im Privatrecht' in: *Summum ius-summa inuria. Individualgerechtigkeit und der Schutz allgemeiner Werte im Rechtsleben* (Tübingen: Mohr, 1963), 145 ff.
[6] Esser, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts (Tübingen: Mohr, 1990), in particular at 346 ff.
[7] MacCormick, 'Law as Institutional Fact' in MacCormick/Weinberger, *An Institutional Theory of Law* (Dordrecht: Reidel, 1986), 49 ff.
[8] See Weinberger, 'Einleitung' in: MacCormick/Weinberger, *Grundlagen des Institutionalistischen Rechtspositivismus* (Berlin: Duncker & Humblot, 1985), 26.
[9] See Weinberger, 'The Norm as Thought and as Reality' in: MacCormick/Weinberger, *Grundlagen des Institutionalistischen Rechtspositivismus* (Berlin: Duncker & Humblot, 1985), 31 ff., at 44.

> has to study the real existence of the normative system in its social reality. Legal science without consideration of social reality – which corresponds to the existential aspects of the norm – is thus unthinkable.[10]

The institutional approach proposed in this thesis has indeed much in common with the theoretical lines of reasoning described above. It proceeds from an understanding of the importance of considering legal rules as institutions in their societal context. However, I venture to go further in crossing the line between social disciplines in search for a viable framework for analysis. 'Contextualism' is thus employed in a more conscious manner, with an open account of the particular theoretical detours in neighbouring disciplines.

1.2 Sociological approaches to institutions

Sociological institutionalism has a long and venerable history, dating back to the classical *oevres* of Émile Durkheim and Max Weber. While Durkheim paved the way for systemic approaches to social relations using large data sets, Weber investigated the political social, economic and legal practices of bureaucracy. He also founded the modern conception of the state and of rationality.

The work of Robert Michels on political parties,[11] Adolphe Berle and Gardiner Means on corporate management,[12] and Herbert Simon on public administration progressively deepened the understanding of various forms of organization.[13] By the 1960s students of bureaucracy, leadership, management and administration were beginning to forge a compatible terminology. At this point sociologists took the lead, insisting that there is more to institutions than an organization with staff, funding and a set of formal regulations and objectives. Apart from such rational, goal-oriented structures, institutions possess a social dimension. Over time, sociologists can demonstrate, an informal structure evolves that helps uphold (and sometimes partially subvert) the formal system once established.

According to a leading sociological institutionalist, Philip Selznick, institutions are closely linked to the realization of values. Different from temporary or purely instrumental arrangements, institutions assume a distinctive character of function, become endowed with meaning and/or vested interests. A mature institution will no longer be limited to its original objectives. In Selznick's view processes of institutionalization constrain conduct in two key ways: "by bringing with it a normative order, and by making it hostage to its own history".[14]

The neoinstitutionalism of the late 1980s and early 1990s reinvigorated many of these insights.[15] The attention of organizational theorists was again directed at the

---

[10] *Ibid.*, 44.

[11] Michels, Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy, reprint (Glencoe, IL: Free Press, 1915/1962).

[12] Berle/Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933).

[13] Simon, *Administrative Behavior* (New York: Macmillan, 1958).

[14] Selznick, *The Moral Commonwealth: Social Power and the Promise of Community* (Berkeley, CA: University of California Press, 1992), 232.

[15] A key contribution was DiMaggio/Powell (eds.), *The New Institutionalism in Organizational Analysis* (Chicago and London: University of Chicago Press, 1991).

embeddedness of state bureaucracies and private organizations in particular social environments. Also economists and political scientists were attracted to the concept of institutions, although some were satisfied to analyze 'social capital' as an aggregate property.[16] In this revival the most important feature of neoinstitutionalism may very well have been the interaction between sociology and related disciplines such as social psychology, anthropology, political science, but above all its expanding contacts with economic theory.

1.3 Economic theory and institutions

A few decades ago economic theory did not have much to offer to legal scholarship. Economic analysis was sometimes invoked for the implementation of legal rules, but often sporadically and in the narrow areas of antitrust law or economic and trade regulation.[17] At the same time economic theory showed a remarkable indifference to the economic role of legal rules and of legal and political institutions. This attitude reflected the state of theoretical sophistication of economic theory at the time. The classical (and neo-classical) model of perfect competition still dominated economic theory. Although far from real life competition, this highly abstract model was considered rigorous enough to provide reliable predictions of markets and the price mechanism.

Under assumptions of transparency, perfect information and rationality of market actors, it is clear that economic theory cannot provide relevant explanations for the existence of legal and political institutions. The latter were consequently generally ignored in economic theory assumptions. In a perfect world of full transparency, rational market actors and given preferences, the very existence of law and politics becomes a puzzle.

1.3.1 From a frictionless world to transaction costs economics

Several contributions in the late 1950s and 1960s that independently of each other had the combined effect of changing this state of affairs. Notable is the classical analysis of Kenneth Arrow on the theory of decision-making under uncertainty, Stigler's seminal article on the economics of information[18] and Coase's studies on the theory of the firm and on the problem of social cost.[19] Despite the difference in theoretical approach, one common feature of the emerging new economic theory consisted in relaxing the assumptions of the perfect competition model and bringing it closer to the reality of markets. In this way economic theory was expected to account for more complex and hitherto unexplained developments. Among the assumptions relaxed were notably those of perfect information and/or of rationality of actors.[20] By ushering ignorance and uncertainty into the ordered home of neo-classical economics, the new economic theory

---

[16] James Coleman and Robert Putnam, to mention two prominent representatives.

[17] For a detailed account see Posner, *Economic Analysis of Law* (Boston: Little, Brown and Company, 1992) 21 ff.; MacKaay, *Economics of Information and the Law* (Boston: Kluwer Nijhoff Publishing, 1982); see also Rose-Ackerman, 'Progressive Law and Economics and the New Administrative Law' (1988) 98 *Yale Law Journal*, 341 ff.

[18] Stigler, 'The Economics of Information' (1961) *JPE*, 213 ff.

[19] Coase, 'The Nature of the Firm' (1937) 4 *Econometrica*, 386 ff.; Coase (1960).

[20] Related and equally significant is the assumption of given preferences. Fo a critical analysis see Sunstein, 'Legal Interference with Private Preferences' (1986) 53 *U. Chi. L. Rev.*, 1129 ff.

opened the way for exciting analysis and for bringing economics closer to the social sciences, as well as to law.

In 1951 Kenneth Arrow directed his attention to processes of individual and collective choice under conditions of uncertainty.[21] Although his main focus was the market, he was likewise interested in decision-making in broader contexts and succeeded in directing the economists' attention to political and regulative processes.[22] The school associated with this work of Arrow has become known as public choice theory and attempts to explain "how political and bureaucratic bodies actually behave by assuming that political actors are self-interested maximizers of something (votes, agency budgets, profits, utility)."[23] In the footsteps of Arrow, Anthony Downs ventured to apply economic theory to the study of the political process, offering economic explanations for phenomena such as party ideologies and majority voting.[24]

Two other classical exponents of the approach, James Buchanan and Gordon Tullock, developed a theory of politics that is very distant from conventional perceptions of the public-spirited politician. Buchanan and Tullock conceptualise politics as a market for votes, where rational individuals, pursuing individual interests of re-election, are trading with votes to maximize their chances for re-election.[25] On a normative note, analysts tried to build a model of a decision-making process that satisfies certain desirable conditions for collective choice.

Equally path breaking was the work of Stigler on the economics of information, published in 1961. Relaxing the assumption of transparency and perfect information, Stigler approached the problem of price dispersion and found an explanation in the existence of search costs. Building on these insights for the role of information asymmetries in economic life, a powerful analytical approach developed accounting for a number of economic institutions and phenomena that previously puzzled economists, such as the emergence of department stores, investment in reputation and advertising. We shall return to this theoretical line of reasoning when analysing the economic rationales for fair trading law.

Yet the breakthrough of institutional economics is usually associated with the work of Ronald Coase. Already in his early contribution 'Theory of the Firm' Coase focused on the importance of transactions as the basis of markets and of all human interaction,

---

[21] Arrow, *Social Choice and Public Values* (New York: John Wiley & Sons, 1951).

[22] Arrow, 'Rationality of Self and Others in an Economic System' in: Hogarth and Reder (eds.), *Rational Choice* (University of Chicago Press: 1987).

[23] Rose-Ackerman (1988), at 344 ff. See also Rose-Ackerman, 'Recht und Ökonomie: Paradigma, Politik oder Philosophie' in: Ott/Schäfer, *Allokationseffizienz in der Rechtsordnung* (Berlin: Springer-Verlag, 1989), 269 ff., cf. Kübler, 'Schlusswort: Vergleichende Überlegungen zur rechtspraktischen Bedeutung der ökonomischen Analyse' in: Ott/Schäfer (1989), 293 ff.

[24] Downs, *An Economic Theory of Democracy* (New York: Harper & Row Publishers, 1957). Building on Arrow's insights in the importance of uncertainty and information problems, Downs demonstrated that seeking to exhaustively inform oneself as a voter was not optimal. Downs offered a more sophisticated understanding of rationality, in which 'the ideal of looking for what is substantively the best solution is abandoned as unrealistic. Instead, to be rational in this sense means to look for the best solution that it is worth looking for'. Cf. Mackaay (1982), 111.

[25] Buchanan/Tullock, *The Calculus of Consent. Logical Foundations of Constitutional* Democracy, 2nd ed. (Ann Arbor, MI: The University of Michigan Press, 1967).

and hinted at the pervasiveness of transaction costs. He conceptualised the firm as one form of economic organisation that has emerged as a response to problems of uncertainty and opportunism in contracting.[26] A hierarchical organization has thus provided an efficient substitute for horizontal contracting in specific situations. This analysis was carried further in Coase's seminal 1960 article 'The Problem of Social Cost'.[27] It was this article which in a dramatic way attracted the attention of economists to law and legal institutions and, even if at a slower pace, the attention of lawyers to economic theory.

The powerful resonance of the article among economists can be understood having in mind that Coase attacked the core of the then dominant paradigm of welfare economics. Challenging the widely accepted Pigouvian criteria for measurement of economic efficiency, proponents of welfare economics argued for governmental intervention in all instances where markets would produce so called 'externalities'.[28] Externalities were defined as situations where economic exchange even under competitive markets would produce unaccounted negative effects for third parties, costs that would not be compensated for by the beneficiaries of the exchange. The classical example was that of environmental pollution and its repercussions for local residents. The policy advice of welfare economics was logically to internalise the incurred third-party costs, i.e. to devise mechanisms for increased accountability of market actors for the negative external effects of their activity. The most obvious mechanisms for internalising external effects were liability rules and governmental sanctions.[29]

Coase radically reversed the perspective. The problem of externality was in his analysis conceptualised as a problem of choice between alternative uses of one and the same economic resource. Thus pollution in a residential area was not about the cost inflicted by the polluter to the residents. It was rather about choosing between residence and industrial production as two alternative uses of the same limited resource (clean air). In case the use of a property as residence was more highly valued in society (value being measured by willingness to pay), then the residents would be granted an injunction against the factory and the industrial production was to cease. By contrast, in case the factory's activity was considered more valuable, the residents would only be granted a right to compensation or to reasonable measures aimed at diminishing the damage. Otherwise they would have to put up with the pollution or give up their residence in the area. Coase predicted that irrespective of the outcome of the case, in a world with negligible transaction costs, market actors would eventually reach a state of optimal resource allocation through voluntary transactions irrespective of the initial distribution of entitlements. The market would finally allocate the resource to the party most willing to pay for it, i.e. efficiently.

---

[26] Coase (1937).

[27] Coase (1960).

[28] Pigou argued that the existence of externalities and market imperfection in general formed a sufficient condition for government intervention. The problem of externality is addressed by Pigou in his *The Economics of Welfare* 5th ed. (London: Macmillan & Co., 1952), 172 ff. See Coase, *The Firm, the Market and the Law* (Chicago, IL: University of Chicago Press, 1988), 20 ff. See also Reich, *Staatliche Regulierung zwischen Marktversagen und Politikversagen* (Heidelberg: C.F. Müller Verlag, 1984), 9.

[29] See Reich (1984), 9.

Following this admittedly oversimplified presentation of the Coase theorem, one may wonder in what way it contributed to the increased interest in the role of legal institutions. The straight-forward conclusion from the analysis appears to be that, given zero transaction costs, the initial resource allocation is unimportant and the economic significance of different legal arrangements on property rights remains obscure. This inference, *prima facie*, suggests the irrelevance of law rather than a new imperative to take legal institutions into consideration. The key to the puzzle is provided by a reversed (*e contrairo*) reading of the analysis. In the presence of non-negligible transaction costs, legal institutions as well as initial allocation of entitlements, acquire crucial importance. The assertion that transaction costs in real markets are never zero does not need extensive corroboration. It is at this particular juncture, in the reduction of transaction costs, that the true economic relevance of legal institutions is seen to lie. A number of legal rules and institutions that previously have remained a mystery to economists suddenly obtain a new meaning and a rigorous explanation.

Paradoxically, the Coase theorem gave rise to two quite divergent schools of thought both on an explanatory and on a normative level. On the one hand, it triggered abundant research on the efficiency maximizing (transaction costs minimizing) function of spontaneously evolved private law rules. For lawyers the theorem opened up a whole new world of alternative conceptualisations of basic private law doctrines. Since law and economics developed as a primarily American discipline, the focus was on common law as judge-made law. The message of the innate tendency of spontaneously evolving legal orders to enhance efficiency proved particularly appealing to legal scholars. One of the most eminent exponents of law and economics theory, Judge Richard Posner associated with the Chicago school of economic analysis, developed a general theory on the efficiency of the common law linked to its evolutionary and efficiency-oriented character.[30]

On a policy level, the underlying message of these analyses was the importance of a rigorous definition of property rights and a general scepticism towards attempts at governmental intervention in economic life. It similarly insisted on the advantages of private ordering. Generally, Coase's contribution was conceived of as a powerful critique of conventional welfare theory with its conceptualisations of market failure, externalities and the ensuing approval of government intervention. In short, the thrust of the article was interpreted by a large group of economists and lawyers as a general appeal for limited government and praise of the virtues of the system of spontaneous allocation of resources through markets and private ordering.

However, the Coase theorem gave birth to at least one alternative current of thought in terms of policy advice. In particular lawyers and economists interested in public policy saw the true message of Coase's analysis to lie elsewhere. They agreed that the article was a reaction to the simplified and uncritical approach to governmental intervention as practiced by Pigouvian welfare economists. Indeed, part of Coase's ambition was to demonstrate that in a number of situations government intervention would not do better than the market, and that it was generally wrong to use the ideal model of perfect competition as a benchmark against which actual economic performance could

[30] Posner (1992), 251 ff.

be judged. Yet they did not perceive Coase analysis as a sweeping denial of legislative and governmental intervention and full reliance on a free market. On an explanatory level, Coase's article could quite to the contrary be read as a more robust explanation for the emergence of a number of institutions, not only a result of spontaneous regimes of private ordering, but also of deliberate public intervention.

The gist of Coase's argument could be read as an appeal for what is often called a 'comparative system approach',[31] i.e. 'an approach that compares the economic consequences of alternative ways of organising the allocation of resources'.[32] As Coase himself stated in the conclusion of his much celebrated 1960 article:

> [T]here is no reason to suppose that government regulation is called for simply because the problem is not well handled by [the politics of] the market or the firm. Satisfactory views on policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects.[33]

Whereas in the first of his two most famous articles, "The Nature of the Firm", Coase pioneered a comparative analysis between different market arrangements (i.e. contract and firm), "The Problem of Social Cost" called for comparison between the market and alternative systems of resource allocation. Therefore, on a normative level, rather than an unequivocal preference for the market, his analysis could be understood as a rigorous programme for selective and solidly motivated legislative and governmental intervention based on insights into the pervasiveness of transaction costs. As Dahlman noted:

> Any economist who is also a self-interested government consultant ought to embrace the Coase analysis whole-heartedly, for it would seem to call for more and better cost-benefit analysis by government agencies dealing with pollution and other environmental problems.[34]

1.3.2 Institutional economics

It was the alternative reading of Coase and the insights into the pervasiveness of transaction costs that gave new life to economic research focusing on institutions, and which is of immediate interest for the purposes of this study. The designation 'new institutional economics' is sometimes used to contrast the new theoretical currents from the old institutionalist approach in economics, notably that which is associated with the work of John Commons.[35] Institutional economics is far from a coherent theory. It is rather a set of theoretical propositions that all focus on the economic reasons and effects of institutions and on alternative forms of social and economic organisation. Similar to social science theories on such matters, institutions in institutional economics are often conceived of as humanly constructed norms, rules and conventions. However, the focus is on the way institutions and organizations

---

[31] Demsetz, 'Information and Efficiency. Another Viewpoint' (1969) 12 *JLE*, 1 ff.
[32] This is very insightfully emphasised by Dahlman, 'The Problem of Externality' (1979) 22 *JLE*, 141 ff., at 161.
[33] Coase (1960), 18.
[34] Dahlman (1979), 161.
[35] See Sjöstrand, 'On Institutional Thought in the Social and Economic Sciences' in: Sjöstrand (ed.), *Institutional Change. Theory and Empirical Fiindings* (Armonk, New York: M.E. Sharpe, 1993), 3 ff., at 6, referring to Commons, *Institutional Economics* (New Brunswick, N.J.: Transaction Publisher, 1934/1990).

contribute to shaping human cooperation and overcoming problems of transaction costs. Economic institutionalists build their theories without necessarily abandoning methodological individualism as a main premise of economic theory. Yet in contrast to classical economists, they relax assumptions of transparency and costless exchange.

Within the broad category of 'institutional economics', the approaches vary on the one hand concerning level, focus, and unit of analysis. On the other hand they differ in terms of behavioural assumptions. In an extensive survey of institutional economics, Oliver Williamson has proposed a three-level scheme for organizing and positioning institutional research: the level of the individual, the level of the organisation and the level of institutions.[36] Institutional research may focus on each of these levels depending on the purposes of investigation and take the other two levels as exogenous variables.

Another point of difference concerns the main behavioural assumption of the neo-classical model, namely that of rationality. A large community of institutionalists, while acknowledging the importance of transaction costs, does not question the rationality model of classical economic theory. Others are inclined to search for more realistic assumptions even in this respect. Students of institutional economics in this divergence perceive an important schism between two trends in institutional economics, differently labelled in order to properly reflect the distinction. The term 'Neoinstitutionalism' is used for those analyses which, although focusing on institutions and critical of the neoclassical approach, remain within the 'hard core' of neoclassical research program and the rational choice model. By contrast, the designation New Institutional Economics is applied only to those institutionalist theories that abandon the rationality assumption.[37]

1.3.2.1 New Institutional Economics

One of the most famous exponents of the New Institutional Economics is Oliver Williamson. In his 'The Economic Institutions of Capitalism' Williamson carried the Coasean analysis (especially 'The Nature of the Firm') further, and sought to explain the origins of horizontal and hierarchical market organization in terms of economizing on transaction costs. In this and other earlier works Williamson did not make a clear distinction between institutions and organizations. Markets and hierarchies as alternative organizations of economic activity were described as institutions. In more recent analyses Williamson has been more precise to underline the distinction between institution and organisation and has described his own interests and contributions to lie on the level of organisations.[38] His focus is thus on the process of governance. Organizations are seen as reacting to both individual preferences and to the institutional environment, and subsequently accommodating these influences through

---

[36] Williamson, *The Mechanisms of Governance* (New York, Oxford: Oxford University Press, 1996), 219 ff., at 223. Especially in his earlier analysis the distinction between organization and institutions is somewhat blurred. Thus in Williamson's analysis firms and alternative organizations of markets are likewise described as institutions.

[37] For a review on the opinions of different institutional economists on this particular issue, see Eggertsson, *Economic Behaviour and Institutions* (Cambridge University Press, 1990), 6 ff. The distinction mentioned here is not universally accepted, though. Moreover, some authors who initially adopted a strict rational choice model, later came to accept modified assumptions regarding social behaviour. See for instance North (1990), 17 ff.

[38] Williamson (1996), 223.

adapted forms of governance. Institutions in the forms of norms, rules and codes of conducts are consequently perceived as something external, exogenous, as environment for the organization, constantly posing new challenges to governance.

When it comes to behavioural assumptions, Williamson's ambition is to introduce a maximum measure of realism but one that would not weaken the theoretical stringency and predictive power of the analysis. For this purpose Williamson finds support in Coase:

> Modern institutional economics should study man as he is, acting within the constraints imposed by real institutions. Modern institutional economics is economics as it ought to be.[39]

The actor is not the 'rational man' but the so-called 'contractual man', characterized through the concepts of bounded rationality and opportunism. Following the classical definition of Herbert Simon of bounded rationality, economic actors are assumed to be 'intendedly rational, but only limitedly so.'[40]

1.3.2.2 Comparative institutional analysis

A promising approach to the analysis of institutions has been advanced by public policy scholar Neil Komesar.[41] Building essentially on Coase, but also on other strings of institutional and public policy analysis[42], Komesar conceptualises the market, the political process and the courts as alternative decision-making processes. His main thesis is that the choice between decision-making institutions is crucial for the efficient achievement of any social goals. The analysis is, thus, decidedly normative. Komesar defines the approach as "revisionist law and economics". And indeed, much of classical Posnerian law and economics focuses on either demonstrating the efficiency of private ordering (the common law in the American setting) or on criticising the malfunctioning of public regulation. Komesar argues convincingly that such analyses are flawed because of their one-sidedness. The performance of the analysed institution should instead be evaluated against the background of possible failures in the performance of alternative institutions.

The key to the comparative system evaluation advocated by Komesar is the so-called participation-centred approach. The use of the broad concept of 'participation' serves to facilitate the extension of the Coasean transaction cost approach from markets to politics and to adjudication. It brings the logic of economic theory closer to public policy and law. Studying the opportunities for participation (and representation) implies on the one hand analysis of the interests involved in a particular policy issue and, on the other hand, analysis of characteristics of the alternative decision-making processes that enhance or reduce participation. Clearly, participation alters shape depending on the decision-making process. Thus, participation in markets primarily

---

[39] Williamson, *The Economic Institutions of Capitalism* (New York: Free Press, 1985), 44.
[40] Williamson (1985), 45.
[41] Komesar (1994). See also Komesar, 'In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative' (1981) 79 *Michigan Law Review,* 1350 ff.; Komesar, 'A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society' (1988) 86 *Michigan Law Review*, 657 ff.
[42] Shepsle/Weingast, 'Political Solutions to Market Problems' (1984) 78 *American Political Science Review*, 417 ff.; Calabresi, *The Costs of Accidents* (New Haven and London: Yale University Press, 1970).

occurs through the process of transacting. Participation in the political process (legislation or administrative process) can take place through a variety of forms among which voting and lobbying are the most important. And finally, participation in adjudication takes the form of litigation. The focus is on the mass of participants, i.e. consumers and producers for the market process, voters and lobbyists for the political process and litigants for the judicial process.[43] Official actors in the political and the legislative process – judges and law-makers – are only attributed secondary importance.

Participation opportunities are weighed through assessing the costs incurred and the benefits expected from participation of the actors in the respective decision-making process. For the market these are transaction costs and benefits, while for the courts they are litigation costs and benefits. In terms of the political process, such opportunities depend on the costs and benefits of political participation. Benefits and costs of participation thus become the main units of analysis. They account for the relative efficiency of the alternative decision-making processes with regard to a specific law and public policy issue. Naturally, costs and benefits are often related and difficult to analyse independently. Yet for the sake of more stringent analysis Komesar insists on distinguishing between the two.

Participation costs are subdivided into two main categories, i.e. information and organisation costs. More specifically, the costs of participation depend "on the complexity or difficulty of understanding the issue in question, the number of people on one side or the other of the interest in question, and the formal barriers to access associated with institutional rules and procedures."[44] As organisation costs Mancur Olson had defined: "the costs of communication among group members, the costs of any bargaining among them, and the costs of creating, staffing and maintaining any formal group organisation".[45] Arguably, in the final analysis even organisation expenses boil down to information costs.

The benefits of participation are measured through the per-capita stakes of affected actors. The emphasis on stakes as determinants for the benefit of participation in decision-making processes allows for further refinement of the analysis. The stakes of potential participants differ both in terms of size and in terms of their distribution among the group. One can usefully distinguish between high stakes and low stakes and between concentrated and dispersed stakes. The distribution of the stakes between potential participants in a decision-making process is decisive for the probability of successful participation. An even distribution of stakes on both sides of the transaction and a relatively low number of parties involved are suggestive of high benefits and thus of high probability of participation. In contrast, skewed distribution with concentrated stakes on one side and dispersed stakes on the other reflects a problematic, non-optimal transaction situation. In this aspect Komesar's approach resembles Mancur Olson's classical analysis of collective action.[46] Olson provided a convincing explanation as to why actors would be disinterested in participation in

[43] Komesar (1994), 7.
[44] Komesar (1994), 8.
[45] Olson, The Logic of Collective Action. Public Goods and the Theory of the Group (New York: Schocken Books, 1965), 47.
[46] Olson (1965).

collective action concerning broadly dispersed interests, despite possibilities to improve the situation of the group. Olson argued that due to high costs of organisation and risk of 'free-riding' such behaviour was rational. His pessimistic prediction reads:

> ...[t]he larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained. For these reasons, the larger the group the farther it will fall short of providing a optimal supply of the collective good, and very large groups normally will not, in the absence of coercion or separate, outside incentives, provide themselves with even minimal amounts of a collective good.[47]

In general, comparative institutional analysis stresses that the dilemmas of institutional choice begin with large numbers. This proposition is familiar from Coasean comparative system analysis. Given small numbers of actors (low transaction costs) markets can be expected to cope endogenously with resource allocation through voluntary transactions.[48] But if there are many actors on one side of the interests involved, transaction costs increase and at least potentially the question arises whether resorting to alternative institutions might reduce allocative inefficiencies. Yet, comparative institutional analysis demonstrates convincingly that large numbers of affected parties constitute a problem in every setting. Similar interest constellations cause analogous problems of organisation and representation. Participation malfunctions in the market setting are reproduced in the political process and in adjudication. In other words, institutions tend to 'move together'.[49]

Still, some categories of participation malfunction are linked to particular decision-making processes. When studying the political process, Komesar identifies two categories of situations that are particularly conducive to representative malfunction. The first is characterized by the dominance of small, concentrated interest groups (which is in conformity with well-established theories of public choice and interest-groups politics).[50] Komesar labels this situation a case of 'minoritarian bias'.[51] The theory predicts that, when public policy issues involve balancing between concentrated high-stake interests and dispersed small-stake interests, the former will prevail in the legislative process as well as in public agency decision-making. This is the result of free riding and low benefits of organization associated with diffuse interest groups[52], but also due to principal-agent problems characteristic of the political and the administrative process.[53] Interest group theories of politics provide empirical evidence

---

[47] Olson (1965), 48.

[48] Of course, even in small numbers situations transaction costs can be high due to information uncertainty, strategic behaviour or other factors.

[49] "Quite commonly, albeit not always, institutions move together. When one institution is at its best or worst, the alternative institutions are often at their best or worst." Komesar (1994), 23.

[50] Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell J. Econ. & Mgmt Sci*, 3 ff.; Buchanan/Tollison/Tullock, (eds.), *Towards the Theory of the Rent-Seeking Society* (College Station, TX: A&M University Press, 1980). Buchanan/Tullock (1967).

[51] In contrast to influence, 'bias' is described as a normative or prescriptive issue. "From the standpoint of resource allocation efficiency, minoritarian bias occurs when a concentrated high per capita minority prevails over the dormant low per capita majority even though the total social costs imposed on the losing majority are greater than the total social benefits gained by the successful minority." Komesar (1994), 76.

[52] As demonstrated by Olson (1965).

[53] On the theory of agency and the principal-agent problem, see Eggertsson (1990), 40 ff. with further references.

of overrepresentation of concentrated interests in the political process, along with the 'capturing' of public agencies by defenders of the very interests they are set to regulate.[54]

Komesar, however, augments the interest group theory with analysis of the role of majorities which allows him to identify a second category of mal-representation, namely 'the tyranny of the majority'. This second category of mal-representation is labelled 'majoritarian bias'. All theorists of public choice recognize some importance for the influence of the majority but do not offer any explanation as to when and why such an influence may produce adverse effects.[55] In order to come to a more satisfactory answer Komesar proceeds to analyse the character of the large group. He offers two explanatory factors that may be decisive for the success of public action despite high numbers. In the *first* place, the average per capita stakes are important. This factor predicts that the greater the mean, the higher the probability that collective action will follow. The *second* factor is the variance and skewness of the stakes. Uneven distribution of the stakes brings the analysis of the large group closer to that of the small group, since a small subgroup with high stakes will then act as a driving force for collective action. The term 'catalytic sub-group' nicely captures this phenomenon.[56] Finally, there are better opportunities for mobilizing dormant majorities if the issue concerned is simple and easy to be communicated in powerful metaphoric terms.

Finally, the framework proposed by Komesar requires a rigorous analysis of the characteristics of each of the institutional alternatives in terms of effects on participation costs and benefits. To take one example, in contrast to the political process, participation in adjudication is typically a costly enterprise, involving litigation fees and requiring sophisticated expert advice. Access to the judicial process is highly formalised through rules on standing, jurisdiction, and choice of law.[57] The judiciary operates on a very limited scale and possesses only limited expertise to decide on highly technical issues. At the same time, the judicial process has the advantages of ensuring direct access, careful and lengthy examination of the issue by a body principally isolated from political pressure and information manipulation. These aggregate characteristics of the judicial process makes it particularly apt to deal with certain situations of skewed distribution of stakes, for instance where the political process suffers from severe majoritarian bias like the violation of minority rights.[58]

---

[54] See Buchanan/Tullock (1967); Rubin, 'On the Form of Special Interest Legislation' (1975) 21 *Public Choice*, 79 ff.

[55] Komesar observes some recognition for the interplay between majoritarian and minoritarian forces in Downs: "Proposition 6: Democratic governments tend to redistribute income from the rich to the poor ... Proposition 7: Democratic governments tend to favour producers more than consumers in their actions." Downs (1957), 297.

[56] For a similar argument, see Stigler, 'Free Riders and Collective Action: An Appendix to the Theories of Economic Regulation' (1974) *5 Bell J. Econ. &Mgmt Sci.*, 359 ff.: "The small number solution has a wider scope than a literal count of numbers would suggest, the size distribution (sales of firm, property of family). The large individuals in a group may therefore properly view themselves as members of a small number industry if their aggregate share of the group resources is large."

[57] Komesar (1994), 126.

[58] Another constellation of interests and stake distribution envisaged by Komesar is the so called skewed 'shifted' distribution. It occurs where dispersed interests *ex ante* (for instance consumer interests in product liability cases) transform into concentrated high stake interests *ex post* (e.g. severe individual injury). Also in this situation the judicial process may prove a more attractive decision-making forum than the market or the political process.

The approach advanced by Komesar offers powerful insights in the comparative advantages and disadvantages of different decision-making processes, moreover in relation to different policy settings. The advantage of Komesar's analytical approach is that it uses relatively clear-cut categories and can be easily applied to different legal and public policy issues. Since one of the intricacies of fair trading regulation is seen to reside with small and dispersed consumer stakes as well as with high costs of information, organisation and litigation, the model appears particularly suitable for the purposes of this investigation.

1.3.2.3 Historical institutionalism

A different perspective on institutions is adopted by another variation in the neoinstitutionalist line of theorizing, better known as historical institutionalism. The leading name is Douglass North. As pointed out above, North understands institutions as humanly constructed constraints to social and economic behaviour. These constraints appear in the form of routines, rules and customs which frame human conduct and help reduce uncertainty. The emphasis is on the level of institutions, where institutions are defined as "formal rules, informal constraints and the enforcement characteristics of both."[59] The main question he poses is: how do institutions evolve over time and how do present institutions influence future individual and institutional choices?

One of the main puzzles that drives North's analysis is the dramatic divergence in economic performance and development between different countries in the world.[60] The unravelling of this puzzle brings him to insights in the constraining force of institutions. Institutions frame human behaviour and serve to reduce uncertainty and economize on transaction costs. According to the evolutionary theory of economic development elaborated by Alchian, competitive markets should over time produce efficient institutions.[61] Yet according to North the empirical evidence for such convergence is lacking and even amounts to the contrary proposition. Inefficient institutions prosper and divergence between developing and developed countries in efficiency terms even increases. It was this discrepancy that provoked his interest for institutions and their role for economic performance and efficiency.

Unlike other institutionalists who treat organizations as institutions, North insists on distinguishing between the two in order to enable stringent analysis of their interaction.[62] The distinction is crucial, since in this way the analytical approach is capable of capturing not only processes of stability and inertia but also processes of change at incremental or more dynamic pace. Organizations are conceived as "groups of individual engaged in a purposive activity." They are designed by their creators to

---

[59] North (1993), 36.
[60] North, (1990), 6.
[61] Alchian, 'Uncertainty, Evolution and Economic Theory' (1950) 58 *JPE*, 211 ff.
[62] Williamson in his early work does not distinguish between institution and organisation. In the school of sociological institutionalism a joint treatment of institutions and organizations is represented by March and Olsen. They include in the definition of institutions not only "social norms and culturally stabilized systems of meaning but also social entities that are capable of purposive action." March/Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New Yok: Free Press, 1989). On the definition of institution and the distinction with organisation and corporate actors see Scharpf, *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research* (Westview Press, 1997), 38.

maximize wealth, income, or other objectives defined by the opportunities afforded by the institutional structure of society.[63] This broad definition covers the classical market organization, the firm, but likewise the guild, the political party, the Congress or the executive agency. It allows for parallel consideration of market, political and adjudicative processes and organizations.

Institutions open new opportunities for gains from trade and thus give rise to organizations and institutional agents who are willing to make use of these new opportunities. In the words of North:

> The organizations that come into existence will reflect the opportunities provided by the institutional matrix. That is, if the institutional framework rewards piracy then piratical organizations will come into existence; and if the institutional framework rewards productive activities then organizations – firms – will come into existence and engage in productive activities. [64]

The backside of the interaction between institutions and organizations is the ensuing risk of symbiotic relations between organizations and institutional frameworks, leading to situations of institutional lock-in, i.e. pronounced resistance to change despite efficiency losses.

Contrary to claims of evolutionary theories of economic growth[65], North convincingly demonstrates that institutions are not necessarily evolving towards increased efficiency in a classical Pareto sense.[66] This is particularly so for institutions which are a product of the political process, typically legal rules resulting from legislative processes. Given differential bargaining power in societies, it is not at all given that these institutions will be created to promote efficiency. Rather they may further the interests of those with greater bargaining strength.[67]

Adopting more realistic behavioural assumptions such as expected utility and bounded rationality, North views the persistence of institutional inefficiency as a problem of knowledge and learning. Even if institutions do not promote increased efficiency, they have a tendency to persist over time because institutional agents follow imperfect subjective models of reality and are influenced by informal constraints that change slowly.

The core of the theory of institutional change advanced by North could be summarized as aiming to explain "how the past influences the present and the future, the way incremental institutional change affects the choice set at a moment of time, and the nature of path dependence."[68] It is the symbiotic relations between the institutional framework and the organizations it (re)produces that account for the persistence of institutions over time. So-called 'path dependence' is according to North a result of

---

[63] North (1993), 36.
[64] North, 'Economic Performance Through Time' (1994) 84 *The American Economic Review*, 359 ff., at 361.
[65] Alchian (1950).
[66] A Pareto-superior (or Pareto-efficient) transaction is defined in economics as a transaction that makes at least one person better off without making anyone worse off. See Posner (1992), 13.
[67] North (1994), 361.
[68] North (1990), 3.

incomplete markets, fragmentary information feedback and significant transaction costs. Under these conditions 'the subjective models of actors modified both by very imperfect feedback and by ideology will shape the path.'[69]

> Much of [that] history is path dependent simply by nature of constraints from the past imposing limits on current choices and therefore making the currant choice set intelligible. But much of it reflects a more fundamental role of path dependence as a consequence of the increasing returns characteristics of the institutional matrix.[70]

The long-term, historical perspective and the emphasis on institutional persistence have provoked criticism that the analysis suffers from a conservative and deterministic bias.[71] Thus, it is claimed, the analysis does not capture situations where potential for change and transformation exists. This criticism, however, does not really do justice to North's analytical model, at least not if one is to judge from North's classical monograph: *Institutions, Institutional Change and Economic Performance.* Although the main focus is on the constraining force of institutions, the analysis offers valuable insights into the role of organizations and actors as factors of institutional change. It is true that change is described as incremental and it is underlined that even revolutionary change does not totally wipe out the pervasive influence of past institutional constraints.[72] At the same time there is an implicit awareness of the importance of institutional actors and their changing preferences as factors for institutional change.

North's approach is basically explanatory. Through an extensive analysis of the role of institutions throughout economic history, he seeks to explain diversity in economic development across countries. Yet there is at least one important insight with normative implications. Discussing the question of how one should evaluate institutions and their impact on economic efficiency, North develops the concept of 'adaptive efficiency'. North describes adaptive efficiency as providing:

> [t]he incentives to encourage the development of decentralized decision-making processes that will allow societies to maximize the efforts required to explore alternative ways of solving problems.[73]

With Hayek[74], North argues that a society that permits the maximum generation of trials will be most likely to solve more problems through time.[75]This is certainly an interesting and exciting approach, since at the same time it questions normative analyses based on abstract criteria of efficiency (Nirvana solutions).[76] But it likewise

---

[69] North (1990), 95.
[70] North (1990), 137.
[71] Knill (2001), 25 ff.
[72] North (1990), 90.
[73] North (1990), 81.
[74] See Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).
[75] North (1990), 80.
[76] For criticism of 'nirvana' type analysis see Demsetz (1969), 1 ff.

demonstrates that comparative system analyses of the Coasean type cannot ignore historical reality and tradition.[77]

[77] See Buzbee's emphasis of historical context and the time element as underdeveloped facets of Komesar's institutional choice analysis in Buzbee, 'Sprawl's Dynamics: A Comparative Institutional Analysis Critique' (2000) 35 *Wake Forest Law Review*, 509 ff., at 516.

2 THE INSTITUTIONAL APPROACH IN THIS STUDY

Having presented a number of different institutional perspectives in law, sociology and economics, it is now time to pull the strings together and provide a more systematic account of the institutional approach used in this study as well as to define the main variables of analysis. The institutional approach proposed here combines an interest in the stabilizing role of institutions and the dynamic role of interests and agents in explaining a continuous movement from stability to change. It builds in its micro-analytical sections on comparative institutional analysis, but is sensitive for the role of institutional path dependence and contingency, in tune with historical institutionalism.

2.1 Institution-centred perspective: the logic of institutional persistence

I shall first outline those aspects which make historical institutional analysis particularly conducive to integration with legal analysis. A kinship between historical institutionalism and legal analysis can be found on a number of levels. An evident commonality is the shared interest in legal rules and enforcement mechanisms. Like historical institutionalists, legal analysts tend to view legal rules as important institutions constraining human behaviour. Either intellectual endeavour insists on the importance of enforcement. Yet whereas legal analysis stops here, economic institutionalism inquires further into the relation of the institutional framework with economic efficiency. As we shall see, however, the question of efficiency is not – or at least should not be – wholly uninteresting for lawyers either. Many legal regimes aim explicitly at enhancing economic efficiency. And even where the goal of certain legal rule is other than efficiency, the efficiency of the legal framework would finally be decisive for the achievement of the goal.[78]

Another commonality is the mutual interest in the history and the evolution of legal rules. For historical institutionalism this interest forms an integral part of its agenda, namely substantiating the decisive influence of past institutions on present choice-sets. But looking at the history of legal rules is an indispensable component of any legal analysis worth its name. Lawyers in most countries would at least glance at the original legislative intent of statutes, consider preparatory material and search for precedents (in both common law and Continental systems). In fact, legal doctrine can be said to be one of the transmission belts for the influence of the past on present institutions and thus an important factor for achieving the continuity so interesting for historical institutionalists.

Historical institutionalism shares the general advantage of economic analysis of law, namely that it directs the search light to the problem of efficiency. Yet, in contrast to classical law and economics, historical institutionalism with its awareness of the conservative force of inherited institutions and intellectual frames of reference provides a much more realistic picture of the world in which legal change takes place. Normative advice on the basis of economic analysis is often influenced by the frictionless paradigm of the neo-classical model. Historical institutionalism gives insights into the conservative force of existing institutions, formal and informal constraints as well as into the role of organizations and institutional agents as factors of continuity or change. Historical institutionalism demonstrates the complexity of the

[78] See Rose-Ackermann (1988), 348; Komesar (1994), 14 ff.

institutional framework and requires an integrated analysis of all its components. This could exert a refreshing impact on the highly technical and isolationist analysis typical for legal scholarship.

One major contribution of historical institutionalism would be to sensitise legal scholars to the importance of the existing mechanisms of enforcement. The rules in combination of mechanisms of enforcement to a large extent predetermine what agents and organizations will emerge on the institutional scene and whether they are in a position to exploit the framework and induce institutional change once preferences and prices change (to effectively signal the need for change).

Finally, historical institutionalism is particularly promising in comparative legal studies. It provides analytical tools to test hypothesis of autonomous legal orders vs. instrumentalist logic of legal transplants, hypothesis of convergence or persistence of legal cultures. As a theory lying on the macro level it is better suited to be applied to more complex large-scale phenomena such as comparative study of legal change and influence of European integration over national frameworks. Conventional economic analysis of law may provide excellent tools for micro analysis of particular legal doctrines in a limited national setting. Historical institutionalism, by contrast, provides an intellectual framework for macro analyses.

Historical institutionalism and legal analysis differ as to the level of detail they require. Whereas legal analysis looks typically at the micro-institutional level of single provisions, precedent, or at a group of rules forming a systematic unity, historical institutionalism is interested in the broad picture and in the institutional framework as a whole. Legal analysis could be compared with classicist painting in its desire to capture the tiniest detail and find its exact place in the picture. Historical institutionalists take a more 'impressionist' approach, where the object can be recognized, but precision is not a virtue. In a similar vein, the time perspective varies substantially. Historical institutionalism digs long back into the past in order to find explanation for present institutional developments. Legal analysis, in contrast, typically limits the travel in time to the near past, which can generate material for legal interpretation.

As always with different disciplines, the most important difference concerns the goals of analysis. Historical institutionalism seeks to explain the effect of legal rules and institutions on economic efficiency. Normatively it tries to shape institutional frameworks that are conducive to economic growth. Conventional legal analysis, in contrast, represents normative analysis in a different meaning, namely in offering guidance for interpretation and application of legal rules.

Naturally, where transposition problems exist, one needs to adjust the framework to its new purposes. How can historical institutionalism be 'translated' into the language of law? The integration between institutional and legal analysis requires several modifications of the design that have to be explicitly reported. It should become evident that the degree of detail is a result of a compromise. The present study zooms in on the picture in comparison to the historical type of analysis conducted by North. As a lawyer I cannot be satisfied with the birds-eye view of a historian. Therefore, as is conventional in legal analysis, I will descend to the level of individual rules and

cases. Since one of the goals of this study is to comparatively explore different legal approaches to the regulation of marketing practices, I provide a relatively detailed picture of substantive rules and enforcement procedures. Yet unlike conventional legal analysis, I do not strive for exhaustiveness of analysis. My ambition is to realistically capture the institutional core of national legal systems seen as ideal types, to reflect and communicate their particular flavour and character. Finally, in order to enhance the normative aspect of the analysis, I complement the historical institutionalist perspective with insights gained from the 'instrumentalist' approach of comparative institutional analysis.

2.1.1 Formal rules, informal constraints, enforcement

The way the term 'institution' is used in this study is influenced by North's, by now classical, definition. Institutions are consequently understood as "formal rules, informal constraints (norms of behaviour, conventions and self-imposed codes of conduct) and the enforcement characteristics of both."[79] Even if this definition may appear rather broad, it is not altogether foreign to a lawyer. Classical legal analysis tends to deal with each of these elements, albeit often in isolation from the others. Arguably, the majority of legal investigations are devoted to formal rules. I refer here to various analyses of what is called 'substantive law'. Another group of legal scholars focus on procedure and thus on enforcement of rules. Finally, case law and legal doctrine reveal deeply embedded informal constraints that influence the behaviour of courts and other relevant agents. Missing is a more complex analysis, integrating the different institutional elements and looking at their interaction and mutual dependence. The three categories – formal rules, informal rules and enforcement will be used as main variables of the institutional analysis also in this study, yet with significant qualifications due to the interdisciplinary character of the analysis.

Despite its strength, the definition per enumeration provided by North does not name the core element of the concept institution. And this core element has actually much in common with the definitions given in sociological studies on institutions. Formal rules, informal constraints and enforcement are there for repeated reference and application. Only in this sense do they act as constraints of human behaviour. In this context it is questionable to what extent formal rules that are 'rules in the books' could be called institutions (law in the books vs. law in action).

2.1.1.1 Formal rules

The *formal rules* category sounds, at least *prima facie*, familiar to a lawyer. Yet one should not be induced to believe that North follows some Kelsenian logic and precision in the distinction between formal and informal rules. Under formal rules North classifies 'political (and judicial) rules', 'economic rules and contracts.' There is awareness about the hierarchy between the different rules from constitutions, statutory law, down to individual contracts. In the economists' jargon hierarchy is described as differing costs for alteration. This means that the higher up in the hierarchy a legal act is found, the costlier its amendment. At the top of this hierarchy is the Constitution, requiring special procedure for its amendment. However, North treats all rules in a similar manner, namely as constraints of human behaviour. This refreshing perspective on rules lends support to a broad concept of legal sources that includes contracts, for

[79] North (1993), 36.

instance in law merchant and in industrial relations. For my own part I will maintain a more legalistic definition of this category and will focus on rules deriving their validity from the legislative process. Guidelines issued by public agencies will be treated to the extent they have strong formal or informal authority for the addressees, whereas contracts are not relevant for this particular analysis.

2.1.1.2 Informal constraints

More problematic from a legal perspective is the concept of *'informal constraints'*. According to North, among these are codes of conduct, norms of behaviour, conventions, beliefs and ideologies.[80] He insists on the pervasiveness of informal constraints. Eventually, it is the embeddedness of formal institutions in informal constraints that accounts for the incremental and slow process of institutional change. Yet in the world of beliefs and convention, both economists and legal scholars tend to feel they find themselves in muddy waters. The necessary tools for studying informal beliefs appear to be in the domain of sociology. Historical institutionalism circumvents that 'trap' by adopting a long-term perspective and by applying a conventional historical approach. Seen from the distance of centuries, historical institutionalists argue that informal constraints and changes thereof can be established with acceptable degree of certainty. Thus, when North refers to changing attitudes towards women and slaves in Western society he is safe from methodological criticism.

Also in this respect an adaptation to legal analysis is needed. Due to methodological difficulties, the analysis in this study sticks to the use of conventional legal material. Consequently, I venture to identify informal constraints through examining judicial practice and legal doctrine. Clearly, this narrowing down of the perspective would not allow capturing the whole range of attitudes and informal constraints. If we turn to the fashionable term 'legal culture', often employed by legal sociologists, the analysis here remains focused on 'internal' legal culture.[81] Yet, given the decisive role that lawyers play on all levels from designing formal rules to their enforcement, the wider intellectual reference systems of those important actors should be taken into consideration. This side of the institutional framework probably remains more hidden to the non-lawyer. Its pervasive influence has, however, rightly been emphasized by legal historians like Alan Watson, who in this legal frame of mind perceives the most important factor of legal change.[82] Seen in a historical perspective and as an aggregate of individual cases and decisions, legal practice carries the flavour and fragrance of changing or persisting attitudes and ideologies. Case law and doctrine in this sense are not treated as normative, but as empirical material, albeit with admittedly lower coefficient of representativity than sociological opinion polls.

2.1.1.3 Enforcement

The *third* element of the institutional framework to be analysed is *enforcement*. In his early analysis, North included mainly formal rules and informal constraints in the concept 'institution'. In his 1990 monograph, however, he showed a growing

---

[80] See North (1993), 36.

[81] This concept is to be distinguished from 'external legal culture'. The concepts have been coined by Lawrence Friedman. See the discussion between Cotterell and Friedman in Nelken, *Comparing Legal Cultures* (Aldershot: Dartmouth, 1996).

[82] Watson, 'Legal Transplants and Law Reform' (1976) *Law Quarterly Review*, 79 ff.; Watson, *Legal Transplants. An Approach to Comparative Law* (Edinburgh: 1974).

awareness for the role of enforcement mechanisms and bodies, devoting them a separate chapter of his book. Again there is a risk that familiar terminology may lead lawyers astray. Enforcement covers in North's view not only procedural rules and third-party enforcement bodies. An important part of enforcement is self-enforcement, i.e. voluntary compliance with a contract or a rule. However, high transaction costs due to imperfect information and opportunism make third-party enforcement (typically courts) imperative in many settings.

Clearly, given the legal character of this study I will focus on the statutory rules of procedural and organizational nature. This does not imply completely loosing sight of the enforcement that takes place outside formal legal procedures. When relevant I will consider mechanisms of self-regulation and will try to find evidence for the degree of self-enforcement. Nevertheless, also informal enforcement occurs 'in the shadow of the law'[83] and largely depends on credible threat (probability) of formal enforcement. Therefore, the emphasis on third-party enforcement possibilities appears justified.

One of the goals of this study is to highlight the central role of enforcement for the emergence of adaptively efficient institutional frameworks. Especially in modern welfare states, regulation takes often the form of broad and rather general standards and clauses, leaving concretisation in individual cases to decision-making by the judiciary or administrative agencies. The use of general clauses increases the importance of rules on procedure and enforcement which ensure the participation of affected agents in shaping of substantive standards. Legal scholars speak of 'proceduralisation of law'.[84]

When putting the three institutional components of the framework to work in the analysis, I shall first treat formal rules and enforcement and discuss their interdependence. In a second stage I will elaborate on case law and doctrine as indicators of the evolving informal constraints (the standard of fair trading). Apart from the classification of formal rules, informal constraints and enforcement North himself offers an alternative logic for classification, namely created and evolving institution.[85] Formal rules and enforcement typically fall under the category 'created institutions', as they are brought to existence by deliberate political and legislative action. Evolving institutions, on the contrary, develop more or less spontaneously and less visibly through the aggregation of individual actions and decision. The latter typically become more resistant to change. At the same time, they may in certain situations serve as a forum for expressing new preferences and values in society, as 'incubators' for future formal rules.

---

[83] Mnookin/Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1978-79) 88 *Yale Law Journal*, 950 ff.

[84] See the discussion in Teubner, *Dilemmas of Law in the Welfare State* (Berlin, New York: Walter de Gruyter, 1986); Teubner, *Juridification of Social Spheres* (Berlin: de Gruyter, 1987); Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993); for an early analysis see Teubner, *Standards und Direktiven in Generalklausulen* (Frankfurt: Athenäum, 1971).

[85] North (1990), 4. North's example of created institution is the Constitution of the United States and of evolving institutions – the common law.

2.1.2 Macro-institutional context as a factor for path-dependence

One of the main propositions of historical institutionalism concerns the embeddedness of institutions in a broader institutional context. The function of institutions is to constrain and frame human behaviour in the face of uncertainty and imperfect patterns of gaining knowledge. In this sense adherence to familiar institutions is an economically understandable (rational) way for handling complexity. Lawyers are arguably well aware of the conservative role of inherited legal institutions, in the form of established doctrines, principles and rules of seniority. Thus new rules in the sphere of public administration or private law are often seen to depend on rules, doctrines and ideologies that have shaped these complex areas through time. It suffices to mention the frequently invoked genetic connection of many modern private law doctrines with principles to be found in Roman law.[86] Apart from coming as a confirmation of intuitive or scientifically defended perceptions, historical institutionalism reveals the two faces of tradition and continuity. Institutional choices that have led towards increased efficiency may generate production of efficient institutions also in the future. And just to the contrary, taking a path of inefficiency may determine distorted institutional development for years to come (path dependence).

2.1.3 Symbiotic relations and lock-ins

For legal analysis, a particularly intriguing insight of historical institutionalism concerns the intimate relationships between an institutional framework, enforcement in particular, and organizations which evolve as products of that framework. Legal enforcement procedures are not infrequently designed to rely on specific organizations and agents to 'breathe life' into institutional rules. A successful enforcement design is usually associated with intensive implementation and with the emergence of interested and engaged 'enforcers'. Historical institutionalism, however, shows the reverse side of the coin, namely the evolution of symbiotic relations between institutional framework and organizations as an impediment to institutional change and as a factor that sustains inefficient institutions (so called 'lock in'). This insight prompts an inquiry into the effects of the institutional framework on organizations and agents.

2.2 Participation-centred perspective: the dynamics of institutional change

Historical institutionalism is concerned with demonstrating the large-scale effects that are observable only from the distance of time. It provides a general theoretical framework for capturing long-term legal change within and across national legal systems. This framework is, however, neither intended nor adapted to serve for deeper inquiries into issues of institutional design or allocation of enforcement competence. Legal analysis, by contrast, is bound to the present and is supposed to offer workable models for improved law and policy making. At this point the insights of historical institutionalism need to be linked to a robust research agenda capable of eliciting details. Most importantly, the question should be faced as to whether there are situations more likely to produce inefficient lock-ins than others or situations where adaptive efficiency can be attained. In my view, comparative institutional analysis augments historical institutionalism by providing further tools for empirical analysis.

In contrast to historical institutionalism, which focuses on institutions and thus adopts a top-down perspective, comparative institutional analysis looks at interests and

[86] On this connection, see in particular Watson (1974); Watson (1976); Wieacker (1995).

agents, thereby arguably taking a bottom-up perspective.[87] The approach can likewise be classified as lying on the micro-level since it requires studying specific law and public policy issues.[88] When can we expect interests to be adequately represented in decision-making processes and finally in institutions, broadly construed? And what are the situations conducive for distorted representation and for ensuing institutional malfunctioning?

The advantage in Komesar's approach is that it is genuinely comparative, i.e. no decision-making process is taken *a priori* as superior over the others. At the same time it advances a conceptualisation of the economic, legal and political system as mutually dependant. It provides insights into the economic effects of politics and at the public policy effects of markets. It brings democratic decision-making, access to justice and market efficiency in relation to each other and demonstrates the interrelations between law, politics and economics.[89]

The influence of the participation-centred approach is less visible from the structural components of the present study. Yet it informs the entire analysis and accounts for the special attention devoted to interest-representation in the legislative process, to choice of institutional structures, and to cost-benefit reasoning in regard to participation in the administrative process and in litigation. Comparative institutional analysis is designed to be used by lawyers. But nevertheless some of the main concepts may need additional adaptation and qualification. More specifically, the suggestion that benefits and costs have to be measured and compared fills no lawyer's heart with enthusiasm. Are we not in the forbidding realm of exact science? The question is justified, but still what is apparently implied is a more approximate even though more vulnerable sort of evaluation, something illustrated by Komesar's own applications of the approach. In this sense qualifications such as high or low stakes should necessarily be understood as rough evaluations. Where even lawyers can be fairly accurate is on the size of litigation costs and formalized costs for participation in the administrative process.

2.2.1 The choice between decision-making processes as main element of the institutional framework

The major contribution of comparative institutional analysis is to advance a way to look at the market, the political process and the judicial process as alternative decision-making processes for law and public policy issues. Moreover, it helps to distinguish the matter of goal choice from the matter of institutional choice and to highlight the decisive importance of the latter. The matter of institutional choice (as Komesar defines it) is to be found at all levels of the institutional framework. Indeed, a choice to leave a decision to the market means to rely on existing informal constraints and informal enforcement mechanisms. Likewise, a choice to entrust a particular policy

[87] On the three-level scheme proposed by Williamson for capturing the research agenda of institutional economics see Williamson (1996), 325 ff.

[88] It may be objected here that also comparative institutional analysis advances a rather ambitious 'macro' framework for analysis. While the approach is indeed ambitious in that it looks at the market, the courts and the political process as separate institutional systems and compares their performance, it simultaneously provides tools for analysis on a 'micro' level, for instance a single case (Booman), single doctrine (strict liability, the takings clause in the American Constitution), etc. See Komesar (1994).

[89] In a similar sense concerning the concept of "Interdependenz der Ordnungen" and with emphasis on ordo-liberal theory and the new institutional economics, see Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers* (Tübingen: Mohr Siebeck, 1998), 203.

issue entirely to the political process would imply a comprehensive statutory regulation of this issue (formal rules). Yet few issues are entirely left to the one or the other process. It is most often a question of supportive and complementary interplay between these processes.

2.2.2 The role of interests and distribution of stakes

Comparative institutional analysis urges us to look closer into the interests involved. It is not a question of 'substantive', but of 'structural' interest analysis. Much conventional legal analysis at least purportedly involves the balancing of different individual, group and public interests against each other. In intellectual property law, for example, we say that the interest of the author to receive remuneration for his or her creative activity is weighed against the interest of the general public to have free access to the object of creation (as well as society's interest to promote intellectual activity in general). The question about which interest should prevail in situations of conflict occupies volumes of legislative and scholarly reasoning. 'Structural' interest analysis, by contrast, requires analysis of the opposed interests in terms of numbers of individuals concerned, size and distribution of the stakes (individual interests, concentrated group interests, and widely dispersed group interests). This specific model of interest analysis is preferred due to the main goal pursued, namely to highlight participation in decision-making. The question is not: which interest is worthier of protection but rather whether the interest structure can cause for representation distortions in the decision-making process?

In legal scholarship awareness for structural interest analysis has been manifested in 'access to justice' approaches mainly in consumer law and environmental law.[90] Such approaches have often led to appeals for alternative dispute resolution schemes, or to novel approaches to adjudication. What is new is that participation costs and benefits are assumed as the main units of analysis and the model applied to all major decision-making processes. In addition, we possess a model for conceptualising the political process in situations that involve decisions over complex public policy issues.

2.2.3 Majoritarian vs. minoritarian bias in the political process

The categories 'majoritarian' and 'minoritarian' influence or bias will be used when relevant in the analysis of the law-making process. James Wilson in *The Politics of Regulation* has earlier advanced these categories.[91] In his contribution to that volume, Wilson advances taxonomy of various forms of regulation. Depending on the influence of powerful concentrated interests or of majority interests regulation types are classified under four headings: client politics, interest group politics, majoritarian politics and entrepreneurial politics. With his more sophisticated elaboration of the model of benefits and costs of participation, Komesar brings this analysis one step further and offers a model for predicting when and where a particular form of politics will arise.[92] Especially in view of the broad cross-country comparison in this study, the broad categories for analysing the legislative and political process are well-suited.

---

[90] See Cappelletti/Garth, *Access to Justice, Vol. I, II, III* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1978/79); Lindblom, *Progressiv process. Spridda uppsatser om domstolsprocessen och samhällsutvecklingen* (Uppsala: Iustus, 2000).

[91] Wilson (ed.), *The Politics of Regulation* (New York: Basic Books, 1980).

[92] Komesar (1994), 87.

Likewise the idea of catalytic sub-groups as one factor for mobilizing dormant majorities and leading to majoritarian influence or bias will be tested. The definition of a catalytic sub-group is, however, somewhat unclear. Komesar identifies two ways of defining the catalytic subgroup: the first emphasizes the (at least potential) capacity to activate the majority even if the result from this is detrimental to the majority. According to the second definition a subgroup is majoritarian if it had the same interests as the majority without regard to whether they could activate the said majority. Komesar himself employs a third definition that combines the previous two: "those parts of the majority whose interests coincide with the majority and who have some ability to activate the majority."[93]

It appears that the latter view excludes all minoritarian influence from the definition of the majoritarian catalytic group. It is not clear whether there is another well-suited concept to capture the important phenomenon of appropriation of the majority interest and its manipulative use to serve the interests of the minority.[94] Since I find this type of influence on the political process as particularly interesting and not fully reflected by the less qualified concept of minoritarian influence, I will treat it as a separate type of interest mal-representation.

2.2.4 Enforcement design

Apart from the specific constellation of interests for each law and public policy issue, comparative institutional analysis insists that institutional choice depends on characteristics inherent to each decision-making process. These characteristics have to do both with the more salient features of the market, the political process and adjudication, but also with the particular design of these complex institutions that may vary from country to country and from one issue/market to the other. Such features as litigation costs, openness of the judicial process to class action and to action by organizations, the flexibility of the administrative process, transparency – are all factors that influence the costs and benefits of participation and respectively the relative advantages and disadvantages of these complex systems.

As a legal category enforcement covers a number of more specific institutions. Central among them is the choice of institutional structures to be entrusted with enforcement.[95] These are typically either the courts or administrative agencies that could, in their turn, be subject to more or less comprehensive judicial review. Another element of enforcement is the access provided of the affected actors to the institutions of enforcement. Any form of legal enforcement carefully defines the circle of individuals and organizations that are authorized to trigger enforcement (standing). Finally, in some systems remedies tend to be viewed as part of enforcement and in others as part of substantive law. In this study they are going to be uniformly treated in the sections on enforcement, since it could be argued that remedies provide the most important incentives for making use of the enforcement opportunities, thus influencing the benefits of participation.

---

[93] Komesar (1994), 84.

[94] As Komesar notes, "majorities faced with complex issues and limited incentives to independently investigate may be manipulated or misled into supporting positions that are detrimental to them." Komesar (1994), 83.

[95] See below Ch. 2.3.1 on the connection with the comparative institutional approach in this respect.

2.3 Merging the institutional and the agency perspective

The approaches promoted by North and Komesar may be perceived as incompatible and in a sense even diametrically opposite. They adopt different time perspectives and largely pursue different goals. Whereas North purports to explain incremental historical change, Komesar is interested in situation-specific, every day policy decision-making. North's analysis is prevailingly explanatory, while Komesar's approach is explicitly normative. The latter's ambition is to provide an operative analytical framework that can generate policy advice on divergent public policy issues. Historical institutionalism focuses on the role of institutions and thus attaches secondary importance to agents and interests. By contrast, comparative institutional analysis emphasizes interests and participants. Thereby institutions and institutional processes are treated as given. In general, the story told by historical institutionalism is one about institutions as constraints on human behaviour, whereas comparative institutional analysis tells us about individuals who collectively use and shape institutions according to their interests.

Yet despite this *prima facie* incompatibility, I shall argue that the two approaches in many respects may be seen as complementary and mutually supportive of each other. The evolutionary approach advanced by historical institutionalism allows us to see national institutions as products of an incremental process of institutional change that does not necessarily increase efficiency, but may sustain inefficient institutional solutions (lock-ins). Institutions are in this theoretical perspective embedded in, and to a great extent determined by, a broader institutional context. In that context constitutional constraints, dominant perceptions about the role of government and public administration, as well as the divide between public and private, come into play. Historical institutionalism also directs the attention to organizations that have evolved as products of institutional frameworks and live in symbiosis with it. It provides rigorous explanation for often observed instances of resistance to institutional change despite declared political will to the contrary.

At the same time, historical institutionalism does not tell us when situations of 'lock in' would be most persistent and difficult to dismantle. Indeed, in his Nobel Prize lecture North explicitly addressed the problem of bargaining strength when discussing the process of creating formal rules (the legislative process).[96] But it was never North's purpose to offer the analytical tools for studying such problems. In this respect the participation-centred approach advanced by Komesar represents a welcome opportunity for refinement of historical institutionalism. The combined approach urges us to inquire deeper into the interests lying behind each law and public policy issue, as well as into opportunities for these interests to be adequately represented in the relevant institutional decision-making processes.[97]

The framework for analysis of costs and benefits of participation in relation to the decision-making process, to the interests and to the issue involved, presents a rigorous

---

[96] "Institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to create new rules. In a world of zero transaction costs, bargaining strength does not affect the efficiency of outcomes; but in a world of positive transaction costs it does." North (1994), 359 ff., at 360 f.

[97] Naturally there are other possible theoretical tools for approaching interests. A classical interest-oriented approach is the game-theoretic one. See Scharpf (1997).

tool-box for diagnosing instances of persistent institutional malfunctioning and, respectively, of situations more ripe for change in accordance with the preferences of the actors concerned. Komesar is thus not only critical of simplistic evolutionary approaches that predict stable move towards efficiency, but moreover has a convincing answer as to when such predictions tend to fail:

> The same may be said of sweeping notions about the evolutionary tendencies of law and public policy to meet social needs. Whether and to what extent the political or adjudicative process will respond to any perceived social need – like the need for a law or a program that reduces transaction costs – depends on how that need will be represented in those processes. When conditions for minoritarian or majoritarian bias are present, for example, these processes may be dormant or even perverse in the face of social need when the need is felt by groups who are underrepresented in these processes.[98]

In a similar way historical institutionalism may offer a useful complementary perspective to the somewhat sweeping 'cure-all' stance lurking in Komesar's approach. The approach advanced by Komesar offers powerful insights into the comparative advantages and disadvantages of different decision-making process, and moreover in relation to different policy settings. The analytical framework advanced by Komesar holds the promise of a universal formula to guide the difficult choice between – admittedly imperfect – institutional alternatives for the efficient implementation of social goals.[99] The somewhat instrumentalist predisposition hidden in Komesar's approach is appealing to lawyers who are accustomed to looking at law as an instrument to change social reality. Here, however, historical institutionalism may introduce a healthy and sobering influence. It warns against naïvely trusting the efficiency of instrumentalist approaches to law and public policy. Even well-informed and well-intended choice between decision-making alternatives may eventually remain entrenched in inherited institutional solutions. Therefore, endeavours such as legal reform, legal transplants and harmonisation of law need to take the stumbling interference of institutional legacies and inertia into account.

One problem with the linking of perspectives lies in that the concept 'institution' is used differently by the two theorists. This only underscores the hidden risks in using a concept that has already been employed in different scholarly and conventional contexts. As noted above, Komesar uses the concept 'institution' in a broad sense referring to three main decision-making processes, namely the market, the political process and the courts. This conforms with the understanding of the concept in a whole branch of institutional economics, where institutions correspond to distinct forms of organisational arrangement. Williamson, one of the most famous contributors to the institutional economics and follower of Coase, thus contrasts different forms of market organisations, such as firms, relational contracting and atomistic spot markets.[100] Likewise, Komesar suggests that the macro institutional processes he

[98] Komesar (1994), 114.

[99] Certainly, proponents of comparative institutional analysis may argue that by rigorous analysis of interests (costs and stakes) in a particular situation, historically created institutional dependencies should be taken into account and calculated as high stakes, low costs, or vice versa.

[100] Williamson (1985).

tackles could be sub-divided for analytical purposes to include trade unions, large corporations, etc.

North's definition of institution as presented earlier in this study is clearly more extensive than that of Komesar, covering formal rules, informal constraints and the enforcement characteristics of both. North particularly insists that it is essential for his framework to distinguish between institutions and organisations. Organisations are the agents of institutional change, whereas institutions represent constraints that shape the conduct of organisations. As I explained in the introduction, I find this second definition more convincing, since it captures the essence of institutions as structuring human behaviour. Moreover, it appears more practicable for the purposes of the present investigation (given the broad comparative approach and the goal to conceptualise legal change). In order to maintain a consistent terminology throughout this study, I will in the following substitute the term institution in Komesar's sense by the terms 'decision-making process' or 'system'. I am confident that this terminological substitution will not do injustice to Komesar's conceptual framework. Komesar himself often uses the term 'process' interchangeably with 'institution'. He also insists on the central role of Coase for his framework (and the analysis of Coase is often called 'comparative system approach').[101]

Combining the two approaches appears particularly attractive for this study. Historical institutionalism provides the intellectual macro-frame, helping us to conceptualise long-term phenomena such as institutional persistence and processes of incremental institutional change such as Europeanisation. The participation-centred approach in its turn offers a practical toolbox for micro analysis of specific institutional solutions – and of enforcement mechanisms in particular – in terms of their effect on the costs and benefits of actor participation and representation. The combination of the two is expected to allow for a rigorous analysis of divergent institutional solutions to fair trading in a broad comparative, European context.

2.3.1 The importance of enforcement mechanisms

There are several specific intersections between historical institutionalism and the participation-centred approach in comparative institutional analysis. The first one concerns the view of enforcement. In economic terms, enforcement provides the link between actors, organizations and rules. Historical institutionalism demonstrates how institutional frameworks (and enforcement opportunities provided thereof) may produce incentives for new organizations that benefit from the institutional framework and through symbiotic relations contribute to its perpetuation and, finally, to lock-in. The participation centred approach suggests that such lock-ins are more likely to occur where the political process suffers of representation malfunctions. In situations conducive to minoritarian bias, the political process is likely to produce formal rules and enforcement mechanisms that excessively favour minority groups at the expense of the majority. The more dispersed and low the stakes of the majority, the more such arrangements are likely to persist. On the other hand, majoritarian bias may assume the form of governmental intervention (e.g. public agency action) shouldering the interest of the majority and converting a skewed distribution into a uniform high distribution of stakes.

---

[101] See Demsetz (1969), 1.

2.3.2 Adaptive efficiency and participation-centred approach

The most important intersection between the two approaches appears to lie in the understanding of efficiency. Both historical institutionalism and the comparative institutional analysis advanced by Komesar are characterized by an unorthodox view on efficiency. North in particular elaborates at length on the concept of adaptive efficiency of institutions, according to which efficiency is equalled with generating the highest possible number of trials. This concept can be seen as coming close to the participation-centred approach advanced by Komesar. Efficient representation of all interests concerned in the decision-making processes and at all levels, both in rule-making and enforcement, is arguably intimately related, if not synonymous, with ability to generate a high number of trials. Efficient representation will per definition imply high interest awareness and will supposedly bring about challenge of the institutional framework with any perceived inefficiency. Like the analysis of Komesar, North's conceptualisation also finds a productive conjunction between economics, politics and law by demonstrating the immediate economic importance of democratic government and institutions.

If we try to translate this normative component into legal terms, then the question may be: how do we shape legal rules and enforcement mechanisms which can better account for all interests involved and avoid unproductive lock-ins? Cast in these terms, the concept of 'adaptive efficiency' becomes much clearer and appealing for legal analysis. Success in economic history is associated with legal and political institutions including rules on enforcement that have rendered the institutional framework more responsive to changing preferences and costs, assuring more adequate interest representation and making room for new interests and actors as they emerge. Broad representation through democratic procedures thus receives a concrete economic meaning, as it contributes to improved economic performance through better capturing and reflecting the preferences of involved interests. The concept 'deliberation' familiar from legal and political science is close to mind.

2.4 An institutional perspective on European integration

Finally, an institutional perspective allows for a more productive conceptualisation of the complex relationship between national law and European law. Also here combining a participation-centred approach with a historical institutional perspective promises to give insights in the complex process of continuity and change associated with European integration and its influence on national institutional frameworks.

Seen from the viewpoint of institutional choice one manifest feature of the European Community project is that it offers new arenas for decision-making. The national market flows over into a Common Market. National political and legislative processes are connected by way of dense net of visible and invisible rules to the political process at the Community level. The European judiciary enters as a new decision-making institution, concurring with national courts and acting often as an arbiter and distributor of decision-making competencies between Community and Member States as well as between the different Community institutions. For national economic and political actors European integration inevitably changes the established balance of participation, powerfully influencing previously insulated procedures of law-making and rule-implementation. Obviously the costs and benefits of participation in the

European decision-making may vary from those in respective national arrangements. These changes in the domain of institutional choice are going to be explored in more detail when looking at how particular European measures have been implemented at the national level and how do national stake-holders adapt to the change in opportunity set.

From a historical institutional perspective the focus is on the different ways in which Europeanisation fits into or challenges long-standing institutional constraints such as ideologies of legal regulation or well-engrained habits in case-law and administrative implementation. Is implementation of European measures disrupting efficient institutional equilibria, causing disarray among the actors involved and decreasing coherence and predictability? Or does it expose inefficient lock-ins and, thus, enhance the adaptiveness of the institutional framework?[102] To what extent Europeanisation opens for new variations and possibilities of learning and influencing the framework? And when are we to expect the one or the other eventuality.

The whole European project is per definition about institutional change, pursuing openly the effectuation of change in formal legal rules (harmonisation), informal constraints (attitudes in market actors, consumer and European citizens) and enforcement (new mechanisms of enforcement before European and national bodies). A central theme in the Europeanisation debate has been that of convergence or divergence of national legal systems, cultures or regulative approaches in more specific areas. By tracing on the one hand the changed opportunities for participation of affected interests, and on the other, the constraining effects of deeply embedded institutional habits, I hope to be able to shed some new light into this debate.[103]

When Community law has been approached by traditionally trained national lawyers, this has been done on a sector-specific basis. More recently, attempts have been undertaken to bring the observations of such lawyers together into more structured comparative accounts of Community influence, thus trying to capitalise on the synergies of different national experiences.[104] Such studies present parallel accounts of stories that have a common subject but they rarely amount to real joining of different perspectives into a true comparative analysis. The general frame of reference but also the references to literature and legal source material remain national in nature. Thus perceptions about Community influence may dramatically shift from one observer to the next. An in-depth understanding of the effects of Community law seems to require a joining of all these perspectives into one single account. This is both a demanding and exciting perspective. It is demanding by the sheer volume of material to be reviewed and by the quasi-impossible exercise of acquiring adequate understanding about multiple complex legal systems and their environment. At the same time it is exciting for it provides an opportunity to feel the pulse of European integration, to hear

[102] For an application of historical institutionalism in the analysis of European influences over national public administrations, see Knill (2001).

[103] See Weatherill, 'Addressing Problems of Imbalanced Implementation in EC Law: Remedies in an Institutional Perspective' in: Kilpatrick/Novik/Skidmore, *The Future of Remedies in Europe* (Oxford: Hart Publishing, 2000), 87 ff.

[104] See Slaughter/Sweet/Weiler, The European Courts and National Courts. Doctrine and Jurisprudence (Oxford: Hart Publishing, 1998); Ladeur (ed.), *Europeanisation of Administrative Law. Transforming National Decision-Making Procedures* (Aldershot: Ashgate, 2002).

the multilingual and multicultural choir of actors and interests that make use or are affected by this process and to observe an array of incongruent, divergent and often unpredicted influences, far away from the ideal world of systemic coherence lawyers once believed to exist.

2.5 Cross-country comparison of the effects of European integration

It has already been suggested that an analysis of the influence of European law on national legal systems holds more promise if the process of influence and change is placed in a broad comparative perspective. If confined to a single legal system, the results of the study may remain specific to the jurisdiction under analysis and not yield to generalization. At any rate, the comparative approach is better suited to generate findings of broader validity. It also brings the research design closer to the dynamic reality of European integration where Community legal rules and principles are forged against a background of divergent national legal and institutional approaches and then transmitted back for implementation and enforcement in the same national environment. Only a comparative analysis of legal change under European influence allows us to test contradictory claims of convergence and divergence of legal systems, of harmonisation or of disintegrative influences of European law on national law.

A comparative approach, however, is laden with multiple risks and pitfalls and requires careful consideration of theoretical and methodological premises. Importantly, one needs to clarify the scope, level and ambition of comparison, to identify the common denominator and component parts, and finally to elicit possible criteria for evaluation of the comparative results.

2.5.1 The purpose of comparison

Naturally, comparisons between legal systems or legal institutions can be conducted with different purposes and with different levels of ambition. Comparative work may precede and inspire new national legislation (instrumental objective); it may be part of the preparation for harmonisation at a regional or international level (harmonisation objective). It has been convincingly argued that in the sphere of economic law, contemporary comparative law can also perform a third task, namely co-ordination between different levels of legal orders – the national, the regional and the international one.[105]

Partly depending on the underlying objective the ambition and scope of comparative legal analyses may differ as well. In comparative law a threefold classification of comparative analyses has been advanced by Strömholm.[106] He distinguishes between studies where the comparison serves as a background and inspiration, studies where the comparison is the central element and studies being a mixture of the two above mentioned categories. In the first category the comparative element has an accidental, complementary (instrumental) role, while domestic law remains at the core of analysis. In this category of comparative studies the foreign legal material is used to achieve objectives typical of the conventional positivistic legal research. The desire is to provide

[105] Buxbaum, 'Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft' (1996) *RabelsZ*, 201 ff., at 201.

[106] See Strömholm, 'Har den komparativa rätten en metod?' (1972) *SvJT*, 456 ff. See also Bogdan, *Comparative Law* (Deventer: Kluwer, 1994). On the method of comparative law, see the detailed account of Constantinesco, *Rechtsvergleichung*, Band II, Die Rechtsvergleichende Methode (Köln: Carl Heymanns Verlag, 1972).

answers to problems anchored in one national legal system. Such brief contacts with foreign law and legal institutions may play an important value-oriented role in that they emphasize the commonality of social problems and of legal solutions.[107] They enhance the awareness of the relativity of legal concepts and institutes, otherwise conveniently covered by a cloak of unreflected immersion in one domestic legal order. This comparative 'spicing' of a legal analysis does not lack methodological intricacies, yet these are far from the fundamental problems which pose themselves if the scope and ambition of comparison are expanded.

The real trouble with (and the real challenge of) comparative law begins with lifting the objective of comparison from the national to the cross-national level. It is at this point that the comparison ceases to perform an instrumental role and turns into the main, bearing principle of the research design. In such comparative studies the legal systems under comparison are investigated on an equivalent basis, without taking any of the systems as a self-evident point of departure (or arrival). As Strömholm observes in such studies the comparison is the dominant element. Solutions to similar problems in different legal systems are juxtaposed as equally possible alternatives and examined with a purpose other than finding answers to problems in the framework of one or the other national legal system.

It is to this second group of comparative studies that the present analysis belongs. The purpose is not confined to giving recommendations for the solution of practical legal problems of a specific legal system. The interest is rather in the process of co-ordination between different legal orders and its broader socio-economic implications. As Strömholm rightly cautions, the pitfalls of such scholarly endeavours are numerous. He notes that such comparative studies are a rare branch of legal science. More seriously, they often risk remaining hollow program declarations with few convincing examples of practical application.[108] Yet, in embarking on this study I am still encouraged by Strömholm's tempered optimism that despite the risks, such studies can contribute to increasing the knowledge and understanding of legal phenomena.[109]

The term 'comparative law' has become infamous for the abundance of contributions consisting mainly of dry inventories of legal rules with only schematic attempts at deeper analysis on causes and consequences of legal similarities and differences. The most frequent trap of such studies has been a bias towards uncritical description of black letter rules.[110] This profile of the field has largely been predetermined by the unreflecting transposition of the classical 'dogmatic' approach to law in the sphere of legal comparison. Yet, whereas within the context of the national legal order description and systematization are always guided by the attempt at improved coherence of legal rules in a given field of law, this purpose cannot fully apply for

---

[107] A compilation of national reports on a specific subject cannot be called a truly comparative work, although it can provide the background for such analysis. See Zweigert/Kötz (1998), 6.

[108] Strömholm (1972), 464.

[109] "Icke desto mindre förefaller det jämförande studiet av de rättsliga fenomenen, insatta i deras historiska, idéhistoriska, sociologiska, ekonomiska och allmänt samhälleliga kontext att ha så mycket att bjuda när det gäller att öka kunskap om dessa fenomen, att det vore orimlighet att avvisa detta studium som en värdefull självständig komponent i rättsvetenskapen." Strömholm (1972), 464.

[110] For a critical analysis see Van Hoecke/Warrington 'Legal Culture, Legal Paradigm and Legal Doctrine: Toward a New Model for Comparative Law' (1998) 47 *ICLQ*, 495 ff.

comparative studies. The outsider position implicit in 'genuine comparisons', i.e. comparisons that are not only instrumental to the dogmatic analysis of domestic law, makes the traditionally trained lawyer feel there is no longer solid ground under his or her feet. The conclusions can no longer be directed at systematic or teleological interpretations within a (more or less) closed systemic context.

The key question for large-scale comparative works is therefore what this 'other' purpose should be that is not related to solving domestic-law problems? And more importantly, are there 'other' purposes that could be legitimately and convincingly pursued by lawyers, given the specific character of their discipline? Some of the most influential writers in comparative law, who have set their intellectual mark on whole generations of comparatists, tend to address such questions with admirable light-headedness, seemingly unconcerned about the methodological and theoretical difficulties implied. Thus Zweigert and Kötz in their much quoted treatise on Comparative Law regard the principal aim of comparative law in its 'theoretical-descriptive' form to be 'to say how and why certain legal systems are different or alike'.[111] In the conclusion of their chapter on the method of comparative law, the authors briefly discuss another objective of comparative law, namely offering a critical evaluation of the results from a comparison. However, they do not elaborate on the basis for such an evaluation. Should the criterion be deduced from legal policy objectives as defined by the national law-maker, or should the starting point be sought somewhere else? Might the comparatist even outline his or her own normative set of priorities? [112]

Other comparative law scholars subscribe to a similar understanding of research objectives. According to Bogdan comparative law encompasses:

> ... the comparing of different legal systems with the purpose of ascertaining their similarities and differences; working with the similarities and differences that have been ascertained, for instance explaining their origin, evaluating of the solutions utilised in the different legal systems, grouping of legal systems into families of law, or searching for the common core of the legal systems; the treatment of the methodological problems which arise in connection with these tasks, including methodological problems connected to the study of foreign law.[113]

Obviously, whereas purely descriptive accounts of similarities and differences may be satisfactorily provided with the traditional tools of dogmatic legal analysis, the goals of explaining interrelations, highlighting reasons and providing evaluation ('how', 'why', and 'which is better') constitute a challenge for lawyers on both theoretical and methodological levels.[114]

---

[111] Zweigert/Kötz (1998), 11.

[112] Zweigert/Kötz (1998), 11 ff. For a critical view, see Gunnerstad/Ingvarsson, 'Den komparativa rätten –värd en omväg?' (1996) *SvJT*, 152 ff.

[113] Bogdan (1994), 18.

[114] See the reflections on the 'what' and 'why' questions of comparative law by Fahlbeck, R'Pleasures and Torments of Comparative Legal Research' in: *Festskrift till G. Karnell* (Stockholm: Carlsson Law Network, 1999), 161 ff.

The research question in such 'genuine' comparative studies is no longer of the same category as research questions in traditional dogmatic research. Respectively, new research questions require recourse to new theoretical and methodological tools. This is generally acknowledged by comparative lawyers. Indeed, Zweigert and Kötz see a room for productive use of the methods of legal sociology in comparative research.[115] Likewise at a recent symposium on the future of comparative law, Reitz observed the drive inherent in comparative law studies towards higher levels of abstraction and to the neighbouring 'law and' disciplines.[116] The inherent interdisciplinarity of comparative law was eloquently praised already by Ernst Rabel in his early appeals to comparative lawyers to constantly broaden their horizons:

> The student of the problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country's history – war, revolution, colonization, subjugation – religion and ethics, the ambition and creativity if individuals, the needs of production and consumption, the interests of groups, parties and classes. Ideas of every kind have their effect, for it is not just feudalism, liberalism and socialism which produce different types of law; legal institutions once adopted may have logical consequences; and not least important is the striving for a political and legal ideal. Everything in the social, economic and legal fields interacts. The law of every developed people is in constant motion, and the whole kaleidoscopic picture is one which no one has ever clearly seen.[117]

Yet it is one thing to broadly agree on the usefulness of contextual analysis, and quite another to offer a pragmatic and feasible programme for such integrative research design. Rabel's agenda, if put into action, would in the first place present insurmountable feasibility problems. It would take a lawyer endowed with a superior intellect, or at least a highly encyclopaedic mind, to conform even to part of his requirements. But what is even more knotty, the use of the neighbouring disciplines risks to be met with utmost scepticism and criticism from all quarters, unless it complies with rigorous methodological criteria. Here new questions arise: Should the lawyer only take the findings of the neighbouring disciplines as given and use them only as a source of inspiration for contextualising one's own observations? Or should one be more ambitious and try to master the methodology of other social sciences and then conduct original research on the basis of the comparative material at hand? In this case, what norms of selection of source material and processing should apply? Shall one apply those valid in legal research or those of the respective social discipline?

These are not easy questions and few comparative law scholars have ever ventured to suggest an answer. Thus, on the one hand, the use of social sciences in legal comparison remains quite limited. On the other hand, most comparative lawyers

---

[115] Zweigert/Kötz (1998), 45 ff.

[116] See Reitz, 'How to do Comparative Law' (1998) *AJCL*, 617 ff. See also Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997).

[117] Rabel, 'Aufgabe und Notwendigkeit der Rechtsvergleichung' (1925), reprinted in: Rabel, *Gesammelte Aufsätze III* (ed. Leser 1967), 1 ff., at 3 ff. Quotation after Zweigert/Kötz (1998), 36. According to Bogdan the comparatist needs to take into account the economic system, the political system and ideology, religion, history and geography, the demographic factor, co-influence of other means of control, accidental and unknown factors, when explaining the similarities and differencies between legal systems. Bogdan (1994), 68 ff.

attempting some integration of disciplines tend to downplay the importance of the interdisciplinary element in their work and avoid theorising methodological issues. They are quick to point that they do not have a genuinely interdisciplinary ambition and that the neighbouring disciplines are only used as background and inspiration. For the most part the intertwining of disciplines thus proceeds on an intuitive level.

As indicated above, the approach taken in this study is overtly interdisciplinary as well as comparative. I thereby embrace the view that any comparative evaluation and analysis, with ambitions beyond the mere description of legal rules, can profit considerably from utilising insights and methods from other social disciplines. Genuine comparisons imply abandoning the 'insider' perspective. The analyst then needs a 'fulcrum' and a 'lever', i.e. a firm basis and special tools that make the task of an outsider comparison possible. These cannot be found in the methods of legal dogmatics because the latter presupposes treating national law as a closed and (more or less) coherent system of rules. It is submitted that the key should instead be sought in neighbouring social disciplines such as legal theory, legal history, legal sociology, law and economics. The choice of discipline obviously depends on the category of law and subject matter studied, but also on the purposes and the research question of the study.

2.5.2 From comparing rules to comparing institutions

There are several advantages in taking an institutional approach to comparative law. The Komesarian type of comparative institutional analysis outlined above arguably provides a convenient basis for comparison between different legal and regulative approaches on a cross-country basis. Using participation costs and benefits as a common unit of analysis provides the common denominator needed for comparative legal studies. It also offers a point of orientation for the normative evaluation of alternative institutional approaches. At the same time the opposite is also true. Cross-country legal comparison gives an opportunity to compare concrete institutional solutions in their historical context and as applied in practical life, so that they do not remain abstract alternatives.[118]

Yet a cross country comparison also exposes some of the weaknesses of Komesar's analysis, namely the underlying assumption that institutional choice can be exercised in an instrumentalist manner. The approach is thus insensitive to endowed positions and historical contingencies.[119] The combination of a cross-country legal comparison and a historical institutional perspective is designed to compensate for this deficiency. Comparative law is often accused of uncritically accepting evolutionary theories of law and society. Classical exponents of the discipline nurture a vision of universal convergence of law and a unilinear progress. In this respect the discipline has inherited an evolutionist and deterministic bias. Historical institutionalism exhibits a different kind of determinism, namely that societies often follow a trajectory which determines historical developments in institutional life. Institutional and legal evolution is

[118] Mattei argues that comparative law provides economic analysis with a "reservoir of institutional alternatives, which are not merely theoretical but actually tested by legal history".See Mattei (1997), 28, with reference to Komesar's comparative institutional approach.

[119] See for similar criticism Buzbee (2000), 516.

constrained by events and decisions of the past, whereby chance and accident may also play a role.[120]

2.5.3 The institutional approach and theories of legal change

In legal theory and in comparative law in particular there has been a lively debate on the relevance of societal context of legal change.[121] Legal historians like Alan Watson, taking a long-term perspective, have tried to demonstrate the continuity of law despite changing social-political contexts. Watson has stressed the autonomy of legal rules and institutions and the possibility of 'transplanting' law irrespective of divergent social-political contexts.[122] Other comparatists, such as Otto Kahn-Freund, have proposed a context-sensitive approach to the study of legal reform differentiating between separate fields of law. Having conducted research on legal regulation characteristic of the modern welfare state, Kahn-Freund underlined the importance of taking account of the social-political context (constitutional and political order) in areas where pressure groups and political interests exert powerful influence.

Naturally, one source of confusion in such a debate can be, and often is, the very concept of legal transplants and what is meant by 'possibility' or 'success' of legal transplants. As Kahn-Freund has observed, the notion of 'legal transplant' suggests that we have to do with living, 'organic' matter. This in turn presumes a sociological view of law. If by legal transplants we merely mean the mechanical transfer of written provisions, the searchlight would be directed at 'law in the books'. But for such purposes the proper term ought to be 'legal borrowings' to avoid confusion with massive, purposeful transfer of law (and legal culture). This simple distinction could clarify a lot of misunderstandings in contemporary comparative law methodology.

The different conclusions of the two authors are apparently dependent on the legal areas that form the subject of the bulk of their own work. While Kahn-Freund (despite his broad competence), has been most prolific in the area of industrial relations, which is also at the centre of his 1974 article, Watson is an expert in Roman law and has mainly dealt with tracing the Roman law origin of many doctrines in contemporary European civil law.[123] In his argumentation Kahn-Freund is clearly aware of the importance of the specifics of each legal area, and speaks of a continuum of legal rules and areas from 'organic matter' where the concept transplant is appropriate, to 'mechanical matter' where one can speak of a simple change (e.g. of a carburettor).[124]

When seen in the light of these distinctions the debate between Watson and Kahn-Freund in fact appears to be a non-debate. Kahn-Freund, while not fully subscribing to

---

[120] For a critical legal approach with affinities to the one proposed here, see Frankenberg, 'Critical Comparison: Re-thinking Comparative Law', (1985) 26 Harvard International Law Journal, 411 ff., at 454, quoting Thompson, The Poverty of Theory and Other Essays (London: Merlin P., 1978), 96.

[121] See the famous debate between Kahn-Freund and Watson in Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1976) 37 *MLR* and Watson (1974), 79 ff.

[122] This is a recurrent theme in Watson's abundant scholarship. See in particular Watson (1974); Watson, *The Evolution of Law* (Baltimore, MD: Johns Hopkins University Press, 1985), Watson, *Law out of Context* (Athens: University of Georgia Press, 2000); Watson, *Legal Origins and Legal Change* (London: Humbeldon, 1991). For a comprehensive critical analysis of Watson's scholarship, see Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995a) 43 *AJCL*, 489 ff.

[123] See Watson (1974).

[124] Kahn-Freund (1974), 5.

Montesquieu's ambitious view on compatibility on law's contingency on its social and physical environment, believes in the deep connections between law and underlying societal structures and conditions. In contrast, Watson seems fascinated by the 'textual' tenacity of legal rules and their tendency to migrate. If Kahn-Freund argues normatively that context should be respected, particularly when political and group interests are involved, Watson focuses on empirically demonstrating that legal rules are in fact borrowed and survive 'textually' irrespective of gross differences in context. The latter evidence, however, does not contradict the normative advice inherent in Kahn-Freund's analysis. It only underscores the important fact that law is often a product of autonomous processes and that the members of the legal profession, rather than posing as 'creators' of rules, choose to refer to the authority of foreign normative solutions.

Even if we take Watson's arguments to suggest that transferred rules in fact can work similarly in widely divergent contexts, this claim is not necessarily incompatible with Kahn-Freund's arguments. From an institutional perspective the two claims are not mutually exclusive and possibly even harmonious. Both authors agree on the importance of law as an institution. In the area of core private law, where the main interests of Watson lie, one might from an institutional economics perspective argue that law performs the function of assigning initial property-rights in a world of individual exchange with low transaction costs. Following Coase, the main role of law is to determine the initial allocation of property rights, where efficient outcomes would anyway be achieved through bargaining between actors. In other words, the rule itself is not important, but the very existence of the rule and the certainty it creates help actors to arrive at mutually advantageous solutions. This may explain the lack of resistance (apart from, nowadays, resistance from legal professional circles) to transfer of legal rules.

In contrast, industrial relations, as much of economic regulation produced in the modern welfare state, have aimed at coping with problems of transaction costs, externalities and market failures. In this case the political and legal systems have been challenged to step in as alternative institutions to the market. However, the same transaction cost problem has plagued these alternative processes. The solution has then been dependent on the political system and its particular constitutional design, on the availability of interest groups, the possibility for collective interest representation in the political and judicial processes.

An institutional economic analysis thus hints at some answers to the puzzle of varying rules and their 'transplantability'. The more rules are connected to public goods and complex processes, involving high number of actors, low transparency, high transaction costs and requiring a high degree of human cooperation, the more difficult is the transfer of solutions. Even if formal rules may be borrowed in these situations, their integration in the institutional environment may produce very different results.

In summing up, whereas Kahn-Freund emphasizes interests and institutional structures and thus is close to the participation approach advanced by Komesar, Watson emphasizes continuity, the decisive influence of the legal profession and the self-referentiality of law, as well as the detachedness of law from its immediate political

context and interest struggles. It therefore seems fair to say that Watson's understanding of legal change has affinities with historical institutionalism.

2.6 Methodological aspects

2.6.1 Methodological intricacies of contextualism

Acquiescence to the desirability of analyzing the context of law does not necessarily mean denying all the theoretical, methodological and epistemological difficulties associated with such an enterprise. The traditional method of legal dogmatics does not offer the requisite methodological tools for studying the context of law. Dogmatic analysis operates with a largely fictive model of legal rules forming a coherent, non-contradictory whole (system), and thus confines the role of legal scholarship to perfecting this coherence. There are actually interesting parallels between perfect competition models in economic theory and the systemic coherence model of positivistic legal theory. Users of either theory admit that their models depart from reality but note that these second-best alternative are workable and hold promise due to their inherent normative character.

As always with interdisciplinary adventures, one of the main problems that the analyst faces is the availability of not just one, but plentiful, versions of the invoked 'alien' social discipline. The temporary 'visitor' in the field is thus forced to choose between various controversial views and interpretations, what we might call the selection problem of interdisciplinary analysis. One need not subscribe to sophisticated views of self-reference (autopoeisis) of highly differentiated social spheres to realize that discourses in economics or in political science are often specific, dynamic and 'self-referential.' In order to be applied to the study of law, economic theory needs to be funnelled into an applicable model, which inevitably implies reduction of the complexity of the respective discipline at the expense of possible distortion. Whereas this problem should not be underestimated, I nevertheless believe that it should not be exaggerated either. Finally, reduction of complexity is at the heart of every scholarly endeavour and is not exclusive to interdisciplinary analysis.

In legal scholarship, sceptics hold that interdisciplinary studies more easily fall into the trap of *ex post* selection and adjustment of theoretical frames to desired results. While there may be some truth in this accusation, rejecting contextual analysis on such grounds would be equal to embracing a highly unrealistic epistemological ideal of science that hardly can be met by mono-disciplinary studies either. Many contemporary theorists of science believe that social sciences at best can provide convincing reconstructions of reality, but that it would be erroneous to measure scholarly success with the yardstick of natural sciences and respective claims at correspondence to objective truth.[125]

Finally, one should not loose sight of the different discourses characterizing law and economic theory respectively. Joerges warns against rapid and unreflected transposition of arguments from the one field into the other. Legal analysis is inherently normative. What is required is careful fine-tuning and translation of the

[125] Bhaskar, Reclaiming Reality: A Critical Introduction to Contemporary Philosophy (London: Verso, 1992); Rorty, Contingency, Irony, and Solidarity (New York: Cambridge University Press, 1989).

economic jargon to practicable tools for legal analysis.[126] The need for cautious interpretation is well-expressed by Buxbaum:

> [Economic theory] can be an aid to understanding, and thus to the proper formulation of good doctrine; it can also be an aid for mystification, and thus to the legitimation of good, bad, or indifferent doctrine. The one thing it probably cannot do is itself to prescribe the good; but at its most useful it should assist the law-maker and the law-applier in transforming the prescribed value into the prescribed action.[127]

Methodologically, the institutional approach taken in this study has implied two major deviations from traditional dogmatic methods. The first one is represented by the extensive historical accounts on the legal developments, especially in Germany and Sweden. While historical reviews are often part of legal analysis, these accounts remain cursory and only perform a background function. In this study the historical accounts serve to demonstrate deeply seated national institutional constraints and are so part and parcel of the method. The historicisation of institutions aims to disclose continuity in legal institutions and to exhibit possible symbiotic relations between institutions and organisations. Moreover, in contrast to classical treatments of legal history, which mainly deal with changes in legal rules, the focus in this study is on interests and interest representation in the legislative process.

A second methodological concession is the treatment of legal material not only as a source of dogmatic interpretation, but also as evidence of prevailing ideals and ideologies. The analysis at points comes close to a 'discursive' one, which accounts for the abundant quotations from original sources, such as preparatory material, parliamentary discussions and judicial decisions.

2.6.2 The use of the comparative legal method

The choice and treatment of sources is also influenced by the comparative perspective embraced in this study. To begin with, we have two legal systems with two sets of legal source material and their distinctive modes of production, interpretation and enforcement of legal norms. A basic principle of comparative law methodology is that each norm is analysed from the viewpoint of the domestic legal system of which it is a part.[128] In the following I have tried to utilise original source material, as well as to respect the integrity of each system and to immerse myself in the German and Swedish legal discourse, to the greatest extent possible.

This has implied paying more attention to preparatory legislative material (*travaux préparatoires*) in the Swedish context, and making more extensive use of doctrinal reasoning when discussing German law. When approaching precedents and interpretation of general clauses, the account on German developments reflects the deductive way of reasoning characteristic of German lawyers. Turning to Sweden, I have been less concerned with systematic categorisations in view of the pragmatic and functional approach distinctive of this country's fair trading law. Given the key position of public institutions in the Swedish model of fair trading law, the

[126] Joerges, 'Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples' in: Daintith/Teubner (eds.), *Contract and Organisation* (Berlin: de Gruyter, 1986), 132 ff., at 147.
[127] Buxbaum, 'Federal Aspects of Corporate Law and Economic Theory' in: Daintith/Teubner (1986), 8.
[128] Constantinesco (1972), 150 ff.; Bogdan (1994), 45 ff.

administrative practice of the KOV has been frequently invoked. Attention has likewise been given to non-binding decisions of self-regulatory bodies and administrative guidelines in Sweden.

In any comparative legal study language and terminology are issues to be seriously considered. From one country to another the legal terminology will inevitably differ as will the more general philosophical notions on which law is based. Comparatists caution against falling into the trap of equating homonyms that conceal deep differences in substance and systemic connotations. The problem is further complicated when two legal systems are analysed in a language belonging to a third one, in my case English (and I was first trained as a Bulgarian lawyer). As far as possible I have tried to translate German and Swedish legal terms into English. In order to preserve as much linguistic precision as possible, though, I have provided the reader with the equivalent in the original language.[129] Furthermore, I have attempted to suppress unnecessary 'disturbance' by avoiding legal concepts predominantly applied in Anglo-Saxon (notably common law) legal scholarship.

Comparative law is premised on the principle of equivalence of units that form part of the study. Constantinesco underscores the importance of constructing and following a common comparative scheme when moving to detailed analysis.[130] This scheme should be based on concepts that are sufficiently broad to accommodate variations of legal rules and institutes in the systems under investigation. In order to conform to this methodological advice, I have subdivided the study according to two main criteria. Chronologically, the study is divided into three parts: the origins of fair trading, the consumerist wave and its implications and, finally, the era of Europeanisation. Analytically, each of the three parts encompasses an examination of substantive rules, enforcement and the evolving standards of fairness.

The institutional approach adopted in this study has led me to envelop each of the parts examining the legal sources within a contextualizing frame in which broader issues are treated. More precisely, each of the parts is preceded by a section elaborating the institutional context in which fair trading law evolves, and a concluding section summarizing the key findings from the viewpoint of the institutional approach in the study (with emphasis on institutional choice, participation in alternative decision-making processes and path dependence). The two units of comparison, Germany and Sweden, have been treated successively and separately in the first two chronological parts (discussing origins of fair trading and consumerism). Reflecting the interweaving with European legal developments in recent years, however, the two countries are examined simultaneously in the final part.[131]

Last but not least, any comparative study, including a legal one has to explicitly or implicitly confront and solve the problem of comparability. This requires a careful

---

[129] The most important Swedish quotations have been translated into English. Translation is by the author if no other translator is given. German quotations are given in the original laguage proceeding from a (probably unrealistic) assumption of knowledge of the German language among the interested readers. This choice has admittedly been also prompted by considerations of time and space.

[130] Constantinesco (1972), 146 ff.

[131] On the presentation of comparative studies in a successive or a simultaneous fashion see Constantinesco (1972), 329 ff.

selection and delineation of a common denominator (*tertium comparationis*), i.e. of a controlled variable, that has to be kept constant throughout the analysis.[132] Mainstream comparative lawyers find the common denominator in the common function of legal rules. Zweigert and Kötz are particularly categorical that "in law the only things which are comparable are those that fulfil the same function."[133] Function is, in turn, defined as the factual situation (or the problem) legal rules and legal institutes intend to regulate.[134] Two rules have consequently a common function if they concern "the same segments in life."[135] Whereas it appears exaggerated to claim such exclusivity for function as a controlled variable for comparative legal analysis, it certainly provides a more solid point of departure than commonality in concepts or in origin.[136] For the present study the common denominator has been found in commercial information and communication within the pre-contractual sphere. These are the 'segments of life' that are at the heart of different national rules and institutes pertaining to what I broadly define as fair trading law. I will draw additional limitations to this subject in the next chapter where I also turn to economic theories for analysis of the phenomena described.

Another intricacy of the problem of comparability pertinently highlighted by Bogdan consists in the need to distinguish between the function of legal rules and their legal/political purpose. According to Bogdan, comparative evaluation, or in other words normative comparative analysis, can be credibly made only if one can reasonably assume that the objectives of the compared legal systems (and rules) are identical (or similar).[137] The institutional approach advanced in this study turns the interests and legal policy objectives behind legal rules into an independent object of analysis and thus gurantees a sensitivity for differences of objective. As to normative evaluation, indeed it has to be underscored that the purpose of this study is mainly descriptive and explanatory, and only weakly normative inasmuch as I reflect on the importance of adaptive efficiency of institutional frameworks.

---

[132] See Constantinesco (1972), 31; Zweigert/Kötz (1998), 34 ff.; Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis' (1994) *AJCL*, 761, 768 ff.
[133] Zweigert/Kötz (1998), 34 ff.
[134] Bogdan (1994), 80.
[135] Bogdan (1994), 60.
[136] In a similar sense see Dehousse (1994), 768.
[137] Bogdan (1994), 80.

3 FAIR TRADING: COMPARING THE MARKET, THE POLITICAL AND THE JUDICIAL PROCESS

The main purpose of this chapter is to relate the categories and analytical tools presented above to the area of fair trading. More specifically, I wish to provide an illustration of the comparative institutional analysis advanced by Komesar, which forms the inner, 'microanalytical', part of the analytical framework. The outer, macroanalytical frame, building on historical institutionalism, will not be treated here since it per definition can only be applied in relation to a specific historic institutional context.

I first introduce the concept of fair trading and the regulative issues it involves, thereby defining the focus of the present study (3.1). Then the market is analysed as a decision making process for setting the standards of fair trading (3.2). The performance of the market is examined in respect to information, communication and trust in order to use this analysis as a point of orientation when comparing this performance with the political process and the judiciary. The analytical tools are borrowed from information economic theory. Information economics is preferred as the approach offering most convincing conceptualisation of the role of information in the marketplace. Information economics brings marketing in general, and advertising in particular, in relation to the costs and benefits of information for market actors. It thus fits neatly into the participation-centred approach advocated by Komesar. More specifically, I scrutinize the estimates derived from economic theory about the potential of the market to achieve a quantity and quality of information that adequately reflects the preferences of the participating actors. The question is: what are the advantages and disadvantages of the market as an institutional system for determining the standard of fairness in marketing? Can we identify instances where the market fails and – at least theoretically – a question arises whether it can be substituted for an alternative institutional solution?

Although market conditions may differ from one country to another, the economic reasoning in this section in principle applies to all states with a relatively free (or mixed) market economy. Therefore the findings should *mutatis mutandi* be relevant for both countries under analysis. The economic analysis is expected to give us a starting point for the individual country analyses and a benchmark with the help of which to tentatively judge the performance of institutional frameworks relying on the political process, on the courts or on administrative agencies.

In a next section (3.3) I briefly examine the prospects for the political process to 'correct' or complement the market in cases of information and communication failures, notably through specific legislation. Following the comparative systems approach advanced by Komesar, I map out the interests typically affected by fair trading laws and inquire into the opportunities for adequate participation of these interests in the political process. Proceeding from Komesar's taxonomy over possible distortions in interest representation in the political process, an extrapolative assessment is made for the area of fair trading. The two categories—majoritarian and minoritarian bias—are employed when discussing the most widely perceived risks for political mal-representation.

Concluding this chapter (3.4), I direct the attention to the courts and to administrative agencies as the institutions most commonly entrusted with the implementation and refinement of the standards of fair trading. Proceeding from the interest structure in some typical situations of unfair trading, the potential advantages and disadvantages of these instiutions from the vantagepoint of participation and representation are outlined.

Like the analysis of the market, also the analyses of the political, judicial and the administrative process are in this chapter conducted at an abstract (systemic) level and without reference to any particular country. The alternative decision-making systems are treated in accordance with their most general and common characteristics. The purpose is to obtain a categorization of potential distortions associated with each of these processes, later to be confirmed or refuted by the detailed country analyses. Of course such an analysis is detached from reality. As Komesar notes "the pattern of governmental (and we can add judicial) behaviour is not random, it can be affected by the design of government and predicted by an analysis that takes into account the interaction between the features of that design and the characteristics of the social issues in question."[138]

As the in-depth institstutional analyses will show, the judicial and administrative processes can be differently designed from one legal and institutional system to another. More importantly, decision-making processes and institutional choices are embedded in a broader institutional framework, which is highly path-dependent. Therefore the normative advice from comparative institutional analysis should always be put into perspective. The short-term, microanalysis of interests and participation needs to be combined with the long-term, macro perspective of embeddedness and path-dependence. Only then, the complex process of persistence and change of legal institutions can be more realistically captured.

3.1 Fair trading law as a patchwork area in focus

Honesty and trust are virtues, whose overall importance for economic life has been appreciated at a very early stage in human history. Societies have in all times produced institutions – formal and informal, deliberately created and spontaneously evolving – for promoting fair trading, although with differential success. Family bonds and group belonging have been a source of trust in early commerce, supported by possibilities for reputation, stigma and ostracism. The guilds with their strict rules of access and conduct took care of fair trading in the late medieval and mercantilist eras. With the advance of modern industrial society, these communitarian institutions based on close personal communication were strained. Exchange between anonymous actors replaced the local market, while consumer products grew in number and complexity and impediments to cross-border trade were lifted.[139] Significantly, the community of market actors and consumers became less homogenous, hosting a wide diversity of value-systems and expectations. The standards of fair trading changed and their enforcement gradually required new institutional arrangements. Some of these were provided by the market, whereas others could be supplied through alternative decision-making processes, such as the judicial systems or administrative control.

---

[138] Komesar (1994), 115.

[139] For a recognition of the important "law functions" excercised by private means in early markets, see Komesar (1994), 113; Coase (1988), 7 ff., as well as North (1990), 5.

Fair trading is of relevance for all spheres of economic exchange from production via marketing and contract formation, to performance and after-sale service. For the purposes of this study, however, the term fair trading is narrowed down to rules, practices and procedures that ensure *bona fide* standards of commercial communications. We are, in other words, in the sphere of marketing and advertising, at the stage prior to a contract being signed. Truthful and non-deceptive market information is a generally accepted element of fair trading so defined. But there are also other, more or less controversial, values that may be (and occasionally have been) integrated in the standards of fair trading. Some of these gravitate toward the sphere of relations between competitors. A time-hounoured virtue is never to sell or market products which imitate or approximate that of competitors. Furthermore, the use of defamatory, personal or aggressive advetising or mere reference to competitive products, represent practices that have been banished as unfair conduct for decades. Other values have more to do with the relations between competitors and consumers. Here we can mention transparency of commercial communication, disclosure of relevant and important information, respect for the personal sphere of customers, and account for limitations in certain consumer groups' abilities to adequately perceive and react to an advert (children, elderly, sick). Finally, on a more general level, advertising and marketing are increasingly charged with meeting general public interest objectives. Contemporary marketing is often expected to show respect for human dignity and personal integrity, not to promote illegal or otherwise undesirable conduct (such as conduct detrimental to human health or to the environment), to comply with statutory prohibitions and other legal requirements. As we are going to see in the following, the understanding of what is or should be covered by the concept of fair trading has been changing in pace with changing societal conditions, even if some standards are more persistant than others.

Given the fluid borders of the area under analysis, the demarcation lines of the present study should be more clearly defined. The focus is on rules and practices that do not primarily concern the interests of individual competitors, but instead directly affect collective (group) and public interests. Thus rules on misappropriation, slavish imitation, passing off and trade secrets, as much as they form the core of the original national and international regimes of fair trading, are deliberately excluded from the scope of this study. These institutions of fair trading once emerged as liability rules, seeking to establish quasi-property rights in different badges of trade and to complement a still evolving system of protection of intellectual property rights. The purpose was (and still is) to provide supplementary protection for trade names, indications of origin, unregistered trademarks, but also for other creations that did not meet the stringent requirements of exlcusive intellectual property rights. These rules will mainly be considered when drawing up the profile of a particular national system of fair trading law.

The cases I am interested in concern collective choices and involve group or public interests. These are cases of 'big numbers' and occasionally of skewed distribution of stakes, to use Komesar's categorization. Whether an advertising message should be prohibited as misleading or unfair is a question that typically affects not just the parties of a dispute, but broader groups of competitors and the broad consuming public as well. It is impossible to confine the effects of such decisions exclusively (or

prevailingly) to private parties. It is these cases that require cooperative solutions through organization and/or representation. The control over diffuse interests, over their identification, formulation and representation can be described as 'loose.' The incentives for participation and representation are not always clear or at hand. Decision-making is thus a difficult and highly imperfect process irrespective of the particular decision-making process preferred. Neither markets, nor political process or adjudication can offer a fully reliable solution. The question is about choosing between imperfect alternatives.[140]

Historically, the first type of situations of the above category that entered fair trading law was probably a generally stated prohibition of misleading advertising. The original focus of attention was the competitor, who could be negatively affected by business being diverged. However, by laying down a general and all-embracing obligation to abstain from deceptive information, the lawmaker – willingly or not – addressed a collective interest and thereby triggered all the intricacies of 'big numbers' decision-making. Decisive for the qualification of an advertising message as misleading were the perceptions of the consuming public. How do consumers understand the advertising? How many consumers are misled by it? What is the relevance of the advertising information to the buyer? These are all questions that arise and whose solutions depend on the representation of relevant interests in the decision-making process.

Other examples of fair trading rules that concern collective and public interests are prohibitions or restrictions of special offers, sales and sales promotions, prohibitions of marketing violating legal standards, or rules on information disclosure. Rules on comparative advertising occupy a middle ground between public and private interest offences. Comparative advertising often identifies an individual competitor or a group of competitors and as such affects well-identified individual interests. At the same time comparative advertising is normally addressed to the general public and can in certain instances be a highly effective information carrier. It can therefore not be treated exclusively as a private interest matter. The interest of the consuming public does not necessarily coincide with that of the advertiser and this conflict may require issues of representation to be settled.

Admittedly the distinction between private interest and collective interest rules is somewhat artificial. Protection of trademarks and other commercial signs from confusion and misappropriation may primarily serve the interests of the right-holder, but at the end it benefits collective consumer interests in that this protection guarantees a reliable system of identification and market communication.[141] Yet there is an important distinction between these situations and the ones that are of primary interest to this study. In all cases where an individual interest can be clearly identified, the question of bringing this interest before the appropriate decision-making process (market, political process or courts) does not pose particular problems. One can be

---

[140] Komesar (1994).

[141] See for an economic analysis of trademarks Landes/Posner, 'Trademark Law: An Economic Perspective' (1987) 30 *JLE*, 265 ff. For an analysis of unfair competition law from the perspective of strengthening the protection of intellectual and industrial creativity and of quasi-property rights in different badges of trade, see Kamperman Sanders, *Unfair Competition. The Protection of Intellectual and Industrial Creativity* (Oxford: Clarendon Press, 1997).

confident that the negatively affected competitor will take care of identifying the problem, presenting the relevant information in a comprehensive manner and channelling it through the respective decision-making forum.[142] Most often than not, the private conflict of interests would sufficiently reflect and elucidate all interests involved. Pure private interest offences are therefore not within the scope of the present study.[143]

3.2 Ensuring fair trading through the market process

Fair trading is about information and commercial communication. An analysis of the market process as an institution ensuring fair trading needs consequently to address the potential of the market to achieve an optimal quality and quantity of market information. By optimal I mean information that ensures the highest number of mutually advantageous transactions, reflecting the preferences of the individual market actors.

Yet, if markets are narrowly understood through the lenses of classical economic theory, such analysis would be obsolete. If we follow the assumptions of transparency and perfect information inherent in the equilibrium competition model building the basis of modern price theory, concerns about fairness of commercial communications should be dimissed as a non-issue. Not surprisingly, many exponents of classical and neoclassical economic theory view advertising and marketing with suspicion, mainly as a source of artificial entry barriers. A more profound understanding about the role of information, uncertainty and trust in economic life requires other analytical tools, provided first with the advance of information economics. The analysis offered by information economists can easily be recast in terms of participation, i.e. in terms of the ability of the market to generate transaction opportunities. In fact one of the principle merits of information economics is to have highlighted information asymmetries and information distortions as one major source of transaction costs. Consequently the findings of information economists in many respects conform to those from an analysis based on a participation centred approach.

3.2.1 Information in the market and the market for information

There are three pretty straight-forward and simple starting points in the analysis of market information. *(i)* Information is unevenly distributed among market actors. *(ii)* Information is costly. *(iii)* Information reveals public-goods characteristics. Each of these propositions needs closer elaboration in order to understand its bearing on problems of fair trading.

---

[142] It is another matter that broader public interests also could be relevant and there may be a problem of establishing and representing these interests in the decision-making process. See Henning-Bodewig/Kur, *Marke und Verbraucher*, Band I (Weinheim: VCH, 1988).

[143] Another categorization that may be helpful for defining the focus of this study is the distinction between facilitative and regulative rules. Whereas the rules of the first category described above, i.e. misappropriation, passing off and trade secrets serve mainly to facilitate market transactions, the rules of the second category seek to solve problems of public interest. They can consequently be better described as regulative. This is not fully accepted among lawyers. As we shall see, especially in German law all rules regarding unfair competition law are traditionally treated as private law rules, and hence as facilitative. For the distinction between facilitative and regulative rules, see Ogus, *Regulation. Legal Form and Economic Theory* (Oxford: Clarendon Press, 1994), 2.

3.2.1.1 Information asymmetry

That market information is unevenly distributed among market actors does not need much substantiation. Buyers generally are in a much inferior position than sellers in respect to both price and quality. Information asymmetry and uncertainty may therefore be a better description of markets than the notion of transparency.[144] There is price dispersion in almost all markets. Prices are consequently not easy to ascertain. Ascertaining quality is an even more complex process. Philip Nelson points at a trivial but fundamentally important distinction between product characteristics. Some features of a product, much like price, can be readily established prior to or at the very moment of purchase (the colour of a pair of shoes). Others can only be ascertained after the purchase (the taste of a bottle of beer).[145] Nelson calls these two types of product characteristics '*search*' (or '*inspection*') and '*experience*' qualities, respectively. This classification is further refined by Darby and Karni, who note that there are product qualities which do not yield costless judgement even after purchase. They refer to this category as '*credence qualities*'. Credence qualities cannot be evaluated in normal use but only through a highly qualified and costly expertise.[146] An example that readily comes to mind is the quality, and indeed the necessity, of a car repair service. To take another example from modern marketing – the alleged environmental-friendliness of a product (high decomposability of a detergent or recycling properties of paper) is a typical credence quality. It is obvious that asymmetry and ensuing consumer uncertainty are more pervasive with respect to credence product characteristics than in the case of price search product qualities. Analysts note, however, that also price can be composed in various ways so as to make consumer scrutiny more difficult.[147]

3.2.1.2 Information cost

The second simple observation is that information is costly. Production, dissemination and assimilation of information all involve costs for producers and consumers. Under conditions of price and quality uncertainty purchase decisions are not made automatically, but are preceded by an intricate process of ascertaining quality and price. This process, called by Stigler search, involves sometimes non-negligible costs. The pattern of consumer search for ascertaining price as a rule differ significantly from those for ascertaining quality. Price-search would mainly consist in canvassing different sellers and comparing their asking prices. The costs are chiefly associated with transportation and time.[148] Ascertaining quality is a much more complex process. Apart from canvassing more than one seller prior to purchase, consumers will be reading advertising materials, consumer journals, consulting friends and relatives, etc. Obviously, in view of the distinction between product qualities discussed above, for

---

[144] Stigler (1961), 213 ff.

[145] This classification was first introduced by Nelson, who distinguished only between search and credence qualities, see Nelson, 'Information and consumer behaviour' (1970) 78 *JPE*, 311.

[146] Darby/Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) *JLE*, 67 ff., at 69: "We distinguish then three types of qualities associated with a particular purchase: search qualities which are known before purchase, experience qualities which are known costlessly only after purchase, and credence qualities, which are expensive to judge even after purchase." As an example of credence qualities of a purchase, the authors then discuss the provision of repair services.

[147] See Ippolito, 'Consumer Protection Economics, A Selective Survey' in: Ippolito/Scheffman (eds.), *Empirical Approaches to Consumer Protection Economics* (Washington DC: FTC, 1986), 1 ff., at 5.

[148] Stigler (1961), 213 ff.; Ippolito (1986), 1 ff.

some categories of goods ascertaining quality will be associated with prohibitive costs. This means that purchase of such goods will always be conducted in uncertainty.

Information costs depend on two main variables: (i) buyers' opportunity cost of time (i.e. the value of opportunities foregone to the consumer by his engaging in search) [149] and (ii) the time spent per unit good.[150] It is important to note that consumers will be willing to engage in search only to the extent that the expected marginal cost of search does not exceed (outstrip) the expected marginal return (i.e. the gain from buying at a lower price or better quality). Both price search and quality search are consequently a function of the value of the product to consumer.

In a perceptive analysis on information and consumer behaviour Nelson demonstrated the complex relation between product characteristics in terms of quality (search/experience goods) and relate to the value of the purchased good and to the frequency of purchase. Two other distinctions in the characteristics of goods provide further insights in the costs of consumer information and the structure of search: the value of the good (high-value and low-value goods) and the frequency of purchase (durables and non-durables). For low-value non-durables Nelson shows that is is cheaper for consumers to search through experimenting, i.e. by bying and trying the product. Conversly, for high-value durables consumers will be more inclined to engage in costly search. Alternative pre-purchase information is demanded most for durable experience goods.[151]

3.2.1.3 Information as public good

Finally, information reveals the typical characteristics of a public good.[152] As other public goods information is characterised by *'non-rivalrous'* consumption. Not one, but many persons can typically make use of the information without its utility being diminished. [153] Information can also be described as a *non-appropriable* good. Those who have information can never loose it by transmitting it. There are few adequate mechanisms for assuring property rights in information. Information is indivisible and therefore difficult to measure and, respectively, to price. Inspection prior to purchase is impossible without revealing the information, which makes the transaction obsolete. In addition, it is problematic to exclude those who do not pay from the use of the good - so-called *non-exclusivity*.

3.2.2 Problem areas

All these characteristics account for the considerable complexity of the market for information, whereby the problems are partly different in respect to seller-provided information and in respect to information supplied independently from the product.

---

[149] See Posner (1992), 6.

[150] Ehrlich/Fisher, 'The Derived Demand for Advertising. Theoretical and Empirical Investigation' (1982) *The American Economic Review*, 366. See also Van den Bergh/Lehmann, 'Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht' (1992) *GRUR Int.*, 588 ff., at 589 f.

[151] Nelson (1970), 318 ff. By using the two variables: search/experience and durables/non-durables Nelson demonstrates that: monopoly is greater with experience and with durables than with search non-durable goods; the same goes for third-party information. Clustering of stores is higher for search than for experience goods (since the quality of experience goods cannot be inspected in the shop). National brand advertising is less attractive for search than for experience goods.

[152] See Arrow (1984), 136 ff., at 142 ff.

[153] Arrow (1984), 142; Schäfer/Ott, *Ökonomische Analyse des Zivilrechtes* (Berlin: Springer, 1986), 77.

Two main problem areas can be identified: (i) there may be an undersupply in information even in competitive markets; (ii) information problems create space for opportunistic behaviour, i.e. for deception and misrepresentation.

3.2.2.1 Free-riding and undersupply of information

Given the demand for product-related information, one would expect that the free market would readily provide such information. We can reasonably anticipate that some market actors (other than producers themselves) will specialise in the production and distribution of market information. Indeed, publications of consumer journals can be seen as a response to this demand.[154] However, there are serious impediments to an efficient market of product-related information, separate from the product market. The public-good qualities of information account for substantial free-rider problems. The purchase, production and use of information by some consumers generate a market-perfecting external benefit to uninformed consumers. In the hope of costlessly using the information purchased by others, many will not reveal their realistic preferences and readiness to pay for the good. In order to cover expenses incurred in the production of information, producers (of information) will charge those few who pay with inadequately high prices. Therefore, there might not be enough incentives for third-party information providers.[155] As a result undersupply of the good may be observed. Seen in participation terms many efficiency increasing transactions with information will not take place.[156]

The demand for product-related information and the problems observed with third-party product information seem to enhance the importance of information provided by interested sellers. There is a natural economy in the joint production of a commodity and of information about that commodity. Sellers typically have a lot of information about their product attributes which is costly for other parties to ascertain. This information is acquired 'casually', as a by-product of their overall activity. They benefit from the knowledge in many different ways and have multiple incentives to acquire information.[157] This solution appears to be Pareto efficient.

However, the same public goods properties of information that inhibit markets for thrid-party information account for externalities in seller-provided information as well. An important factor, constraining an optimal information disclosure in a competitive market, is the risk of *free-riding* on a competitor's information due to the public-good properties of information discussed above. Sellers may not be interested to disseminate relevant product information, if the benefit resulting from this dissemination will be shared with other competitors. Similarly, incentives for counteracting incorrect and

---

[154] See Stigler (1961), 51.

[155] Arrow (1984), 142; MacKaay (1982), 114 f.

[156] On the positive side, the better-informed consumers arguably contribute to raising the transparency of the whole market. Shapiro, 'Consumer Policy in the United States' (1983) *Zeitschrift für die gesamte Staatswissenschaft*, 527 ff., at 530; Beales/Craswell/Salop, 'The Efficient Regulation of Consumer Information' (1981) *JLE*, 491 ff., at 503 f.

[157] In an analysis of mistake and disclosure in contract law Kronman distinguishes beween deliberately acquired information and casually acquired information. In this light Kronman discusses cases under common law when a duty to disclose has been imposed on a seller concerning the properties of his goods. Arguably such solutions are efficient since they do not undermine the seller's incentive for future investment in acquiring information. Kronman, 'Mistake, Disclosure, Information and the Law of Contract' (1978) 7 *JLS*, 1 ff., 13, 26.

deceptive claims of competitors will be small if the benefits from such actions do a service to other competitors.

On a different note, the fact that advertsing is a function of sellers' marketing efforts, generally makes disclosure improbable if revealing the truth may negatively affect one's own business. A typical case of information failure in a competitive market is when all the competitors share the same *negative product characteristic*. The advertising of cigarettes is a particularly telling example.[158] Albeit cigarettes are a product with serious health effects, no producer has the incentive to reveal these negative characteristics to consumers.

3.2.2.2 Advertising and opportunistic behavior

Asymmetric information distribution and excessive (or prohibitive) search costs have multiple implications for the behaviour of market actors and the efficiency of market transactions. More generally, they open space for opportunistic behaviour, i.e. for cheating and misrepresentation. Seller-provided information (typically in the form of advertising) aims at determining consumers' purchasing behaviour.[159] Sellers have incentives to misrepresent and the information they provide is contaminated by credibility problems.[160] Opportunistic behaviour is a clear danger.

Two patterns of behaviour have been highlighted as particularly serious sources of market distortions. They are usually summarised under the concepts 'moral hazard' and 'adverse selection'. *Moral hazard* may be defined as opportunistic behaviour whereby a market actor may change behaviour if he can remain unnoticed by the opposite party. Thus, producers may use consumers' ignorance about quality and shift to lower quality production, charging the same price. Similarly, in an insurance contract the insured party may switch to a more hazardous behaviour omitting the necessary precautions once the risk has been passed on to the insurer. With the term *adverse* selection information economists describe a situation in which market participants are uncertain about the quality of a product or service, and are not in a position to distinguish between good and bad quality despite their willingness to pay for this discriminating ability. Arguably, under these conditions market actors will orient their decisions after the visible quality.

The effects of adverse selection in the setting of strong asymmetry of information have been vividly demonstrated through the so called '*lemon market*' model designed by Akerlof.[161] The example chosen is the market for used cars. Akerlof detects a paradox on this market. Owners of good-quality cars are less inclined to sell their cars since they cannot convincingly communicate quality information to interested buyers and can hardly hope of getting a satisfactory price. Thus poor-quality cars ('lemons') prevail on the market. For a 'lemon' market to emerge the following conditions have to exist: (i) Consumers must be unable to determine quality before purchase, i.e. it must be a

---

[158] Posner, Regulation of Advertising by the Federal Trade Commission (1973).

[159] This is to be seen by some private initiatives for test magazines: they provide only this type of information that would lead to an increased distribution of the magazine. On these issues, see Assmann/Kübler, *Verbraucherinformation im Ordnungsgefüge des Privatrechts* (Königstein: Athenäum 1981), 29.

[160] Assmann/Kübler (1981), 29; Shapiro (1983), 530.

[161] See Akerlof, 'The Market for "Lemons": Quality Uncertainty and Market Mechanism', in: Akerlof, *An Economic Theorist's Book of Tales* (Cambridge: Cambridge University Press, 1984), 7 ff.

question of experience or credence goods. (ii) Higher quality goods should cost more to produce than lower quality. In other words, there should be a premium for producers from switching to lower quality, so called *opportunism premium.* (iii) There must be no credible way for a seller to communicate quality. Arguably, under these conditions consumers will orient their purchasing decisions after price as a more easily observable characteristic. Better quality sellers will be driven out of the market. It can eventually result into a market break-down, in that better quality producers may be driven out of the market.[162] The described phenomenon may cause flagrant misallocation of resources. In a worst-case scenario the market may collapse. Economists speak of the risk for *functional inefficiency.*[163] Akerlof links this analysis with the observed differential market conditions in developed and developing countries and calls this 'the cost of dishonesty'.

3.2.2.3 Market institutions to cope with information and uncertainty

The market has produced a number of institutions to cope with or at least to mitigate problems of uncertainty and information. Attempts to minimize search costs are behind some of the secrets of various forms of distribution - ex via specialised traders, located markets, etc.[164] The department store, which generates expertise and knowledge on brands, is seen to be a response (among others) to exactly that necessity of consumers to get hold of a more precise and objective information than the one offered by producers themselves.

One way by which the specific setting of 'lemon markets' is avoided is the triggering of '*signal competition*'.[165] 'Signal competition' means a transfer of competition from the field of invisible quality characteristics to the field of indirect but visible symptoms, that is to signs (signals) of quality. Building a trademark and investing in goodwill and reputation are among the most common ways of signalling quality.[166] But investment in a franchise or in a luxurious store may have a similar effect. Providing warranties or trial periods and other contractual arrangements may be viewed as alternative ways to give consumers a time to build experience with a product and to communicate quality.[167] Arguably, even high prices can function as a signal for quality. A seller who charges a high price indicates that he values repeat sales highly and thus has an incentive to provide high quality product in order to retain his customers.

In Stigler's view goodwill can be defined as continued patronage by customers without continuous search (that is, no more than occasional verification).[168] Goodwill and reputation create certain monopolistic space for the individual supplier. The incentives for sellers to maintain quality and the likelihood of establishing goodwill depend on

---

[162] See Akerlof (1984), 16; Rubin, 'The Economics of Regulating Deception' (1991) *CATO Journal*, 667 ff., at 667.
[163] Assmann, *Prospekthaftung* (Köln: 1985), 289.
[164] Stigler (1961), 218.
[165] See Nelson (1970), 311; Beales/Craswell/Salop (1981), 507.
[166] Stigler (1961), 218. Some authors distinguish between signals, bonds and reputation; see Ippolito (1986), 7 ff. Of course, overinvestment in signals can, in turn, give rise to imperfections on the product market since it aims at redistribution of consumers between different brands, which is not always socially efficient. See Beales/Craswell/Salop (1981), 507.
[167] Akerlof (1984), 20 f. under the concept "counteracting institutions".
[168] Stigler (1961), 218

several variables. Particularly decisive appears to be consumers' ability to keep track of brand-specific performance experience.[169] It is also important that consumers purchase the product frequently, that true quality is relatively easy to judge after use of the product, that the future is not discounted too heavily and that consumers tend to stay in the market for a long time. An alternative way to promote reputation is to invest in collective reputation by subscribing under and promoting collective ethical codes. The increased reliability of a profession is a shared benefit for all members.[170] Collective reputation thus provides substitute to the information about the conduct and reliability of an individual trader. Generally speaking, signals indicate that the seller has made a significant investment (economists speak of 'sunk costs') and has much to loose if customers are unhappy.[171]

The findings of information economics sketched out above suggest that the market provides information in many subtle ways. One of the market's great advantages is that it generates a huge number of information signals in a spontaneous manner. Opportunistic behaviour and undersupply of information are certainly often occurring but there are a variety of mechanisms to curb such inefficiencies and to induce transactions. Nevertheless, there are several areas where fair adequate quantity and quality of information will not be ensured by the market, or will be ensured only imperfectly. In the area of price information, consumer ignorance creates certain incentives for traders for manipulation of prices and deliberate price dispersion. In the area of quality, non-disclosure of information and use of deceptive information can be rewarded in some situations. The persistence of such informational failures and the chances for their correction through the market appear to depend on several factors, among them the structure of the market and the product characteristics in point, being the most important. Both factors can be directly related to conditions for paricipation in the market. Market structure and product characteristics will determine the distribution of stakes on the part of sellers whereas the value of the good and the frequency of purchase determine the size and distribution of stakes among consumers.

Market structure

Under rigorous competition, producers will arguably have stimuli to reveal information that is relevant for consumer choice. From the positions of the neoliberal Chicago school of economic analysis, economists argue that the risk of opportunistic behaviour, i.e. engaging in deceptive practice, will ideally be neutralised by producers' incentives to induce repeat purchases on consumers.[172] Likewise, competition is supposed to give sufficient incentives for self-control, deception disclosure and prosecution among competitors.[173]

Monopolistic markets imply that the stakes on the one side of the transaction are highly concentrated. On the one hand price and quality variety will not exist and the costs for canvassing different sellers are zero. On the other hand the asymmetry as to

---

[169] Shapiro (1983), 530.

[170] Arrow (1984); Schäfer/Ott (1986), 311 f.

[171] Signals can be used as indicators of quality but also as an instrument of selection, for instance in the job or insurance market.

[172] See Jordan/Rubin, 'An Economic Analysis of the Law of False Advertising' (1979) 8 *JLS*, 527 ff., at 530.

[173] This is, however, a truth with many modifications, some of them related to the characteristics of the product. See the section below.

the quality of goods is great. There are no competing products and there are no incentives for the seller to disclose and to inform consumers. Intuitively one might think that monopolistic markets would make an excellent environment from the point of view of market transparency. In a fully monopolistic market consumers are faced with products coming from one source only. This would supposedly make search obsolete and thus eliminate search costs. Despite this intuitive assumption, economists generally argue that monopolistic markets have adverse effects on market information in many respects. A monopolist has fewer incentives to provide information than sellers under intensive competition do. Consumers are not in a position to discipline the monopolist through shifting their preference to alternative products and there are no competitors that would have the incentive to provide the missing bits of information or to counteract false claims.[174]

Another structural arrangement that is particularly problematic from information perspective is the *turbulent market.* As turbulent we can describe markets with instability of supply and demand conditions and constantly changing identity of buyers and sellers. Analysing phenomena of price dispersion resulting from the imperfection of information about prices, Stigler mentions several factors that deepen the impact of this market distortion. Among these are: the instability of supply and demand conditions and the *changing identity of buyers and sellers that increase ignorance.*[175] In principle, as Stigler notes, "there is a flow of new buyers and sellers in every market and they are initially uninformed on prices and by their presence make the information of experienced buyers somewhat obsolete." [176] More flagrant example of turbulent markets to be found in most economies are tourist markets known for an unusually high mobility of buyers and occasionally of sellers as well.

When it comes to changing identity of sellers, one can generally distinguish between firms who plan for a continuous stay in business and so called 'fly-by-night' actors, who strike once and then move to a different field of business. In established market economies firms in most industries are closer to the former type. Therefore economic analysis usually doesn't deal with the 'fly-by-night' type of firm taking it as atypical.[177] The situation, however, changes drastically if one shifts the focus to developing countries and emerging markets. Clearly, transient participants in business are less likely to be disciplined through market institutions such as repeat purchases and reputation. Warning of the grave consequences of asymmetric information about product quality, Akerlof underlines that dishonesty in business is a more serious problem and that quality variation is greater in underdeveloped countries than in developed areas. The presence of people who are willing to offer inferior goods tends to drive the market out of existence. It is this possibility that represents the major cost of dishonesty – because dishonest dealings tend to drive honest dealings out of the

[174] Posner (1973), 8 f. On oligopolistic markets see Pitofsky, 'Beyond Nader: Consumer Protection and the Regulation of Advertising Regulation' (1977) 90 *Harvard Law Review*, 661 ff., at 665. For a sophisticated argument that monopolistic markets may stimulate customer activism ('voice') instead of switching to competitive products ('exit'), see Hirschmann, *Exit, Voice and Loyalty. Responses to the Decline in Firms, Organizations and States* (Cambridge, MA: Harvard University Press, 1970).

[175] A third factor is the size of the market in terms of both dollars and number of sellers. According to Stigler, as the market grows there will appear a set of firms which specialise in collecting and selling information, taking the form of trade journals or specialized brokers. See Stigler (1961), 215.

[176] See Stigler (1961), 220.

[177] See Clark, *Competition as a Dynamic Process* (Washington D.C.: The Brookings Institution, 1961), 93.

market.[178] The message is simple but powerful: fragile markets create an environment more likely to produce informational market failures. This insight has a particular bearing on the analysis of emerging post-communist markets, where dynamic change of actors occurs both on the demand and on the supply side.

The role of product characteristics
Apart from and irrespective of market structure, the potential of market forces to remedy informational failures, and to discipline deception in particular, would very much depend on the specific characteristics of the products in question. Here both product qualities are important but also price category and frequency of consumption.

In the context of the already introduced classification of product qualities, it is clear that sellers would have little incentives to misrepresent search qualities facing the prospect of immediate detection. In the cases of experience goods, where consumers can determine quality only by purchasing and using the good, the situation is more nuanced. While in this group of goods advertisers may have an incentive to mislead, for low-priced often-purchased goods such opportunistic behaviour would presumably be curbed by sellers interest in repeat purchases. By contrast, consumers' power over advertising is substantially weaker in the case of credence goods and expensive and rarely-purchased experience goods.[179] Arguably, signals would in a similar manner work unsatisfactorily if consumers are not in a position to get any reliable post-purchase information about the quality of the product, either by their own experience or from a third person, and where they buy the product only infrequently.

When consumption is only occasional (it is guaranteed that each consumer will consume the product/service only once), the distinction between credence and experience goods is irrelevant, since ascertainment of quality through consumption will as a rule not lead to correction of future choices. Consumers do not have possibility to communicate their dissatisfaction through their purchases.[180]

The analysis of information economists can be easily recast in terms of the participation-centered approach advanced by Komesar. Both cases – of undersupply of information and of opportunistic behaviour – are in a position to negatively affect institutional behaviour in the market, i.e. transacting. Efficient transactions will not take place or alternatively transactions will be concluded which do not adequately reflect the preferences of consumers. The participation-centered approach suggests that persistence of such failures will depend on the cost conditions as well as on the distribution of stakes as determinants of institutional participation.[181]

Comparing advertising with political propaganda, Komesar speaks of advertising as 'rent-seeking' in the market context.[182] In the typical case of marketing and advertising

---

[178] "Any comparison of the heterogeneity of quality in the street market and the canned qualities of the American supermarket suggests that quality variation is a greater problem in the East than in the West." See Akerlof (1984), 7 ff.
[179] Nelson, 'Advertising as Information' (1974) 81 *JPE*, 729 ff., at 730; see also Jordan/Rubin (1979), 530
[180] See Schäfer/Ott (1986), 306 f.
[181] Komesar (1994), 117.
[182] See "Rent-seeking in the market and in political processes", Komesar (1994), 115. Rent-seeking is a concept coined on the basis of Buchanan and Tullock's economic theory of the political process, describing politicians as

we have a single actor, the seller, with high and concentrated stakes on the one side and a mass of consumers, with low and dispersed stakes on the other side of the interests. At the lowest stakes level, as Komesar puts it, "consumers do not have sufficient interest to even recognize the problem or to be interested in attempting to assimilate any information – false or otherwise. They can neither be led nor misled." According to Komesar this recognition failure is problematic, but does not lead to economic rent-seeking and instead only leaves a potential need unrealised.

The really problematic cases that Komesar identifies are the mid-stakes consumers, who are sufficiently interested to register information, but not sufficiently interested to discern information.[183] It is within this group that rent-seeking in the form of misleading or other manipulative advertising and marketing could be successful. At this level Komesar turns to the role of the issue being at the centre of advertising, i.e. price and quality of a product. The more complex the issue, the greater the space for economic rent-seeking from misleading information. Again the correspondence with Nelson's analysis on the role of product characteristics for defining the space for misleading advertising is noteworthy.

Bringing this analysis a step further, it can be argued that the situation will be different if the market in question is characterised by a sufficient portion of high-stake consumers. Misleading information and manipulative product differentiation will in these cases not be a serious issue, since these consumers would have sufficient incentives to get informed through alternative channels. The developed secondary markets for information in such industry sectors as cars, computers and other expensive electronic equipment demonstrates that high stakes normally would prompt information-seeking. This hypothesis finds support in Nelson's analysis on advertising of high-value goods.[184]

Finally, one should make an important caveat for irrational consumer behavior. Information economics proceeds in general from the basic behavioural assumptions of neoclassical economic theory (the 'homo economicus' model). In reality, however, consumers are often not in a position to adequately process and evaluate information. There are clear limitations on the amount of information consumers are willing to absorb and able to process. Consumers are often poor negotiators and yield to pressure and other techniques of persuasion and marketing.

3.2.3 The potential role of alternative institutional processes

Summing up, information economics provides a more sophisticated analysis of markets than neoclassical theory, identifying market failure as a result of information imperfections as well as market institutions that have emerged to compensate for these imperfections. At least at a first blush it appears that these findings open the gate for intervention by alternative non-market institutional processes. The political process

---

self-interested players trading with votes to achieve reelection. The analysis offered by Komesar is somewhat simplified, which he also admits. With reference to the study by Comanor and Wilson, *Advertising and Market Power* (Cambridge, MA: Harvard University Press, 1974), he defines advertising as a primarily rent-seeking activity in a market setting, producing brand differentiation, monopoly rents, waste of resources and efficiency losses. Obviously no account is taken of the information economics literature on advertising.

[183] Komesar (1994), 117.

[184] See Nelson (1974), 130.

could potentially serve as an instrument for reducing the cost of information through creating non-market institutions for protection of trust and goodwill and through appropriate legislation for policing deception. The judicial and the administrative process can likewise be entrusted with shaping and enforcing fairness standards.

Diagnosing a disease, however, is not the same as prescribing the right medicine. For any credible normative conclusions to be drawn from the analysis above, one has to leave the Nirvana approach characteristic of much economic analysis and to embark on a true comparative system analysis. The conclusion about the imperfection of markets as a decision-making process on issues of market information requires analysis of the institutional characteristics of alternative decision-making processes and setting them in relation with the social policy issue at point. What is needed is a more careful evaluation of the relative abilities of these alternative processes to ensure a more efficient (less imperfect), participation and representation of all interests involved.

3.3 Fair trading in the political process

The economic analysis above provides a new pespective on fair trading law. Fair trading law is conceptualised as a complex of legal institutions facilitating market communication and protecting trust and goodwill in the marketplace. By discouraging opportunistic behaviour (i.e. minimising the premium for opportunism) fair trading laws seek to enhance market transparency and efficiency. Moreover, such institutions can potentially promote trust, which in a world of increasing information asymmetries is a cost-effective substitute to knowledge.[185] Yet, this type of economic analysis implicitely assumes that the alternative processes (political, judicial and/or administrative) that will be entrusted with shaping these standards and will step in place (or by the side) of the market mechanism would work in a tension-free manner. The analysis assumes that these processes will be in a position to provide the desired efficient solution. It does not deal with the working of these alternative processes and is thus one-sided.

In contrast, the comparative system-approach advanced by Komesar requires to look critically at the political, administrative and the judicial process called to substitute or complement the market and to comparatively analyse their institutional strengths and weaknesses. Turning to the legislative (political) process, consumers and producers change their role into voters and lobbyists and transactions are substituted by different forms of participation in the political process, among them lobbying and voting being the most important. Decisions are no longer directed at specific products (transactions), but concern more abstract regulative issues, typically involving aggregation of different interests. To analyse this process, the participation-centered approach suggests several components. The first two concern the regulative issue (its complexity and importance) and the interest structure behind it. A third component is the examination of the characteristics of the political process in terms of possibilities and impediments to participation. All three factors are at best analyzed in the context

[185] Schäfer/Ott (1986), 301. In the same line of argument, the legal system could arguably enhance market transparency by promoting institutions that signal quality. Protection of trademarks as well as creating additional quasi-property rights in different badges of trade are devices that have the aggregate effect of enabling reliable communication of goodwill and quality from producers to consumers. See Van den Bergh/Lehmann (1992); Landes/Posner (1987), Drexl (1998), 593 ff.

of a concrete legislative measure in a specific legal system. Nevertheless some generalizations are also possible.

3.3.1 Interests involved: size and distribution of stakes

The area of fair trading law as defined above involves a great variety of regulative issues having different degree of complexity and involving different interests. Two groups of actors are, however, inevitably affected by legislative decision-making, namely competitors and consumers. With a risk of simplification I will attempt a categorisation of the regulative issues in terms of size and distribution of stakes between these major institutional actors. Looking at the interests of competitors, we can identify, broadly speaking, four categories of situations. The first category can be dubbed '*quasi-propety*' issues. Rules on passing off, misappropriation, trade secrets and libel have justifications exhibiting kinship with those valid for protection of intellectual property rights. Fair trading law is involed to serve as an extension of trademark and intellectual property rights or complements personal rights (e.g. the right to personal integrity).[186]

The second category of issues can be termed '*horizontal*', since they, at least prior to regulation, affect in a similar manner all businesses, irrespective of sector belonging. Here fall rules such as a general prohibition of deceptive advertising, broad requirements of fair competition and a general duty of information disclosure. The size of stakes is in the low and medium range, but *ex ante* regulation the stakes are evenly distributed across industries. It is certainly important for traders to influence these general legislative standards of commercial communication. But in *ex ante* regulation each competitor can picture himself or herself both on the side of the accused in misleading advertising, or on the side of the negatively affected by such advertising. Moreover, since the form of regulation will often consist in laying down quite open-ended standards of fairness and correctness of marketing and advertising, this would not be expected to be an issue of controversy. The refinement of this standard will typically take place in other institutional arenas.

In the third category we can classify issues concerning a specific industry sector which can therefore be defined as '*vertical*'. One example is restrictions on tobacco advertising, on alcohol or drugs advertising. The stakes of the affected traders are definitely high and concentrated. The industry is well-identified and, depending on the specific form of intervention (general standards, restrictions or plain prohibition) regulation may bring about serious losses for the respective sector.

A fourth category of regulative issues, while formulated in a general manner, tends to affect harder some industries at the expense of others, and can therefore be labeled as '*preferential*' (or hidden sectoral). An example here could be restrictions on certain forms of marketing that are more intensively employed by some industries or industry sectors and thus promising to provide competitive advantages to the firms not employing the regulated marketing strategies. A classical example is the controversy between wholesale traders and produces on the one side vs. retail traders, on the other, in respect to restrictions on rebates and special offers.

---

[186] See Kamperman-Sanders (1997).

If we turn to the interests of consumers, as a general observation, one can say that most instances of regulation in the sphere of fair trading involve broad and diffuse consumer interests. Fair trading is about information. Given the public-good properties of information, each general or specific legislative decision concerning marketing has an effect on the broad consuming public. A decision to permit or to prohibit certain marketing measure cannot be confined to one single transaction but works inevitably *erga omnes*. Characteristic of diffuse consumer interests is that they concern nearly all subjects of a given jurisdiction and that every consumer has different value preferences and hierarchies.[187] The stakes are low and distribution is uniform.

Setting fair trading standards in specific sectors can occasionally change the size and distribution of stakes. For instance regulating fair trading in real-estate or car markets may raise the stakes of affected consumers and increase the concentration of stakes. Yet, even then consumers will be many and difficult to identify. The interest structure *ex ante* regulation for the most part is characterized by low stakes and dispersed interests on the part of consumers.

In his analysis of the political process Komesar chiefly proceeds from a bipolar interest structure. In reality, however, the interests involved in a certain regulative issue may reflect more complex arrangements.[188] Indeed, certain issues of fair trading exhibit a triangular structure, where we have opposing industries lobbying for different regulative strategies and a broad consumer interest that may (or may not) coincide with one of the alternatives supported by the industries. In the area of fair trading typical examples of such interest structures are the different positions taken by small and medium-sized enterprises and by big industry, or by retail industry vs. wholesale business on issues of aggressive marketing strategies such as combined offers, rebates, price comparisons, etc. Behind these *prima facie* neutral and horizontal regulative issues structural interests of divergent nature may transpire.

If we apply the categories of comparative institutional analysis, the issues can be divided into four different categories depending on the size and distribution of the stakes involved. In the first catregory we find issues with uniform high distribution of stakes. Trade secrets, confusing imitations, comparative and disparaging advertising are situations involving high stake business interests on both sides. In a second category we have issues with uniform low stake distribution. Arguably, misleading advertising at least prior to legislative regulation is an issue involving many potential wrongdoers and many potential victims. The stakes are certainly higher on the side of competitors, than on the side of consumers, but are relatively evenly distributed. Thirdly, there are regulative measures that target a specific industry group restricting substantially the choice of marketing instruments, while bringing alleged benefits for a large and dispersed group of consumers. The issues in this category can be called

---

[187] See Reich, *Internal Market and Diffuse Interests* (Bruxelles: Story-Scientia 1990), 15 f.

[188] Komesar admits the need for multiple interest analysis. He insists, however, that such analysis should also consider the same factors determining political participation, namely: absolute per capita stakes, uniformity of distibution, size of group and complexity of the issue, the cost of information. He adds: "As such, one can imagine a whole range of interest groups concerned about any particular governmental decision. These groups may vary in size, heterogeneity, per capita impact, endowed knowledge, or any of the other factos that have been suggested in this chapter. Their political influence could be ranked according to the factors suggested in the two-force model." See Komesar (1994), 89.

sectoral. This is an example of skewed distribution of stakes. Prohibitions, or severe restrictions on tobacco, children or alcohol advertising are examples of such stake distribution. Finally, there are situations, where on the surface the regulative measure affects uniform distribution of low (or medium) stakes. Under the disguise of neutrality the measures may, however, accord greater benefits to certain interest groups at the expense of broad consumer interests and consequently present a situation of skewed distribution. Regulations on rebates and special offers are examples in point. This tentative categorisations of regulative issues and size and distribution of stakes is presented in the table below.

Distribution	**Uniform High**	**Skewed**	**Skewed Mulitple Interests**	**Uniform Low/ Mid-range**
Size and distribution of stakes	high concentrated v high concentrated	high concentrated v low dispersed	high/medium-range concentrated v high/medium range concentrated v low dispersed	low/mid-range not concentrated v low dispersed
Regulative issue	Quasiproperty -confusing imitation; -disparagement; -trade secrets; -corruption of employers	Sectoral Prohibition of: -tobacco -alcohol -children advertising	Preferential Abstract restrictions on certain marketing forms: - price comparisons - rebates; - promotional offers	Horizontal -general clause on fair trading -misleading advertising

Lastly, it should be noted that the particular form of intervention also affects the stakes involved. Depending on the remedies and sanctions envisaged for specific conduct the stakes may be raised or diminished. Participation in the political process will predictably be much more intensive on the part of the affected industry in case an outright prohibition on the marketing of specific product than if general standards leaving broad margin for interpretation are on the legislative agenda. The threat of injunction on a particular advertising message will assumably not provoke strong reactions, given the broad variety of communication means at the disposal of every trader.

3.3.2 The costs of information and participation

Participation in the legislative process on the part of affected institutional actors will depend not only on the size and distribution of stakes but also on the cost of information and organisation connected with participation. Information costs depend on the complexity of the regulative issue and the costs associated with acquiring the

necessary understanding. A simple and emotionally charged issue may have a strong potential to provoke participation even on the part of broad and otherwise dormant majority.[189] Conversly, complex law and public policy questions requiring expertise may pass unnoticed. Rules on deceptive and unfair advertising are generally likely to provoke popular support without triggering strong reaction among the general public. Issues of sector regulation may be more complex to approach, but could incidentally attract public attention if they relate to health and safety or the environment (as is the case with tobacco advertising for instance). Finally, issues of preferential regulation tend to be muddled and difficult to penetrate.

The second component in the analysis of the costs of participation in the political process relates to the costs of organisation. In the political science and economics literature diffuse interests are given as a typical example of rational disinterest in organisation. The difference in value preferences and hierarchies makes it impossible to integrate consumer interests in collective bargaining. Moreover, the pulic good qualities of consumer information gives rise to severe free riding problems, making it difficult for consumers to organize into membership-based organisations. Non-members also benefit from the initiatives of the activists organisations without paying any costs for it.[190] Therefore private organisations have few incentives to improve the overall consumption standards. One should not forget, however, that lobbying is not the only way by which consumers partcipate in the political process. Consumers are also voters and as such they may exercise considerable influence at the polls. This ability will, however again depends on the complexity of the issue and its potential to provoke media attention.[191]

In contrast to consumers, industry is as a rule well organised into membership associations. Political influence (lobbying) is just one among the broad variety variety of goals these industry organisations are set up to pursue. The plurality of objectives usually makes membership attractive, ensuring continuity and financial stability. It endows these organisations with advantages of synergy, knowledge and economies of scale. Likewise, the capacity of such organisations to acquire information and expertise about specific regulative issues is high.

Finally, the costs of participation largely depend on the characteristics of the political process in terms of size, complexity and openness.[192] Here generalizations are of little use. One can sweepingly say that the political process in small jurisdictions may reveal a higher degree of transparency and accessibility than that in a big jurisdiction. Conversely, it has been claimed that complex political structures such as federal structures (and for that matter the Community political process) tend to open more room for influence of concentrated and well-organized groups.[193] Such groups can

[189] Komesar speaks of a stock of "simple symbols" which provides some social issues with easy recognition. Komesar (1994), 73.
[190] See Reich (1990), 15 f.
[191] "Each culture has certain subjects such as religion or ethnicity that are part of the common experience of the members of that culture...Because the press and the media provide cheap and accessible information, press and media response is a central element in determining the degree of majoritarian influence." Komesar (1994), 73.
[192] "The more complex and extensive the political process, the more difficult it is to understand its rules and discover its channels of influence – both formal and informal. These various costs of information and the associated costs of organizing political action often have a threshold or fixed quality." Komesar (1994), 72.
[193] Scharpf (1997).

invest in gaining knowledge about complex decision-making processes and thus find effective ways to influence the political agenda. Interest groups, which can muster the resources to study these complex decision-making processes, can expect to be successful in their lobbying activity. Last but not least, constitutional traditions may be based on an open or more closed nature of the legislative and the political process (by for instance different regulation of access to information), which encourages or discourages participation. This would have immediate implications for the chances of diffuse groups to participate in the political process and have their concerns addressed. In a negative sense, small and transparent jurisdictions may be more susceptible to majoritarian bias, whereas federal jurisdictions create more levels at which strong interest groups can find a sympathetic ear to their demands.

3.3.2.1 Risk for minoritarian or majoritarian bias

The interest structure for most of the regulative issues that enter the sphere of fair trading promises a rather balanced consideration of the issues in the political process, although with a substantial tilt towards the interests of business and less visible and recognizable attention to the interests of consumers. One should not, however, be hasty to exclude any risk for bias in the political process in a minoritarian or in a majoritarian direction. For industry the situation may change with shift towards greater specification of the regulative issue in terms of substance or in terms of industry sector. In the latter instances industry is likely to mobilize and organize for better representation in the political debate. One such shift in the area of marketing and advertising is witnessed in attempts to regulate the marketing of certain products, like tobacco or alcohol. Such attempts reveal different distribution of stakes with the stakes of the regulated industry being much higher and concentrated than those of the broad interests in the name of which regulation is undertaken. Another reshuffling of interests could possibly take place if certain marketing methods were more narrowly associated with certain industries. For instance, attempts at regulation of direct marketing face a more concentrated interest structure on the business side than that created through generally applicable prohibitions of deceptive advertising.

Likewise, interests may awaken and mobilize if restrictions on specific forms of marketing are sought that would create benefits of trade for identifiable industry groups. Limitations on aggressive price reduction campaigns, sales promotions and sales under production costs are often driven by organizations representing medium- and small-size enterprises, which perceive the new marketing strategies as a threat to the competitive *status quo* and associate possible legislative intervention with some benefits from trade.

In all of the interest constellations discussed above a risk of minoritarian bias in the political process is at hand. It may be expected that the industries threatened by regulation will be sufficiently motivated to organize and lobby in order to exert influence on the political process either by completely blocking the intended regulation or by trying to soften the instruments and effects of regulation. Likewise, a particular industry may feel that regulation in a certain direction could bring benefits of trade, and would actively push the issue through the legislative process. Provided that the losers from the novel regulation are primarily to be found in the broad consumer community, resistance is unlikely.

Whereas interests on the part of industry may take different shape depending on the regulative issue involved, it appears at least *prima facie* that no such variations are likely to occur on the consumer side. *Ex ante* regulation consumers are typically a big and anonymous mass with low and highly dispersed stakes. They have difficulty to even recognize the regulative issue as one affecting their interest. The debate is likely to be dominated by industry. This is, however, not the full story. One important caveat applies. As Komesar reminds us, there are situations where a dormant majority can be successfully mobilized to participate and influence the political debate. Crucial is the emergence of a catalytic sub-group that would represent higher stakes in comparison to the rest of the group and that would feel motivated to move the issue to the political arena on behalf of the whole group. We can imagine here action by an interest group of high-stake investors in shares (consumers of financial services) lobbying for instance on the issues of more transparent financial markets and better control of insider trading. Even if the prevailing number of shareholders consisted of small-stake actors, for whom it would not pay to even recognize the issue (rational disinterest), this group of high-stake actors would still continue to have a perceptible interest of improved regulation that would justify the costs invested in lobbying and organization.

Alternatively, as Wilson pointed out, it may suffice that a skillful entrepreneur emerges who is able to mobilize the majority or at least to convincingly threaten to do so.[194] In such situations we may face a genuine attempt to represent consumers' best interests. One example that has acquired emblematic significance in the consumer protection field is the activist work of the American consumer advocate Ralph Nader in the 1960s and 1970s.[195] In a somewhat different vein, it can happen that a group outside the circle of consumers defines itself as acting in the interest of consumers of its own accord (self-appointed consumer advocates). A benevolent scenario finds an internal motivation for action that diverges from, but does not run contrary to, the 'genuine' interest of consumers. A political group or actor may simply find it attractive to stand out as pro-consumer in the general political debate. Pushing consumer interests in fair trading law may be bringing voting points or may move the image of an organizations in a desired direction.

A malevolent scenario involves misappropriation and misrepresentation of interests, culminating in regulative results running contrary to the genuine interest of consumers. The usual example is industry organizations lobbying for restrictive tariffs or quality standards in the name of consumers but pursuing anti-competitive (and hence anti-consumer) effects. In the case of fair trading industry representatives may on the surface support restrictions on advertising and marketing in the name of consumers while pursuing competitive advantage over import products that are less adapted to the existing regulative framework.

Also on the consumer side, the characteristics of the policy issue involved in terms of benefits from participation and costs of gathering knowledge and understanding, matter. If we consider the stakes, the more palpable the interests affected, the greater the chance of even diffuse interests being activated. In this respect fair trading does not

[194] See Wilson (1980), 357 ff.

[195] Wilson provides an example of less felicitous entrepreneurial politics, namely the power of mobilization through the skillful machinations of Joseph McCarthy, launching the 'McCharthyist' era in American history. Wilson (1980), 370.

promise a constant and intensive attention on the part of the public. The stakes are as a rule very low.

The costs for the majority of becoming informed (or at least becoming sensitized) is an important variable. This potential is more readily available where the regulative issue is less complex and easier to mobilize under the impression of a powerful metaphoric language. Fair trading is not particularly conducive for such situations to emerge. Although the interests of consumers are likely to be substantial in aggregate terms, violations of fair trading rules unlike other consumer-related scandals (like the Mad Cow disease and the Thyroid accidents) rarely make newspaper headlines. At any rate, Komesar's analysis sharpens our attention for situations where the particular combination between regulative issue and interest arrangement may result in a majoritarian orientation or majoritarian bias of the political debate. This may be facilitated by the relatively moderate stakes industry has in the regulation of fair trading.

3.3.2.2 Protectionism and paternalism

Seen from a slightly different angle, some of the instances of majoritarian and minoritarian bias may be related to two familiar although debatable categories of policy-making, popularly known as protectionism and paternalism. With the term *protectionism* one usually dubs political decision-making where, under the disguise of public interest objectives, regulation is introduced that is in fact driven by attempts to favor a particular domestic industry.[196] It may be a question of conferring benefits to one domestic industry at the expense of another (sector protectionism), or more typically, at the expense of foreign competitors. In the latter case domestic industry may even support an otherwise burdensome regulation, knowing that it is better adapted to meet the requirements than is the import industry. Regulation may thus be relied upon to impede imports and assure windfall profits to the better-adapted domestic industry. Protectionism is probably one of the most widespread and tenacious forms of minoritarian biases in the legislative process. According to liberal economists the costs of protectionism are invariably borne by the consuming public.

Fair trading is *prima facie* not an area where protectionist policy-making has a natural place. General standards against unfair and deceptive practices appear neutral and meant to be equally applicable irrespective of industry sector. Yet as we noted above there are forms of regulation that under a neutral surface can more negatively affect certain industry sectors or imports, thus securing gains of trade to less competitive industry sectors or to domestic industry and trade in relation to imports. Such are the examples of some regulations on direct marketing, on aggressive promotional techniques, rebates and special offers, etc. The area is thus not fully immune against the allure of protectionism.

Paternalism can be placed on the opposite side of the scale between minoritarian and majoritarian influences. There are instances of regulation, where the majority substitutes the preferences of certain group of individuals with its own preferences, the main argument being that the individuals are not in a position to independently decide

[196] Knill uses the terms 'sectoral protectionism' and 'interventionism' to describe the German regulative tradtion. See Knill (2001), 219.

in their best interest (children, drug-, tobacco- and alcohol- abusers, persons addicted to games of chance, etc.). Paternalistic interventions imply that individual choices are overridden.[197] Not all paternalist motivated regulation has a minority group as a target. In their classical article on property rights and liability rules, Calabresi and Melamed address the problem of paternalism when they discuss a third category of rules for protecting and regulating entitlements, apart from property rights and liability rules, namely inalienablity.[198] Inalienable entitlements often take the form of prohibitions of transacting with certain rights and entitlements that cannot be waived by individual agreement. Calabresi and Melamed suggest that there may be good efficiency arguments for such prohibitions. Among the justifications for inalienability, the authors highlight a specific category of external effects that are of non-pecuniary nature. Thus, the preference exhibited by some for pornographic literature or for slavery may cause disquiet and moral concern with another social group. This category of justifications is called moralisms. A major source of transaction costs in this case is, apart from high numbers, the fact that this category of external costs "do not lend themselves to collective measurement which is acceptably objective and nonarbitrary."[199] In the view of Calabresi and Melamed prohibitions on grounds of moralism can be successfully analyzed in efficiency terms. It may be more cost-efficient to prohibit transactions with an entitlement, then to regulate entitlements through property or liability rules.

Another category of justifications for inalienability is paternalism. The authors distinguish between self-paternalism and true paternalism. Under self-paternalism the authors classify instances of "individuals passing a bill of rights so that they will be prevented from yielding to momentary temptations which they deem harmful to themselves."[200] According to Calabresi and Melamed this type of limitation cannot really be called paternalism. It is moreover a fully Pareto- efficient solution, since here the individual decides for himself and no one else knows better what is best for him.[201] Self-paternalism entails giving up some freedom of choice in the short run, but this is in order to secure long-term freedom of choice.[202]

Marketing and advertising do not directly affect the exchange of goods. As indicated in the analysis of market information, they are a function of the market for goods and services. Nevertheless, regulations and limitations on marketing and advertising may well be undertaken with the intention to limit the exchange and the consumption of certain goods and services. Restrictions on tobacco advertising, on alcohol and drugs advertising are examples that readily come to mind. Although these rules are not equal to prohibitions of smoking or drinking they are intended to reduce consumption.

---

[197] See Ogus (1994), 51.

[198] Calabresi/Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review*, 1089 ff., at 1113.

[199] Calabresi/Melamed (1972), 1111.

[200] Calabresi/Melamed (1972), 1113.

[201] In the political science literature this type of decisions are called self-binding, or pre-commitment. The analogy is with Ulysses' decision to tie himself to the mast of his ship in order to resist the 'fatal attraction' of the sirens. In Elster's reading Ulysses is "the model of rational compensation for irrationality", see Elster, *Ulysses and the Sirens* (Cambridge, MA: Cambridge University Press, 1984), 36 ff. Offe, *Modernity and the State: East, West* (Cambridge, MA: MIT Press, 1996), 38.

[202] Calabresi/Melamed (1972), 1113. On differing views on paternalist interventions from liberal and antiindidvidualist perspectives, see Ogus (1994), 52 f.

Alternatively we can say that these rules affect the entitlement to information about the products in point and can arguably be classified as self-paternalism. Naturally, in making collective choices, not all actors agree on these limitations. What is perceived as a necessary self-limitation by some could well be considered as an extreme limitation of freedom of choice by others. Self-paternalism in a (democratic) political process is therefore always a result of majoritarian decisions and may well be a case of majoritarian bias.

Calabresi and Melamed reserve the term 'true paternalism' for prohibitions where the majority decides for a certain minority group what is in the latter's best interest under the presumption that it cannot decide for itself. The classical example is of limitations on the rights of children to perform certain transactions. In the area of advertising and marketing, restrictions on targeting children with commercials may have true paternalist tilt. Calabresi and Melamed see also this category of prohibitions as conforming to efficiency considerations. True paternalism can in their view not be measured in Pareto-efficient terms, since the reason for the prohibition (inalienability) is that the person would be better off if prohibited from transacting.

Calabresi and Melamed use the terms 'moralisms', 'self-paternalism' and true paternalism for genuinely intended interventions. They warn, however, that moralist and paternalist motives could be used to disguise political agendas and for redistributional goals. Alternatively, genuine moralist and paternalist concerns could bring about unwanted distributional results. Thus, prohibiting liability waivers in product sales contracts would not only benefit the injured. Since producers tend to transfer the costs of regulation into product prices, such prohibition would arguably be to the disadvantage of make poorer all those consumers who were not injured and paid a higher price. In the words of Calabresi and Melamed:

> The danger may be, however, that what is justified on, for example, paternalism grounds is really a hidden way of accruing distributional benefits for a group whom we would not otherwise wish to benefit.[203]

Summing up a cursory analysis of the politics of fair trading demonstrates that the political process and in particular the legislative process is not saved from the risks of mal-representation. Specific exemplifications of this abstract analysis will be provided in the country analyses below.

3.4 Fair trading through the judicial or the administrative process

As indicated above, due to the changing standards and forms of unfairness, the legislative process only rarely defines the precise standards of fair trading. More often the statutory provisions take the form of broad general clauses, the implementation and shaping of the standards being left to alternative institutions such as the courts and/or administrative agencies. Thus, even post legislative intervention, substantial room is left to market actors to continue to influence the the standards of fair trade. With the exception of the common law system in England, all European countries have such general clauses on fair trading (fair competition, fair commercial practices, *bonos mores*, etc.). By keeping the standard broad and open, the political process recognizes

[203] Calabresi/Melamed (1972), 1115.

the dynamic of markets and the need to base the standard of fairness on the changing perceptions of market actors. Decisive in the area of fair trading become not the formal rules, in the sense of statutory provisions created in the course of the legislative process. An obligation to trade fairly is very elusive and says little on the actual demands on business conduct.[204] The real significance of the general clause is in its function to delegate decision-making to courts or other institutional structures and it can be understood only when read in conjunction with the provisions regulating enforcement.

The impressive variety of approaches to enforcement in the area of fair trading has been noted on multiple occasions. In the context of this study I have chosen to group these approaches into two broad groups, namely those that vest confidence in the judicial process and those that rely in different variations to the administrative process as a continuation of the political process. In the latter category one can classify the broad variety of specially created public agencies (consumer, fair trading, competition agencies) or public interest bodies with general functions (such as public prosecutors, economic ministries).

The interest structure at the stage of implementation of fair trading standards resembles that in the political process, but there are also some qualifications. Importantly, decisions here address specific situations of allegedly unfair conduct by identified market actors. The actions in the adjudicative and in the administrative processes are often retrospective (even though the available remedies may have prospective character, like in the case of injunctions). For some categories of issues the distribution of stakes *ex ante* and *ex post* may differ. Low and dispersed stakes may become high and concentrated stakes after the violation. These are the situations of shifted distribution in Komesar's terminology which he illustrates with product safety. A diffuse mass of potential victims turns in a case of serious product injury into a group of few actual victims with high and uniform stakes.[205] As Komesar argues settings of shifted distribution, where the victims' low distribution becomes high uniform distribution ex post, are conducive to adjudication.

Although such situations are not excluded in the sphere of fair trading, they are not at all typical. For cases of deceptive advertising addressing broad consumer circles, the uniform low distribution of stakes likewise will persist even after deceptive information has been disseminated in the market places and some consumers have been actually mislead.[206] There is, however, a specific shift to be observed. In many cases one and the same message will be differentially perceved, interpreted and valued by individual consumers and consumer sub-groups. Therefore what appears exceptionally problematic in deciding on deception cases is to take account of those

---

[204] "Es hat den Anschein, als sei mit dem Begriff der Guten Sitten zu allen Zeiten und in allen Ländern der Wissenschaft und der Rechtsprechung ein Rätsel aufgegeben worden." Teubner continues this quote from Deutsch (*JZ*, 1963, 385 ff., 389), as follows: „Diese begriffliche Unklarheit hat weitreichende Konsequenzen. Sie wirkt sich in der verfassungsrechtlichen Deutung aus und in den Methoden der Generalklauselpräzisierung." Teubner (1971), 9.

[205] Komesar (1994), 134 ff.

[206] It should be recalled that fair trading as defined here does not cover the sphere of contractual relations. Deception leading to contract would typically be examined under the rules of contract law and is therefore not subject to the present analysis.

differential perceptions and value systems and choosing whose perceptions to respect. Generally, one can either take a majoritarian approach and proceed from the perceptions of the average consumer or take a minoritarian approach and give credit to the perceptions of consumer minorities. We will see that this choice and weigning of interests has been a major source of uncertainty in the decision-making process at this level.

3.4.1 Reliance on the judicial process

Turning to the judicial process, we have to think of participation in the form of litigation, where the actors step in the decision-making process as plaintiffs and defendents. According to Komesar, there are three basic characteristics of the judicial process: higher threshold access costs; limited scale and judicial independence. These characteristics structure the conditions for participation and account for the advantages and disadvantages of the judicial process compared with the market and the political processes.[207] The multiple guarantees for the courts' independence insulates the judiciary from political influence and pressure and makes them a suitable institution for deciding on a number of issues. At the same time, the access to the judicial process is usually expensive and highly formalized through rules on standing, evidence and jurisdiction. Importantly, courts are substantially limited in their decision-making in that they cannot choose the issues to decide. These characteristics of the judiciary account for the fact that uniform low stakes are notoriously underrepresented in the courts. Likewise complex issues requiring massive expertise and resources are dealt only highly imperfectly in the judicial setting.

The specific characteristics of the judicial process combined with analysis on the size and distribution of stakes provides a tentative picture of the likeliness of different issues to be litigated. The typical situations of disputes between competitors (trade secrets, confusing or slavish imitation, disparaging advertising) will retain the uniform high/medium distribution of stakes. Litigation is likely with the reservation that sometimes voluntary settlment may be more advantageous. For cases of deceptive advertising addressing broad consumer circles, the uniform low distribution of stakes likewise will persist even after deceptive information has been disseminated in the market places and some consumers have been actually mislead, which makes litigation improbable. One should remember that fair trading law is confined to the pre-contractual phase of a transaction. Normally, once a contract (purchase, hire, lease, etc.) is being entered into, the rules of contract law are being triggered with all the specific protective mechanisms connected with contractual liability (damages, cancellation of contract, etc.) So the damages to the individual consumer in the case of misleading advertising, for instance, consist chiefly in expenses made for checking the authenticity of a particular advertising claim. These are typically negligible sums for each individual consumer. The fact that the aggregate loss may be substantial is hardly sufficient to induce consumers into pursuing this issue through the political process. The probability that consumers will recognize their interests and by mobilizing will prompt a legislative debate to redress the situation, is consequently also very low. ven if the stakes for individual consumers may be non-negligible, the differential between the actual purchase and a possible more advantageous one is typically too minuscule to justify the cost of litigation for individual consumers.

---

[207] Komesar (1994), 123.

An occasional shift in distribution can only be noticed on the side of competitors. A deceptive advertising campaign in the mass media, if successful, may temporarily attract a huge number of consumers and be perceived as undue diversion of customers by the competitors. The dispersed negligible losses of individual consumers accumulate to a big aggregate loss of the competitor. Only in such situations can adjudication be expected. The extent to which this probability will be realised will depend on the the free-riding opportunities it provides to other traders on the same market.

The judicial process can, however, be designed in a variety of ways, giving more generous or more restrictive access of interested actors to the courts. In the case of fair trading the particular conditions determining the *locus standi* of individual competitors, of trade associations and of consumer associations have differed substantially from one legal system to another. The possibilities for collective action deserve particular attention. As we demonstrated earlier, in a competitive market setting there may be too little incentive for individual competitors to counteract deception and unfairness, since the costs and uncertainty of litigation may be high and the gains may be distributed among other 'free-riding' competitors. Likewise consumers are notoriously lacking the incentives to litigate. The action by trade associations and consumer associations have been seen as different forms of overcoming these barriers to effective representation of interests in the judicial process.[208]

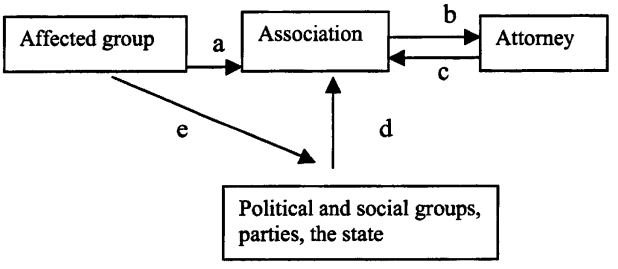
At the same time, the economic and institutional analysis of collective action suggests that there are a number of imperfections and even risks in such procedural devices. The first obvious problem is the one defined by Mancur Olson as rational disinterst in organisation, which also applies to legal prosecution of small claims. Especially broad-based organisations with many members and general objectives would as a rule have a difficulty to summon and represent common interests in the long run. The first reason is familiar and relates to the size of stakes. Members in such organizations will not have substantial benefits from participation. The second reason is associated with the notorious free-riding problems.[209] In the event that legal action by the organisation will benefit the whole group (and this is typically the case with injunctions in fair trading law), many will feel that they can use the benefits without having to stand for the costs of litigation.

Another, more serious risk from generous possibilities for collective action in the courts is seen to lie at a different level and is usually referred to as 'the principal-agent problem'.[210] All systems of collective interest representation inevitably rely upon intermediaries – a union or/and a lawyer – to mobilize and represent the collective interest. The incentives for these intermediaries may differ (and often do differ) from the interest to be represented. Both union staff and professional lawyers usually pursue their self-interest of continued activity, income or fees. The system thus accepts this

[208] See on such tendencies under German unfair competition law, Jordan/Rubin (1979), 549.
[209] Schäfer, 'Die ökonomischen Grundlagen der Bündelung gleichgerichteter Interessen im Prozess' in: Basedow/Hopt/Kötz/Baetge, *Die Bündelung gleichgerichteter Interessen im Prozess* (Tübingen: Mohr Siebeck, 1999), 67 ff.
[210] See Olson (1965), 34.

divergence of interests but expects, much like in the market, public virtue to flow from private vice.[211] Problem arise, however, from the poor possibility for control over the procedural behaviour of the association on the part of the represented members. The reasons are similar to those that explain the difficulties of collective action in general, namely rational disinterst in organisation. In addition, legal action is per definition a complex matter. It requires time and expertise for its proper assessment, which few are ready to invest. The weak control on the part of members is problematic chiefly because there may be a divergence in the incentives for litigation between the association as such (i.e. its staff) and the represented members.

The principal-agent problem in a collective action through organization may become even more severe if the chain of actors involved is longer. Schäfer provides the following graph capturing different constellation of dependency and control:



He summarizes the possible situations under four categories:
(*i*) Where the influence of the affected group (a) over the association and of the association over the attorney (b) is high, while the reverse influence of the attorney on the association (c) is weak and the direct or indirect influence via other political and social groups (d, e) is low, then we are in the hypothesis of a 'true' association with active membership, that controls the actions (legal and other) of the association. The principal-agent problem here is minimal.
(*ii*) Where the attorney's influence on the association (c) is strong and all other dependencies (a, b, d, e) are weak, then there is a risk of so-called *Anwaltsverein*, which can abuse the collective action for personal interests.
(*iii*) Where the decisive influences over the actions of the association come from political parties or other strongly engaged social groups (e.g. environmental groups) or from the state (a) and the association controls the attorney, while the control of the affected group is weak both on the association and on the political parties and the state (a,e), then there may be a principle-agent problem. The problem will be greater the more dispersed the interests.[212]

Economists warn that if possibilities for collective litigation are cheap and efficient the right of action of the association might be used for purposes other than those originally intended by the legisator.[213] Harassing competitors through frivolous lawsuits may be one consequence. Winning political battles or voters may be another.

[211] Komesar (1994), 119.
[212] Schäfer (1999), 67 ff., at 86.
[213] Bebchuk, 'Suing Only to Extract Settlement Offers' (1988) 17 *JLS*, 437 ff.; Rosenberg/Shavell, 'A Model in Which Suits are Brought in for their Nuisance Value' (1985) 5 *International Review of Law and Economics*, 3 ff.

3.4.2 Reliance on the political/administrative process

Finally, decision-making in fair trading may be shifted partly or entirely to the administrative process. This solution has become increasingly widespread with the rise of the welfare state with a growing number of issues requiring intervention on public policy grounds. As a compromise solution between choking the political process with all the details of regulation and leaving clear-cut policy matters to the courts, an independent regulative agency first emerged in the United States and later (and more hesitantly) in Europe. Variation in design is considerable, but different solutions boil down to two alternatives: delegating decision-making to a public agency, with quasi-adjudicative competencies entrusted to decide on and enforce fair trading standards. Alternatively, a public agency may be assigned the role of a consumer advocate, representing diffuse low-stake interests that are otherwise having poor chance of representations in the courts (general courts or administrative courts).

Irrespective of the particular design, such schemes have in common that the state shoulders the dispersed interest and contributes to shifting the distribution from low to high stake uniform. It is the state which is responsible for enforcement and will defend the statute against possible claims of unconstitutionality.[214] One of the early protagonists of administrative enforcement in the sphere of fair trading, the US Federal Trade Commission, and belongs to the most famous examples of regulatory bodies designed to face complex issues of fairness in competition.[215] With the Magnusson-Moss Act of 1938 the Agency was empowered to act against unfair and deceptive conduct in business. In the context of the American system of checks and balances, the regulative agency has been a controversial construct. Accusations have been directed from different quarters. Whereas some have been critical about the lacking democratic legitimacy of the independent agency and its expansive powers, others have conversely been concerned with the insufficient powers at the Agency's disposal and about the risk for 'capture' by the regulated industry.

Such strategies have become favourite objects of attack on the part of prominent representatives of public choice and interest group theory of politics.[216] The main misgivings as to the performance of such agencies are again based on analyses of the principal-agent problem. Critics claim that the problem is even greater by public action than by private. Public agencies are typically 'low visibility' arenas, where enforcement is complex and can be monitored and controlled by interested groups only at a substantive cost.[217] The more severe malfunctioning professed by public choice theorist is the capture of public agencies by the very interests they aim to regulate.[218]

---

[214] Komesar (1994), 136.

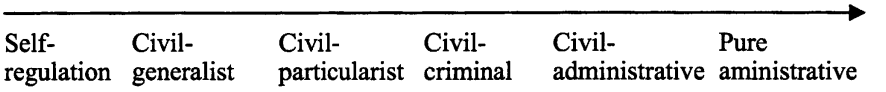
[215] See Reich (1984). Pertschuk, *Revolt Against Regulation. The Rise and Pause of the Consumer Movement* (Berkeley, CA: University of California Press, 1982). For the experience in the UK, see Cranston, *Regulating Business. Law and Consumer Agencies* (London: Macmillan Press, 1979).

[216] Posner (1992), 530 ff.

[217] See Trubek, 'Environmental Defense' in: Weisbrod/Handler/Komesar, *Public Interest Law: an Economic Analysis of Institutional Innovation* (Berkley, Univ. of California Press, 1978); Trubek, 'Public Advocacy: Administrative Government and the Representation of Diffuse Interests', in: Cappelletti, M. / Garth, B., *Access to Justice,* Vol. III (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979), 447 ff., at 457.

[218] See Bernstein, *Regulating Business by Independent Commission* (Princeton: Princeton Univ. Press, 1955).

Clearly, neither the market nor the political process can alone produce a fully satisfactory solution to problems of information asymmetry, opportunistic behavior and undersupply of market information. In reality, the two act as complementary processes supported by the judicial and/or the administrative process ensuring avenues of enforcement.[219] Nevertheless, different systems tend to gravitate towards either private or public enforcement. If we have to place the different approaches on a scale from market via judiciary to public intervention, we have to start with self regulation, pass via a 'civil generalist' model based on general clauses of tort liability, go over to a 'civil particularist' model where groups of traders and consumers are given brought enforcement opportunities, to a 'civil criminal' with a mix of public prosecution and civil enforcement. A mixed 'civil administrative' model would involve a combination between private enforcement and agency action. Finally a pure administrative m The scale may look like this:



In the country analyses we will study the design and performance of different enforcement models in more detail. Some of them build on private (individual and/or collective) enforcement through the courts. Others rely on public intervention in different forms. At the same time, it should be observed from the outset that many of the models present hybrid solutions, hosting elements of both public and private enforcement. The difference should therefore not be overstated.[220] As will become evident from the historical review, many of the challenges of creating effective and adaptive institutional framework for regulating fair trading have in fact been related to finding appropriate solutions to problems of paticipation and representation of collective interests.

Given the widely divergent approaches to enforcement of fair trading rules across countries, a legitimate question may be: What happens with the evolving standard of fairness when entrusted in the hands of different decision-making bodies and processes? Can one rely that different enforcement designs will produce largely the same results? This will be among the central questions to be explored in the following national chapters. Here only a hypothesis can be ventured. Different processes can be predicted to show different degree of responsiveness to different interests. Different organizations emerge as products of the particular institutional framework and the activity of these organizations tends to shape the standard of fair trading.

The question acquires particular relevance in the context of European integration, where harmonisation is expected to be achieved mainly through approximation of substantive rules. Traditionally and respect for the sovereignty of Member States is

[219] It should not be forgotten that the intervention of the legislator in some countries is very limited and the evolution of fair trading standards has prevailingly been left to self-regulatory bodies. On developments in the UK, see Circus, *Towards a General Rule to Trade Fairly?* (Essex: 1988); Miracle/Navett, *Voluntary Regulation of Advertising. A Comparative Analysis of the UK and US* (Toronto: Lexington, 1987).

[220] This is rightly observed by Schäfer when analysing punitive damages and similar constructions: "Mit derartigen Konstruktionen entfernt man sich allerdings vom klassischen Zivilrecht und gelangt zu hybriden Lösungen, die nur noch schwer von verwaltungsrechtlichen zu unterscheiden sind. Schäfer (1999), 91.

particularly emphasized in the field of procedure and institutional structures since these issues touch upon most salient aspects of the system of government.

The comparative systems approach informs the following chapters, although the individual analyses do not represent a full-blown application of this approach in all its richness and detail. As already stated, the comparative study of national institutions is not, and cannot be, led by the normative ambition inherent in this approach, namely identifying the least imperfect decision-making system for solving law and public policy problems. Firstly, there are not one but many issues that belong to the broad area of fair trading law and applying the comparative systems approach to all these issues would have made the study unmanageable. Second, cross-country institutional comparison demonstrates the limits of this approach when applied in the abstract and without reference to specific national institutional context. As Komesar himself states, it is real governments (and one should add real judiciaries and real markets) that are at work and these real institutional processes are embedded in a specific instiutional context, which requires a deeper historical study and understanding.

The approach, however, is invaluable in providing a holistic way of looking at the legal system highlighting its complexity and its interrelatedness with different decision-making processes usually treated separately. By focussing on the costs and benefits of participation in political and judicial decision-making (transaction, political participation and litigation) we can analyse the legislative and the judicial process as aggregate institutions. In contrast to traditional legal analysis, the approach makes possible evaluations at the systemic level. Consequently, it enables us to tentatively compare the relative efficiency of these processes and to discover bottlenecks of representation and participation.

II NATIONAL PATHS: GERMANY AND SWEDEN COMPARED

Within the EU, Swedish and German law are often regarded as the two far ends of a continuum between private and public law approaches to the regulation of fair trading.[1] In this part of the study I want to capture the spirit of each of the two models of fair trading law, that of Germany and that of Sweden. Following the historical institutional approach, I explore the influence of the past on the present institutional framework of fair trading law in the two countries. My ambition is, on the one hand, to analyse the extent to which the institutional framework of fair trading is conditioned by general features of the respective national legal system and by deeply embedded attitudes and expectations of the relevant actors. On the other hand, by tracing the evolution of the framework in each country and by focusing on interests involved and enforcement design, I want to try and evaluate the capacity of the framework to accommodate altering interests and preferences as well as its overall potential for institutional change.

Through a comparative historical review I wish to prepare the ground for analysis of the impact of European integration on these divergent national institutional paths. If legal change is constrained by deeply embedded national institutional heritage, then what are the prospects for effective legal harmonisation at the European level?[2] And, if changing interests and preferences can influence the institutional framework, how does European integration affect such preferences and interests?

The following two chapters take us on a journey from the second half of the 19th century to the end of the 1980s, when European integration first started to exert palpable influence on national fair trading laws of the Member States.[3] Two major phases can be distinguished in the development of fair trading law in the two countries during this period. The first phase, starting at the turn of the 20th century (Chapter 4) and reaching until right after the II World War, can be described as the formative years of the original institutions of fair trading law. The second phase, commencing in the 1960s, is mostly characterised by a process of integration of consumer interest objectives into the institutional matrix and the reconciliation of these new objectives with the traditional unfair competition approach (Chapter 5).

As mentioned above, Germany and Sweden have been in constant intellectual contact and German legal thought and lawmaking have been recognized as influential in Sweden in many respects, in particular during the second half of the 19th century and the first half of the 20th century.[4] Yet the analysis below demonstrates some important differences in the macro-institutional context in which the institutions of fair trading have evolved in each country. This in its turn appears to have been decisive for the

---

[1] See Micklitz et al. (2000).

[2] Legrand (1996), 52 ff.

[3] It may be objected that Sweden joined the European Union at a later stage. Yet, as a member of EFTA it had to keep a close eye on European developments and was bound by many of the principles of European law. See Ch. 7.1.

[4] For a detailed analysis of the influence of German legal thought on Swedish doctrine during the second half of the nineteenth century and until the 1920s, see Sundell, *Tysk påverkan på svensk civilrättsoktrin 1870-1914* (Stockholm: Nordiska bokhandeln, 1987).

emergence of two distinct approaches in solving problems of collective interest representation, in choices made between decision-making processes and in the evolving understanding of fairness.

The so-called 'German model' of unfair competition law is based on the famous Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb, UWG*) of 1909. The main features of this model and its private law profile have remained largely unchanged throughout almost a century. It has frequently been noted that the discipline of unfair competition law has attracted considerable interest in German legal practice and has given rise to countless court decisions and an estimated even higher number of settlements. Likewise, the attention that unfair competition law has received in legal doctrine in the form of monographs, commentaries and scholarly articles as well as the intellectual sophistication of the analyses, have arguably no counterpart in any other legal system worldwide. The UWG has served as a source of inspiration for lawmakers throughout Europe and even beyond that continent.

In Sweden, by contrast, the corresponding legal field never enjoyed the same attention. The first legislative initiatives were inspired by developments in Germany and can be dated back to approximately the same time. The lawmaking process, however, proved to be sluggish. A modest statutory product saw the light first in 1919 and was subsequently followed by a few half-hearted attempts at more efficient regulation. The original institutional framework was fundamentally reconceived in the 1970s and subjected to the ideology of consumer protection. At this time in modern legal history it was Sweden that came to play the role of a pioneer, and Swedish legislation attracted attention as a potential model for legislative borrowing, an alternative discussed even in Germany.

The literature on UWG is copious, authored by numerous local commentators as well as by foreign scholars, interested in comparative analysis.[5] Quite to the contrary, doctrinal analysis of the Swedish marketing practices law is relatively scarce.[6] This can be explained by the limited size of the country's population and the number of people exercising the legal profession respectively as well as by the more scarce application of the fair trading laws in practice. But it is also consequence of the more limited role played by legal doctrine in the process of interpretation of law in general. On the other hand, the gap is to some extent compensated by the availability of rich preparatory material, such as reports by legislative commissions and governmental Bills. These are often drawn up with the active participation of legal scholars and often display high academic standard. The difference is by no means accidental, but as we are going to see in the following, it reflects fundamental distinctions between the

[5] It suffices to mention some of the numerous UWG commentaries: Baumbach/Hefermehl, *UWG Kommentar*, 20th ed. (München: Beck, 1998); Köhler/Piper, *UWG Kommentar*, 3rd ed. (München: Beck, 2002); Emmerich, *Das Recht des unlauteren Wettbewerbs*, 3rd ed. (München: Beck, 1990); Jakobs/Lindacher/Teplitzky, *Handbuch des Wettbewerbs* (Berlin: de Gruyter, 1994). For an early and still authoritative comparative analysis from a Swedish perspective, see Bernitz (1969), 438 ff.

[6] See, however, the commentaries by Bernitz, *Svensk marknadsrätt*, 3rd ed. (Stockholm: Juristförlaget, 1991); Bernitz, *Marknadsföringslagen* (Stockholm: Juristförlaget, 1997); Bernitz, *Otillbörlig konkurrens mellan näringsidkare* (Stockholm: Norstedts, 1993); Svensson/Stenlund/Brink/Ström, *Praktisk marknadsrätt*, 7th ed. (Stockholm: Norstedts Juridik, 1996).

German and the Swedish legal and political system. Methodologically, one has therefore to accept an imbalance in the use of source material.

The analysis in the following proceeds on two levels. On a micro-analytical level, the focus is on the interests affected by the emerging rules of fair trading and on the enforcement design as decisive for ensuring representation and participation of these interests. Enforcement design implies on the one hand a principled choice between institutions deciding on the standard of fairness. Should decision-making be exercised by the legislative, the administrative or by the adjudicative process? Different decision-making processes reveal different costs and benefits for participation and representation and respectively influence the possibilities for participation of the affected interests. Rules on access to courts or administrative agencies, on costs of litigation or representation, can influence the perceptiveness of the institutional framework for changing interests. Especially in the case of general and abstractly formulated statutory rules, enforcement largely determines when, how and whose interests are going to have access to the enforcement institutions, and will respectively render meaning to the substantive rules. The analysis of enforcement mechanisms relies on a conceptualisation of enforcement as a transmission belt between interests, formal rules and evolving standards of fairness.

On a macro level, the historical institutional approach not only requires a more distinctly historical perspective than is usual for traditional studies of law as it stands. It also dictates an interest in the broader institutional context in which the rules on fair trading have evolved. As elaborated in the analytical part of this study (chapter ...), three groups of institutional factors are elicited as being of most immediate importance for the shaping of fair trading law: the prevailing understanding about the relationship between the political and the economic process, i.e. the balance between liberalism and interventionism; the basic constitutional outlook on division of power between alternative institutional structures and on the role of the judiciary; and finally, the status of private law and the stringency of the distinction between private and public law.

4 THE ROOTS OF FAIR TRADING INSTITUTIONS IN GERMANY AND SWEDEN

In both Germany and Sweden, fair trading entered the political debate as an issue of its own right in the second half of the nineteenth century, when the first systematic attempts at stipulating formalized general rules against unfair trading were undertaken. To be sure, rogue and dishonest trading was not a novel phenomenon. However, during the mercantilist era these problems were taken care of through special internal arrangements and regulations of the guilds.[7] The introduction of freedom of enterprise and laissez-faire in the mid-nineteenth century economy opened the gates for a brave new world of free competition.[8] In this world the structure of industry and trade constantly changed, processes of concentration of economic power were enhanced and, importantly for our purposes, more aggressive marketing methods were advanced. The latter trend was perceived as particularly detrimental by small and medium-sized businesses.

In some of the German territories, where the French *code civil* applied before 1900, attempts were made to follow the French example and extend classical tort law provisions to the area of unfair competition. Building on the general clause of Art. 1382 *code civil*, economic actors sought an injunction against allegedly unfair business practices as well as compensation for economic loss, resulting from such practices. These efforts, however, did not find the support of the courts. In a landmark decision concerning trademark protection, the Imperial Court (*Reichsgericht,* RG*)* refused to allow a broad interpretation of the existing general tort law. The court referred to the recently adopted Ordinance on Economic Activity (*Gewerbeordnung)* of 1869 as well as to the Trademark Protection Act of 30 November 1874, declaring that it was not empowered to restrict economic freedom beyond the scope of these statutes.[9]

The ideological grounds for this restrictive line of reasoning were twofold. First, freedom of economic enterprise was considered the most progressive achievement of economic thought at the time and there was a natural fear not to violate this principle by replacing old barriers with new ones.[10] Second, in the aftermath of unification in 1871 it was important for the young German state to bolster the hierarchy of decision-making authority, with the legislature as principal law-making institution. The role of courts as decentralised decision-makers was to be confined to strict statutory interpretation. It would take a concerted effort on the part of lawmakers and doctrine

---

[7] See references in Kohler, *Der unlautere Wettbewerb* (Berlin & Leipzig: Dr. Walter Rotschild Verlag, 1914), 33 ff. For Sweden references to the „skrå-, hall- och handelsordningar" of the 17th century can be found in Bernitz/Modig/Mallmén, *Otillbörlig marknadsföring* (Stockholm: Jurist- och samhällsvetareförbundet, 1970), 37.

[8] Recent accounts in economic history suggest that the demise of guild control has not been as radical as it sometimes appears. See Fukuyama, *Trust* (Penguin Books, 1995).

[9] RG 3, 68. The decision of the Court was severely criticized in legal doctrine. Even nowadays in the influential Baumbach/Hefermehl commentary, the decision is qualified as a misconception. The reasoning in the decision according to the same authors is based on an "ungeheurlichen Gegenschluß" (horrendous *a contrario* conclusion) that everything outside the Trade Mark Protection Act should be regarded as allowed. See Baumbach/Hefermehl (1998), Einl. UWG, Rdnr. 16, 188.

[10] Brüggemeier, 'Probleme einer Theorie des Wirtschaftsrechts' in: Assmann/ Brüggemeier/Hart/Joerges, *Wirtschaftsrecht als Kritik des Privatrechts* (Athenäum, 1980), 9 ff., at 44 ff.

to justify the compatibility of competitive freedom and the ideal of *Rechtsstaat* with a broad-based unfair competition law.[11]

The stringent attitude on the part of the judiciary left no other choice to political decision-makers than to fill in the lacuna through specific legislation. On 27 May 1896 the Act Against Unfair Competition *(1896 UWG)* was passed. It constituted one of the first open legislative interventions in the sphere of economic life and signalled the end of a short period of true liberalism in Germany.[12] Only a decade after this first act entered into force, the need for reform became evident. After relatively brief consultations a new Act Against Unfair Competition was adopted in 1909 (*1909 UWG*).[13] Despite a number of subsequent amendments the 1909 UWG remained practically unchanged in its core provisions and even today provides the foundations for fair trading law in Germany.

As in Germany, Swedish courts were not inclined to use general tort law in order to respond to increasing needs to regulate competitive behaviour.[14] Moreover, there was no general clause on tort liability to build on in Swedish tort law. Compensation for pure economic loss was envisaged only for damage caused by acts constituting violation of the Penal Code, or in cases specifically provided for in legislative acts. Legal doctrine also showed a rather conservative attitude to any attempts to introduce a principle of compensation for damages inflicted in the course of economic competition.[15] This pushed developments towards searching for a special statutory solution.

The first motions to introduce legislation on unfair competition were submitted to the attention of the Swedish Parliament in 1897, only a year after the first German Unfair Competition Act entered into force. In the following decades, German unfair competition law was to be a constant source of inspiration and point of reference for Swedish lawmaker and legal doctrine.[16] However, the legislative process proved to be very protracted and cumbersome. A legislative commission summoned in 1909 produced a draft proposal six years later, in 1915. The draft in many respects conformed to the 1909 German *UWG*.[17] Yet with reference to the principles of economic freedom and freedom of the press it had been severely trimmed during the legislative process. An Act with Certain Provisions against Unfair Competition was adopted in 1919 (Lagen den 19 juni 1919 med vissa bestämmelser mot illojal konkurrens, 1919 IKL), but largely remained limited to the area of trade secrets, corruption and bribery of employees.[18]

---

[11] See Ulmer, 'Wandlungen und Aufgaben im Wettbewerbsrecht' (1937) *GRUR*, 769 ff., at 770. Efforts in this direction were particularly made by the two fathers of German unfair competition law, namely Kohler, *Das Recht des Markenschutzes* (Würzburg: 1884), and Lobe, *Die Bekämpfung des unlauteren Wettbewerbs*, Vol. I-III (Leipzig: Dieterische Verlagsbuchhandlung, 1907), 8 ff.

[12] See Brüggemeier (1980), 44.

[13] Gesetz gegen den unlauteren Wettbewerb vom 7.6.1909, RGBl 499.

[14] See Kleineman, *Ren förmögenhetsskada* (Stockholm: Juristförlaget, 1987), 206 ff. with references to early case law.

[15] Winroth, *Om skadestånd. Strödda uppsatser IV,* 2nd ed. (Uppsala: 1907), 138.

[16] Prop. 1931:175, 6.

[17] See SOU 1966:71, 46.

[18] See lagen den 19 juni 1919 med vissa bestämmelser mot illojal konkurrens.

A new Bill was submitted in 1931[19], leading to the 1931 Act with Certain Provisions against Unfair Competition (Lagen 1931 med vissa bestämmelser mot illojal konkurrens, 1931 IKL). This new law contained a prohibition of unfair advertising, and provisions on free gifts and similar offers. Even after the amendments in 1931, the legislation on unfair competition remained limited in scope and effect.

4.1 Macro-institutional context

The evolving institutions of fair trading and the divergent paths taken by the two countries can hardly be understood without looking into some distinguishing features of the German and the Swedish legal systems at the time. As mentioned above, three aspects appear particularly relevant: the prevailing attitudes to the balance between economic freedom and state interventionism; the dominant constitutional understanding on separation of powers, and finally the attitude towards private law and the delineation between private and public law.

4.1.1 Between economic liberalism and interventionism

For Germany the period between the second half of the 19th century up to the 1930s was a period of shift from mercantilism to liberalism, and then back to growing intervention of the state in economic life. This period started with German unification under Bismarck, continued with the Wilhelmine Era (1890-1914) and ended with the collapse of the Weimar Republic (1918-1933). It should be noted that the decentralized nature of political power in the German lands "kept alive a host of feudal communal institutions, such as the guilds, for much longer than in other parts of Europe."[20] On 21st June 1869 the *Gewerbeordnung* of the North-German Confederation proclaimed freedom of economic enterprise *(Gewerbefreiheit)* and freedom of economic association *(Koalitionsfreiheit)* as fundamental principles of the national economy. This regulation was regarded as the "positive legal Magna Charta" of competition freedom.[21] The *Gewerbeordnung* was accompanied by dissolution of the concession system and by promotion of free international trade. These developments provide conspicuous evidence of the far-reaching spread of liberal economic ideas, most convincingly elaborated in Adam Smith's influential treatise *The Wealth of Nations*.

In 1871, two years after the *Gewerbeordnung*, the establishment of the German Reich opened a market of considerable proportion. In combination with the industrial revolution, the rise of Germany as a unified state triggered the highest rates of economic growth in its modern history.[22] The blessings of free trade and free competition were, however, short-lived. The 1873 crash of the Vienna stock-exchange became the beginning of a long and painful period of economic crisis, the so-called Great Depression. According to some analysts, the depression put the end of the short phase of genuinely free competitive capitalism and marked a transition to organised capitalism.

In the face of economic crisis cartelisation became widespread, accompanied by an intense process of organizing industry into formal interest associations. There were

[19] Prop. 1931:175.
[20] Fukuyama (1995), 246.
[21] Brüggemeier (1980), 47.
[22] For a historical account and statistical data see Brüggemeier (1980), 47.

frequent appeals for public intervention in economic life for protection of national industry and labour. With Chancellor Bismarck's programme of national economic policy ('*nationale Wirtschaftspolitik*') in 1878/1879, a political programme of state interventionism was put into action, which according to Brüggemeier announced "the beginning of the end of a bourgeois society based on liberal and open economy". The same author speaks of a turn from "free trade liberalism to protectionist collectivism", supported by an interest community of industry and agrarian capital on the basis of protective duties.[23]

In the interwar period the trend towards intervention of the state in economic affairs was enhanced. Interventionism could be noticed on two levels and in two somewhat contradictory directions.[24] On the one hand, the state recognised, albeit half-heartedly, a need to counteract cartelisation and exclusion of free competition characteristic of the quickly growing German economy at the turn of the century. On the other hand, the state entered directly as an actor on the market stage. Following the takeover of the German Railways by the state, public enterprises started to appear in other sectors of the economy as well, partly subject to different rules than private economic entities.

Concerning the process of cartelisation the validity of agreements restricting competition, like price cartels, rebate cartels, agreements on market sharing or boycott measures, was in principle upheld by the courts. In the words of the Imperial Court in a seminal decision of 1890:

> Aus dem Prinzipe der Gewerbefreiheit folgt keine Unantastbarkeit des freien Spiels wirtschaftliche Kräfte in dem Sinne, dass den Gewerbetreibenden der Versuch untersagt wäre, im Wege genossenschaftlicher Selbsthilfe die Bethätigung dieser Kräfte zu regeln und von Ausschreitungen, die für schädlich erachtet werden, abzuhalten.[25]

The validity of cartel measures was maintained in respect to members, acting in violation of the cartel agreement, as well as in respect to negatively affected third parties[26] Regarding the first situation, agreements were examined on the basis of general freedom of contract doctrine. Provided that the agreements were voluntarily entered into, the view of the Imperial Court was that freedom of enterprise pronounced in *Gewerbeordnung* of 1871 could not prevent tradesmen to agree on limitations of

---

[23] *Ibid.*, 49. In comparative terms Kitschelt/Lange/ Marks/Stephens speak of a "business-coordinated market economies" (CME) and "liberal market economies" (LME). See Kitschelt/Lange/Marks/Stephens (eds.), *Continuity and Change in Contemporary Capitalism* (Cambridge: Cambridge University Press, 1999). The emphasis here is obviously on business-labour relations. Within this taxonomy Germany and Sweden may fall under the same category of CME. Our analysis, however, reveals other aspects that rather produce divergence. In Germany the state much more openly allows protectionist corporate practices and even actively intervenes in a protectionist manner. In Sweden open protectionism is less tolerated and free market attitudes are stronger.

[24] See Ulmer, *Sinnzusammenhänge im Recht des unlauteren Wettbewerbs* (Berlin: Verlag von Julius Springer, 1932), 17 ff., Ulmer summarizes the developments like this: "Der Staat in seiner immer stärker werdenden Tendenz zur Beeinflussung privater Wirtschaft arbeitet zum Teil auf Mehrung der gebundenen, zum Teil umgekehrt auf Wiederherstellung der freien Konkurrenz". *Ibid.*, 9.

[25] RGZ 28, 238 ff., at 244.

[26] See the case RGZ 28, 238 („Börsenverein der deutschen Buchhändler").

their own economic freedom.[27] Thus the liberal principle of formal freedom of contract was upheld without attention being paid to material outcome and factual position of the parties. In the second situation, i.e. in respect to non-members (typically boycotts and refusals to supply), the practices were examined on the basis of tort law and non-contractual liability. The court rejected a narrow view that a damage could entail liability only if the act infringed a criminal law or an acquired private law good. At the same time, the liability threshold was set very high. Obstructive measures were to be prohibited only when they threatened the economic existence of the targeted enterprise.[28]

The tolerant attitude of the judiciary was in harmony with a general acceptance of trusts and cartels. As Wieacker notes, cartels were perceived positively in almost every political quarter, although the ideological grounds for acceptance differed.

> ...[A]ll groups of society, except the classical liberals, had been in thrall to the idea of Genossenschaft and had therefore seen cartels as a perfectly proper feature of the economy; entrepreneurs, planners of the macroeconomy, and socialists had all in their very different ways contrived to accommodate in their economic models the combinations of businessmen and then the coalitions of workers which the state recognised in the late nineteenth century.[29]

Given the failure of the judiciary to effectively prevent cartelisation, the only way to exercise control went via the political process. In 1923 a Cartel Ordinance was introduced, marking the first attempt to counteract concentration and abuse of economic power in Germany. However, even after the entry into force of the Ordinance, actual attitudes in society and in the courts remained unchanged and the implications of new legislation was limited. According to Fikentscher the Ordinance may have even enhanced the process of cartelisation. It laid down the conditions under which cartel agreements were legal and thus inadvertently triggered a new wave of concentration.[30] The *Verordnung* was to be applied by a special Cartel Court, while the *Reichsgericht* continued its tolerant line of reasoning towards boycotts and other forms of obstructive measures undertaken by cartels.[31] With the rise of National Socialists to power a process of forced cartelisation was initiated, turning into an official national policy. The Act on Cartelisation of 1933 provided legislative sanctioning for this policy.[32]

In contrast to Germany, mercantilism was never deeply entrenched in Sweden. The guilds spread to Swedish small towns first in the 17th century, i.e. considerably later than on the Continent.[33] They lasted only about a century and arguably affected

---

[27] This position was elaborated in the Reichsgeicht's decision in the Sächsischer Holzstoff case, RGZ 38, 155 referred by Fikentscher, *Wettbewerb und gewerblicher Rechtschutz* (München: Beck, 1958), 167; cf. Bernitz (1969), 320.
[28] See RGZ 28, 237 ff., at 247 f.
[29] Wieacker (1995), 433.
[30] Fikentscher (1958), 172.
[31] *Ibid.*, 179 ff.
[32] Waelde/Gunderson, 'Legislative Reform in Transition Economies: Western Transplants - A Shortcut to Social Market Economy Status?' (1994) 43 *ICLQ*, 347 ff., at 369.
[33] Strömholm, 'General Features of Swedish Law' in: Bogdan (ed.), *Swedish Law in the New Millennium* (Stockholm: Norstedts Juridik, 2000), 31 ff., at 32.

mentalities and attitudes among economic actors to a lesser extent. The first steps towards a laissez-faire economy were taken through a Royal Ordinance of 1848. This Ordinance theoretically abolished the guild system. More important than the abolition of the guild system was the deregulation of trade and dismantling of the complicated and burdensome regulation of privileges and licenses aimed at keeping trade within the cities. This was achieved with the 1864 Ordinance on economic freedom (*Näringsfrihetsförordningen*).[34] With this act the state guaranteed free access of economic actors to the market and the right to conduct business without licensing or control by a public agency. Liberalisation of imports and a marked decrease in import duties were introduced towards the second half of the 19th century.

Once embraced, the laissez faire philosophy was considered so fundamental that any intervention of the state to limit economic freedom was for a long time viewed with utmost suspicion. Whereas the doctrine was characteristic for most of the industrialised countries at the time, its implementation was carried out with remarkable vigour and consistency in the Nordic countries and in Sweden in particular.[35] This is probably due to the export-import character of its economy. Throughout the 19th century Sweden's economy was dependent on the massive export of raw materials (primarily timber and iron) to the quickly expanding industrial nations in Europe, mostly Britain and the Netherlands. Even up to the second half of the 19th century the raw material based industry stood for 60 percent of the country's exports.[36]

As in Germany, the economic crisis toward the end of the nineteenth century in conjunction with national industry lobbying led to some concessions in terms of Sweden's *laissez faire* philosophy. In 1880 the advocates of protective import duties won a victory over liberals, and import duties were reintroduced for wheat and goods produced by local industry.[37] Nevertheless, protectionist intervention remained much more moderate than in most continental countries.[38]

But also in Sweden economic growth and increased competitive pressure brought about tendencies towards monopolisation of the economy. This development became visible at the turn of the century and intensified in the time between the two world wars. As in Germany, the attitudes towards cartelisation among politicians and experts were generally positive.[39] Cartel agreements were regarded as an efficient and modern form of organization of the economy, allowing for better planning and internal regulation of the respective industry sector. Moreover, concentration of industry was seen as a natural and desirable response to centralization on the part of workers and employees within the trade union movement.[40] The emergence of strong collective labor organizations paved the way to efficient and stable agreements between

---

[34] The first regulation which made decisive steps towards laissez-faire economy was SFS 1846:39.

[35] Bernitz (1969), 31 ff. "Konkurrensfrihet, konsumtionsfrihet och en vittgående avtalsfrihet torde ha uppfattats som tämligen självklara, ehuru okodifierade utgångspunkter för förmögenhetsrätten, vilka inte fordrade någon närmare normering i sig.", 32.

[36] Nilsson, *Sverige i förnyelsens Europa* (Malmö: Liber-Hermod, 1995), 58.

[37] Inger, *Svensk rättshistoria*, 4th ed.(Malmö: Liber Ekonomi, 1997), 219.

[38] Nilsson (1995), 58.

[39] For a detailed overview and analysis of the early developments of competition law in Sweden, see Bernitz (1969), 410 ff.

[40] The history of the trade unions in Sweden culminated in the establishment of the Swedish Trade Union Confederation (LO), an organization uniting the large part of trade unions in Sweden in 1888.

employers and employees and contributed to the effective management of social conflict, something highly appreciated by the government authorities. In 1937, the seminal Agreement of Saltsjöbad (Saltsjöbadsavtalet or huvudavtalet) was signed between Swedish Employers' Association (SAF) and the Swedish Trade Union Confederation (*Landsorganisationen i Sverige*, LO). The agreement was to be of crucial importance for the maintenance of social peace and stability in the country, by virtue of which LO acquired a uniquely influential position in Sweden's political and economic life. The Saltsjöbad agreement marked the beginning of a novel way of conflict settlement between labour and capital, based on compromise and negotiations.

Although sympathy for cartelisation was a general trend in Europe at the time, the lenient attitude of the Swedish lawmaker is remarkable even in comparative perspective. Illustrative is the debate on the advantages and disadvantages of cartels and trusts held in 1910.[41] The legislative outcome from this debate was a rather toothless Act on Investigation Regarding Monopolistic Undertakings and Associations (Lag om undersökning angående monopolistiska företag och sammanslutningar) that entered into force in 1925. The Act took a markedly soft approach to cartels. It authorized the government (Kungliga Majestät) to commission investigations of undertakings and associations of monopolistic nature, with the purpose of establishing their effect on prices and turnover. Restrictive agreements were not addressed at all. No sanctions were envisaged either, thus leaving it to the government to decide on appropriate measures to rectify possible distortions in competitive relations for each individual case.[42] The only novel measure introduced by the Act was a duty for undertakings to provide information in the course of investigations.

In particular since the 1920s and with the strengthening positions of social democracy in Sweden, an ambitious project of building '*folkhemmet*' (– a concept that is usually translated as the Swedish Welfare State but which literally means 'the people's home') was put into action.[43] The key architects behind this project were prime minister Per Albin Hansson, economy minister Ernst Wigforss and the prominent intellectual couple of economist Gunnar Myrdal and his wife Alva Myrdal. All three believed in enlightened rationalism and modernity and brought forward a program of radical but successive social and economic reform, suitably labeled social engineering. The main measures in this program were of distributive character and focussed on aggregate welfare.

To sum up, several distinguishing features of the Swedish outlook on public intervention in economic life and on monopolization can be identified from a historical overview. The first and most important characteristic was a general reluctance of the state to act as an arbiter in competitive relations and an ensuing tolerant attitude to cartels and trusts. Another characteristic, as observed by Bernitz, was the way in which consumer and employees views were brought to the fore. Finally, the importance attached to publicity as a way to prevent and counteract competitive abuses deserves mentioning. As we will see below, this soft approach of inducing economic actors to a desirable conduct has remained a key instrument for public regulation in Sweden.[44]

---

[41] Bernitz (1969), 411 f.
[42] Bernitz (1969), 414 ff.
[43] Westberg, *Den demokratiska drömträdgården* (Stockholm: Statsvetenskapliga institutionen, 2003).
[44] Bernitz (1969), 413.

4.1.2 Constitutional constraints

As discussed in the previous chapters, the approach to fair trading law and in particular the choice of enforcement design is strongly influenced by some basic principles and doctrines of constitutional law. More particularly, the attitude towards the separation of decision-making powers and the position of the judiciary and public administration vis-à-vis the executive and the law-making branch of the state appear to be of crucial importance.

At the time when the first discussions on legal regulation of fairness of competition took place, neither Germany nor Sweden was a full-fledged democracy in the present meaning of the word. However, both countries were experiencing turbulent developments towards the establishment of democratic government, and increased participation of growing strata of the population in political decision-making. At the same time, there were substantial differences in traditional modes of government.

As mentioned above, Germany was established as a unitary federal state (*das Deutsche Reich*) only in 1871 when the North German Confederation, dominated by Prussia, was joined by the states of Hessen, Baden and Bayern. This put an end to long-cherished dreams of Grand German unification to include the two main powers, Prussia and Austria.[45] The year of unification was also the year in which the Constitution of the German state entered into force. According to the Constitution, the main political decision-making bodies in Germany were the Federal Council (*Bundesrat*), consisting of representatives of the individual states, and the Parliament (*Reichstag*). The so-called Constitutional Order for the first time in German history provided for elections based on general, direct and secret suffrage.[46] However, elections for Parliament in the largest and most powerful of the federal states, namely Prussia, continued to be based on three classes up to 1919. The federal character of the young state was visible from the central position of the Bundesrat in the legislative process. Much attention in the constitution was devoted to ensuring a balance between the powers of the *Reich* and those of the federal states.[47]

Nineteenth-century constitutional thinking in Germany was strongly influenced by the philosophical idea of the *Rechtsstaat*, which also left its clear marks on the 1871 Constitution. Despite its complex intellectual roots and shifting connotations, the concept of the *Rechtsstaat* is usually seen as intimately connected with Kant's theory of public law and his vision of the state as 'union of persons under laws' and as 'Staat der Vernunft'.[48] The Kantian concept of *Rechtsstaat* embodied a liberal understanding

---

[45] With the Peace of Prague of 1866 the dissolution of the German Alliance (*Deutscher Bund*) between the two main powers Russia and Austria was declared. The same year the North German Union was proclaimed. In November 1870 the North German Union concluded the November Treaties with the states of Hessen, Baden and Bayern.

[46] Eisenhardt, *Deutsche Rechtsgeschichte*, 3rd ed. (München: Beck, 1999), 392 ff.

[47] In contrast to the early Constitution of the German Alliance, the Constitution of 1871 did not contain a catalogue of citizens' rights.

[48] See for a detailed account Ewald, 'Comparative Jurisprudence: What Is It To Try a Rat' (1995b) 143 *University of Pennsylvania Law Review*, 1889 ff., at 2046 ff. According to Ewald, whereas the main idea could be traced back to thinkers like Machiavelli, Locke, Montesquieu and Rousseau, the concept itself was a very German creation with no counterpart in any other language. Kant himself never used the very term *Rechtsstaat*, which was, arguably, coined by Robert von Mohl; Ewald (1995), 2047.

of the state, at the center of which lay individual autonomy. The three main principles that constitute the Kantian concept are freedom, equality and independence.[49] Every member of society should as citizen be free to develop his (female suffrage still not introduced) own personality, be equal before the law and independent. As a guarantee of individual autonomy, the idea of setting constraints on the authority of the sovereign (the prince, the monarch and more abstractly the state) was advanced.

It is important to emphasize that the main concern to which the *Rechtsstaat* responded was not democracy, but rather securing individual liberty from the tyranny of a despot as well as from the tyranny of the majority. Ewald points out that in contrast to the prevailing attitude in Britain and America, liberalism and democracy were for many German thinkers of the time perceived not as mutually reinforcing but as notions poised in sharp contradiction.

> Liberalism aimed at greatest possible freedom for the individual, and at limiting the power of the state; its origins were to be found in Kant and in the anti-monarchical tradition of England and medieval Germany. The origins of democracy, on the other hand, were to be found in Robespierre and the Terror: the true heirs to the absolute despotism of the French monarchs. The aim of democracy was not freedom but community, and the maximum participation of the individual in the power of the state.[50]

This two-dimensional essence of the Kantian conception of the *Rechtsstaat* explains at least partially the apparent paradox that the *Rechtsstaat* was seen as fully compatible with a non-democratic and even absolutist order of government in Imperial Germany.[51] Thus although not a democracy, the political organization of the Reich in a number of respects was seen as in conformity with the idea of *Rechtsstaat* (state under the rule of law).[52]

In a state characterized by the rule of law the judiciary occupied an important position. Judges were to be impartial and objective servants of the state, so in that sense they could not compare with the much stronger status enjoyed by common law judges. At the same time, the judiciary had to be independent and this independence was to be secured not only by constitutional rules on tenure, but also by the conceptual clarity and perfection of the laws. Only a perfect edifice of concepts standing in logical and unequivocal relation with each other could allow the judge and the lawyer to act in a value-neutral and objective manner.[53] Conceptual jurisprudence (*Begriffsjurisprudenz*), and the brand of legal positivism associated with it, can consequently be regarded as having a set of subtle constitutional underpinnings.

---

[49] As Ewald notes, later on the last principle of independence was substituted by liberal adherents to the *Rechtstaat* idea with a principle of protection of private property. This, however, was not the original Kantian definition. Ewald (1995), 2046.
[50] Ewald (1995), 2053.
[51] Ewald (1995).
[52] Eisenhardt (1999), 394.
[53] See about this ideal Sundell (1987), 55.

The adoption in 1877 of the Code of Criminal Procedure (StPO) and the Code of Civil Procedure (ZPO),[54] as well as the Act on the Judiciary (*Gerichtsverfassungsgesetz*) of 1879, played an important role for implementation of the *Rechtsstaat* principle in the young German state. These legal acts facilitated the growth of a unitary judicial system in Germany. They remained valid for more than a century, and according to legal historians ensured the continuity and the preservation of the tradition of the *Rechtsstaat* throughout modern German history.[55] Another fact of seminal importance was the establishment of the Imperial Court in 1879. The independence of the court was almost unrestricted, whereby the judges were not subject even to disciplinary control. The choice of Leipzig and not the capital Berlin as seat of the RG came to underscore the distance and independence of the judiciary from the power of the State, as well as the federal character of the Reich.[56] Constitutional review (*Verfassungsgerichtsbarkeit*) was recognized under the constitutions of some of the German Länder already at the beginning of the nineteenth century and before the foundation of the German Reich. The 1871 Constitution did not stipulate explicitly constitutional review. However, the *Bundesrat* performed some functions of a constitutional court, by trying disputes between the *Länder* as well as complaints by individual citizens on grounds of denial of justice (*Justizverweigerung*).[57] Indicative of the strong position of the courts is also an early developed system of judicial review of administrative acts.[58] Students of comparative public administration explain the prominent role of courts in the process of ensuring the legality and accountability of the administration by the fact that the *Rechtsstaat* developed in Germany before the introduction of parliamentary democracy.[59]

In contrast to Germany, Sweden has a long history as a unitary and independent state. Many features of the political and administrative system can be traced back to local custom and political tradition and have retained their structuring influence on modern ways of government.[60] One particularly important historical fact is that the feudal forms of government never really took graft in Sweden.[61] According to Herlitz, the Swedish state rests for a long time past on a particular interplay between royal and popular power.[62] An older tradition of popular government accounts for a number of persisting devices providing democratic influx in public life at local and central level. Among these were the election of lay members of the courts as a source of local influence over the process of administration of justice, a centennial tradition of self-government in boroughs ('*socknar*') and other local units, and finally, the right to "go

[54] Both acts entered into force in 1879.
[55] Eisenhardt, (1999), 399 ff.
[56] *Ibid.*, 399 ff.
[57] See Eisenhardt (1999), 348 ff. and 401 ff.
[58] See Knill, (2001), 65.
[59] Hereby a contrast is often drawn to early parliamentary developments in Britain, but, as we are going to see, this consideration is valid also in regard to Sweden. See Heady, *Public Administration. A Comparative Perspective* (New York: Marcel Decker, 1979). Cf. Knill (2001), 66.
[60] For a brief review of early Swedish legal and political history see Strömholm (2000), 31 ff.
[61] See Strömholm (2000), *ibid.*
[62] "Den svenska staten vilar sedan gammalt på en egenartad växelverkan mellan kungamakt och folkmakt." Herlitz, *Svensk självstyrelse* (Stockholm: Gebers, 1933), 24 ff. Herlitz, *Grunddragen i det svenska statskickets historia,* 6th (Stockholm: Norstedts, 1964), 216 ff. See also Söderlind/Petersson, *Svensk förvaltningspolitik* (Uppsala: Diskurs, 1986), 34.

to the king". All this serves to affirm the proposition that Sweden never set up a truly feudal order under which local rulers could exercise an unlimited power.[63]

In addition to these more ancient forms of popular participation in government, a Parliament (*Riksdag)*with representation of the four estates – nobility, clergy, burghers but also peasants – had existed in some form in Sweden ever since the fifteenth century, partly supporting and partly controlling the Crown.[64] In the seventeenth century, during the so called Age of Liberty (*frihetstiden*) Sweden produced one of the earliest – even if short-lived - attempts of parlamentarism, understood as a political order based on a government elected by and accountable to Parliament and not to the monarch.[65] Parliament continued to be elected on the basis of the four estates until 1866, when general, secret and universal suffrage was introduced.[66] Without formal change in constitution, the order of representation was radically reformed through an amended Parliamentary Act (*riksdagsordning*). The powers of the monarch were significantly curtailed and a bicameral parliament was introduced.[67] The main function of the indirectly elected first chamber was to effectively check excesses of proportional representation.[68] Parliamentarism received an important breakthrough in 1905 when a cabinet was formed by a representative committee set up by Parliament, and no longer by the monarch. Since 1917 the executive has consistently been appointed in accordance with the composition of Parliament.[69]

Against this backdrop it is understandable that the idea of the *Rechtsstaat* did not come to play the same role in Sweden as it did in the context of Continental European developments. As discussed above, in Germany as well as in most other European states on the Continent, the concept of the *Rechtsstaat* was a product of nineteenth century constitutionalism. The *Rechtsstaat* was about setting constraints on the absolute power of the monarchy through a successive democratization and parliamentarisation of the state, but it was equally about protecting individual autonomy against the tyranny of the majority. Sweden does not really "fit into this scheme".[70]

Of course, political turmoil on the Continent did not remain unnoticed and new trends of political thought became influential also in Sweden. The Instrument of Government (*Regeringsformen*, RF) adopted in 1809 built on the principle of separation of powers between different branches of government, namely the king, the parliament and the courts. It tried to avoid the evils of unchecked royal supremacy and of unlimited parliamentary power. According to Strömholm this occurred partly in the light of the then well-established local political experience, but also under the influence of

---

[63] Söderlind/Petersson (1986), 34.
[64] See Strömholm, who makes an analogy with the Parliament standing behind the monarchy in Tudor England; Strömholm (2000), 33.
[65] On the unusually high level of press freedom in late 18th Century Stockholm, see Hallberg, *The Age of Liberty* (Stockholm: Statsvetenskapliga institutionen, 2003).
[66] See Inger (1997).
[67] Inger (1997), 187.
[68] Immergut, 'The rules of the game: The logic of health policy-making in France, Switzerland and Sweden' in: Steinmo/Thelen/Longstreth, *Structuring Politics: Historical institutionalism in comparative analysis* (Cambridge: Cambridge University Press, 1992), 57 ff., at 78.
[69] Inger (1997), 190 ff.
[70] Söderlind/Petersson (1986), 34.

contemporary European ideologies.[71] Yet in contrast to continental developments, it appears that the issue of protecting individual autonomy against majoritarian excesses had not attracted high political priority in Sweden.[72]

In the period of joint monarchical and parliamentary rule, one important institution used to avoid decision-making stalemate was that of Royal Commissions. The Commissions represented consultative bodies to which representatives of interest groups and political parties were appointed by the Royal government to draft legislative proposals in a process of consultation. The drafts were then send for written comments to interest groups in a so-called '*remiss*' procedure. This procedure expanded with the increased attempts of the monarch to avoid parliamentary decision-making procedures at the beginning of the 20th century.[73]

With the victory of the Social Democrats in 1932 the existing parliamentary design unexpectedly came to serve a radically different interest constellation. Notably, the first chamber was dominated by Social Democrats, which provided them with a comfortable legislative environment for implementing their policy agenda. The Royal Commissions, once serving the monarchical bureaucracy, now promoted Social-Democratic legislation. According to commentators, a transition from minority parliamentarism to majority parliamentarism came about in the early 1930s.[74]

In the above-described constitutional model, the courts, despite their formally guaranteed independence, were assigned a relatively humble role. Given the early evolution of a parliamentary tradition and the continuity in the prominent place of Parliament in processes of law-making and control of royal power, the courts were primarily regarded as interpreters of the will of the law-maker. Moreover, the separation of powers between the King and the courts was never carried out in full. Under the 1809 RF the king continued to be a member of the Highest Court.[75] While the idea of a judiciary bound by law was as strong as in Germany, judges were only to a limited extent authorized to exert control over the executive. Even in popular jargon, the courts were never perceived in Sweden as the third power in the state.[76] Legal scholars tend to underline the role of '*travaux préparatoires*' for legislative interpretation. Strömholm speaks of "judges, that are bound not only by the wording of the law, but also by the legislator's intention".[77]

---

[71] Strömholm (2000), 34.

[72] On a different note Strömholm suggests that harsh natural conditions, a scattered and rather homogeneous population, may have contributed to broad acceptance of collective fiat for dealing with many of life's hardships. See Strömholm (2000), 37 f.

[73] *Ibid.*, 79.

[74] Immergut (1992), 79 ff. with reference to Nyman, *Svensk parlamentarism 1932-196. Från Minoritetsparlamentarism till majoritetskoalition,* unpublished dissertation, Skrifter utgivna av Statsvetenskplig Föreningen i Uppsala genom Axel Brusewitz, No. 27 (Uppsala: Almqvist & Wicksell, 1947).

[75] See Inger (1997), 184.

[76] According to Louis Favoreu, the judiciary is not recognized as the third branch of power in most European countries, and this is certainly so, especially when viewed in comparison with the activist political role played by the judiciary in the United States. However, within the group of European legal systems, the modest position of the judiciary in Sweden is conspicuous. See Favoreu, 'Constitutional Review in Europe' in: Henkin/Rosenthal (eds.) *Constitutionalism and Rights* (New York: Columbia University Press, 1990), 38 ff., at 53.

[77] Strömholm (2000), 38.

In the context of this review of basic constitutional doctrines, it should finally be noted that one of the main controls over public power was to be exercised not by the judiciary, but by the media. Sweden is unique with its early recognition of the principle of freedom of the press and public access to official documents.[78] The early anchoring of this principle in Sweden in a special legal act of constitutional order, the Freedom of the Press Act (*Tryckfrihetsförordningen*, herinafter TF), has given the protection of the printed word a particularly high status in Swedish law. Freedom of the press has thus evolved into one of the most dearly cherished elements of Swedish legal and political tradition. As we are going to see in the following in the sphere of advertising regulation, this principle has produced some odd results.[79]

4.1.3 The status of private law

Historically, German legal tradition is based on Roman law.[80] The reception of Roman law in the territories of Central Europe which were part of the 'Holy Roman Empire of the Germanic Nation' occurred formally in 1495, when Roman law was adopted by the Reichskammergericht. Even after its formal reception, however, Roman law continued to coexist with a variety of local statutory and customary laws in the politically fragmented principalities.[81] Early attempts at legal codification inspired by the French *code civil* and by the general spirit of Enlightenment failed due to unfavorable political conditions.[82] Under these circumstances legal scholars at the universities played a particular role for the interpretation and application of law , as they were regularly consulted within a formal procedure called 'Aktenversendung'.[83] According to Zweigert and Kötz "law in Germany after the Reception had a rather academic and theoretical quality ... controlled by university teachers rather than by legal practitioners and it was to be found in textbooks rather than in law reports."[84] Among the major legacies of Roman law in modern German law is undoubtedly the divide between private and public law (*ius privatum* and *ius publicum*). To the domain of private law belong all norms, governing relations between individuals, and defining the freedoms, rights, obligations and risks which people have toward each other. To the domain of public law, in contrast, pertain norms, governing the organization of the state and its activity vis-á-vis individuals.[85]

---

[78] Due to the principle of free access to public information preparatory legislative materials were published in a systematic form from a very early date in Sweden. Arguably, this fact accounts for the very strong position of preparatory works in Sweden as a source of interpretation of law.

[79] For a detailed account of the history of TF, see Persson, *Exklusivitetsfrågan* (Stockholm: Norstedts Juridik, 2002). A discussion on the effect of this law on the development of unfair competition law can be found at 75 ff.

[80] The reason for the reception and for its subsequent diffusion and triumph in Germany is usually found in the absence of a centralised system of courts and of a unified legal profession in the fragmented German territories throughout the Middle Ages. See Wieacker (1995), de Cruz, *Comparative Law in a Changing World* (London: Cavendish Publishing, 1999).

[81] According to the operative Ordinance of the *Reichskammergericht* of 1495, judges were to decide cases coming before them "according to the common law of the Empire", meaning Roman law. Statutes and customs were placed on equal footing. See de Cruz (1999), 80.

[82] It is well known that one of the most celebrated texts in German legal scholarship, Savigny's 'Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft', came as a powerful negative response to early proposals for codification advanced by Thibault. See Savigny, 'Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft' (Hildesheim: Georg Olms, 1967 [1840]).

[83] On the position of the learned bench and of Faculties in Germany before the unification, see Wieacker (1995), 135 ff.

[84] Zweigert/Kötz (1998), 258.

[85] See Köhler, 'Einführung' in: *BGB*, 51st ed. (München: Beck's Texte im dtv, 2002), IX.

Private law in Germany was heavily influenced by the turbulent economic and political developments at the previous turn of the century and by emerging constitutional law doctrine. The political unification attained in 1871 provided new fuel to the debate on grand codification of civil law commenced already in the early nineteenth century. Scholarly ambitions of conceptual perfection this time coincided with a trend towards establishing strong structures of central government and the replacement of particularist laws through legislation at the central level. The codification of the BGB civil law thus acquired unprecedented political importance.[86]

Doctrinally, the BGB embodies the notion of primacy of private law guaranteeing freedom of contract and protection of private property. It was inspired by Savigny's urge towards systematic clarity and consistency, and by the even further reaching ambitions of conceptual jurisprudence. The Code was thus firmly anchored in liberal ideas of two distinct but mutually connected strands. The first one was economic liberalism. Civil law was through freedom of contract and protection of private property supposed to guarantee private autonomy and to provide the foundation of a competitive free market economy. In the spirit of economic liberalism private law should be formal and blind to individual circumstances and to arguments of fairness and justice. It was to ensure maximum predictability and certainty in economic exchange and thus to facilitate the unimpeded operation of the 'invisible hand'.

In its insistence on the equality of citizens before the law, on conceptual clarity and consistency and in its formalism, private law was at the same time highly 'political' and influenced by constitutional doctrine. The conceptual and systematic perfection of the BGB was not an aim of itself. It was to create the conditions for neutral and impartial application of the law by an independent and law-bound judiciary and administration. Scholars, applying the value-neutral techniques of juridical science, were to elaborate the laws into abstract and coherent system, and to develop their formal and logical implications.[87] Given this background, it is not surprising that German legal tradition is described by comparative lawyers as based on deductive and substantive philosophy (as contrasted to the inductive and procedural philosophy of English common law).[88] According to Peter de Kruz: "German law thinks in terms of general principles, rather than in pragmatic terms, conceptualising problems, rather than working from case to case."[89]

---

[86] See Wieacker (1995), 371 ff.

[87] Ewald (1995b): A very pertinent expression of these ideas is to be found in the following passage by Windscheid, a prominent professor on the Pandects and one of the fathers of the BGB: "Law is the ordering of the powers of will that exist in the world. The wills that exist in the world, if left to their natural impulses will collide with one another, begin to fight, and try to subjugate each other. Law creates for each will a space within which alien wills bounce off it, and within which it dominates. Law [*Recht*] is in the first instance not a constraint, but the acknowledgement of human freedom; the constraint is only the other side of the acknowledgement thus guaranteed. Positive law [*Rechtsgesetz*] only imposes duties in order to protect rights [*Rechte*]; the moral law [*Sittengesetz*] imposes only duties. If one likes epigrams one can say: positive law protects rights, the moral law imposes duties." Windscheid, as quoted in Ewald (1995b), 2072.

[88] See Knill (2001), 65, with references to Dyson, The State Tradition in Western Europe. A Study of an Idea and Institution (Oxford: Martin Robertson, 1980), 42 and Damaska, The Faces of Justice and State Authority a Comparative Approach to the Legal Process (New Haven: Yale University Press, 1986).

[89] de Cruz (1999), 91.

Another evidence of the philosophical underpinnings of private law as a main guarantee for individual freedom was the already mentioned doctrine of strict distinction between private and public law. In the private sphere the free will of the parties was to prevail. The task of the state was merely to provide a framework for private autonomy and to enforce agreements voluntarily entered into. Sometimes this was even expressed in terms close to the modern principle of 'subsidiarity' between private and public law. In the areas where private law could ensure individual autonomy, public law was to step back.[90]

The liberal foundations of the BGB have prompted a number of analysts to refer to the Code as a delayed law.[91] As noted in the previous section, German economy and society at the dawn of the twentieth century, shaken by economic crises and torn by social conflicts, had already started to embrace different ideas about the position of the state and the role of group interests. In place of the highly individualist model of civil law fortified through the BGB new ideas developed, emphasizing collective solutions and solidarity. In stead of the neutral state, visions of active state intervention in social and economic affairs for protection of national economy and labour and of the weak in society were coming to the fore.

One of the most influential advocates of these ideas in the area of private law became the prominent representative of the Germanist school of jurisprudence Otto v. Gierke (1841-1921).[92] Gierkes's major scholarly work appeared in 1887 and was dedicated to the law of corporations/associations (*Genossenschaften*)[93]. In line with the main ideas of the Germanist school, he was critical of the strong influence of Roman law and wanted to study truly German institutes and legal traditions. In the association he found a legal phenomenon that was not present in Roman law and could thus be regarded as a genuine product of the legal consciousness of the German people. It was the tendency to organize in associations, to form communities and approach social problems in a collective fashion that Gierke wanted to also normatively forward in contrast to the pure individualism of formal private law, especially in the debate about the BGB. In the excessive conceptual sophistication and formalism of the Code Gierke easily recognised commitment to individualism and conscious disregard for issues of social justice. Therefore he stood up as one of the most vocal critiques of the Code.[94]

The views held by Gierke represented a mixture of nostalgia for the time of economic regulation by the guilds and egalitarian ideas of social justice of socialist flavour, although he considered himself neither a conservative, nor a socialist. Against liberal individualism he advocated a communitarian ideal whose roots seemed to derive from mercantilist tradition. At the same time his plead for "some drops of socialist oil" in

---

[90] See Kohler (1914), 17.

[91] See Brüggemeier (1980), 9 ff., at 41; Zweigert/Kötz (1998), 143 ff.

[92] The Germanist school of jurisprudence was, similar to Savigny, strongly influenced by Herderian ideas. However, in contrast to Savigny, Germanists refused to seek the *Volksgeist* in Roman law, but insisted on the importance of studying local legal institutions. See Wieacker (1995), 286 ff.

[93] *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, 1887. In the words of Wolff, this was „ein groß angelegter Versuch in der Zeit der Pandektistik das Fortleben der Formen und Grundsätze deutscher Genossenschaftsbildung im Rechtsleben aufzuzeigen." Wolff, *Grosse Rechtsdenker der deutschen Geschichte* (Tübingen: Mohr Siebeck, 1963), 669 ff., at 689.

[94] See Wieacker (1995), 358 ff.; Ewald (1995b), 2055 ff. and 2074 ff.; Wolff (1963), 669 ff., at 701 ff.

the BGB made him an ally of the social-democrats, who were the only parliamentary group that voted against the adoption of the BGB.[95]

Gierke's plead for a social private law brought him to reject a sharp delineation between private and public law. He was consequently pursuing an ideal of the unity of the law of the German nation.[96] This is eloquently expressed in Gierke's famous arcticle on the social tasks of private law:

> Die Entstaatlichung allen Rechts im Sinne des Individualismus bedeute die Aufstaatlichung und der Tod der Volkseinheit, die Verstaatlichung allen Rechts im Sinne des Sozialismus aber bedeute die Unfreiheit und die Barbarei.[97]

Concluding on German private law, it could be said that Gierke opened a debate on social issues and their place in the German legal order, which continues to the present day. Many analysts see Gierke as the father of the idea of the *Sozialstaat*, which has subsequently been anchored in the present German Basic Law (*Grundgesetz*, GG) parallel to that of the *Rechtsstaat*.[98]

Swedish private law and doctrine were at many instances powerfully influenced by continental – German and French legal theory. In reality, however, legislative private law followed its quite specific historic path. The customary rules of private law were for the first time loosely codified in the Code of Commerce (*Handelsbalk*) of 1734, which, however, applied a rather casuistic and unsystematic approach. Already during the first half of the 19th century and obviously under the strong influence of Napoleon's *code civil*, there were plans for grand codification of Swedish civil law, mainly contracts and torts, in a new *Handelsbalk*.[99] The draft of 1826 contained a general clause on compensation of damages modelled closely after Art. 1382 *code civil*. In parallel to the codification of civil law, legislative work on a new Penal Code (strafflag) was underway. A draft was presented in 1832, referring in the part on damage compensation to the draft *Handelsbalk*. Yet neither of the drafts led to enactment. Objections were raised against the radical nature of the reform pursued, and after two negative votes in Parliament the drafts were stranded. Instead tort liability was exclusively regulated in chapter 6 of the 1864 Penal Code, relating to compensation of damages as a result of criminal act. For decades this chapter formed the sole legislative basis of Swedish tort law.

The most important codification in the area of private law was the enactment of the Law on Contracts of 1915 Lag om avtal, but it lacked the scope and ambition of previous reform suggestions. A reform in tort law had to wait until 1970. Thus, also in the field of private law Swedish developments can be characterized as incremental and marked by continuity. Suffice it to say that the Code of 1734 has never been formally

---

[95] The following citation is a classic: „In unserem öffentlichen Recht muss ein Hauch des naturrechtlichen Freiheitsraumes wehen und unser Privatrecht muss ein Tropfen sozialistischen Öles durchsickern." Gierke, *Die Soziale Aufgabe des Privatrechts* (Berlin, 1889), 13, quoted after Wolff (1963), 702. On the general clauses as fulfilling the function of such „drops of socialist oil", see Zweigert/Kötz (1998), 142..

[96] Wolff (1963), 702.

[97] Gierke (1889), 12, quoted after Wolff (1963), 701.

[98] See Ewald (1995b), 2055 ff.

[99] Lagkommitéens förslag till allmän civillag (Sthlm 1826). See reference in Kleineman (1987), 23.

repealed and that some of its provisions in the area of commercial law and real estate are still valid.[100] The Code's division into books/codes to a large extent determines the systematic arrangement of Swedish law to be found also in the Statute Book of Sweden - the most authoritative and comprehensive compilation of valid statutory law in Sweden.[101] Sweden never experienced the scholarly and political turmoil connected with grand codification of private law, and private law was not charged with the same political and ideological connotations as in Germany.

Probably because private law was never regarded in the same extent as in Germany as an embodiment and guarantor of individual autonomy and of the principle of the *Rechtsstaat*, the strife towards conceptual perfection and systemic coherence was never as outspoken in Sweden as in Germany. Neither was there a similar insistence on the distinction between private and public law. Certainly, legal positivism was characteristic also of Swedish doctrine and judiciary. However, it was a different brand of positivism, underlying the primacy of binding legal source material, instead of relying on conceptual perfection and the mastery of legal science.[102]

The absence of comprehensive harmonisation of private law among others explains a pragmatic rather then dogmatic and theoretical approach to all the contemporary problems that came to challenge modern (private) law. The Swedish debate was to a much lesser extent obsessed by issues of systematisation and search for a comprehensive logic and general principles. A discussion of the social tasks of private law like the one provoked by von Gierke in Germany never took place in Sweden.[103] The social problems that gradually pressed for urgent solution were instead subject to piecemeal legislative technique and consequently anchored in problem-oriented statutes. Bernitz also notes the very pragmatic attitudes among Swedish legal scholars.

It is difficult to grasp legal and, for that matter, societal developments in Sweden of the 1920s and onwards without highlighting the enormous impact exercised on Swedish legal thought by the jurisprudential school of Scandinavian legal realism (Uppsalaskolan). The Scandinavian realists were concerned to show that "notions commonly accepted as essential part of the structure of law such as rights, duties, transfer of rights, and validity, are in part composed of superstitious beliefs, 'myths', 'fictions', 'magic' or rank confusion".[104] In the sphere of legal scholarship their powerful attack was clearly directed to natural law and more specifically to the

---

[100] Bernitz, *European Law in Sweden – Its Implementation and Role in Market and Consumer Law*, Juridiska fakulteten, Skriftserien Nr. 70 (Stockholm University: 2002b), 16.

[101] The systematisation does not follow the Pandects but rather an original Swedish systematization covering both public and private law. The original *Äktenskapsbalk, Föräldrabalk, Ärvdabalk, Jordabalk, Handlesbalk, Byggningsbalk, Brottsbalk* and *Rättegångsbalk* have been complemented with time through more modern codes (balks) such as *Miljöbalk, Fastighetsbildningslag*. See Vogel, 'Sources of Swedish Law' in: Bogdan (ed.), *Swedish Law in the New Millennium* (Stockholm: Norstedts Juridik, 2000), 48 ff.

[102] See the analysis of the method used by Winroth in Kleineman (1987), 91; cf. Sundell (1987), 77 ff. on the late transition from the concept of '*lagfarenhet*' (experience in law) to that of '*rättsvetenskap*' (legal science) in Sweden.

[103] On the contemporary debate about the social purposes of civil law, see Wilhelmsson, 'En social avtalsrätt - Några kommentarer' (1993-94) *JT*, 499 ff., and the response by Sandgren, 'En social avtalsrätt?' I-II (1992-93) *JT*, 456 ff., 643 ff.

[104] Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), Essay 6, 'Scandinavian Realism', 161 ff.

influential school of conceptual jurisprudence discussed in the German context. In a Weberian rationalist strife to demystify legal science, they defended the use of methods of modern empirical science in legal scholarship, believing that "legal thinking must be explained in terms 'of the same logic as that on which other empirical sciences are based'.[105]

In an analysis of the connections between Scandinavian legal realism and the Swedish welfare state project Källström convincingly argues that the value-nihilism propagated by the Uppsala school ultimately prepared the ground for the large-scale social and economic reforms envisaged by the social engineers of the "people's home".[106] The leading Uppsala philosophers rejected notions of "natural rights" and the concept of "property right" in particular.[107] Since there are no objective rights, rights are to be seen as function of political power and a new Riksdag majority can always redefine their substance and content.[108] Clearly if one proceeds from the belief that "the binding force of the law is a reality merely as an idea in human mind" and that "there is nothing in the outside world that corresponds to this idea"[109] the respect for law in force decreases, opening the way to unrestrained and innovative legal-political decision-making. Ross in particular favoured a discipline he called legal politics. The central task of this discipline is in the words of Hart:

> To discover not the aims or ends of law but the best methods of adjustment of law to changing technical or 'ideological' conditions, and to equip the lawyer to referee between experts when they disagreed concerning social changes. It is an art where the value of the result is measured 'by being in fact accepted by others, particularly those in power.'[110]

This is only one among many quotations that demonstrate the understanding of Scandinavian realists about the mundane role of lawyers and judges in modern society.[111]

4.1.4 Interim conclusions

I can now summarise the admittedly complex and multifaceted developments described above and elicit some distinguishing institutional features of the legal systems in the two countries. Several points appear as particularly important for the further analysis. In both Germany and Sweden economic liberalism made a breakthrough in the middle of the nineteenth century. However, mercantilism was rooted deeper in Germany than in Sweden and came to exert a stronger and longer-lasting influence on German society than on Swedish one. In Germany protectionist communitarian solutions to economic problems seem to have had more powerful appeal. Gierke's eulogistic theory on corporations may have provided theoretical

[105] Ross, as quoted by Hart (1983), 162.
[106] Källström, 'Riddaren av det moderna. Om värdenihilism och samhällsbygge' in: Hallberg/Lernerstedt, *Svenska värderingar* (Stockholm: Carlssons, 2002), 21 ff., at 25, quoting Myrdal about the appeal of the Uppsala school among advocates of radical social reform: "Hägerström tilltalade dem som ville ändra på saker och ting".
[107] Quoted after Källström (2002), 22.
[108] Källström (2002), 23.
[109] The aim of law-givers is "to impress a certain behaviour on people". Olivecrona, *Law as Fact* (Copenhagen: E. Munksgaard, 1939), 31.
[110] Hart (1983), 162.
[111] For a critical analysis see Hedenius, *Om rätt och moral* (Stockholm: Tidens Förlag, 1941).

justifications not only for cartelisation in Germany, but also for other processes of socialisation, like the mobilisation of the *Mittelstand* into organisations for defence of group economic and political interests. In contrast, in Sweden liberal ideas were more consistently implemented.

As far as constitutional doctrines are concerned, the two countries present quite a contrasting picture. The late advance of parlamentarism and a long legacy of despotic and absolutist rule account for the central importance ascribed to the doctrine of the *Rechtsstaat* in Germany. The principles of law-bound administration and an independent judiciary evolved as important safeguards against despotic arbitrariness but also as a means to secure individual freedom from foreboded excesses of possible majoritarian rule. In the absence of parliamentary counterbalance of the power of the monarch, the courts were at an early stage charged with important functions of guaranteeing the rule of law. In Sweden, by contrast, parlamentarism with a relatively broad-based representation had been part of the political tradition ever since the Middle Ages. Consequently, it was the Parliament which was expected to check the power of the monarch in a centralised manner, whereby the courts were entrusted with the more mundane issues of everyday administration of justice.

Finally, if we turn to private law, modern German civil law is the product of a grand codification project, whereas Swedish private law has evolved incrementally. The German BGB bears the imprint of the Pandectist school of conceptual jurisprudence, with particular emphasis on systemic coherence and conceptual perfection and with insistence on the distinction between private and public law. It is thus a child of liberalism in both economic and political sense. At the same time the Code carries the seeds of a social understanding of private law, notably in the openness of its general clauses and in its reference to concepts of good morals and good faith. In contrast piecemeal evolution in Swedish private law was ill-suited for more daring systemic conceptualisations. It seems to have nurtured a pragmatic attitude in both scholarship and judicial practice and a problem-oriented approach to issues of social justice and public regulation. This pragmatism received further boost and scientific corroboration by the Uppsala school of jurisprudence.

4.2 Shaping the institutional framework in Germany

To what extent did the intricate mix of institutional factors just sketched above, predetermine the institutional framework of fair trading law in Germany? And to what extent was the framework a product of the interplay of interests? We will in the following try to identify the actors standing behind the evolution of the legislative rules on fair trading, and trace the institutional constraints and the opportunities they faced in pursuing their interests.

4.2.1 The legislative process: evolution and interests involved

Legislative work on an Act Against Unfair Competition was initiated and promoted by industry and in particular by the well organised entrepreneurial middle classes (*das Mittelstand*).[112] Evidence of the active participation of representatives of the *Mittelstand* in the initiation stage and in the further elaboration of the Bills are abundant in the preparatory materials to both the 1896 and the 1909 legal acts. One

[112] See Schricker, 'Unlauterer Wettbewerb und Verbraucherschutz' (1970a) *GRUR Int.*, 32 ff., 33.

learns indirectly that the 1909 Bill came as a result of intense criticism on the part of chambers of commerce and of handicrafts, of commercial associations and corporations.[113] While deemed unsatisfactory by the German Association of Small and Medium Size Enterprises (*Deutsche Mittelstandvereinigung*) which sought influence over the entire drafting process, a parliamentary Working Commission on the law was set up as a guarantee that the *Mittelstand* would have a say in the legislative preparations.[114] In fact, submitting the Draft to the critical evaluation of the *Mittelstand* had been a deliberate strategy of the lawmaker. In a manner unusual for the time, the Bill was published in the "Deutscher Reichs- und Preussischer Staatsanzeiger" ("State Gazette"), predictably provoking a massive response by the organised *Mittelstand*.[115]

Under the pressure of the organised *Mittelstand* the legislative debate on unfair competition law acquired a structural tinge. According to the explicit motives behind the governmental Bill of the 1896 UWG:

> Der Kampf ums Dasein, der unter den heutigen Verhältnissen besonders für die mittleren Schichten der Wettbewerbsstände schwer genug ist, kann unter solchen Umständen ein Kampf mit ungleichen Waffen werden, in welchem das redliche Gewerbe den kürzeren ziehen müsste. Daß hierin eine Gefahr für die Wohlfahrt weiter achtungswerter Kreise unseres Volkes und damit für die Gesundheit des Staatswesens selber liegt, ist nicht zu verkennen.[116]

The Minister presenting the Bill to the 1909 UWG before the Parliament for first reading openly acknowledged that the proposed legislation was intended to fulfil a long-standing desire of Germany's economic *Mittelstand*.[117] The same open structural policy concerns were expressed by almost all political representatives who took a stand on the draft in the parliamentary debate.[118]

---

[113] See 'Erste Beratung des Entwurfs eines Gesetzes gegen den unlauteren Wettbewerb' (1909) *GRUR*, speech by member of parliament Findel, 114.

[114] GRUR 1909, 119.

[115] GRUR 1909, speech of MP Linz, 119.

[116] This quotation has been referred to as justification of subsequent attempts to use the UWG for structural-political goals. According to Ballmann, it confirms that the fathers of the UWG aimed among other things to provide protection for the smaller-sized enterprises against certain practices of their more powerful rivals. Lobe (1907), Band III, 14. Cf. Ballman, *Der Machtaspekt im UWG. Die Bedeutung der Macht eines Wettbewerbers für die Anwendung des § 1 UWG* (Frankfurt am Main: Peter Lang, 1990), 146.

[117] „... mit der Vorlage des Entwurfs einem neuen Wettbewerbsgesetze erfüllen die verbündete Regierungen einen aus den Kreisen unseres wirtschaftlichen Mittelstands lebhaft lautgewordenen Wunsch, der auch bei den Vertretern der verschiedensten Parteien des Reichstags Widerhall gefunden und sich in mannigfachen Resolutionen verdichtet hat.", GRUR 1909, 106.

[118] Cf. the statements in the course of parliamentary debates in GRUR 1909, 106 ff: MP Giese, at 109: „Hoffentlich gelingt es dieser Kommission, ein gutes Stück Mittelstandspolitik zu vollziehen und den Mittelstand in seiner schwer bedrohten und bedrängten Existenz, die ihm die unlautere Konkurrenz bereitet, durch das neue Gesetz zu strärken."; MP Findel, at 116: „Deshalb werden wir gern an einem Gesetze mitarbeiten, welches berufen ist, Treu und Glauben wieder zu Ehren zu bringen und unserem Mittelstand diejenige Schaffensfreude zu ermöglichen, die er zu seinem Gedeihen braucht und die neben seiner vaterländischen Gesinnung noch immer sein schönstes Kennzeichen war."; MP Linz, at 119: „Auch meine politischen Freunde haben den Gesetzesentwurf als ein erfreuliches Zeichen des zunehmenden Verständnisses für die Not und die Bedürfnisse des Mittelstandes freudig begrüßt..."

Initially, the interests expressed in the legislative process were of a more individualist nature and concerned protection of quasi-property rights of individual traders in products of industrial and intellectual creativity not covered by exclusive intellectual property statutes. The narrow definition of the object of protection under the Trademark Act, and its even more restrictive interpretation by the courts, left unsanctioned many practices perceived as unfair by competitors. The UWG was expected to provide the necessary remedy. Protection against disclosure of trade secrets was likewise hoped to complement industrial property rights. The explanatory statement to the 1896 UWG explicitly renounced any conceptualisation of unfair competition law as a cure-all remedy to unfair market conduct by way of legislative fiat. The act could and should provide relief only against specific morally reprehensible methods of competition if these "zu den Zwecke angewendet werden, um berechtigte Vorteile gegenüber Konkurenten zu gewinnen."[119]

However, in practice the law was increasingly called on to satisfy sector-specific interests and to perform direct economic regulation. Small and medium scale entrepreneurs, notably those in the retail trade, obviously perceived a growing competitive threat from big business, large department stores and foreign economic actors, who were gaining market shares through aggressive promotional activities. The UWG was consequently seen as one way to preserve the competitive *status quo* and to prevent changes in market structure and redirection of customers flows.[120] Particularly eloquent about the hopes nurtured in *Mittelstand* circles was the reporting Minister Bethmann-Hollweg in his speech to the *Reichstag* during the first reading of the 1909 UWG:

> Ein Teil hat die Schuld einer unvokommenen Handhabung des Gesetzes zugeschoben, während ein anderer Teil und zwar namentlich die kleineren und mittleren Interessenten, gedrängt und gedrückt von dem Konkurrenzkampf mit den großen Geschäften, neue detaillierte Reglementierungsvorschriften in weitstem Umfange gegen jegliche Form des Missbrauchs im Wirtschaftsleben forderten.[121]

The structural political tilt of the debate is well reflected in the main types of unfair trade practices receiving the attention of parliamentarians in the debate on the 1909 UWG. In the focus of the discussion was the need to curb aggressive promotional methods such as eye-catching price reductions, rebates, season sales and price cuts of brand products – practices used extensively by big department stores and newcomers to gain a competitive edge. The desire was to broaden the avenue of legal means for attacking a variety of trade practices that finally determined the answer to the major legal policy question, namely the introduction of a general clause.

---

[119] Denkschrift zum I Regierungsentwurf des UWG vom 27.5.1896: „Auf der anderen Seite würde man unmögliches anstreben, wenn man versuchen wollte, in Handel und Wandel jedem Verstoß gegen die guten Sitten schlechthin durch gesetzliche Bestimmungen vorzubeugen. Nur insoweit, als gewisse Mittel, welche moralisch verwerflich, wenngleich vom Gesetz bisher nicht verboten sind, zu dem Zweck angewendet werde, um unberechtigte Vorteile gegenüber den Konkurrenten zu gewinnen, ist Abhilfe nötig und erreichbar.", in: Lobe (1907) Band III, 17.

[120] See Ballmann (1990).

[121] Parliamentary debates, GRUR 1909, 106.

Among the blatantly partisan expressions of commitment to active protection of the *Mittelstand* were appeals to oblige the public prosecutor to acknowledge a public interest simply by virtue of registration of a complaint on the part of industry or commercial associations.[122] At several points in the debate, the interests of the *Mittelstand* were equated with the public interest. Furthermore, the dominant industry perspective in the law is conspicuously reflected in reliance on *Verbandsklage* as the main form of enforcement of the statute.

The question has sometimes been raised whether the UWG already in its original version was intended to protect the interests of consumers. Indeed, in the preparatory material it was recognised that protection of competitors against unfair competition would inevitably have positive repercussions on the consuming public. Many competitive methods that ran contrary to good business practice were eventually detrimental to the end-consumer as well. Some of the speakers notably the representatives of the Social-democratic Party, during the first reading of the 1909 UWG insisted that the law should primarily serve the interests of the consuming public and not those of competitors.[123] The same representatives hinted likewise that there are instances where it would be unrealistic to expect that action by businessmen alone would be sufficient to remedy situations that are prejudicial to consumers. Nevertheless, protection of consumers was explicitly regarded as falling outside the direct objectives of the statute:

> Der Schutz des konsumierenden Publikums gegen Übervorteilung ist nicht der unmittelbare Zweck eines gegen den unlauteren Wettbewerb gerichteten Gesetzes, wenngleich Maßregeln, die in den gegenseitigen Beziehungen der Gewerbetreibenden Treu und Glauben zu befestigen bestimmt sind, mittelbar auch dem Interesse ihrer Abnehmer entgegenkommen werden.[124]

In summing up, one can safely say that the UWG was created to respond partly to a universal concern with honesty and trust in economic life, but also to immediate and transient needs of the national economy and in particular to the appeals of certain sector-specific interests enjoying wide-spread political support.[125] Therefore, despite its principally private law wrapping, it was one of the first examples of interventionist economic law in the allegedly free market bourgeois society.[126] In this respect the UWG was a much more unequivocal reflection of a time of growing interventionism than the BGB.

4.2.2 The substantive rules of fair trading: a general clause approach

The main question in the German debate concerned the general clause of unfair competition. The pride of place is easily explained. The French example of using the general clause of tort law also for the field of competitive economic activity was both

---

[122] See GRUR 1909, speech of MP Giese, 109; MP Findel, 116.

[123] See GRUR 1909, 116. Speech of MP Frank: „[d]er unlautere Wettbewerb gedeiht auf dem Grenzgebiet zwischen Betrug und Reklame; und die Bekämpfung liegt nicht bloss im Interesse des redlichen Kaufmanns, sondern meist auch im Interesse des konsumierenden und kaufenden Publikums."

[124] See authoritative comments (amtliche Begründung) to the 1896 UWG in Lobe (1907) Band III, 51; cf. Schricker (1975), 213; Pause (1984), 259 ff.

[125] See the evaluation by Bernitz (1969), 145.

[126] Brüggemeier (1980), 44.

inspiring and disquieting. It showed the immense flexibility that could be rendered to a generally drafted rule by a creative judiciary. At one and the same time it appealed with its remarkable potential to adapt to changing economic circumstances, and worried with the uncontrolled discretion left to the courts.

The 1896 Act rejected a general clause approach and was instead drafted with marked legislative restraint. It focused on several specific factual situations of unfair trade practices, which, with the exception of false advertising (§§ 1-2 and 4)[127], affected primarily individual competitive interests, namely disparagement (§§ 6-7), confusion with one's trade name, firm or other commercial sign (§ 8), and disclosure of commercial secrets by an employee (§§ 9-10). The provisions were detailed and painstakingly formulated, leaving the impression of a well-defined and limited range of application.[128] The leading rule was the prohibition of incorrect advertising. The latter's scope was relatively narrowly defined, by requiring that a significant number of people are targeted, and that the impression of a particularly advantageous offer is communicated.[129]

Obviously, the lawmaker wanted to keep the intervention into economic freedom to the possible minimum. Moreover, the statute purportedly complied with ideals of conceptual clarity and logical systematisation that would allow an impartial and value-neutral implementation by the judiciary. The 1896 statute was remarkable by the mere fact that for the first time, also internationally, unfair trade practices were addressed in a separate legal act. Notwithstanding such features, it did not fully satisfy the expectations of the interested circles, which soon managed to reopen legislative deliberations.[130]

The original Bill to the 1909 UWG did not differ much from its predecessor. The aspirations of the *Mittelstand* toward a broad general clause did not meet with the approval of the Government. The reporting Minister openly expressed fears of anticompetitive abuse stemming from a loosely drafted rule.[131] Yet in the course of the parliamentary debates the law-makers turned a more sympathetic ear to such desires. As a result a broad general clause was introduced as a crown paragraph in the new UWG.[132][133] It built on the standard of good morals ('*gute Sitten*' or *boni mores*) in competitive relations and prohibited any conduct in competition that violated this standard under threat of injunction and damage compensation.

Apart from the general clause, the 1909 UWG took over the detailed rule on incorrect advertising from the 1896 UWG and included some new provisions aiming at

---

[127] See also Art. 5, which set forth a general delegation of the Bundesrat to issue regulations on weights and measures.

[128] One example of this careful drafting technique is § 1 1896 UWG, which exists as § 3 1909 UWG even to this day in a somewhat modified fashion. The fact that the provision yields to broad interpretation, despite the detailed enumeration, is well evidenced by the thousands of cases, which have been decided on its basis throughout the years. In this sense see Beater (2000), 141.

[129] These restrictions were removed with amendment of UWG in 1969; see Ch. 5.

[130] See GRUR 1909, 106 ff.

[131] Speech of MP Bethmann-Hollweg, GRUR 1909, 106.

[132] Similar interpretation in Bernitz (1969), 145.

[133] The clause revealed close kinship with the general clause on tort law in the new German Civil Code, drafted some years earlier, § 823 BGB.

regulating competitive relations in a more direct and specific manner. Thus detailed administrative and criminal law rules on bankruptcy sales (§ 6 UWG) as well as on season and clearance sales (§§ 7-10 UWG) were introduced, threatening with penalties and imprisonment upon violation. The objective was, according to Callman, to combat the unfairness in the practice of clearance sales and, when necessary, to prevent sales that deserved no protection.[134] Despite heated discussions and campaigning on the part of the *Mittelstand*, no limitations on rebates and special offers were stipulated. The introduction of a general clause, however, grossly reduced the importance of drafting more specific rules. The general clause allowed, at least theoretically, for bringing any alleged abuse of competitive freedom before the courts as an act of unfair competition.

4.2.3 Enforcement design: the primacy of private ordering

4.2.3.1 General civil courts as main decision-making institutions

The choice between detailed provisions and a general clause was readily recognised as a choice between decision-making institutions and as a question of division of decision-making powers between the political process and the judiciary.[135] The general clause approach in fact implied a broad delegation of decision-making powers to the judiciary without giving the judge precise guidelines as to the decision criteria. The main concern was consequently whether the courts were in a position to deal with the considerable degree of discretion allowed by a general clause. In the words of one MP:

> Die Gegner der Generalklausel heben außerdem nicht mit Unrecht hervor, dass durch ihre Einführung dem subjektiven Ermessen, der subjektiven Auffassung des Richters ein etwas weiter Spielraum gelassen werde, der leicht zu einer willkürlichen Interpretation des Gesetzes führen könne. [136]

The first UWG by its strictly formulated provisions reflected a desire to retain the decision-making control within the political sphere. The balance between fair and unfair competition was struck in the parliamentary process by laying down specific prohibitions and directions. The courts had only to apply the legislative provisions. This approach revealed an understanding about the position of the courts, corresponding to the principles of the *Rechtsstaat*. As one MP critically commented, the prevailing opinion in Germany saw the function of the judge "only in applying the law in the particular case and not, as was the situation in England and other Anglo-Saxon countries, in creating law and in saying from one case to another: this here is legal and has to be valid as law." [137]

The 1909 parliamentary discussion, however, showed a clear change of attitude at least among the political actors. Almost all parties in the political spectrum expressed support for a general clause solution. While some concern was still expressed as to the opening of too wide a room for free, subjective and arbitrary decision-making on the part of the judiciary, the majority agreed that the courts could be trusted and that they were the most appropriate institution to deal with the constantly changing grievances

---

[134] Callmann, *Der unlautere Wettbewerb*, 2 Aufl. (Mannheim: J. Bensheimer, 1929), 197.
[135] See speech of MP Linz, referring expressly to "the power sphere of the judiciary" ("die gerichtliche Machtsphäre"), GRUR 1909, 121.
[136] Speech of MP Linz, GRUR 1909, 121.
[137] See speech of MP Linz, GRUR 1909, 121. See also MP Roeren, GRUR 1909, 110.

of unfair competition.[138] Support in favour of a general clause was sought from two sources: the first one was the French practice[139], and the second one, the already existing general clause of § 823 BGB.[140]

4.2.3.2 Generous litigious possibilities for business associations

With the delegation of decision-making powers to the judiciary implied in the general clause of the 1909 UWG, the question of legal standing and access to the courts acquired decisive importance. The lawmaker emphasized the initiative of the affected market actors. As the Minister put it:

> Machen aber die Beteiligten, seien es die einzelnen, seien es die klageberechtigten Verbände, von denen ihnen durch das Gesetz gebotenen Rechtsbehelfen einen ernstlichen Gebrauch, dann bin ich der Überzeugung, dass das neu vorgelegte Gesetz bessere Zustände schaffen wird und schaffen kann, als es das alte Gesetz getan hat.[141]

In harmony with the original individualistic character of the statute, the affected trader competing on the same product market was to be the primary agent of enforcement of the UWG standards.[142] The lawmaker, however, recognized a tendency of individual competitors to shy away from conflict and litigation. As expressed in the parliamentary debates to the 1909 UWG, if one relied only on the initiative of the individual trader, the latter risked either to enter in animosities or to be a constant visitor to the courts.[143] It was therefore considered essential that industry and trade associations step in and take care of the 'sanitation' of competitive relations, discharging conflicts from personalized confrontational character. Thus the institute of the so-called association lawsuit (*Verbandsklage*) was born.

The *Verbandsklage* was introduced already with the first Unfair Competition Act. Initially, the draft for the 1896 UWG used the term 'associations of traders' (*Verbände Gewerbetreibenber*). In the course of the preparatory work this term was substituted by the more open concept 'associations for promotion of industrial and commercial interests' (*Verbände zur Förderung gewerblicher Interessen*, § 1 1896 UWG). The change was introduced with the expressed intention to grant standing to a greater variety of associations (such as corporations, guilds, chambers of commerce and of handicrafts) to sue in the general or more narrow commercial interests. The associations could be specialised according to industry sector or universal, regional or national. They worked along the principles of non-profit associations and were often referred to as associations of public utility (*gemeinnütziger Verein*).[144] The 1909 UWG did not change anything in this respect. To the contrary, in the course of the preparatory work it was emphasized again that the concept *Verbände zur Förderung*

---

[138] See comments of MP Linz, GRUR 1909, 116. Cf. Ohly, *Richterrecht und Generalklausel im Recht des unlauteren Wettbewerbs* (Köln: Carl Heymanns, 1997), 202.
[139] See speech of MP Dove, GRUR 1909, 124.
[140] On the function of general clauses in German law see Teubner (1971).
[141] GRUR 1909, 106 ff., at 107.
[142] See § 13: der Gewerbetreibende, der Waren oder Leistungen gleicher oder verwandter Art herstellt oder in den geschäftlichen Verkehr bringt.
[143] See speech of MP Findel, GRUR 1909, 116.
[144] Pastor, 'Verbraucherverbände im Sinne des § 13 Abs. 1 a *UWG*' (1969) *GRUR*, 573 ff.

gewerblicher Interessen should be broadly construed, in particular to cover the chambers of commerce and handicrafts.[145]

The broadly defined *locus standi* of business associations was, especially since the 1920s, extended further by a very lenient jurisprudence. Already in a decision of 1912 the Imperial Court rejected attempts to interpret the right of action of the associations as a sort of proxy, i.e. as a procedural right to represent in their own name the substantive rights of their members.[146] This implied that the associations were regarded to litigate in their own or in the public interest and their procedural standing was not dependent on violations of member rights or on any substantive rights of third parties whatsoever.[147]

In a seminal decision of 1928, in the so called *Markenverband* case, the Imperial Court confirmed that the claim of an association was independent from that of the natural or juridical person immediately affected by the unfair conduct. The main issue in the case was whether a business association could bring a suit on unfair competition grounds although the immediately affected party (another association with whom the defendant had entered an agreement) had already claimed contractual damages and settled the matter with the alleged wrongdoer. In the particular case the two claims had different legal ground. But even if the two claims would be based on § 1 UWG, the Court held that they would still both be admissible. Neither a settlement, nor a pending suit were to be regarded as reasons for dismissing an action filed by a new and procedurally legitimate party. With this decision the court interpreted § 13 UWG as granting an independent substantive right of action (Klagebefungnis) to the associations and not just a procedural standing to sue, derivative from the rights of their members.[148]

This extensive line of interpretation was carried one step further with a subsequent decision of the RG of 1930.[149] In this decision the Court made clear that the standing of the plaintiff business association was not dependent on the fact of whether it had members in competition with the defendant. This decision once again confirmed that business associations could use the Verbandsklage independently of their membership as agents of the public interest. They were not seen as bound in their litigious activity by the sector-belonging of their members. They were admitted to sue on grounds of violations that did not directly affect their members. Secondly, it was not required that the protection of fair competition in the particular industry sector where the alleged violation was taking place should be among the statutory objectives of the association. It sufficed with generally formulated goals such as: combating unfairness in industry and trade. In the individual case the court had to ascertain whether the prosecution of the questionable conduct fell under the purposes of the union as set out in the articles of association, and whether the prosecution of the specific trade practice could

[145] See speech of MP Findel, who called for explicit listing of the chambers among those having standing to sue, GRUR 1909, 116.
[146] See RGZ 79, 326.
[147] In German law the disctinction between right of action (a substantive right) and standing to sue is important. For analysis of this dogmatic distinction in relation to recent reforms on association suits see Greger, 'Verbandsklage und Prozessrechtsdogmatik: Neue Entwicklungen in einer schwierigen Beziehung' (2000) 113 *ZZP*, 399 ff.
[148] See RGSt. 45, 358, quoted by Callmann (1929), 236.
[149] RGZ 128, 339 ff., at 342 ff. See Schricker (1970a), 32 ff., at 34.

reasonably serve the achievement of these objectives.[150] Another significant implication of the doctrine on the independent right of action of industry unions was the opportunity for multiple prosecution of the same unlawful conduct. Also in this respect the breakthrough came with the *Markenschutzverband* decision.

The *Verbandsklage* is sometimes described as a very unusual and modern instrument of enforcement for its time. Historically, it harmonises with the departure from classical liberalism typical of the turn of the century that was referred to above. In the vacuum emerging after the demise of the guild systems and as a reaction to competitive pressures from foreign capital, German industry and trade was moving towards a higher degree of interest mobilization and organization.[151] This tendency was supported by an ever more interventionist state and found its ideological justifications in corporatist theories. Thus the unions were allowed to fill the vacuum created by the demise of the guilds and to participate in shaping the standards of fairness in the new economic situation.[152]

4.2.3.3 Remedies: injunction and damages

A number of specific provisions in the 1896 UWG as well as in the 1909 UWG were sanctioned through criminal penalties and even imprisonment (§ 22 UWG). These sanctions, however, never acquired real practical importance.[153] The ingenuity of the statute lay in awarding central place to the civil law remedy of injunction (*Unterlassung*), requiring no proof of intent or strict causality. The action for an injunction had its roots in a few specific provisions of general civil law. An extension of its scope of application followed as a result of creative judicial interpretation and doctrine.[154] As Callmann rightly noted, the importance of the injunction action lay not only in the broad scope of protection but also in what he calls "the detoxification of the procedural atmosphere" ("*die Entgiftung der prozessualen Atmosphäre*"). The disputes focused not on the moral conduct of the alleged perpetrator, but on scrutinizing the objective illegality of his acts.

In UWG the action for an injunction was explicitly laid down already in § 1 UWG 1896 and then repeated in the general clause and in other provisions of the 1909 UWG. In the field of general civil law the injunction action was often used as a supportive action to other claims such as damages, specific performance, etc. In UWG it was designed as an independent key remedy for enforcement of the underlying rights and obligations. In view of the vagueness of the statutory standards of fairness and the difficulties of substantiating damages in the area of unfair competition law the injunction evolved into the single most important and appropriate remedy. It responded to the immediate need of terminating an unwanted conduct and at the same time represented a sufficiently flexible and mild remedy not to prejudice requirements of legal certainty and due process. It appears that reliance on injunction had been among the most significant factors facilitating intensive enforcement and expansive interpretation of the statute.

---

[150] RGZ 105, 375; RGSt. 45, 361 as quoted by Callmann (1929), 236.
[151] See Brüggemeier (1980), 47.
[152] See Beater, Zur 'Zur Deregulierung des Wettbewerbsrechts' (1995) *ZHR*, 217 ff. Brüggemeier (1980), 47.
[153] See, however, complaints in the speech of Roeren about the tendency of tradesmen under the 1896 UWG to resort to the public prosecutor instead of taking the matter into their own hands, GRUR 1909, 112.
[154] See Callmann (1929), 58 ff.

When discussing the efficiency of the civil law injunction, a procedural detail, which deserves particular attention is the institute of preliminary injunction. This institute built on rules on safeguarding measures in the Code of Civil Procedure (§§ 935, 940 ZPO). However, according to § 25 UWG preliminary injunction could in unfair competition matters be sought even when the prerequisites of the Code of Civil Procedure were not met. The outcome depended to a greater extent on the free discretion of the court (*'freies Ermessen des Gerichts'*), whereby the claims of the parties and the protective purpose of the injunction played a central role.[155] In the context of unfair competition law, it had crucial importance for the viability of the injunction action and arguably for the whole statute. In the dynamic world of advertising and marketing, a delayed injunction would practically amount to no injunction at all, especially when the measure envisaged is of temporary and transient character.

The preliminary injunction ensured swift action and effective opportunity to revoke a marketing measure before it had achieved its effect. Moreover, whereas in the ordinary action for an injunction the plaintiff had to sue at the court in the place where the defendant had his residence/place of business, preliminary injunctions could be sought at the court in the place of the tortuous act. This optional jurisdiction provided additional flexibility and facilitated litigation. Thus from an auxiliary procedural device the preliminary injunction grew into a handy shortcut to the pursued objective and a pillar of enforcement of rights and obligations under UWG. [156]

The second integral part of the remedy system of the UWG from its very inception was the action for damage compensation. Considering the individualistic tilt of the statute in its original form and its 'genetic connection' with intellectual and industrial property law, this is not surprising. As intellectual property rights had already demonstrated, however, substantiation and calculation of damages inflicted on abstract and impalpable values like intellectual property rights, the clientele or goodwill tended to create difficulties. Yet also here creative interaction between doctrine and judiciary bore fruit. An important innovatory device was the so-called information duty of the defendant (*Auskunftserteilung durch den Beklagten*). This institute envisaged in § 687 Abs. 2 BGB for the particular case of agent of necessity (*Geschäftsführung ohne Auftrag*) was extended to other areas.[157] Finally, the courts were granted wide margin of discretion to determine the damages even in the absence of conclusive evidence (§ 287 ZPO). The scope of the duty for damage compensation was generously defined as covering both direct damages and loss of profit. Following this principle the judiciary has recognized damages inflicted through nuisance and interference into mere acquisitive prospects.[158]

---

[155] Callmann (1929), 435.

[156] Of course the injunction finds its limits in the defendant's right of action for damages caused by an ungrounded preliminary injunction, i.e. by the forced interruption of activities that have been the subject of the injunction. See Callmann (1929), 436.

[157] See Callmann (1929), 79.

[158] Callmann (1929), 82.

4.2.3.4 Cost-efficient procedure

Regarding litigation costs in unfair competition matters the general procedural law rules applied. According to these rules the losing party stood for its own litigation costs and those of the adversary. In case law the principle was established that the above rule did not apply if the defendant readily recognized the claim and had not offered any reasons for immediate recourse to court action.[159] This in turn gave rise to a customary procedure of serving the alleged infringer an pre-trial notification, dissuading him from persisting with the unlawful conduct and warning him of imminent court proceedings (*Abmahnung*).

Apart from the general procedural rules on distribution of litigation costs, case law and doctrine consistently broadened the possibilities for recovering additional costs connected with the proceedings through employing the general rules on damage compensation. Thus Callmann argued that extra expenses for specialized lawyers, patent attorneys, expert opinions and the like should be recoverable as part of a damage compensation claims. The same went for pre-trial expenses and for the procedure of pretrial notification.[160] Here one identifies the seeds of a much discussed controversy in subsequent development of UWG. The twists and turns regarding the legal assessment of this procedure and the costs connected with it will continue to occupy our attention in the following chapters.

4.2.4 The Wettbewerbsverbände as beneficiaries from the institutional framework

One can say that the broad general clause in combination with a flexible enforcement mechanism, granting generous opportunities for collective representation of joint industry interests, proved to be the key to the success of the statute, if one equates 'success' with intensity of application of a piece of legislation in practice. The innovative institutional design promised a direct and speedy avenue for acknowledgment of well-organized interests and thus responded adequately to the structural-political concerns of the legislator. As already mentioned above, at the end of the 19th century Germany experienced a powerful trend towards industry organization, actively promoted by the government.[161] The new organizations were set up either along industry-sector lines or cross-industry, like the Union of German Industrialists, the Chambers of Industry, Commerce and Handicrafts. All these organizations now received the right to prosecute a broad range of trade practices that were perceived as detrimental by their members.

More importantly, the institutional design in itself created incentives for setting up new organisations with the specific purpose of monitoring competitive conduct and dealing with litigation. Shortly after the entry into force of the statute some unions emerged exclusively dedicated to the combat of unfair trade practices. Thus in 1912 the Association for Combatting Unfair Competition (*Zentrale zur Bekämpfung unlauteren Wettbewerbs*, hereinafter *Wettbewerbszentrale*) with its seat in Berlin, was established. It continues to be one of the most active and influential organizations in

[159] See Callmann (1929), 72.
[160] Callmann (1929), 84.
[161] Brüggemeier (1980), 47.

the field of unfair competition law to the present day.[162] Among the plaintiffs before the *Reichsgericht*, one already in 1912 meets another diligent litigant in unfair competition disputes: *Verband gegen Unwesen in Handel und Gewerbe, Köln.* This type of organization, specialized in litigation and policing the compliance with the statute, came to be particularly influential when shaping the interpretation of the rather vague standards of the general clauses of UWG.

On the basis of this generous approach, the courts found as admissible claims submitted by chambers of commerce, industry, handicrafts and agriculture, different professional organizations of attorneys, patent attorneys, medical practitioners, dentists; industry unions of producers, bankers, retail traders, guilds and guild unions.[163] Apart from these more classical industry and professional unions, the courts had no problems of granting standing to unions with more general objectives like the combat with corruption and against 'misconduct' in industry and trade (*Verein gegen das Bestechungswesen; Verein gegen Unwesen in Handel und Gewerbe*).[164]

Despite this broad interpretation, however, and despite a general acknowledgment that the UWG was granting protection to more than just individual interests, the *Reichsgericht* excluded an extension of the substantive right of action and its procedural counterpart for consumer organizations. The Court stated that it did not suffice if a union "without having as an aim the promotion of business interests, had as a sole objective the promotion of the interests of consumers."[165] Given the clear legislative text of § 13 Abs. 1 referring only to Unions for the promotion of industry interests, any other interpretation would obviously have been *contra legem*. It is therefore not surprising that during the three decades between this decision and the introduction of the right of action of consumer unions in 1965, no attempts to challenge the wisdom of the highest instance court have been recorded, despite dramatically changed conditions of production and trade.[166]

4.3 Shaping the institutional framework in Sweden

4.3.1 Evolution of the legislative process and interests involved

Also in Sweden the initiative for legislation on fair trading stemmed from industry, and notably from organisations of small and middle size enterprises. The driving force behind legislative work were chambers of commerce and various trade associations, acting collectively or individually. Most of these organisations represented small and medium-size enterprises. The first motions in Parliament were tabled in 1897. In 1898 the Manufacturers' Union in Stockholm addressed an appeal to the Crown to commission a draft on unfair competition. This appeal was rejected by the National Board of Trade (*Kommerskollegium*) with arguments that such legislation could pose

---

[162] On the history of the *Zentrale*, see *75 Jahre Zentrale zur Bekämpfung unlauteren Wettbewerbs* (Bad Homburg, 1987); Baumbach/Hefermehl (1998), Einl. UWG, Rdnr. 36, 194; Grimes, 'Control of Advertising in the United States and Germany, Volkswagen Has a Better Idea' (1971) 84 *Harvard Law Review*, 1760 ff., at 1784.

[163] See the list with respective references to decisions of the Reichsgericht in Callmann (1929), 237.

[164] See Callmann (1929), 237.

[165] "ohne die Förderung gewerblicher Interessen zu bezwecken, lediglich die Förderung der Interessen von Verbrauchern (Konsumenten) zum Ziel gesetzt hat", RG St. 45, 360.

[166] See the Bill to the 1965 UWG amendment, BT-Drs. IV/2217, 3.

serious risks for economic freedom, combined with technical legalist objections.[167] According to some commentators, a potential problem with determining the relations of a new unfair competition law to the TF was observed already at this early stage.[168]

The failure of this first initiative was followed by new motions in 1903, 1904 and 1905, but the motions were consistently turned down in Parliament. In 1908 finally the Parliament assigned the task of drafting a new law against unfair commercial practices to the Patent Legislation Committee (*Patentlagstiftningskommittén*). As the name of the Committee indicates, its main priority was to consider new patent legislation in Sweden. But although unfair competition seemed to be of secondary importance, the Patent Legislation Committee took all its duties seriously. Its efforts resulted in an impressive report containing over 500 pages of analysis and proposals for a new law on unfair competition.[169]

The Committee underlined the active support for such legislation among the interested business circles. In nearly all replies to the circular letter sent by the Committee such legislation had been requested. [170] In contrast to Germany, in the Swedish debate the interests of small and medium size enterprises were not particularly emphasised, even though the more immediate impact of prospective legislation on these particular economic groups was certainly well-known to the legislator. The only reference to a particular sector was the reference to the trading classes ('handelsståndet') to be found in the early motions for legislation submitted by the Manufacturers' Union.[171] The considerations of the Patent Legislation Committee were presented in neutral terms with reference to industry and trade as a whole:

> The introduction of an appropriate legislation against unfair advertising is for our trade and industry a sound development.[172]

Instead of stressing the interests of the middle classes, a distinguishing feature of the Swedish debate appears to be that the interests of the general consuming public were frequently invoked.[173] Thus an Expert Committee summoned by the Manufacturers' Association already in 1896 infers:

> Not the least, dishonest competition could be of importance for the whole purchasing community, especially if one pays attention to the type of competition, which under one form or another creates the impression of a particularly advantageous offer... The

[167] Since German experience was always referred as a model, the absence of commercial courts in Sweden was seen as an obstacle to legal borrowing. See Levin, *Lag med vissa bestämmelser mot illojal konkurrens, Lagtext och kommentar* (Lund: C.W.K. Gleerups Förlag, 1944).
[168] See Persson (2002), 76.
[169] Förslag till lag mot illojal konkurrens, Patentlagstiftningskommitténs betänkanden, band IV, Stockholm 1915 (hereinafter Betänkande).
[170] Committee Report (Betänkande), 98.
[171] Betänkande, 55.
[172] Betänkande, 17, 99.
[173] See the deliberations on the impact of legislation against untruthful advertising on the interests of competitors and customers. Betänkande, 84 f.

> Committee therefore believes it can claim that the unfair competition threatens to become a genuine public evil.[174]

Consumer interests[175] were probably not at the centre of deliberations, but were not disregarded either. Interestingly, while discussing the value of existing criminal law provisions on fraud, the representation problem for affected clients (consumers) was clearly identified.

> And it is perfectly easy to explain that customers would usually shy away from instituting themselves costly proceedings with a risk of suffering additional losses, or from denouncing the crime and thus making the fact of their being deceived public, especially having in view that no big value is at stake and evidence is normally difficult to summon.[176]

Concerning the rules on standing a dissenting member of the Patent Legislation Committee required broader intervention opportunities for the public prosecutor. He underlined that the law against unfair competition should not exclusively aim at regulating the competition among entrepreneurs, but in the same extent prevent dishonest (illojal) course of action in relation to the general public.[177]

These consumer-friendly considerations were developed further in the Bill preceding the 1931 IKL. The reporting minister expressed a desire, "in contrast to the Committee's proposal, to render the provisions on untruthful (sanningslös) advertising the character of legal rules not only exclusively protecting traders, but also having as an objective to prevent that the public were misled." He further expressly talked of a "double purpose" with the law, but nevertheless acceded to keeping the rules within the framework of the established area of unfair competition law.[178] Considerations implying a wider understanding of the functions of the law of unfair competition can also be identified in the reflections submitted by the minister regarding the rules on standing. The Legislative Committee had proposed a right of standing for the prosecutor only in case of notification on the part of the affected traders or their associations. The Minister found this proposal too restrictive. He expressed preference for granting a right for the prosecutor to intervene upon own discretion, thus supporting the (above mentioned) dissenting opinion of the 1915 Committee.[179]

---

[174] "Icke mindre vore den illojala konkurrensen av betydelse för hela den köpande allmänheten, i synnerhet om man fäste sig vid den art av konkurrens, som under den ena eller andra formen föregåve sig att erbjuda sällsport gynnsamma tillfällen till inköp... Kommitterade trodde sig därför med skäl kunna påstå, att den illojala konkurrensen hotade att bliva ett farligt samhällsont." Betänkande, 55.

[175] It should be noted that the concept 'consumer' (konsument) had not been accepted in the Swedish language at that time. The word habitually used was rather 'customers' (kunder) or 'the public' (allmänheten).

[176] "Och att kunden merendels skulle draga sig för att med risk av ytterligare förlust själv anställa en ofta kostsam rättegång eller angiva brottet till åtal och således bringa offentligheten att han låtit föra sig bakom ljuset, vore lätt förklarligt, i synnerhet som några större värden i allmänhet ej stode på spel och, enligt vad förut påpekats, det i många fall vore ganska svårt att anskaffa nödig bevisning." Betänkande, 85.

[177] Betänkande, 510.

[178] Prop. 1931:175, 12. See Tengelin, 'Illojal reklam och annan illojal marknadsföring' (1959) *NIR*, 93 ff., 99; Bernitz/Modig/Malmén (1970), 40.

[179] Prop. 1931:175, 39.

That not all interest groups were equally supportive, especially in respect to proposals for a broad-based legislation is evident from the reserved attitude shown by the Federation of Swedish Industries (*Sveriges Industriförbund*, SI) on the issue of a general clause. SI organised the most powerful big business in Sweden at the time.[180] The most influential opponent to the statute proved to be the Swedish Newspaper Publishers' Association (*Svenska Tidningsutgivareföreningen*, TU). As I already indicated above, freedom of the press is a constitutional principle of remarkable seniority enjoying extraordinary respect in this country.[181] Among other things, the TF stipulated the exclusive liability of the editor for the contents of a publication. With the press constituting the main form of mass communication at the beginning of the 20th century, introducing criminal liability for unfair advertising was seen to impose so far unknown restrictions on printed matter and to jeopardize editorial independence. The Patent Legislation Committee was well aware of these misgivings.

Since there was considerable uncertainty as to the scope of protection provided by the TF, there was anxiety that vague rules on honesty of advertising could prejudice the privileged status of the constitutional freedom. There was a risk, so to say, that one would "break the spell" surrounding the TF, conceived of as a cornerstone of Swedish democracy. These fundamental constitutional and political concerns became among the main obstacles for the growth of marketing practices law.

To avoid intervention in the scope of TF the 1915 Patent Legislation Committee proposed to exclude printed matter from the field of application of the new unfair competition law (§ 36 of the draft). But even this very guarded approach was met with storming criticism on the part of the TU.[182] The Union mainly attacked the proposal of amending the TF. Apparently it was important to keep the aura around this act as something sacred and stable, not to be flickering with the whims of time and political opportunism. Any changes, even those intended to actually show deep respect for the primacy of the act, were therefore perceived as encroaching on the TF's authority and privileged constitutional status. In their position paper the TU expressed disappointment at the fact that the interests of commercial competitors had gained the upper hand when weighed against the interests of protection of freedom of speech.[183]

Aware of the necessity to find a solution to the problem of unfair and dishonest advertising, the Union proposed more limited alternative strategies. But none of these were compatible with any reasonably efficient legislation on unfair advertising. Given the strong opposition and doubts as to the conformity of the proposal with constitutional rules on freedom of the press, the legislative process came to a grinding halt. Only the rules on trade secrets and on corruption of employees found their way into a 1919 statute with the modest title "Act on certain rules against unfair

[180] The Union expressed misgivings as to the introduction of a broad general clause of unfair competition, in line with the 1909 UWG considering such a clause as all too broad. Betänkande, 77.

[181] See Ch. 4.1.2 above.

[182] Om patentlagstiftningskomitténs betänkanden 5 maj 1915 medförslag till lag mot illojal konkurrens, yttrande af styrelsen för svenska tidningsutgivarförening, 1915 (Yttrande).

[183] "Den särställning som vår tryckfrihetsrätt i jämförelse med andra länders intager på olika punkter, komplicerar, såsom redan antytts, i avsevärd mån spörsmålet om införande i vår lagstiftning av stadganden om illojal konkurrens genom tryckt skrift. ...Tryckfrihetslagens ordning i fråga om anonymitätsrätt, ansvarighet, rättegång, juryväsen och åtalsrätt, allt har fått vika för konkurrensskyddets kraft." Quotation after Persson (2002), 81, referring to Yttrande, 62, 74.

competition". The broad area of unfair and misleading advertising and marketing remained untouched.

In 1920 and 1921 new appeals to the government for more vigorous legislative measures against unfair competition were directed by the twelfth conference of the Swedish Chambers of Commerce, as well as by other business associations.[184] The demands of the commerce chambers and associations were supported by the National Board of Trade.[185] It took, however, ten more years of deliberations before a satisfactory solution was found to the issue of the relationship between TF and advertising regulation. Eventually, the opinion prevailed that unfair advertising should not be regarded as falling under the scope of the TF, which made regulation possible.[186] The exact meaning and reach of this opinion remained, however, a matter of controversy.

4.3.2 Substantive rules: preference for narrowly defined rules

The proposals of the 1915 Patent Legislation Committee in many respects followed closely the German model. This was a deliberate choice. The German UWG was a modern act, recently revised and had already become well-known among lawyers. A delegation was therefore sent to Germany to study the German unfair competition law and its application in practice. Consequently the draft provisions addressed many of the factual situations to be found in the German UWG, like false advertising, disparagement, false geographical indications of origin, trade secrets and bribery of employees. In some respects the list was complemented with practices that were not included explicitly in the catalogue rules of UWG, but were later condemned by the judiciary on the basis of the general clauses of this act (i.e. price cutting selling branded products, use of rebates and coupons, etc).[187] Injunction and preliminary injunction were suggested as main remedy and competitors and their associated organisations were given a broad access to the courts.

There were nevertheless some fundamental deviations from the German prototype. Firstly, the Swedish proposal contained no general clause on unfair competition. In this respect the preferred approach was more similar to the 1896 German UWG, the proposed Swedish rule on unfair advertising being even more restrictively formulated than § 1 1896 UWG. The 1915 Patent Legislation Committee had discarded categorically any ideas of introducing a general delict clause of the type of the French *code civil*. Regarding the French system the Committee summarized the reactions of the consulted business associations and bodies as follows:

> Such a system, even if attractive from a theretical point of view, would be all too evasive and not appropriate for us, considering the organisation of our judiciary and our procedural order.[188]

---

[184] The Chambers of Commerce in Stockholm, Gothenburg, Skåne, the Association of Leather Producers, the Stockholm Manufacturers' Association, etc.

[185] Prop. 1931:175, 8.

[186] Prop. 1931:175, 57.

[187] For comparisons with German law concerning free gifts and rebate coupon systems, see Betänkande, 233; on reducing prices of branded products, see Betänkande, 210.

[188] " [E]tt sådant system, om än ur teoretisk synpunkt tilltalande, vore alltför svävande och hos oss föga lämpligt med hänsyn till vår domstolsorganisation och processordning", Betänkande, 75.

The Committee shared this view:

> The Committee is likewise of the opinion that the French system should not be the basis of a Swedish legislation in this area. There is no doubt that such a system would give rise to a situation of uncertainty that would be highly prejudicial. Actually with such a system the courts would be in a way turned into lawmakers in an area where the lawmaker has seen difficulties to draft specific provisions. Consequently, this places a considerable demand on the courts.[189]

This quotation deserves special attention since some of the phrases used by the Committee there will come to be reiterated in subsequent debates.[190] The arguments are twofold. The Commission expressed deep reluctance to vest broad decision-making powers into the courts. The state of indeterminacy and uncertainty associated with such delegation was obviously poorly tolerated by the Swedish legal and political system. On the other hand, an additional disadvantage was seen in the slow and incremental character of the process of precedent-building.

However, the prevailing opinion among interested circles was overwhelmingly positive to the solution offered by the 1909 UWG. Twenty seven positive responses were filed upon request by the Committee. Only the powerful SI[191] was in favour of the more restrictive 1896 solution. The majority in the 1915 Patent Legislation Committee, however, found itself sidelined with the representatives of big business. Among the serious misgivings of the Committee was the risk of vexatious lawsuits brought with the purpose of harassing competitors and avoidng undesired competition. The motivation for this position deserves quotation:

> In an area such as this, even with a system like that of Germany from the year 1909, there would certainly arise a questionable state of uncertainty, even though to a lesser extent than if applying the French system. Which conduct that violates 'good morals' or 'sound business practice' ought in many cases be difficult to determine, even for the trader himself. ... That this would create a damaging impediment on justified competition, is clear.[192]

---

[189] "Även kommittén är av den uppfattning, att det franska systemet icke bör läggas till grund för en svensk lagstiftning i ämnet. Utan tvivel skulle nämligen därav uppstå ett osäkerhetstillstånd, som vore i hög grad menligt. I själva verket göras med ett sådant system domstolarna på sätt och vis till lagstiftare å ett område, där den verklige lagstiftaren ansett svårigheter möta för uppställande av speciella bestämmelser. Det är ett betydande krav som sålunda ställes på domstolarna." See Betänkande, 75 f.

[190] See prop. 1931:175, 10.

[191] The Swedish Association for Protection of Industrial Property also had objections against a broad general clause.

[192] "[P]å ett område som detta även med ett sådant system som 1909 års tyska helt visst skulle, om än i mindre mån än med tillämpning av det franska systemet, uppstå ett osäkerhetstillstånd av betänklig art. Vad som strider mot "god sed" eller "sunt affärsmoral" torde i många fall vara synnerligen vanskligt att avgöra, även för affärsmannen själv. Om också straff icke kunde ifrågakomma utan blott förbud mot handlingens fortsättande eller upprepande och eventuellt skadeståndsskyldighet, skulle den redbare affärsmannen ofta komma att draga sig för att använda konkurrensmedel, som rätteligen icke vore att anse som illojala. Fruktan att utsättas för obehaget av en, låt vara obefogad rättegång skulle sannolikt ej sällan avhålla honom t.o.m. från åtgöranden, angående vilkas lagenlighet han visserligen själv icke hyste någon tvivel, men som han befarade kunna av annan, kanske i syfte endast att åsamka honom skada och obehag, stämplas som illojala. Och även om trakasseringssyfte icke förelåge, kunde obefogade rättegångar lätt komma att väckas av dem, som i den hårda

As already indicated above, after complicated twists and turns of the legislative process the 1931 IKL finally was enacted as the first statute containing a broader prohibition against false advertising. In the footsteps of the 1915 Patent Legislation Committee the 1931 IKL, however, stopped short from introducing a general clause on unfair competition. Despite a revision undertaken after the opinion of the Council on Legislation,[193] the rule on false advertising remained far from the flexibility and openness of the general clause in the German UWG and even from the general clause proposed in the 1915 *Betänkande*. The first paragraph of the 1931 IKL on unfair advertising reads:

> He, who in the exercise of business through a message on a good, label or board or in an advertisement, circular letter, brochure or price-current or other message aimed at a large number of people in evident violation of good business morals regarding the activity or goods or performances offered in it provides inaccurate statements, intending to produce the impression of an advantageous offer, is punished, in cases where he possessed should have possessed knowledge of the inaccuracy, for unfair advertising with a fine...[194]

1 § IKL was deliberately tailored to avoid too broad interpretation. Several locks were retained to block a floodgate of litigation that could encroach on economic liberty or on the freedom of the press. Thus the provision did not cover all marketing methods but only advertising. It referred not to unfair advertising in a more general sense, but only to untruthful advertising and applied solely to objective data (*"uppgifter"*), excluding subjective statements of appraisal.[195] Likewise, due to respect for the freedom of the press, information concerning a competitors' goods or enterprise was outside the scope of the law. The rule encompassed advertising messages directed to a broad circle of customers and excluded personal commercial communication. The desire to hold the interpretation of the clause within narrow limits finds probably its most blatant expression in the requirement that the advertising should be in manifest (*"uppenbar"*) conflict with good commercial practice (*"god affärssed"*). The explicit intention behind this restriction was to avoid application of the law in what could be common cases of "puffing" and exaggerations, that were not to be taken literally.[196] Finally, the provision required a likelihood that the advertisement should create

konkurrenskampen hade svårt att uppdraga skillnaden mellan illojal och endast besvärlig konkurrens. Att därigenom en skadlig hämsko komme att läggas på den berättigade konkurrensen, är tydligt." Betänkande, 89 ff.

[193] The Council on Legislation is a specific Swedish institution which exercises *ex ante* control on constitutionality of most legislative acts. Its status is at present regulated in RF 8:18. The recommendations of the Council are not binding on the Government and Paliament, but are normally given a very thorough consideration and are as a rule respected. See Strömberg, *Sveriges författning* (Lund: Studentlitteratur, 1999), 90 ff.

[194] 1 § 1931 IKL read as follows: "Illojal reklam" Den, som i utövning av näringsverksamhet genom meddelande å vara, anslag eller skylt eller i annons, circular, prospekt eller priskurant eller genom annat för stt större antal personer avsett meddelande i uppenbar strid mot god affärssed angående verksamheten eller däri utbjudna varor eller prestationer lämnar oriktig uppgift, ägnad att framkalla uppfattningen om ett fördelaktigt anbud, straffes, där han haft eller bort hava vetskap om uppgiftens oriktighet, för illojal reklam med böter från och med fem till och med två tusen kronor eller, där omständigheterna äro synnerligen försvårande, med fängelse från och med en månad till och med ett år; ersätte ock uppkommen skada.

[195] The example given in the Bill was the antiseptic qualities of a mouthwash, but not its nice aroma. Prop. 1931:175, 21.

[196] Prop. 1931:175, 23. Bernitz/Modig/Malmén (1970), 41.

impression of an advantageous offer in order to fall in the scope of the prohibition.[197] So the relevance of the advertising message for the purchase of the good or the service was expressly included as a element of the factual situation. In fact, one could say that the very title of the law and of its first paragraph (Unfair advertising, "*Illojal reklam*") were misleading. Although the room for creative interpretation was extremely limited, the 1931 IKL created an impression of much wider protection than actually accorded by the law.

4.3.3 Controlled enforcement

The reserved attitude to legislative intervention in the area of free competition and free speech can likewise be identified in the enforcement design of the 1931 IKL. Although the initial legislative steps against unfair trade practices in Sweden were undertaken in the name of primarily private interests, the institutional framework set up by the new laws only partially reflected this approach.

4.3.3.1 Deciding who decides

The Swedish law-maker showed reluctance to introduce broad general clauses that would leave the interpretation and concretisation to the courts. In the words of the minister introducing the Government Bill to parliament:

> It seems to me hardly appropriate to turn law-enforcers into lawmakers in a way that the minority promotes. As the majority has pointed out, the introduction of a general clause would create a state of questionable uncertainty both for the traders and for the courts that would have to apply the law.[198]

By avoiding a general clause approach and preferring to formulate more specific standards, carefully balanced in legislative deliberation, the decision-making sphere of the judiciary was substantially limited. In the choice between the courts and the legislature, the confidence was definitely vested with the latter.

4.3.3.2 Remedies: emphasis on classical criminal law sanctions

The same attitude is discernable in the choice of enforcement techniques and remedies. Both the 1919 and the 1931 (IKL) acts were designed as criminal law statutes and thus fell under the domain of public law. Probably the most significant deviation of the 1931 IKL from the initial proposal of the 1915 Patent Legislation Committee, as well as from the German model, was the overwhelming reliance on classical criminal law sanctions such as fines and imprisonment for the combat of unfair competition. Injunction was no longer envisaged as a remedy for unfair advertising.

Of course, one should not be so naive as to believe that the injunction as envisaged by the 1915 Commission was a full-fledged counterpart to the German 'Unterlassung'. Also here the idiosyncrasies of Swedish public and procedural law manifest themselves. The injunction proposed in the 1915 Report was classified by the Patent

---

[197] This restriction was supported by the National Board of Trade with reference to the German clause on misleading advertising as well as by the TU.

[198] Prop. 1931:175, 10.

Legislation Commission as a remedy of criminal law.[199] So the understanding of the function of the injunction was quite different in the two countries. By leaving the injunction out altogether, the possibilities for enjoining objectively unfair conduct were excluded.[200] Violations of the most important rule on fair advertising (1 § 1931 IKL) were punishable by fines and in aggravating circumstances by imprisonment of up to 1 year under classical principles of criminal liability, such as intent (*dolus*) or at least negligence. Sanctions and compensation for damages likewise required a subjective element of respectively bad faith or wilful misconduct (*dolus* or *culpa*).

This option for enforcement techniques and sanctions might certainly be seen to express the principled view of the legislator that unfair trade practices constitute a matter of public interest (including the consumer interest as described above). This is however only partially so. Another explanation for the preference for criminal sanctions is connected with the much discussed doctrinal idiosyncrasy of Swedish tort law, where there is no general clause on compensation of damages. Compensation of pecuniary damages (pure economic loss) in extra-contractual relations was[201] as a rule awarded only for violations of criminal law or where expressly envisaged and not for other forms of undesired conduct.[202] An expansive interpretation of this rule was never accepted by the judiciary.

It is obvious that criminalizing certain unfair marketing methods implied an 'upgrading' of such conduct to a legal fact, thus preconditioning compensation of pecuniary damages (pure economic loss). From a private interest perspective penalisation was – at least theoretically – a shortcut to increasing the attractiveness of private enforcement.[203] For a claim for damage compensation to be successful, all the prerequisites for sentencing for the respective crime had to be met. At the same time, the damage compensation claim could be lodged independently from any criminal action against the alleged offender and was not conditional upon a punishment having actually been imposed.[204]

Swedish law at the time of adoption of 1931 IKL had not introduced the principle of free assessment of evidence. As in general tort law, also under the rules of IKL one had to show that damage had indeed occurred and to prove the size of the incurred

---

[199] "Enligt förevarande paragraf äro jämväl mål angående sanningslös reklam, vilka ej innefatta yrkande om straff eller ens om skadestånd utan allenast gå ut på meddelande av förbud mot ett visst förfarande, i tillämpliga avseenden att betrakta såsom brottmål däri talan om ansvar föres." Betänkande, 414 ff.

[200] The possibility for granting injunction in the absence of express statutory support was rejected by the Supreme Court in the case Bönan Lyx, NJA1948, 642 ("Bönan Lyx"). See the critical comments of Bernitz (1993), 75 ff. and 106 ff. The Court took a more lenient stance in a later decision NJA 1956, 664 ("A-Bilskola"), Bernitz (1993), 76.

[201] This is still the case under the 2 § 5 of the Tort Liability Act (Skadeståndslagen, SkL).

[202] See SOU 1966:71, 284 ff; cf. generally Kleineman (1987).

[203] Though see the critical attitude of the Gothenburg Chamber of Commerce towards wider possibilities for damage compensation. Prop. 1931:175, 28. In general it appears that Swedish industry tried to walk a fine line between introducing some restrictions to unfair competitive methods, but at the same time not itself be exposed too directly to the judicial process. In trying to solve this dilemma the fear of litigation often took the upper hand and attractive possibilities like damage compensation were sacrificed.

[204] SOU 1966:71, 56; 1915 Betänkande, 126.

loss, a fact that posed significant difficulties in the area of unfair competition law.[205] Certain relief on the burden of proof was introduced with an amendment in the Code of Judicial Procedure (*Rättegångsbalken*, RB) adopted in 1942.[206] This rule authorised the judge to estimate the damage to an equitable sum in cases where complete evidence could not be summoned or could only be summoned with considerable difficulty.[207] The rule could, however, only partially compensate for the inherent difficulties of summoning evidence in cases of unfair competition. Moreover, proving causal relation between the conduct and the damage afflicted to individual competitors was often practically impossible.

4.3.3.3 Conditioned access of business associations to enforcement

As under most criminal statutes, the right to prefer a charge against a person on grounds of unfair competition was vested primarily in the public prosecutor (11 § IKL). As commented above, the prosecutor was eventually authorized to act not only upon complaint, but on his own discretion. He could theoretically (at least) act as a priority-setter and 'filter' by prosecuting only really significant cases involving the public interest, and not to unnecessarily encroach on the freedom of economic enterprise and competition. Given the limited human and other resources of the public prosecutor's office (and the numerous other matters that understandably were seen to be of higher priority), the number of cases initiated by the public prosecutor was very limited.

To be sure, the enforcement design of the 1931 IKL did not confine prosecution of unfair competition only to the public prosecutor. Businessmen and trade associations in the same or similar business sector (bransch), were also granted a right to bring an action before the court on the basis of unfair advertising and unlawful sales promotions (11 § IKL). In respect to action for damages, individual businessmen (but not associations) could institute proceedings independently of any criminal charges pressed by the public prosecutor (11 § IKL).[208] Nevertheless, damages were to be awarded only if the prerequisites for criminal prosecution were met. In respect to criminal charges the right of action of competitors and their organisations was additionally restricted through a decision of the Supreme Court.[209] According to the court, private claimants could not independently raise charges of a crime that was under general prosecution. Their right was conditional upon a decision of the public prosecutor not to prosecute. In this respect the right of action was designed as subsidiary. It is naturally doubtful whether a private plaintiff would have the persistence and the courage to continue with his charges after a negative decision of the public prosecutor.[210]

---

[205] Despite this limitation there are a number of decisions in which the courts awarded damages even without conclusive evidence on the size of the loss suffered, NJA 1940, 145, ("Centrum radio"); NJA 1941, 580 ("Svensk uppslagsbok").

[206] RB 35:5.

[207] SOU 1966:71, 56. RB 35:5 "Om det är fråga om uppskattning av en inträffad skada och full bevisning om skadan inte alls eller endast med svårighet kan föras, får rätten uppskatta skadan till skäligt belopp."

[208] SOU 1966:71, 56.

[209] NJA 1954, 113, interpreting 11 § IKL in connection with RB 20:8.

[210] See 11 § IKL, SOU 1966:71, 56 ff. It may be interesting to note that in the other Scandinavian countries the resistance to intervention in the freedom of economic enterprise was also rather strong and reflected on the procedural rights of traders to sue on unfair competition grounds. Thus in Denmark the *locus standi* in the first place belonged to trade associations, particularly authorized for the purpose by the Minister of Trade. Individual

An additional cooling effect on litigation willingness certainly ensues from the very fact that the proceedings have criminal character. Especially given the general Swedish averseness to litigation, it could easily be projected that competitors would not wish to be seen as troublemakers. Such a reputation could arguably have a more negative than positive effect for their business.[211]

Finally, an individual client (consumer) was not to be regarded as having a right of action and could consequently not raise charges or bring a claim for damage compensation. This was the explicit position adopted in the influential preparatory materials, shaping the basic parameters of the new legislation.[212]

4.3.4 The shift to self-regulation

It is not surprising that the sluggishness of the legislative process and the meagre results with restrictive substantive provisions and cumbersome and inefficient enforcement mechanisms called for alternative means of solving the problems of everyday business life. The interested circles in industry and trade tried to fill in the gap through self-regulation. This is clearly expressed in the introduction to the volume with decisions from the years 1935-1951 of the self-regulatory organ of industry in Stockholm:

> The valid legislation does not contain a so-called general clause against unfair competition. As a consequence thereof industry organisations have been forced since a long time ago to seek to combat the constantly changing forms of unfair competition that are not penalised by way of appropriate self-regulatory measures.[213]

Already in 1934 a self-regulatory body (*opinionsnämnd*), was set up under the auspices of the Stockholm Chamber of Commerce.[214] In 1935 similar bodies, so called Councils on Buisiness Practices (*Näringslivets Opinionsnämnder)* were established in Gothenburg and Malmö, whereby the Stockholm Council remained the one with most intense activity. In 1938 the Councils adopted their rules (*stadga*) and appointed a Central Council Committee having the task to promote uniformity in the practice of the three bodies.[215] The panels of the Councils were composed by representatives of the Chambers of Commerce and of the five industry and trade organisations that

---

traders were also allowed to bring proceedings to court, but only after approval by one of the authorized trade associations. Cf. prop. 1966:71, 293.

[211] In a similar sense Treis, Recht des unlauteren Wettbewerbs und Marktvertriebsrecht in Schweden (Köln: Carl Heymanns, 1991).

[212] See Betänkande 1915, 130, 134, SOU 1966:71, 56.

[213] "Gällande lagstiftning mot illojal konkurrens saknar s.k. generalklausul... till följd härav har näringslivets organisationer sedan lång tid tillbaka varit nödsakade att själva söka genom lämpliga åtgärder effektivt bekämpa de skiftande yttringar av illojal konkurrens, som tid efter annan uppkomma, och vilka icke äro kriminaliserade av lagstiftningen."*God affärssed och illojal konkurrens* (Stockholm: AB Nordiska Bokhandeln, 1953), 5 ff.

[214] On the history and activity of industry self-regulation see Eberstein, 'Generalklausulen mot illojal konkurrens' (1951a) *SvJT*, 1 ff., at 12 ff.; Körner, 'God affärssed och illojal konkurrens' (1954) *NIR*, 81 ff., Tengelin, 'Den illojala konkurrensen i blickpunkten' (1957) *NIR*, 137 ff.; Tengelin, 'Självsanering på marknadsföringsområdet' (1970) *NIR*, 111 ff.

[215] See *God afferssed* (1954), 5. In the following I shall use the abbreviation NOps when I refer to the period when several Councils existed and NOp for the centralized Council established in 1957.

supported the Councils.[216] The president and vice-president of each Council had to have legal education and judicial experience.

The main task of a Council was to provide qualified opinions as to whether certain competitive act was in compliance with good commercial practice ("*[huruvida] av näringsidkare i konkurrenssyfte företagen åtgärd står i överenstämmelse med god affärssed*").[217] Clearly inspired by German law and practice, and in the absence of legislative directives, the Councils applied a 'soft law' general clause. Not only individual traders but also their organisations had access to the Councils. In addition to this soft law activity the rules envisaged a possibility for public authorities (such as the public prosecutor or the courts) to request the expert opinion of the Councils. In such matters the Councils were not conducting hearing with parties and therefore in were only in a position to offer a tentative opinion on whether the practice was in conflict with good commercial practice. The Councils could in any case not take a conclusive stand on the question whether the practice was in evident breach of such practice. One important procedural aspect of the activity of the Councils was its confidential character. Opinions that had been requested by private parties – businessmen and business organisations – could not be made public unless the respective Council should decide otherwise but then only after the Central Council Committee had given its approval.[218]

On a parallel track in 1935 another self-regulatory body, the Swedish Council on Advertising, was founded within the auspices of the Advertising Association of Sweden (*Sveriges Reklamförbund*, SRF), gradually taking a high profile in supervising the ethical standards of advertising. The Council on Advertising was actively involved in the elaboration of the ICC Code of Advertising Practice, which accounts for the importance the Code gradually acquired in Swedish fair trading law.

In 1957 the three Councils of the Chamber of Commerce, together with the Swedish Council on Advertising, merged into one central Swedish Council on Marketing Practices (*Näringslivets opinionsnämnd*, NOp) with the pronounced objective to improve enforcement and to render the combat with unfair competition more effective.[219] This central self-regulatory body was supported by sixteen organisations of industry and trade and could after some years of existence report of a high number of proceedings and intense norm-making activity.[220] Not only traders and trade associations but also individual persons could lodge a petition with the NOp free-of-charge.[221] It is noteworthy that the new body firmly based its decision-making in

---

[216] These were the SI, the Federation of Swedish Retailers (*Sveriges Köpmannaförbund*, SKF), the Association of Swedish Enterprises (*Sveriges Hantverks- och Småindustriorganisationen*, SHS), the Swedish Cooperative Union (*Kooperativa Förbundet*), *Ibid*, 5 ff.

[217] § 1 Rules. For a detailed account on the organization and activity of the NO with references to their Rules of procedure see Eberstein (1951a), 13 ff.

[218] See Eberstein (1951a), 15. The decisions of the Board were, however, made public in an anonymous form through publications of the chambers of commerce. See Körner (1954), 81 ff.

[219] Tengelin, 'Den illojala konkurrensen i blickpunkten' (1957) *NIR*, 137 ff., at 140. *Otillbörlig konkurrens och god affärssed.* Yttranden avgivna av Näringslivets Opinionsnämnd under åren 1957-58 (Stockholm: Norstedt & söner, 1963), 5.

[220] Tengelin (1970), 119.

[221] According to estimate by Tengelin individual petitions made for 20 percent of the cases before the Board, Tengelin (1970), 118.

advertising matters on the International Code of Advertising Practice adopted by the Interntional Chamber of Commerce.[222]

The work of industry self-regulation in Sweden and the degree of compliance with the decisions of the NOp have subsequently been positively assessed by many commentators.[223] Arguably, Swedish society presented a beneficial environment for efficient functioning of such 'soft law' systems of regulation. In legal literature the following factors have been elicited as being conducive for effective self-regulation: low compliance costs, cohesive groups of sellers, low costs of detection of breach and adequate sanctions.[224] Most of these factors were present in Sweden at the time with the possible exception of adequate sanctions. The Swedish market was relatively small and transparent, traders were few in numbers and well-organised, mechanisms of reputation and stigmatisation could be effectively triggered. Society as a whole was homogeneous and cohesive. As to sanctions, certainly the threat of formal court proceedings and criminal sanctions could be invoked. Nevertheless, given the rudimentary subtantive protection afforded by the IKL, such sanctions could be claimed in only a limited number of factual situations and remained therefore of little value. So the main sanction remained the expected negative following an opinion of the Councils condemning certain business conduct.

4.4 The evolving standard of fairness

4.4.1 Germany: expansive protection of the competitive *'status quo'* and 'Mittelstand' interests

The case law on the basis of the *1896 UWG* evolved within the relatively strictly limits drawn by the statute. The factual situations covered by the substantive provisions prompted an individualistic understanding of the statute. Even if a right of action was recognized for business associations, it was regarded more as a bundle of individual rights and less as an opening towards collective interest protection. The situation did not change much with the entry into force of the statute of 1909. The plaintiffs based their claims mainly on the specific and less controversial catalogue rules of unfair competition, i.e. misleading advertising, trade secrets, trade mark protection. Deception chiefly concerned situations of appropriation of competitors' trade names, trademarks and geographical indications. The general clause was only rarely invoked before the courts.[225] Attempts to give expansive interpretation of the clause were generally met with hostility.

4.4.1.1 From individual rights to 'general interest' objectives, from monism to pluralism

Gradually, however, a different broader understanding of the functions and objectives of unfair competition law started to win the sympathy of courts. Some early decisions, especially in cases of deceptive advertising, suggested that the UWG would "keep clean public exchange" in the interest of the general public ("die Reinhaltung des

[222] Tengelin (1957), 141. I have not been able to find references to the ICC Code in reports on the activity of the early NOs.
[223] See Bernitz/Modig/Malmén (1970), 45.
[224] Ramsay, *Consumer Protection* (London: Weidenfeld & Nicolson, 1989), 91.
[225] See Ohly (1997).

öffentlichen Verkehrs im Interesse des Publikums").[226] This expression was nevertheless used in passing, without any independent value attached to it. It basically referred to the accepted view that the Unfair Competition Act in a reflexive manner might induce positive effects for the consumers.[227]

The real breakthrough took place with decisions recognising the interest of the general public as a separate and independent objective of the statute beside the individual or joint interests of competitors. It was the collective right of action granted to business associations and unions that opened the way for this so-called 'social' conception of unfair competition law, providing a dogmatic justification for such approach. Clearly granting a right of action to a collective body such as business unions could be rigorously justified only if the statute envisaged a protection of interests, reaching beyond the strictly individual private interest. Contemporary commentators regard the above referred *'Markenschutzverband'* decision of the Imperial Court of 1928 as the turning point. The Court set forth that the claim of the *Markenschutzverband* was independent from that of the trader/union immediately affected by the unfair conduct. The justification for this interpretation was summarized in the seminal formula:

> [D]ie Unterlassungsklage, die an sich nur den Konkurrenten schützen soll, in Wahrheit doch – wie das ganze Wettbewerbsgesetz – den Auswüchsen des Wettbewerbs auch im öffentlichen Interesse entgegentreten und daher die Verfolgung der betreffenden Rechtsverletzungen nicht dem Belieben des unmittelbar Verletzten allein überlassen will.[228]

This decision was indeed particularly categorical in confirming the departure from the individualistic understanding of the functions of the UWG. By allowing the parallel and cumulative prosecution of one and the same conduct by different plaintiffs, the Imperial Court left no doubt that the statute served a broader objective, not identical with the sum of individual interests of the directly affected competitors.[229]

In the *'Markenschutzverband'* decision the defendant was accused of having violated contractual obligations *vis-à-vis* a trademark union, through providing greater rebates and discounts to his customers than was allowed by the agreement. It was in other words a question of deviation from a restrictive competitive agreement, imposed by a conglomerate of big wholesale dealers in the chemical industry. The court noted that the character of the agreement was not without significance. Theoretically the fact that an agreement was itself in conflict with *bonos mores* could rectify a violation of the agreement. Yet in the particular case, the court did not find the agreement to violate

---

[226] See the cases quoted by Pause, *Die Berücksichtigung der Interessen der Allgemeinheit bei der Beurteilung wettbewerblichen Handelns* (Frankfurt am Main: Peter Lang, 1984), 18 ff.; cf. also Schricker (1970), 32 ff., at 34.

[227] See the quotations from the parliamentary debate above.

[228] RGZ 120, 47 ff., at 49. The RG pointed out that in the first Bill to the UWG there was a proposal to grant those lodging subsequent claims on the same ground (e.g.unions) only the right to step in the proceedings as joint plaintiffs. Since this proposal had not been incorporated in the legal text, the court drew an *e contrario* conclusion of multiple rights of action in the same matter. See also RGZ 128, 330 ff., at 332. Cf. Baumbach/Hefermehl (1998), 197. See Schricker (1970), 34.

[229] For an even earlier case with reference to public interests in connection with Verbandsklage see RGZ 79, 325, in Leidl, *Rechtsprechung des Reichsgerichts in UWG Sachen* (Verlag Gisela Liedl, 1968), 349, See also the examples quoted by Pause (1984), 13.

honest commercial practices even if it admitted that "a refusal to sell on the part of all members of the Trademark Union should bring about not insignificant economic damages to the defendant."[230]

The interests of the general public were not understood in the sense of '*ordre public*' or as being identical with the interests of consumers. Rather the phrase 'interests of the public' seems to vaguely relate to considerations of structural economic policy, giving preference to the interests of a particular type of competitive conduct and indirectly, to a particular economic group. In the early case, however, one can identify a still lingering commitment to the principle of free economic enterprise, whereas in the second case the interests of the public were interpreted as identical with the interests of an industry group. Although lip service was paid to the necessity of balancing these interests with free competition, eventually unfair competition law was allowed to be used as an instrument of enforcement of questionable industry-wide objectives. The definition of 'good morals in business' was clearly influenced by the perceptions of the dominant circles in the respective industry. Another category of decisions concerned the application of the statute of limitations in unfair competition law. The courts took the stand that despite the expiry of the statute of limitations, a violation of the standards of UWG could be legally tried, if its effects persisted to the detriment of the general public.[231]

The relation of the formula of general public interest to consumer protection is not an uncontroversial issue in legal literature. In the opening toward a public interest interpretation, Schricker tends to see the roots of a more consumer-friendly interpretation of the statute.[232] Other commentators, like Pause, tend to identify a different category of interests behind the notion of *Interessen der Allgemeinheit,* and notably one which does not coincide with those of consumers.[233] Generally speaking, the broadened understanding of protected interests inevitably contributed to more active litigation and to creative judicial law-making.

4.4.1.2. **Fallgruppen** *(categories of cases)*

The advancement of the collective/public interest understanding of the UWG, in combination with broad interpretation of the procedural rules with generous access of bodies for collective representation of industry interests before the courts, wide-opened the way towards inventive concretisation of the general clause under the pressure of litigious business unions. Apart from situations affecting individual competitor's interests such as slavish imitation, misappropriation of competitor's products as well as true but ill-spirited disparaging information, the clause was gradually stretched to cover situations that had more general effects on the market and on collective interests of market participants. Among these new situations were boycotts, the granting of rebates and use of other particularly attention-catching promotional techniques like free distribution of goods, sales under the indicated 'brand' prices, lotteries, etc.

---

[230] Pause (1984), 13.
[231] See Pause (1984), 17 ff. with further references.
[232] See Schricker (1975), 213, fn. 20.
[233] See Pause (1984), 235 ff.

The role of the general clause as a dominant paragraph for the whole UWG was well perceived and confirmed already in the early case-law of the *Reichsgericht*. The general clause was to dominate the whole legislative act and could be applied whenever the conditions for applying the special provisions were not at hand. But a special provision did not necessarily preclude recourse to the general clause.[234] This interpretation ensured the broadest possible margin of discretion to the courts. The concept *gute Sitten*, was early casted into the seminal formula: "das Anstandsgefühl aller billig und gerecht Denkenden".[235]

Unlauterer Wettbewerb durch Rechtsbruch (breach of statutory duty)
Already early in the enforcement history of the UWG, the question emerged whether business conduct violating legal norms outside the scope of UWG could be interpreted as coming into conflict with good morals (*gute Sitten*).[236] A positive answer would imply that any illegal conduct, as long as it was undertaken for the purposes of competition, could be parallely qualified as an act of unfair competition and consequently enjoined on the basis of the general clause of UWG unfair competition law. Clearly this question gained importance only after the general clause was introduced in the 1909 Act.[237] Also in this respect both courts and doctrine were initially careful not to allow for too broad interpretation of the general clause. In an early decision of 1912 the Imperial Court was asked to take a stand in a dispute between pharmacies and drugstores. A number of trade regulations and criminal provisions limited the sale of certain medicines only to pharmacies. The issue in controversy was, among other things, whether continuous violations of these rules on the part of drugstore-owners could be considered as against honest commercial practices and whether injunction could be sought by affected pharmacists on the basis of § 1 UWG. The court admitted that such a breach of statutory rules could negatively affect competitors and potentially constitute an act against good morals. Nevertheless, it held that a violation of a legal prohibition was still not "*par exellence* against bonos mores."[238] Similar judicial restraint was exercised in cases concerning pyramid sales allegedly in violation of statutory restrictions on games of chance, or activities of consumer cooperatives exercised in the absence of the required license. In the pyramid sales decision the RG did not see the breach of statutory duty as unfair conduct in itself, but found elements of unfairness, which led to an injunction.[239]

Callmann commented approvingly the reserved attitude of the judiciary. With the Imperial Court he held that "the greatest care is required in these cases, since often the interests are of a widely divergent character and the moral appraisal of private economic conduct is independent from norms that are exclusively influenced by the

[234] RGZ 79, 327.
[235] RGZ 48, 114 ff., at 124.
[236] Breach of statutory duty. See Ohly (1997), 240. A catalogue with examples from case law is provided by Callmann (1929), 130 ff.
[237] See Schricker, *Gesetzesverletzung und Sittenverstoß* (München: Beck, 1970b), 21.
[238] „Eine ein gesetzliches Verbot verletzende Handlung verstößt indessen noch nicht schlechthin gegen die guten Sitten." RGZ 77, 217 ff., at 220, quoted after Callmann (1929), 99, § 1, Rdnr. 16.
[239] See Schricker (1970b), 24 with reference to cases on pyramid sales and on the activity of cooperatives without a license.

reason of state".[240] The courts should not consider violations of trade regulations which have public order character as necessarily against honest practices (*bonos mores*).[241]

The legal reasoning in the pharmacy decision demonstrates the sophisticated intertwining of the logic of the Unfair Competition Act with that of the BGB. Injunction was often sought not exclusively on the basis of UWG. The claims were supported on several grounds, and almost invariably on general tort law. In this respect the theories on the protective law (*Schutzgesetz*) developed under the rules of tort liability in the Civil Code are of particular relevance. § 823 II BGB stipulates compensation of damages in case of violation of a law aiming at the protection of another person, fault being required. In the controversy over the conduct of drug-store owners the court did not interpret the criminal provisions as aiming at the protection of pharmacists, but only as protecting the general public on public health reasons. This latter objective of the statute was not considered to have any relevance for the analysis of the conduct under § 1 UWG.[242] The only valid concern recognized by the court was that about the interests of competitors.[243] Similar reasoning was developed in the subsequent decision concerning violation of a prohibition, under criminal liability of games of chance, on organising pyramid sales.[244] The argument that the public should be protected from enticement to games of chance (gambling) did not suffice.[245]

A new and more lenient attitude towards claims based on breach of statutory duty could be witnessed towards the end of the 1920s. In a seminal decision of 12 April 1927 the Imperial Court for the first time introduced the idea of 'undue competitive advantage' (*Vorsprung durch Rechtsbruch)* as motivation for subsuming breach of statutory duty under § 1 UWG. The case addressed violation of collective agreements on wage tariffs. A governmental ordinance had declared the tariffs legally binding for the whole service sector (security surveillance of real estates). The defendant had systematically paid his employees wages under the agreed tariff level and had consequently been in a position to charge lower prices for his services. The plaintiffs attacked this conduct as violating honest commercial practices. The court granted the injunction and found the action for damages to be well founded despite the fact that the breach of the tariff was undertaken with the explicit consent of the affected workers. It motivated its decision by the competitive advantage gained by the offender

---

[240] "es ist überhaupt größte Vorsicht geboten, weil vielfach unvergleichbare Interessen einander gegenüberstehen und die moralische Bewertung privatwirtschaftlichen Handelns unabhängig ist von Normen, die etwa ausschließlich von der Staatsräson beeinflusst sind." Callmann (1929), 99.

[241] "ein Verstoß gegen gewerbepolizeiliche Vorschriften noch nicht notwendig eine Sittenwidrigkeit enthielte, auch dann nicht wenn er mit einer vorsätzlichen Benachteiligung eines Mitbewerbers verbunden war." Callmann (1929), 99.

[242] RGZ 77, 217 ff., at 220: "...ihre [der Zuwiderhandlung] gesundheitspolizeiliche [Seite] kommt für den Anspruch des Klägers nicht in Frage..."

[243] The situation changed only after approximately 50 years when the BGH explicitly dissociated itself from this line of precedent and confirmed a broader range of protected interests under unfair competition law. See Schricker (1970b), 22, with further references. Schricker ascribes the change to altered understanding of courts as to the protected interests under unfair competition law, including the interests of consumers and the general public Schricker (1970b).

[244] RGZ 115, 319. See Schricker (1970b), 23.

[245] Also in this category of cases Schricker notes a change in attitude in that it would arguably be easier to infer an act against good morals from violation of a criminal prohibition. See Schricker (1970b), 24, with further references.

in relation to his law-abiding competitors. With reference to the motivation of the Appellate Court, the Imperial Court repeated the principle that an action in breach of a legal act does not in and of itself constitute an infringement of *gute Sitten* and that it depended on the contents of the legal act. It then continued that a planned violation connected with a deliberate impairment of competitors' interests was as a rule against *gute Sitten*. Through his systematic illegal conduct the perpetrator was gaining an "undue advantage in competition."[246] The Imperial Court confirmed this reasoning of the Appellate Court.[247]

The concept of *ungehöriger Vorsprung* (undue competitive advantage) would subsequently evolve into a multifaceted instrument for extending the scope of the general clause. Violations of statutory obligations with some bearing on the competitive process placed the illegally acting competitor in a situation of undue competitive advantage in respect to all law-abiding competitors. Through this justification theoretically all illegal conduct could be, in parallel to liability under criminal and administrative law, prosecuted on unfair competition grounds. The competitors could thus turn into watchdogs of the market, a second police force, seeing to it that the law was observed.

Clearly, formulated in this breadth the doctrine was untenable in the long run. With an increased number of decisions interpreting breach of statutory duty as an act against good morals, the judiciary sought more nuanced approach. One such dogmatic distinction was that between value-laden (*wertbezogen*) and value-neutral (*wertneutral*) norms. Schricker identifies first hints of this distinction in a decision of the *Imperial Court* of 7 April 1941.[248] By identifying norms that "did not have anything to do with the general moral perceptions" and were more of a pragmatic, state expediency nature, the *Imperial Court* tried to prevent the expansion of this cause of action out of proportion. Even here, however, the line was not drawn sharply. We learn from the reasoning of the Court that also violations of rules of pragmatic character could fall under the general clause, provided that this violation threatens the interests protected not only potentially and that it in other ways contravenes the perceptions of the people (*Volksempfinden*). So we find the Court again reluctant to delimit its own decision-making competencies.

Aggressive price competition and obstructive competition

In their assessment of aggressive marketing techniques both judiciary and legal doctrine initially remained faithful to the spirit of true economic liberalism. As emphatically expressed by Kohler:

> Es besteht ein freies Preisbestimmungsrecht, insbesondere ein freies Recht, die Konkurrenten zu unterbieten.[249]

---

[246] RGZ 117, 16 ff., at 20.

[247] „Der Beklagte verwertet demnach einen durch Rechts- und Vertragsbruch erlangten gewerblichen Vorteil, nämlich die erheblich niedrigeren Einstandspreise seiner gewerblichen Leistungen, dazu, um sich vor den tariftreuen Wettbewerbern durch seine so ermöglichten sehr viel billigeren Vergütungssätze einen Vorsprung im gewerblichen Wettkampf zu sichern." RGZ 117, 16 ff., at 24.

[248] RGZ 166, 315 ff., at 319. The dispute regarded an alleged violation of a prohibition to deal with procurement of real estate and mortgage contracts.

[249] Kohler (1914), 26.

Gradually, however, attitudes were changing. Thus the courts condemned practices like price-cutting in violation of vertical price agreements of branded goods (*Preisschleudern mit Markenartikeln*).[250] Similar was the development in respect to sale under cost. Whereas in the early years of UWG jurisprudence the courts were very careful in taking a stand on these issues, an activist era was launched with the *Benrater Tankestellen* decision.

These decisions sharpened the question of the exact division between unfair competition and antitrust law.[251] In doctrine Kohler had been arguing that the evaluation of a competitive behaviour in respect to prices had to take place only with regard to the situation taken without taking account of past or future (*'ohne Vor- und Rückschau'*), thus defending liberal price formation.[252] The more activist line of reasoning of the courts, however, was approvingly commented by Ulmer on the basis of the broad concept of 'undue competitive advantage'.[253] In the absence of efficient antitrust law and policy, many of the pertinent and delicate decisions about the line between free and fair competition obviously had to be made by the judiciary.

One important question that both judiciary and doctrine had to face was whether the general clause on unfair competition had to be extended to respond to direct economic concerns or to be treated as neutral with regard to the operation of the market. The matter was brought to a head in a line of disputes concerning boycotts, stoppage of supply with materials and dumping. The measures were in the majority of the cases undertaken on the part of cartels or individual powerful enterprises. The courts initially tried to walk a fine line between free and fair competition. Measures of so-called 'organized outer coercion' (*äusserer Organisationszwang*) were regarded as principally allowed. The same applied to boycotts that were described as permissible means in the competitive struggle.[254] At the same time the judiciary saw itself authorized to compare the justifiability of the purpose with the measure and to examine the proportionality in the individual situation.[255] Generally, the courts introduced the principle that there should be proportionality between means and ends.[256] The Cartel Ordinance in § 9 explicitly addressed the issue of organized outer coercion.[257] But according to Ulmer there was even after entry into force of the ordinance room for unfair competition law to fill in the gaps.

Rebates and free distribution of original (Massenverteilung von Originalwaren)
As evident from the legislative history of the 1909 UWG, the advocates of new legislation were particularly interested in curbing the spread of aggressive promotional techniques. Many of these aggressive strategies were employed by powerful competitors who could afford the costs of such campaigns. A particular concern of the

[250] RGZ 88, 9; RGZ 120, 47 („Markenschutzverband").
[251] Ulmer (1932), 16.
[252] Kohler (1914), 31.
[253] Ulmer (1932), 24.
[254] RGZ 51, 385; RGZ 56, 274; RGZ 76, 43.
[255] RGZ 28, 238 („Börsenverein der deutschen Buchhändler") on *inneren Organisationszwang*; RGZ 56, 271 („Verein deutschen Buchhändler") on *äußeren Organisationszwang*.
[256] Callmann (1929), 106 ff. with further references.
[257] Quotation as in Callmann (1929), 106.

time was the growth of the department store at the expense of smaller retailers. This tendency was perceived as an American influence inimical to the traditions of German retail trade and threatening for small-scale businesses. The legislator was reluctant to introduce a specific prohibition in this area from fear of limiting economic freedom. Much of the desired prohibitions arguably materialised by way of judicial interpretation.

Originally rebates were considered as allowed, irrespective of whether the price-reduction was offered immediately or subsequently, whether limited to certain loyal clients, clubs, etc. or universally awarded. Coupons were according to Callmann fully acceptable, as long as they were not misleading. On this matter, however, the opinion of the German Retailers' Association differed.[258] Also in this respect we may notice the antagonism against the department stores – the main actors dealing with rebates and coupons.[259] In the 1930s the mounting pressure eventually resulted in two special acts of economic regulation: the Rebates Act (*Rabattgesetz*) and the Free Gifts Regulation (*Zugabeverordnung*).[260] On the basis of the general clause and the doctrine of undue competitive advantage through statutory breach the two acts could be rigorously enforced by competitors and their associations.

A specific category of cases that evolved under the general clause concerned the mass distribution of original products. Such strategies were arguably possible and lucrative for powerful enterprises, hoping to acquire an increased market share in the long run. They could also be used as a means of entry into a new market (often dominated by import products). The grounds for legal evaluation were laid down in the seminal 'Diamantine' case. The defendant had distributed leaflets with coupons to the households and inserted advertising in the newspaper inviting customers to collect a free of charge tin of shoe-polish from their local store. In addition, customers were urged to participate with their coupons in a lottery where objects of substantial value could be won.[261] The Imperial Court issued an injunction on the basis of § 1 UWG and allowed the damage compensation claim. The court considered it to be against good morals to promote one's position in competition through free distribution of goods. The Diamantine decision was followed by other decisions of the Imperial Court condemning the mass distribution of products, like the 'Persil' decision concerning English washing powder, the *'Lockenwickler'* decision and the *'Eierbrikett'* decision.[262]

Several arguments were given in support of the restrictive line of reasoning advanced by the court, often citing economic policy implications. In the opinion of the Imperial Court a marketing strategy linked to free distribution of goods conflicted with established standards of sound economic management. It was not the salesman vocation to give away his products at the disadvantage of his competitors, but instead to distribute the goods from producer to consumer upon orderly calculations and after

---

[258] See Callmann (1929), 136.
[259] Callmann (1929), 134.
[260] Gesetz über Preisnachlässe (*Rabattgesetz*), 25 November 1933, RGBl I, 1011; Verordnung des Reichspräsidenten zum Schutz der Wirtschaft, 9 March 1932, RGBl. I S. 121 (*Zugabeverordnung*).
[261] RG GRUR 1936, 810 („Diamantine").
[262] RG GRUR 1938, 207 („Persil"). See also the cases RG GRUR 1938, 849 („Eierbrikett"); RG GRUR 1939, 862 („Lockenwickler").

realization of reasonable profit. The use of one's own inventive talents and capital resources for the purposes of competition was not in itself foreign to competition and an advertising could not only on these grounds be qualified as unfair. However, advertising could go beyond the borders of the fair and acceptable if it resorted to means that were incompatible with what according to the 'in den beteiligten Verkehrskreisen herrschende Volksanschauunung' was the essence and the purpose of objectively and economically reasonable commercial advertising.[263]

The Court distinguished the case of distribution of products from distribution of samples. Whereas free samples were a convenient strategy to introduce a new product or the new qualities of a familiar product, it was argued that the distribution of original goods, for a certain period of time, is a marketing method which violates the premise of reasonable commercial activity (*das den Boden sinngemässe kaufmännische Betätigung verlässt*). With reference to the *Rabattgesetz* prohibiting rebates and discounts in particular cases, it was logical *per argumentum a fortiori* to be even more restrictive to the giving away of the whole product. Another macro-economic factor considered was the effect of this practice on the market, in terms of risk for other competitors to be forced to follow and respond with similar measures (*Nachahmungsgefahr*).[264]

In many of these arguments the desire transpired to assure better protection for small and medium size enterprises from aggressive promotion techniques, which they were not in a position to imitate. When drawing the analogy with the Rebate Act, the lower instance court in the Diamantine decision explicitly found the rationale of the marketing strategy to lie in the danger it posed for the viability of smaller enterprises. The Imperial Court sustained this argument. In the 'danger to imitate' argument there was an implied concern that less powerful enterprises would not be able to survive in this kind of competition. The reasoning of the Imperial Court revealed a clear tendency to give weight to economic policy considerations. Expressions like 'sound business management', 'management that does not burden the economy excessively'[265] are symptomatic of an economic interventionism characteristic of the time. Indirectly it implied that the courts could and should be the arbitors of the market and that reasonable economic conduct may be judged objectively. This type of argument has been much discussed and criticized in post-war German doctrine as belonging to a planned economy, although (as we shall see later on in this study) such criticism did not bring about a complete overhaul of earlier reasoning.[266]

The use of economic policy considerations was, as Pause notes in his analysis, well covered under the concept of 'protection of the interests of the general public'. In the Diamantine decision the court explicitly distinguished between the interests of the consuming public (the consumers) on the one hand, and the interests of the general public (the public interest) on the other.[267] Obviously the "interests of the general

[263] RG GRUR 1936, 810 („Diamantine"), 811.
[264] *Ibid.*, 812.
[265] RG GRUR 1936, 810 ("Diamantine"), 812.
[266] See BGH GRUR 1965, 489 („Kleenex").
[267] RG GRUR 1936, 810 ("Diamantine"), 812; cf. Pause (1984), 15 pointing at the mention of „Verbraucher" and „kaufendes Publikum" .

public" were thus seen to refer to situations where economic competition and the economic order were affected in a manner detrimental to society at large.

Comparative advertising
The spread of *incorrect* and denigrating information about the person, the enterprise, the business and the goods of a competitor were expressly regulated in § 14 of the 1909 UWG (*Anschwärzung*).[268] The purposeful recourse to such marketing practice was even prohibited under threat of criminal sanctions.[269] It was unclear whether this provision exhausted all situations of use of information about competitors in one's own advertising, and whether correct disparaging information was allowed. Gradually, a generally restrictive view on all advertising that, instead of promoting one's own goods and services, referred to the goods, services or personality of the competitor established itself in German unfair competition law and practice. In legal doctrine such an attitude was arguably first defended by Kohler. Kohler was explicit in condemning any form of advertising directed at the performance of competitors.[270] He postulated that "according to well-established commercial practice any person engaged in trade or business was entitled to be spared the negative assessment by his competitor."[271] In legal doctrine the distinction was drawn between advertising referring to the private sphere of a competitor (like family, religion, political conviction, nationality and race) and advertising referring to competitors' goods and services.

Personal advertising was considered by the leading doctrine as unfair under any circumstances, since personal relations had nothing to do with competition.[272] Comparative advertising concerning goods, services and the business of competitor was initially accepted by the Imperial Court. During the 1920s, however, the attitudes changed.[273] As indicated above, the courts early demonstrated their determination to give the general clause of § 1 UWG a full swing of application by treating the specific catalogue provisions only as exemplifications of the general clause.[274] Thus, on the basis of the general clause of § 1 UWG the courts gradually developed the doctrine of '*wahre üble Nachrede*' (spreading true but malicious information).[275] Based on the general clause of § 1 UWG they found promotional methods that did not emphasize personal advantages, but the disadvantages of a competitor, as unfair. References to the goods or relations of the competitor were considered against *gute Sitten* if they were not necessary.

First in the *Konsumverein* judgement,[276] and then in the *Hellegold* case,[277] comparative advertising was condemned as unfair (arguably under the influence of the above

[268] See § 14 UWG. The closest English concept would be that of the tort of 'injurious falsehood', which in English law does, however, require proof of intent or negligence (malice). See Ohly (1997), 30 ff.
[269] See § 15 UWG.
[270] Callmann (1929), 1329, quoting Kohler (MuW XVI, 128).
[271] Bastian 'Comparative Advertising in Germany – Present Situation and Implementation of the EC Directive' (2000) 31 *IIC*, 151 ff., at 153, quoting Kohler (NJW, 1917, 127, ff).
[272] Callmann (1929), 131.
[273] On this evolution see Ohly (1997), 302 ff.
[274] On the concurrent application of the general clause and the catalogue provisions see the *Markenverband* judgement, RGZ 120.
[275] This concept corresponds closer to the English concepts of defamation and slander. See Ohly (1997), 29.
[276] RG GRUR 1927, 486, 488.
[277] RG GRUR 1931, 1299 ff. ("Hellegold").

referred article by Kohler). A distinction that gained recognition in doctrine and legal practice was that between critical comparative advertising and parasite comparative advertising. Since its Hellegold decision the RG[278] consistently held that comparative advertising in both forms as a rule was unfair.

> Die Mitbewerber, auch wenn ihre gewerbliche Leistungsfähigkeit tatsächlich geringer sein sollte, brauchen sich nicht gefallen zu lassen, in den fremden Anpreisungen als Mittel zur Erhöhung der eigenen Leistungsfähigkeit des Anpreisenden verwendet zu werden.[279]

Yet in order to balance this far-reaching prohibition of comparative advertising, in the case of critical comparisons, several defences were accepted as admissible. The so-called comparison of systems (*Systemvergleich*) was not considered as comparative advertising, because it did not name any particular competitor. This doctrine applied even when the competitor could be identified due to his leading market position in the compared category of goods. Another exemption concerned comparisons made for the purpose of informing about achieved progress in comparison with other products (*Fortschrittsvergleich*). The exemption applied however only when the comparison was necessary for achieving the purpose. In the words of Callmann:

> Die Verhältnisse können es notwendig machen, dass gewisse Ergebnisse nur beschrieben werden können, indem man ihre Fortschritte gegenüber andern Leistungen kundgibt.[280]

The comparison was likewise allowed when it took place in the course of consumer counselling (*Auskunftsvergleich*). Finally, an often applied although rather muddy reason for exemption was the retaliatory comparison (*Abwehrvergleich*), i.e. comparison that comes as a justified reaction to a competitors conduct and marketing. It should be noted that the doctrine of justified defence was applied not only when the interests of the competitor were infringed upon, but also where the interests of the general public were involved. Thus disseminating information about a sickness of a competitor, although morally questionable, could be defended when the interests of the customers were at stake.[281] Whenever a concession for allowing comparative advertising was made, high requirements on the objectiveness of the comparison were demanded (*sachlicher Vergleich*).

Not only the critical comparative advertising (*kritisierende Werbung*) was regarded as unfair but also the parasite advertising, taking advantage of the reputation of a competitor and claiming equivalence with his goods or performance (*anlehnende*

---

[278] Ibid.

[279] RG GRUR 1931, 1299 ff., 1301. Ohly and Spence see the gist of this decision in the old saying that no one can be a judge in his own case, see Ohly/Spence (1999), 684; cf. Reich/Ahrazoglu, 'EG-Binnenmarkts und Werberecht' (Bremen: ZERP, 1990), 30.

[280] Callmann (1929), 133.

[281] The example given by Callmann concerned spreading information about lung disease of a competitor (dentist), RG MuW XI, 436. Since it would be open for everybody to inform the interested customers, this was considered allowed for the competitor as well. The conduct was nevertheless prohibited, but on other grounds. Callmann (1929), 133. In a similar sense RG, GRUR 1916, 186 (information about fatalities resulted from consumption of vinegar essence.

Werbung).[282] Whereas the critical comparison could be exempted from the prohibition under certain circumstances, equivalence claims were prohibited without exception.

Lowering threshold for deception
The deception paragraph of UWG (§ 3) was, as mentioned above, worded with great care and seemingly so exhaustively and precise to hardly cause any interpretation problems. According to Beater the extensive enumeration of specific situations and advertising statements that could be misleading could be ascribed to the legislative and methodological approach characteristic of the time of drafting the 1896 UWG.[283] The desire to avoid general clauses and to give the impression of clear and well-defined guidelines for implementation prompted formalistic techniques that approach the pedantic anglo-saxon style of statutory drafting.

Yet early on the problem of the decisive "threshold" of deception surfaced. The departure from narrowly individual interests familiar from classical private law, controlled by their beneficiaries, and the move towards weighing of collective interests, opened a 'Pandora's box' of regulative jurisprudence. Each decision on what Callmann aptly called 'öffentliche trügerische Reklame' (public deceptive advertising) implied an assessment on how 'the public' perceived a message, and then taking a normative stand on whose perceptions should be given preference.

The early decisions of the RG underlined the intimate connection between the standard of deception and the target audience. The individual case could bring to the fore factors such as language problems, intellectual capacities and habits of the targeted audience. Decisive for juducial interpretation were the perceptions of the average target audience. If advertising was addressed exclusively to professionals, the average professional should be the standard. By contrast, if the advertising targeted an audience thought to be susceptible to prejudice, the perceptions of this audience were deemed important.[284]

Even preceding the television era, the scrutiny (inspection, trial) of the average public was considered to be superficial. The average reader was supposed to read advertising messages casually (*flüchtig*). However, the importance of the message, the purpose of the message, the medium, the number of the announcements and their font style were considered to influence the sharpness of perception and the care applied.[285] Thus, when a valuable edition of a well-known animal encyclopedia was announced as a free gift, one was expected to read the announcement carefully, a decision much criticised in the doctrine.

As to the normative yardstick for establishing deception, a balance was sought between excessively strict and excessively lax criteria. The judiciary held that for identifying cases of deception it was not necessary to establish that the announcement was understood in a certain sense by each and every member of the target audience. This would be a too demanding requirement. Likewise the threshold could not be set

[282] See Ohly/Spence (1999), 684 with reference to Nerreter, GRUR 1931, 8 ff.
[283] Beater (2000), 8 ff.
[284] See Callmann (1929), 160 with further references.
[285] See Callmann (1929) with further references: RG 58, 239: RG I MuW XIV, 182, RG i. MuW 27/28, 25.

by the majority, nor by a substantial part of the public. Already at an early stage a magic formula won recognition:

> Es genügt ein nicht völlig unerheblicher Teil des Publikums, nicht aber der Irrtum einzelner Personen.[286]

The restrictive elements included in the rule of § 3 UWG – like the requirements of addressing a broad audience or creating the impression of a particularly advantageous offer – were in effect neutralised by the opportunity recognised by the judiciary to subsume practices not fulfilling these requirements under the general clause of § 1. Most importantly, the judiciary at a rather early stage declared the possibility of applying the general clause where the prerequisites for applying the clause on false advertising were missing.[287]

Aggressive promotional techniques
The jurisprudence on aggressive promotional techniques in spirit resembles the case law on aggressive advertising. From the principle of truthfulness of advertising Ulmer deduced restrictions regarding its form. In this respect eye-catching advertising, client-hunting by approaching clients on the streets, unwanted visits at funerals, etc. could all constitute means of extracting an undue competitive advantage.[288]

It is sometimes submitted that the judiciary already in the pre-war time had taken consumer protection into account.[289] Indeed, the courts early recognized that an accepted deceptive '*usance*' in the relevant commercial circles does not necessarily justify the deception.[290] Apart from the interests of competitors there are other relevant interests to be considered. In many decisions of the RG referring to the interests of the '*Allgemeinheit*' the court did not discriminate between the general public and the consumers.[291] Some decisions leave the impression that the terms are used as mere synonyms. This, however, would be an exaggerated interpretation. Even in decisions showing great concern for the weak and exposed citizen groups, like the elderly and the less well off, the emphasis of the decision is on competitors' interests.

4.4.1.3 The standard of fairness in legal doctrine
The theoretical justifications for fair trading law submitted in legal doctrine were based on an individualist understanding of the statute. Two competing theories were elaborated, reflecting the theoretical discussions from general civil law but also the most authoritative philosophical and theoretical trends of the time. Many of the first commentators of the UWG, like Kohler and Lobe, followed classical theories of tort law (in particular the law of individual rights) and regarded unfair competition law as an extension of the protection of the personality to the sphere of economic activity (*Persönlichkeitsrechte*). Another group of scholars built on the links between unfair competition law and industrial property law and sought the object of protection in the

---

[286] See Callmann (1929), with references to RG 99, 28, 135; RGSt. 36, 378 and other cases.
[287] Callmann (1929), with reference to RGZ 77, 431 ff., at 433.
[288] Ulmer (1932), 31. Similar already earlier Kohler (1914), 104 ff.
[289] Schricker (1970b).
[290] RGSt. 36, 378; RGSt. 48, 41.
[291] See Pause (1984), 15.

right to the undertaking as exercised by the competitor. Among this group we find prominent authors like Baumbach and Callmann.

Josef Kohler, one of the most respected commentators of the UWG, in 1914 published his treatise "Der unlautere Wettbewerb". He submitted a view of unfair competition law based on a general theory of personal rights (*Persönlichkeitsrechte*).[292] The person was, following this theory, to be regarded as one whole in both his private and economic capacity.[293] There were two important elements in the theory. On the one hand, everybody had to be free to use his creativity and to pursue his personal well-being to the best of his abilities even if this was detrimental to one's rivals. In an economic order of free enterprise, personal egoism would ultimately bring about the general good. This part of the theory was clearly inspired by ideas of economic liberalism stemming from Adam Smith. On the other hand the egoistic strife after private prosperity had its limitation in the personal rights of others.[294] Everybody should, according to Kohler, have the right to be free from damages afflicted on his personality by the unfair conduct of others. Unfair in this context meant a conduct that accorded a competitor an advantage in a way that was not justified by the objective situation. It is important to point out that personal rights were ultimately conceived as individual freedom. An encroachment on individual freedom was seen to lie already in the fact that a person, as a consequence of the unfair conduct of competitors, would himself feel forced to resort to unfair conduct. It is not difficult in his theory to recognize influences from both liberal economic thinkers like Adam Smith and philosophers like Kant and his 'Categorical Imperative'.[295]

The theory of the enterprise as the main object of protection of unfair competition offered a similarly individualistic perspective. However, in this case the object of protection was seen to lie in the "right upon the established and exercised industrial undertaking" ("*Recht auf ausgerichteten und ausgeübten Gewerbebetrieb*"). The term first evolved in the context of industrial property law and was applied to achieve extensive interpretation of the general clause on tort law in the Civil Code, § 823 BGB. Damage compensation was under this paragraph only awarded for damages afflicted to so-called 'absolute rights' like property and possession. Subsuming the right to the enterprise under this category allowed for a flexible development of tort law in pace with social and economic demands.[296]

---

[292] See Kohler (1914). Kohler was not only one of the pioneers in the scholarly analysis of intellectual and industrial property law (cf. his *Markenrecht*, *Autorenrecht*), but also a respected scholar in the field of legal history and theory of law (cf. the five-volume encyclopedia devoted to legal science published under his editorship: Kohler, (ed.), *Enzyklopädie der Rechtswissenschaft in systematischer Bearbeitung* (München: 1913-1915).

[293] *Ibid.*, 22 ff.

[294] „Die heutige Wirtschaft, welche den Einzlenen als Enzelnen zum selbstentscheidenen Träger der Produktion und des Verkehrs macht, muss durch das Persönlichkeitsrecht bestimmt werden. Hiernach ist die Wirtschaft individualistisch frei, aber so, dass die Persönlichkeit nicht angetastet werden darf. Jede Wirtschaft des Einen hat sich in den Grenzen zu halten, welche die Persönlichkeit des Anderen erfordert. Die Persönlichkeit eines jeden verlangt aber, dass er nicht durch täuschende anstandswidrige Mittel geschädigt, oder unterdrückt wird." Kohler (1914), 17.

[295] On the Kantian influence on Kohler in the context of copyright law see Strömholm, *Le droit moral de l'autor, I* (Stockholm: Norstedts & söner, 1966), 184 ff.

[296] Cf. the comparative comments of Kleineman (1987) in this respect.

Irrespective of the particular theoretical construct, the emerging discipline of unfair competition law was invariably conceived as a branch of private law. In the words of Kohler:

> Die Beziehungen, welche sich nicht nur zwischen dem Produzenten und den Abnehmern, sondern auch unter den Wettbewerbern bilden, gehören vorwiegend nicht dem öffentlichen, sondern dem bürgerlichen Recht an.[297]

Indeed, Kohler readily recognized a broader public interest in upholding a climate of good faith in the economic exchange. His reflections on the importance of trust in economic relations reveal a stunningly modern sense for the role of legal and non-legal institutions for the promotion of economic efficiency.[298] Yet regardless of the existence of this general public interest in fair competition, he insisted that it was a matter of governing relations between businessmen, between businessmen and their clientele, as well as of protecting private interests. Consequently unfair competition law was to be regarded as private law.[299] Even though the preparatory works made reference to non-individualistic interests, such as the interests of particular economic groups (*Mittelstand*), or even of society as a whole, the foremost purpose of the legislation was seen in providing protection for individual traders against unfair methods of competition. This understanding was in harmony with the views on trade mark law expressed earlier. Trade mark law and unfair competition were seen to ensure the smooth exercise of private rights.[300]

The private law understanding of unfair competition law was not uncontested. Public law scholars had difficulties to reconcile the liberal conception of private law corresponding to unbound competitive activity of economic actors with the substantial restrictions which unfair competition law imposed on this activity. Therefore they were inclined to see trademark law and unfair competition law as "interventions of public legislation in the natural interplay of private rights ... deprived of any private law basis."[301]

The trend towards recognition by the courts of general public interest objectives in unfair competition law clearly intensified in parallel with growing state

---

[297] Kohler (1914), 16.

[298] „Man täusche sich nicht: es ist nicht der Verlust des einzelnen Individuums, der Vermögensniedergang eines einzelnen redlichen Arbeiters, um den es sich handelt; es ist die Demoralisation des ganzen Verkehrs, welche eintritt, wenn rechtswidrige Übergriffe ungeahndet ihr Spiel treiben können; es ist der Mangel des Vertrauens, welcher alle Verkehrsoperationen in furchtbarer Weise lähmt", see Kohler (1914), 42.

[299] „Trotzdem handelt es sich hauptsächlich um bürgerlich rechtliche Interessen; denn es gilt der Grundsatz: wo das bürgerliche Recht ausreicht, soll das öffentliche Recht in die Verkehrsverhältnisse nicht eingreifen; nur wo das bürgerliche Recht nicht genügt, um den sicheren Lauf der Ding zu gewährleisten, wird es erforderlich sein, auch von Seiten des öffentlichen Rechtes Bestimmungen zu geben, damit der Gang des Verkehrs nicht die Grenzen überschreitet, welche die ruhige Entwicklung der menschliche Verhältnisse verlangt." Kohler (1914), 17.

[300] Joerges, 'Die klassische Konzeption des internationalen Privatrechts und das Recht des unlauteren Wettbewerbs' (1972) 36 *RabelsZ*, 421 ff., at 443, quotes Kohler as saying: „Man denke an die Grenzbezeichnungen, an das Grundbuchwesen und an das Registerwersen ... - überall der gleiche Zweck und dieselbe ... rechtliche Hilfe" (Kohler, *Warenzeichenrecht*, 1910, 68).

[301] „...Eingriffe der Staatsgesetzgebung in das natürliche Spiel der Privatrechte" für die jede privatrechtliche Grundlage fehle" See Mayer, 'Die concurrence déloyale' (1881) 26 *ZgesHR*, 363 ff., at 434; quoted after Joerges (1972), 444.

interventionism in the time between the two world wars. Doctrine, however, was not well prepared to provide viable conceptualisations of the disparate social phenomena and interests reflected in the UWG. Most of the commentators of the early German unfair competition law continued to see the individual competitors as being at the centre of the statute.[302] There was no coherent theory for introducing group and collective interests in the world of private ordering. Consequently, the introduction of a general clause on fair trading was generally welcomed, but it did not receive much attention in the first commentaries.

Notably, as pointed out in modern analysis of UWG, the particular role and place of the general clause did not receive adequate attention. Parallels were drawn between § 1 UWG and the general clauses in the BGB (§ 138 *Sittenwidriges Rechtsgeschäft*; § 826 *Sittenwidrige vorsätzliche Schädigung*) failing to identify the fundamental difference between the general clauses of the BGB and the UWG. Whereas the general clause of the BGB had the character of a 'safety net' (its main function being to cover situations that would not fall under the main provisions of the Code but would still produce unfair results), the general clause in UWG was to become the principal norm of fair competition. In this sense its function was mainly one of delegation of decision-making power to the courts.[303] The doctrinal discussion spurred by the new BGB was, however, absorbed by the 'subjective right' as a legal institute of private law. Echoing this debate, much theoretical ambition concentrated on identifying the object of protection (*Schutzgut*) of unfair competition law.[304] The difficulty lay in defining what exactly unfair competition law purported to protect.

The first reactions in doctrine to the departure from the purely individualistic approach in UWG were sceptical or openly critical. More nuanced on the issue of the divide between public and private law was Rudolf Callmann as a prominent representative of the theory of the undertaking. Influenced by ideas about an increased role of the state in economic life, he eloquently discarded simplistic views of sharp distinctions between the two domains as outdated echoes of the *Digesti*.[305] Even in the case of the deception paragraph of UWG he insisted that the real objective was the protection of honest competitors against the disadvantages that the deceptive advertising can afflict on them. Although the RG had recognized the *'Reinhaltung'* of the public exchange as a significant idea in the statute, this interest was according to Callmann essentially served by the norms and organs of public law.[306]

Baumbach was among those who first welcomed the shift of the courts towards integrating broader economic and public interest considerations in their judgements. Yet he was also the last to try a unitary subject of protection for the whole field of unfair competition law. Pointing at the ever growing case law of the courts encompassing new categories of competitive conduct, Baumbach rejected theories based on personal rights and further elaborated the theory of the enterprise.

---

[302] See references in Schricker (1970a), 32 ff., at 33; Callmann (1929), 43 ff.
[303] See Ohly (1997).
[304] See the retrospective analysis by Fezer, 'Modernisierung des deutschen Rechts gegen den unlauteren Wettbewerb auf der Grundlage einer Europäisierung des Wettbewerbsrechts' (2001) *WRP*, 989 ff., at 996.
[305] Callman (1929), 34.
[306] Callmann finds support for this view in RGSt. 13, 44; 42, 16.

Towards the end of the 1930s, the time had become ripe for a paradigm shift. Drawing on the jurisprudence of the Imperial Court Nipperdey elicited the concept 'performance competition' (*Leistungswettbewerb*) as being at the centre of this classification and of unfair competition as a discipline.[307] Performance competition included competing through one's own activity, i.e. lower price, better quality, better advertising. In contrast, denigration or exploitiation of the achievements of others, the creation of confusion or action that eliminates competition were acts that amounted to 'impediment competition' (*Behinderungswettbewerb*).[308] In a treatise in 1936 Nerreter advanced a classification of the possible factual situations that could come under UWG into three major groups: '*ungehörige Beeinflussung* ' (undue influence), '*ungehörige Behinderung'* (undue obstruction) and '*ungehörige Ausnutzung*' (undue exploitation, abuse).[309]

Building on Nipperdey's arguments Eugen Ulmer provided a convincing theoretical shape of the modern developments in case law and in social life. In his Heidelberg inaugural lecture he presented his vision of unfair competition law as a discipline with broad and multifaceted tasks that has to be balanced against antitrust law.[310] Instead of asking the question of the protected 'good' Ulmer shifted the attention towards the question about the principles after which business activity, the person or the enterprise were protected. In addition to *Leistungswettbewerb*, Ulmer advanced another innovatory conception, namely that of undue competitive advantage. Competition could be fair only where the statutory limits of competition were similar for all and where they had equal opportunities to present their achievements. Ulmer explicitly recognized the need to depart from the individualist understanding of unfair competition law and to embrace the new ideals of the time, while at the same time remaining true to the principle of free competition. He emphatically reconfirmed free economic enterprise to be the economic constitution under which a powerful blooming of economic life occurs.[311] At the same time he projected new tasks before the discipline of unfair competition law.

> Inhaltlich hat sich so – auf längere Sicht gesehen- ein Wandel von einer individualistischen zu einer sozialethischen Beurteilung vollzogen.[312]

The acknowledgement of socio-ethical foundations of unfair competition law brought yet another change in legal ideology, namely the abolition of unitary thinking in respect to unfair competition law and substituting it for more openly pluralist approaches. Ulmer criticized the individualistic understanding of unfair competition

---

[307] Nipperdey, *Wettbewerb und Existenzvernichtung* (Berlin, 1930) quoted after Ulmer (1932), 16. Interestingly, through the interest of Franz Böhm in unfair competition law 'Leistungswettbewerbs' turned into a conceptual building block in the theory of Ordoliberalism, that has been particularly influential when laying down the foundations of the postwar German *Sozialstaat*. See Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 *AJCL*, 25 ff., at 53.

[308] Ulmer (1932), 18 with reference to Nipperdey (1930). See also Gerber (1994), 53.

[309] See Nerreter, *Allgemeine Grundlagen eines deutschen Wettbewerbsrechts* (Berlin, 1936). On the evolution of the taxonomy in unfair competition law and the *Fallgruppen* see Baumbach/Hefermehl (1998), Einl. UWG, Rdnr. 158 ff., 246 ff.

[310] Ulmer (1932).

[311] Ulmer (1937), 769 ff., at 770: "Die Gewerbefreiheit ist die Wirtschaftsverfassung, unter der ein starkes Aufblühen des Wirtschaftslebens sich vollzieht."

[312] Ulmer (1937), 769 ff., at 771.

law as protecting only the interests of the competitors, and as an alternative advanced a theory of the triad of interests: the competitors, the economy and the consuming public (the customers).[313]

Ulmer's reasoning in the area of unfair competition law was far from accidental or isolated. Also in the area of civil law, theories concerned with opening private law for social objectives were thriving.[314] Similar processes were observable in the core area of private law, where the general clauses, those drops of socialist oil (*'ein Tropfen sozialistischen Öles'*) were paving the way towards collectivist and social interest considerations.[315] On a more abstract jurisprudential level, Ulmer was giving expression to new general trends in jurisprudence that flourished at the time, namely the schools of *Wertungsjurispudenz* and teleological reasoning.

The stunning variety of situations that were brought before the courts throughout the formative years of unfair competition law in Germany challenged the doctrinal preference for impeccable and hermeneutic systematisation. Raised in the Pandectist tradition of an ideal and perfectly ordered world of interconnected and harmonic concepts, German legal scholars quite naturally sought a similar degree of predictability and perfection in the field of unfair competition law.[316] Starting from the early commentators of the UWG various systematisation approaches were suggested. Kohler divided the factual situations under two main groups: *Irreleitung* and *Feindseligkeit* (confusion and animosity). Callman was less concerned with gross systematisations and offered casuistic divisions into multiple sub-groups. One of the more ambitious attempts at a comprehensive systematisation of unfair competition law was undertaken by Nerreter. As contemporary commentators noted, however, none of the advanced classification schemes was sufficiently convincing.

In summing up, it can be said that the UWG already from the beginning was charged with an immanent controversy between attempts to regulate economic relations in a binding manner while at the same time remaining true to the 'ideology' of private law. If one looks at the environment in which the UWG was conceived, the structure and the approach characteristic for this statute is hardly surprising.

4.4.2 Sweden: restrictive application of statutory rules vs. dynamic evolution of self-regulation

In Sweden the narrow formulation of the substantive provisions of the 1931 IKL and the emphasis on criminal law sanctions did not create a favourable environment for active enforcement of the law by the interested business circles. Likewise, violations of advertising standards understandably did not occupy high priority on the agenda of

---

[313] „Nun ist kein Zweifel: Der Schutz der schöpferischen Leistung des Einzelnen ist und bleibt in hervorragendem Masse Ziel der Wettbewerbsordnung. Aber daneben stehen doch für uns zwei weitere entscheidende Zielsetzungen: Da ist zunächst das Interesse des Volksganzen an einer gesunden und sauberen Ordnung des Wirtschaftslebens....Und ferner, was oft – in der Rechtsprechung – unter dem Titel des Interesses der Allgemeinheit damit zusammengeworfen wird, in Wahrheit aber auf einem besonderen Blatt steht: es geht auch um die Interessen der Abnehmer, des Publikums." Ulmer (1937), 769 ff.

[314] See v. Gierke, 'Der Rechtsgrund des Schutzes gegen unlauteren Wettbewerb' (1895) *Zeitschrift für gewerblichen Rechtsschutz*, 109 ff.

[315] Gierke cited in Wolff 1963), 702; Wieacker (1995), 432 ff.

[316] Ohly (1997), 288 ff.

the office of the public prosecutor. The cases were few and often resulted in acquittal due to the relatively strict requirements for conviction.[317]

4.4.2.1 Restrictive interpretation of the unfair advertising clause by the judiciary

As the analysis above indicated the rule on unfair advertising (*illojal reklam*) in the 1931 IKL contained numerous qualifications, making its application in individual cases highly cumbersome and complicated. Given the criminal law nature of the rule, the courts tended to apply a very stringent method of interpretation and to stick to the letter of the law. As a result, even cases of blatantly misleading advertising could not be effectively counteracted because of the failure to substantiate one or more of the factual elements prescribed.

First and foremost, despite the title 'unfair advertising', the rule only addressed the use of incorrect information in advertising. As pointed out in the Bill to the 1931 Act only objective data and not subjective qualifications of the product advertised could be examined under 1 § IKL, e.g. the antiseptic qualities of a mouthwash, but not its nice aroma.[318] The courts insisted on literal interpretation of this requirement. Thus advertising messages, although misleading, were not seen to be incorrect (*oriktiga*) and the charges were dismissed by the courts. Among the cases discussed in the literature, one concerned advertising of optical services, asserting that expert opticians performed scientific examination of the eyes. Although the opticians could not demonstrate professional qualifications corresponding to the established Swedish standards, they had undergone certain training in Germany. Consequently, the advertising claim could not be qualified as incorrect and was considered to fall outside the scope of 1 § IKL.[319]

Another requirement interpreted narrowly was that the advertising should be intended for a greater number of people ("*avsett för ett större antal personer*"). In a case that provoked many critical reactions and even led to a legislative change, the Supreme Court dismissed charges against a blatantly fraudulent marketing practice because the statements had been made in the course of visits to the premises of the customers and not in a mass advertising. The method was not seen to fall under 1 § of the 1931 IKL since the information was not spread to a broader circle of customers as required under 1 § IKL.[320] The plaintiffs argued that the law indeed required the information to be intended for a broader circle of people but not that it should also be received simultaneously by the addressees. They insisted that statements spread successively to a large number different people should be qualified as advertising in the meaning of the IKL. The Supreme Court, however, did not find reasons to change the Appellate Court's decision.[321]

---

[317] See SOU 1966:71, 59 ff. Bernitz/Modig,/Malmén (1970), 42.

[318] See prop. 1931:175, 23.

[319] NJA 1935, 593. SOU 1966:71, 59. See the critique of Eberstein, 'Generalklausulen mot illojal konkurrens och Pariskonventionen' (1951b) *NIR*, 1 ff., 5. Likewise an advertising of glass items, using a geographical indication ("Glas från Kosta") misleadingly similar to the trade name of a famous glass-factory (AB "Kosta"), was not regarded to fall within the scope of 1 § IKL. The message was indeed misleading, but not incorrect since the advertiser's workshop was indeed situated in the Kosta area. Cf. NJA 1950, 365, NIR 950, 260. See Bernitz/Modig/ Malmén (1970), 121.

[320] NJA 1938, 193.

[321] NJA 1938, 193. The decision led to a change, however not in IKL but in the Criminal Code's provision on fraud, which originally required evidence of actually suffered damage for a sentence.

In other cases the advertising was not regarded to be in obvious conflict with good commercial practice (*"uppenbar strid mot god affärssed"*). This restriction together with the requirement that the advertising should be likely to create an impression of an advantageous offer (*"ägnad att framkalla uppfattningen om ett fördelaktig anbud"*) were specifically introduced to ensure a lenient approach to exaggerations commonly used by the business community.[322] The courts indeed showed the required restraint. For example, an advertisement of furs of average quality as being "selected furs of highest quality" was not regarded as standing in manifest conflict with good commercial practice. The court held that there were no generally accepted criteria for the meaning of "high quality". Despite two dissenting opinions the charges were dismissed.[323]

Not all prosecution was of course unsuccessful. A few clear cases of fraudulent and misleading advertising ended with sentences.[324] A case that popped up several times in the records of the courts and of the self-regulative bodies concerned the allegedly free distribution of volumes of an encyclopaedia, *Svensk Uppslagsbok*. The Supreme Court found the advertising to be misleading to the public on a number of grounds (as to the relative price of the collection, the number of volumes distributed free of charge earlier, the criteria for selection of those to receive free edition, etc.).[325] Comparative advertising was also considered, but only sporadically.[326] Criminal sanctions were imposed for false and misleading announcements of bankruptcy sales and sales from the estate of a deceased person[327], for alleged sale through factory outlets (*Fabrikernas Direktförsäljning, "inga mellanhänder"*)[328] and on factory prices. In some court decisions damage compensation was also granted. In the encyclopedia case a compensation of 10 000 Swedish crowns was awarded to the publisher of another encyclopedia.[329]

The rule in 2 § IKL on free gifts and similar offers was applied on an even more limited scale. Bernitz et al. report of only two decisions found in the records of the courts between the years 1931 to 1970.[330] The main obstacle to more intensive application in this provision was most likely created by the requirement that the special offer should imply abuse of the gullibility of the public (*"utnyttjande av allmänhetens godtrogenhet"*).[331]

As a general observation it could be said that the restrictive formulations in the IKL appear to have discouraged the interested circles from prosecution of possible violations of the statute. Generally, the courts proceeded in a very careful manner and thus remained loyal not only to the letter of the law, but also to the signals sent by the

---

[322] See above, prop. 1931:175, 41 and Bernitz/Modig/Malmén (1970), 41.
[323] NJA 1957, 188. See for other first instance cases *God affärssed* (1954).
[324] See decision of Stockholm Rådhusrätt in: *God affärssed* (1954), 17, 20, 44 ff.
[325] NJA Avd. I 1941, 580; cf. *God affärssed* (1954), 18.
[326] See SOU 1966:71.
[327] SvJT, 1935, 78; SvJT 1944, 47.
[328] SvJT 1944, 86; *God affärssed* (1954), 27, 10.
[329] See Bernitz (1993), 111.
[330] NJA 1935, 686 and NJA 1937, 154. Bernitz/Modig/Malmén (1970), 42. See also Levin (1944), 63.
[331] See Bernitz (1993), 229.

lawmaker through the reasoning in the preparatory materials. The number of cases remained limited.

4.4.2.2 No complementary application of tort law

As shown above, the narrow and precise definition of the substantive rules on advertising and free gifts of 1931 IKL did not allow for extensive application of the statute to new factual situations, unforeseen by the lawmaker. The wide variety of marketing practices that in Germany came to be subsumed under the general clause of § 1 UWG remained unregulated in Sweden. Naturally, such an sweeping statement requires a test as to whether the social and economic problems posed by such practices were not addressed by alternative legal means, notably by tort law. As mentioned above, under the restrictive tort rules in the Criminal Code, compensation for pure economic loss was regarded possible only when the damage was a result of criminal conduct or when compensation was specifically envisaged in other legislation.[332] In doctrine and in legal practice there was significant uncertainty as to the scope and exclusivity of these provisions.

One of the main arguments for restrictive application of compensation for pure economic loss was the so called "damage-of-competition" argument ("*konkurrensskadeargumentet*"). As late as 1938, after the IKL had been in force for several years, the respected civil law scholar Hjalmar Karlgren stated:

> The entire societal system, with its still extensive opportunities to competition and free enterprise, is founded on the presupposition that it is permitted, even useful for society, that we incur damage to each other.[333]

As early as in 1906 the Supreme Court took a stand on a situation of what would in German law be qualified as *Vorsprung durch Rechtsbruch*. A tradesman was convicted for illegal trade with medicines on information given by a pharmacist. The pharmacist sought compensation for damages suffered by him in his business as a result of the violation of the license requirements on the part of the tradesman. The higher instance courts, however, did not regard the pharmacist as an injured party and consequently denied him the right to be a plaintiff in the case.[334] A minority of the court members took the opposite view. Obviously, this decision was not conducive to conceptualisations putting the interests of law-abiding tradesmen at the centre of attention.

Likewise, tort law was not applied as a remedy for counteracting blockades, boycotts and other forceful collective measures used in competition. The attitude of the courts and doctrine were visibly affected by the intertwining of two essentially distinct issues. One type of collective measures typical for the beginning of the 20th century was the industrial action taken by organised labour in respect to entrepreneurs who did not comply with labour demands or in respect to workers who did not act loyally to the

---

[332] The problem of compensation of pure economic loss in Swedish law has received its most extensive treatment in Kleineman (1987).

[333] "Hela det nuvarande samhällsskicket, med dess alltjämt så omfattande möjligheter till fri konkurrens och företagsamhet, bygger på att det i största utsträckning är tillåtet, ja att det är för samhället nyttigt, att vi tillfogar varandra skador"; quoted from Karlgren, SvJT 1938, 373, quotated after Kleineman (1987), 281.

[334] NJA 1906, 509. Kleineman (1987), 209. See also Heuman, *Målsägande* (Stockholm: Norstedts, 1973), 381.

trade unions. A different kind of collective measures was sometimes applied by cartel-like organisations against third parties or against members of the cartel who deviated from the agreement.[335] In both categories of cases the collective measures typically took the form of blockade or boycotts (in industrial action boycott of work and in competitive relations refusal to buy or to supply). However, the first kind of measures were clearly tainted by political considerations, whereby the courts visibly tried to avoid taking a stand in the political struggle. The second kind of measures involved (economic) policy reasoning, but could arguably be decided on more objective grounds.[336] By treating the two kinds of measures jointly the caution as to limitation of industrial action, dictated by political motives, helped forge a liberal attitude to competitive action as well.[337]

A similar position was taken – at least in early tort law doctrine – with respect to sales below cost, including situations where such practices sought to push a competitor out of business. In what is considered to be a classical treatise on tort law, Alfred Winroth gave the sale below cost as one example that compensation for damages in Swedish law could not be awarded in cases of unfair competition.

> If for example somebody, unequivocally intending to bring a competitor to ruin, sells goods below cost, the law will not provide the latter with any protection. [338]

In the same section Winroth gave other examples of practices that would not invoke damage compensation, among them false information as to the low price of goods, price comparisons and carrying out of business or trade without the necessary license.[339]

Bernitz, analysing this restrictive interpretation in comparative perspective, considers Winroth's statement as outdated already at the moment it was made. And indeed in Germany the 1896 UWG had already introduced the prohibition of incorrect information, and the judiciary had already established a strict standard as to comparative advertising. Concerning price-cutting, the Swedish judiciary formulated the principle at approximately the same time as Winroth wrote his article that such strategies were unacceptable if their only purpose was to eliminate a competitor.

It is on the basis of these examples from classical unfair competition law that Winroth drew the more general conclusion:

> Only when a measure, which not solely is reprehensible and unwarranted, is taken, but, regardless of its harmful purpose, constitues a *criminal act* directed immediately

---

[335] On the situation in German unfair competition law, see Ch. 4.4.1 above.
[336] See Kleineman (1987), 267 ff.
[337] *Ibid.*, 267 ff. with further referenes.
[338] "Om exempelvis någon, i ostridigt afsigt att bringa ruin öfver en konkurrent, säljer varor till underpris, erbjuder icke lagen den senare några skyddsmedel"; cited from Winroth (1907), 138. This is a popular quotation to be found in Eberstein (1951a), 1 ff., at 2; Kleineman (1987), 280, and Helgesson, *Affärshemligheter i samtid och framtid* (Stockholms Universitet, 2001), 230.
[339] "Förhållandet ändras icke, om falska uppgifter lemnas till at förklara varornas prisbillighet och göra dem ytterligare begärliga för kunder, ej heller om för ändamålet jämförelse anställes mellan egna priser och konkurrentens eller till sist sjelfa handeln drifves utan laga lof eller anmälan." Winroth (1907), 138.

> at the party concerned, a right to compensation arises, namely the degree to which the same act has caused damage.[340]

This statement has had important implications for further development of tort-law doctrine and practice. It has by many been interpreted as a formulation of a general principle of Swedish tort law (so-called "*spärregel*"), connecting liability for pure economic loss in extra-contractual relations tightly with penal law.[341] At the same time Kleineman holds that one should not regard Winroth's as personal theoretical elaboration, but rather as a concise and descriptive restatement of valid law. It was in his view clear evidence of the strong influence of legal positivism on the method of interpretation applied by Winroth, implying that an opposite principle at the time of writing had not been established neither by statutory law nor by highest instance precedent.

In fact Kleinemann argues that Winroth was himself critical of the weak protection against unfair competition and viewed this as one important motive for reform of Swedish tort law.[342] Other authors, while supporting the so called "*konkurrensskadeargument*", also saw it necessary to draw a line between what is allowed and not allowed in competition, under consideration of ethical principles. As Thyrén put it in his 1893 article '*Culpa legis Aquiliae*'

> Whereas the causing of, for example, bodily harm, at least to the extent that it precipitates loss of fortune, without restriction can and should bring about liability to pay compensation, it would be unreasonable to allow loss of fortune incurred by however purposeful economic competition, as long as one with regards to the means remains within certain limits, bring about liability; it would equal a prohibition on competition and thereby kill the economic nerve of society.[343]

Although rejecting intervention into the freedom of competition through extended tort law, Thyrén did not exclude the possibility of allowing liability for damages when competition was carried out with improper means. Obviously, he proceeded from an assumption that there was a rule on extra-contractual liability for damages stretching beyond the respective provisions of the Penal Code. With reference to the motives to a draft version of the German BGB (then in progress), he tried to lay down a general principle for liability for pure economic loss in competitive relations. The watershed was seen to lie in disloyal conduct:

---

[340] "Först då det tillgripes åtgärd, som ej allenast förkastligt och obehörig utan alldeles oafsedt sitt skadegörande syfte, är en omedelbart mot vederbörande riktad *brottslig handling*, uppstår rätt till ersättning, nemligen till den del som samma handling haft skada till följd"; quoted in *ibid.* As examples of such practices prohibited under criminal law Winroth mentions preventing the access to a competitors shop or the dissemination of rumours denigrating his goods. See Eberstein (1951a), 2.

[341] Bernitz, 'Otillbörlig konkurrens: det glömda rättsområdet' in: Bernitz, *Festskrift Jan Hellner*, (Stockholm: Norstedts, 1984), 115 ff., at 119. See Kleineman (1987), 17.

[342] See the reference to Winroth (1907), 350 ff. in Kleineman (1987), 281.

[343] "Under det att vållande av t.ex. kroppsskada, åtminstone i den mån den förorsakar förmögenhetsförlust, utan inskränkning kan och bör medföra ersättningsskyldighet, skulle det vara orimligt att låta t.ex. förmögenhetsförlust förorsakad av en än så avsiktlig ekonomisk konkurrens, försåvitt en med hänsyn till medlen håller sig inom vissa gränser, medföra ersättningsskyldighet; det skulle vara detsamma som att förbjuda konkurrens och därmed döda samhällets ekonomiska nerv".

> Thus the entire field of loss of fortune falls into two parts: loyal and disloyal – which is to say: liability to damages entitling to compensation and liability to damages not entitling to compensation. The boundary between these two areas must be drawn through positive law (let it be customary law: the principle of disloyalty).[344]

For the most part, however, the uncertainty as to the exact scope of tort law rules in the Penal Code seemed to have provoked a tendency towards narrow interpretation rather than a desire for creative experimentation. As several commentators of Swedish private law have observed, doctrine was not allowed to play the same constructive role that as in Germany. Instead, a rather restrictive, positivistic approach to legal interpretation was dominant. The same is true for the attitude of courts with respect to legal rules. There is in Swedish legal tradition a deeply entrenched reluctance to develop new principles through brave analogies and even less so through employment of legal policy arguments.[345]

4.4.2.3 Dynamic and balanced practice of self-regulatory bodies

As mentioned above, under the described circumstances the development of Swedish unfair competition law essentially took place outside the formal system of administration of justice. The self-regulatory bodies set up by industry and trade, i.e. the Councils on Marketing Practices and the Council on Advertising, developed a rich and finely nuanced body of decisions. The basis for the decisions of the Councils established with the Chambers of Commerce was a test of conformity with "*god affärssed*".[346] The concept "*god affärssed*" was borrowed from the text of 1 § IKL, but was gradually provided the character of a true general clause. The Council on Advertising already at a very early stage followed in its decisions the rules of the ICC International Code of Advertising Practice. The ICC Code continued to play an important role also in the work of the central NOp since 1957. Admittedly, the published opinions of the Council are concise and may not always lend themselves to a fair and independent estimation. Moreover, as the Council warns itself, the circumstances of the individual cases differ widely. Still, a brief look at these decisions can give an orientation about tendencies in the Councils' practice. The decisions carry the flavour of the time and allow some generalisations to be made on the prevailing standards of fairness.

Despite the *prima facie* broadly defined basis for action, the practice of the NOp displays a considerable degree of caution in areas bordering with free competition. The focus of activity was on advertising practices and in this area the NOp developed a rich and finely nuanced body of deisions. Thus, most situations brought to the attention of the NOp were within the scope of 1-2 §§ IKL and, since the amendment of 1940 9 § IKL, concerned misleading, incorrect or confusing marketing and special

---

[344] "Sålunda delar sig hela området för förorsakande av förmögenhetsförlust i två delar: tillåtet och otillåtet – d.v. här säga: ersättningsskyldighet icke-medförande och ersättningsskyldighet medförande. Gränsen mellan dessa båda delområden måste uppdragas genom den positiva rätten (låt vara sedvanerätt: illojalitetsprincipen)"; quoted in Thyrén, *Culpa legis Aquiliae enligt justiniansk rätt. Ett bidrag till läran om utomobligatoriskt* skadestånd (Lund 1893).

[345] Kleineman (1987), 83 ff.

[346] *God affärssed* (1954), 6 with reference to the Rules of the Boards (stadga).

offers.[347] Part of the decisions were pronounced upon request by the courts for the Board's opinion on the interpretation of the concept "*god affärssed*" in particular cases. Self-regulation thus took place "in the shadow"[348] of formal law and was most effective when there was a threat of litigation and formal sanctions. Statutory law came to exert a disciplining effect on soft law.

Indeed, in some respects the Councils tended to have stricter perceptions as to the customary standard of fairness in industry and trade than the courts and the prosecuting authorities. In a number of cases the courts did not follow the interpretation suggested by the Councils and dismissed the charges fully or partially.[349] In one case the Council held an advertisement that allegedly discredited the whole cement industry to violate good commercial practice, whereas the public prosecutor closed the file.[350] The Councils developed more independent and extensive practice within the area of comparative and discrediting advertising. In a number of decisions the Councils urged tradesmen in their advertising to avoid references to competitor's goods, services or enterprises. Discrediting the products of competitors was consistently qualified as against good commercial practice.[351] Also here, however, caution was exercised. In case comparative information was used in advertising, the Councils required that the comparison should be based on comparable characteristics and otherwise be objective.[352] The decisions of the Boards were not always followed by the prosecuting authorities.

By contrast, only a few cases were filed with the Boards that addressed practices explicitly held as legal by the courts on grounds of general tort law or competition law. In such situations the Board tended to recommend a settlement or avoid to take express standing on the issues. In particular, the Boards typically manifested caution in instances where the estimate of whether a practice was against *bonos mores* was intimately intertwined with general competition policy reasoning.[353] In a case of distribution of free samples (similar to the *Persil* case) a competitor complained that the quantity of washing powder distributed was beyond the one customary for samples. The Council stated cautiously:

> In this matter the Council can only state that distribution of free samples should not take place on a scale that could have a disturbing impact on the sales of the product on

---

[347] About 60percent of the files in the collection of decisions of the NOs for the years 1935-51 (50 of 80 reported) concerned misleading and incorrect advertising, including misleading comparisons and special offers, *God affärssed* (1954). A similar ratio is reported by Tengelin in a review of the activity of the 1957 NO. See Tengelin (1970), 118. Another big group, especially after the amendment of 1942, formed instances of alleged confusion with trade name, firm, trademark, get-up and other distinguishing and well-established commercial mark. See 9 § IKL. Cf. Körner (1954), 81 ff.

[348] Mnookin/Kornhauser (1978-79).

[349] See *God affärssed* (1954), 22 ff.

[350] The case involved a comparison between methods of production (between inorganic and organic concrete tightening material) that would in Germany be qualified as Systemvergleich. See *God affärssed* (1954), 13 ff.

[351] See *God affärssed* (1954), 9, 22, 36. Likewise spreading discrediting and incorrect information concerning the business organisation (cooperative enterprise) of a competitor to potential foreign customers with the purpose of diverting orders was against good commercial practice, see *ibid.*, 45 ff. On the practice of the 1957 NO see Bernitz/Modig/Malmén (1970), 150 ff. On the change in attitude after 1966, see below Ch. 5.

[352] See *God affärssed* (1954), 15, 28.

[353] See *God affärssed* (1954), 10 ff., 20 ff.

> the market. The Council finds it too difficult to set a clear limit on the sample's size although it considers it desirable to limit the smaple's package as much as possible.[354]

The same line of reasoning was continued in the practice of the 1957 NOp. In a number of cases the Council pronounced itself not competent to give opinion due to the interface with antitrust issues.[355] Similar considerations prompted the Council to dismiss complaints against different types of sales promotions. The NOp underlined the importance of free competition and directed its attention to the presentation of the offer and its likelihood to mislead and negatively affect the public.[356] In respect to trading stamps the NOp held that it could not undertake evaluation of the appropriateness of certain competitive methods on the basis of economic considerations about the structure of retail trade ("distributionstekniska och distributionsekonmiska synpunkter").[357] The contrast with the bold approach taken by German courts in similar matters is patent.[358]

According to data from the Councils, their opinions were largely respected and followed by established businesses.[359] However, in cases of persistent and more callous breach of good commercial practice, often exercised by enterprises acting outside the network of industry and trade organisations supporting the system of self-regulation, the Boards were not in a position to undertake effective action.[360] One could of course argue that the same would be the effectiveness of the ordinary system – if there are flight by night actors, or if they are insolvent – no measure could threaten them.

The complainants before Councils in the first twenty years of their existence were most often individual competitors. But also industry and trade associations initiated a number of cases.[361] Their participation as complainants was even more active under the 1957 NOp, probably because the latter had a broader basis within industry.[362] Occasionally associations contributed to achieving voluntary settlement of disputes.

---

[354] "Nämnden anser sig i ärendet kunna göra allenast det uttalandet, att utdelning av gratisprov icke bör ske i sådan omfattning, att densamma inverkar störande på varans omsättning i den allmänna handeln. Nämnden finner nämligen alltför stora svårigheter möta att fastställa någon bestämd gräns, som proven med hänsyn till god affärssed icke må överskrida, även om Nämnden anser önskligt, att provpaketens storlek så långt görligt är inskränkes." *God affärssed* (1954), 13.

[355] See *Otillbörlig konkurrens,* 1960 (1963), 330.

[356] SOU 1966:71, 187. See also the succinct comments of Tengelin on the difficulty to balance conflicting business interests in these matters, Tengelin (1959), op. cit., 109.

[357] On trading stamps see SOU 1966: 71, 189 with reference to NO, 676, 677/63. On 'lockvaruförsäljning' – sale under self-cost see SOU 1966:71, 191 with reference to NO 279/60.

[358] See section above.

[359] *God affärssed* (1954), 7; Bernitz/Modig/Malmen (1970).

[360] Illustrative in this respect is the case with Nordisk Familjebok AB. NO issued three decisions, condemning basically the same practice, but apparently the practice resurfaced after a while in the same or slightly modified form. See *God affärssed* (1954), 32, 35. The Board found clear case of abuse of the gullibility of he public (in accordance with 2 § IKL); Ref. Nr. 48 this time the misleading offer was combined with negative contract building whereby the customers were bound by their passivity. In all cases complaints were lodged by the Swedish Book Publishers Association (Svenska Bokförläggareförening).

[361] See the decisions on Nordisk Familjebok. All complaints were lodged by the Swedish Book Publishers' Association, *God affärssed* (1954), 32ff, 35ff, 38 ff.

[362] See Otillbörlig konkurrens (1963).

4.4.2.4 Legal doctrine

With the fact that the law of unfair competition did not develop into a viable academic discipline, it remained in a marginal position also in legal doctrine. The 1931 IKL did not provoke any strong reactions among legal scholars, nor did it give rise to theoretical elaborations and debates. Interestingly, no attempts to place this new kind of legislation in the larger academic study of law were undertaken. It is perhaps indicative that the only commentary on the 1931 IKL was published by a Danish lawyer, Benny Levin in 1944, representing a rather dry and a-theoretical account of the legal provisions.

The few voices raised in legal doctrine were mostly critical about the failure of the legislator to introduce a general clause on unfair competition. One of the most consistent and severe critics of the 1931 IKL was Gösta Eberstein. With a keen interest in intellectual property law and broad comparative insights about alternative approaches in the area of unfair competition, Eberstein questioned the Swedish legislative approach from several different angles.[363] Most of all he emphasised the functional need of such a clause in economic life. Restrictive provisions left all to many lacunae in the protection of honest traders, he argued.[364] This contention was supported by legal systematic arguments. Eberstein demonstrated that the development of Swedish and Nordic private law had led to a frequent recourse to general clauses (standards) and thereby left concretisation to the courts.[365] At any rate, the insertion of the expression "*uppenbar strid mot god afärssed*" into 1 § IKL had made the many objections obsolete, since the courts were anyway obliged to interpret this concept.[366]

Comparative law arguments carried quite a lot of convincing power for Eberstein. Sweden occupied a politically and economically unique position in the industrialised world, he felt.[367] More importantly, its position was unique among its Nordic partners. By a detailed account of the history, substance, procedure and practical application of general clauses in Norwegian, Danish and Finnish law, Eberstein managed to underscore the peculiarity of the Swedish approach. It deserves mentioning that he paid particular attention to the right of standing and its importance for avoiding non-serious or abusive litigation.[368] The usefulness of a general clause, which could provide authority to industry self-regulation, was another theme.[369] Finally, Eberstein found a serious argument in favour of a general clause in international law, namely that Sweden could not reasonably claim that it fulfilled its obligations under the Washington version of the Paris Industrial Property Convention.[370]

4.5 Comparative comments

The review of the early period in the development of fair trading institutions in Germany and Sweden reveals a true paradox. A new legal area, then commonly known

---

[363] See Eberstein (1951a), 1 ff; Eberstein (1951b), 1.
[364] See the examples of failure of the courts to provide protection in Eberstein (1951b), 4 ff.
[365] Eberstein (1951a), 4 ff. He pointed at several general clauses that have entered into force after the Patent Legislative Committee delivered its report, among them 33 § of the 1915 Contracts Act and 4 § of the 1927 Insurance Act.
[366] This argument had earlier been made by Levin (1944), 16.
[367] Eberstein (1951a), 6.
[368] Eberstein (1951a), 8.
[369] Eberstein (1951a), 14 ff.
[370] Eberstein (1951b), 1.

as unfair competition law (*Recht des unlauteren Wettbewerbs/otillbörlig konkurrens*), seemed to take its beginning from the same tap-spring in the two countries. Both in Germany and in Sweden legal developments were apparently provoked by similar economic problems. Similar groups of economic actors and at approximately the same time pressed proposals for new legislation through the sieve of the political process. The legislative solution advanced in Germany obviously offered a legal framework regarded as attractive in Sweden as well. The legislative proposal of the first Swedish Patent Legislation Committee in its substantive part followed the German example almost to the slightest detail, even turning some of the precedents in German case law into legislative provisions.

Yet despite conditions favouring similar legal development by 1909 Germany had a dense net of rules governing fair trading, whereas in Sweden regulation remained only sporadic and minimalist. In Germany the evolution started from hesitant rules on deceptive advertising through introduction of a general clause and special rules on sales, to special statutes on rebates and bonuses. This legislative expansion was paralleled in jurisprudence. The general clause on unfair competition in particular contributed to the evolution of a uniform self-contained normative system, purporting to offer an exhaustive solution to all problems of dishonest commercial practices.[371] Whereas the courts initially showed considerable interpretative restraint, towards the end of the period they did not hesitate to embark on bold and creative lawmaking. Analoguos developments are evident in legal doctrine, beginning with an individualist and liberal approach stressing the application of fair trading law as a complement to protection of individual industrial creativity, and culminating in calls towards taking into account the public interest in performance-based competition.

In Sweden the initial skepticism of the lawmaker was never really overcome. Until 1931 advertising and marketing were practically left outside the formal system of legal regulation. In the 1931 IKL the emphasis was on deceptive advertising, but even this provision was very restrictively formulated. Assuming a penal law shape and lacking a general clause of unfair competition the statute remained with only limited effect in practice. The judiciary, interpreting the statutory provisions in a strict fashion, inadvertently mirrored the restraint of the lawmaker. And legal doctrine with only a few exceptions did not make a major contribution to changing the statutory. Finally, even self-regulation of industry and trade was confined within rather prudent limits not challenging established legislative standards.

4.5.1 Institutional choice

If we restate the results from the above comparison in terms of comparative institutional analysis, one can say that the two legal systems opted to assign the shaping of the standards of fairness to different institutional processes. In Germany, by introducing a general clause of unfair competition, a great deal of decision-making power was vested in the courts. The judiciary was considered to be the institution with the capacity, i.e. the competence and flexibility, to balance the interests involved and to lay down a dynamic standard of fairness responsive to the changing perceptions of the business community and of society as a whole. The political process intervened more decisively on issues revealing a skewed distribution of stakes. Under the pressure

[371] See in this sense Bernitz/Modig/Malmén (1970), 23.

of the well-organised and politically strongly represented *Mittelstand* the legislator showed a greater willingness to lay down specific substantive standards, like restrictions on bankruptcy and season sales, satisfying the business interests of this group.

In Sweden, the lawmaker was reluctant to vest the same confidence in the judiciary. This indirectly implied shifting the weight of decision-making to the market and to business self-regulation. The few standards that were laid down in the statute, for instance the provision against incorrect advertising, did not concern particular sectors of trade but broad interests, including those of the general public. It appears that the misgivings of potential misuse of the law by competitors for satisfying their individual and group interests, and for setting these interests above the general interest of free competition, have had a strong bearing on the legislative process.

4.5.2 Interests in the political process

Given the difference in institutional choice, the question is pertinent whether the interests involved in the legislative process in the two countries were similar. Although the idea of protecting the consuming public was not foreign to the lawmaker, in neither Germany nor Sweden were consumers at that stage regarded as a group of its own right with particular interests and in need of representation in the political and the judicial process.[372] Organized commercial interests instead dominated the legislative debate. The documentation of the legislative process in both countries gives evidence of the strong engagement and initiative of business associations in the matter. Legislation against unfair competition was perceived as a chance to enhance the competitive position of the established traders and particularly of small and middle-sized competitors. However, the influence of the *Mittelstand* in Germany was clearly more manifest and the responsiveness of the political process to such interests higher than in Sweden. In Sweden, by contrast, legislating in response to particular trade sector interests was encountered with suspicion. Moreover, in the Swedish legislative debate two powerful organizations, namely the SI and the TU, acted vigorously against a statute based on broad and vague general clauses.

The strong influence of the TU is an idiosyncratic interest arrangement for Sweden associated with the traditionally strong position of the press. Obviously, the representatives of the daily press formed a powerful and influential alliance. In a subsequent legislative debate on the same issues, one of the authors of the 1915 *Betänkande* would admit his fears of being branded as an enemy of freedom of the press while steering the work of the committee. The power of the press to mobilize public opinion clearly had a strong hold on politicians at the time.

In both countries the mobilization of special interests varied depending on the specific regulative issue in point. In chapter 3 it was argued on the basis of normative theory that a general requirement of fair competition should not involve significant opposition of interests in the legislative process. Most honest traders would profit from a climate of trust and fair competition. This would likewise be in the interest of the large and

[372] For a detailed account on the idea of consumer protection in the period between 1871-1933, see Geyer, *Der Gedanke des Verbraucherschutzes im Reichsrecht des Kaiserreichs und der Weimar Republik (1871-1933)* (Frankfurt am Main: Peter Lang, 2001).

diffuse group of consumers. The stakes were estimated to be low and evenly distributed among affected actors. In addition, it could be presumed that the situation would change for the worse with attempts to draw clearer lines between fair and unfair competition in the legislative process, and by formulating specific restrictions on advertising and marketing.

Indeed, the early history of the legislative process in Sweden and Germany demonstrates that express prohibitions of certain forms of aggressive advertising like special offers, rebates and price-comparisons tended to provoke differential reactions in different groups of traders, depending on the scale of business and the economic potential to apply such methods. Thus small and middle-sized businesses typically emerged as advocates of strict standards of marketing and supported outright prohibitions on aggressive marketing strategies. In a rough competitive climate these entrepreneurs obviously perceived strict rules on unfair competition as a way to strengthen their established positions in trade.

Interestingly, the review above demonstrates that even a general clause on fair competition may mobilize interest groups in a differential way. Such a clause per definition postpones the shaping of concrete rules to a future moment and shifts the rule-making from the legislature to a different institution, typically the courts. It thus leaves a big margin of uncertainty as to the rules that apply. Yet, if combined with an enforcement design providing individual businesses and their associations generous access to the courts, the general clause acquires the potential of turning into a constant source of new restrictions, favoring established businesses at the cost of aggressive new-comers.

The same applies, even though with qualification, to general rules on deceptive advertising. At the first glance it is hard to imagine that these rules could favor particular group interests. A closer look nevertheless reveals that if aggressive litigation ensues a low threshold for ascertaining deception may excessively raise the demands of truthfulness of advertising, consequently depriving competitors of effective marketing strategies.

4.5.3 Enforcement design: the costs and benefits of participation

The remarks made above underscore the decisive role of enforcement design in fair trading law. Enforcement design consists of specific rules and practices that govern the access of interested actors to the respective decision-making forum, the costs and speediness of procedure, the access and ways of communicating information, and the availability of remedies. All these rules influence the costs of, and benefits from, participation in decision-making. But also the 'nuts and bolts' of procedure and institutional structure are not to be underestimated.

In Germany the *Mittelstand* at an early stage identified the law as a potential weapon in the competitive struggle against the expansion of big business. This view found recognition and support in the political process and later on in judiciary and doctrine. In Sweden the legislator never considered the kind of open and generous enforcement model advanced in Germany. Thus, the expansion of substantive standards through aggressive litigation was never encouraged nor perceived as a viable alternative by interested business circles.

With respect to enforcement design, the German model opened a broad avenue for frequent recourse of individual businessmen and their organizations to the judicial system, thus actively shaping the standard of fairness in trade. At an early stage of legislative development it was recognized that the issue of fair trading was not a matter solely of individual, but also of collective and public interest. The adjudication process was designed taking this recognition into account. The system promised easy access to the courts, along with rapid and uncomplicated procedure. Through the remedy of injunction (and preliminary injunction in particular) and the *Verbandsklage*, the costs of adjudication were diminished significantly.

The benefits were real and palpable. Although the injunction as a remedy does not entail direct monetary benefit, its advantages are numerous. Especially when linked to a rapid and efficient summary procedure, a it promises rapid termination of unwanted competitive practice, authoritative condemnation and likely disbandment of certain types of practices for the future. Even if the practical difficulties were not insignificant, compensation for damages was still an important part of the remedy system and facilitated by the authorisation of free judicial discretion on matters of determining the size of compensation. Finally, the system of distribution of litigation costs could be described as litigation-friendly. Arguably, in such a model litigation can in itself be used as a method of obstruction through the associated litigation costs and expenses for the defendent. Seen in this light, an injunction claim would not leave a competitor fully indifferent. Through the UWG, traders and middle and small-size enterprises in particular received an efficient tool for improving their competitive position.

Whereas in Germany the enforcement design promoted litigation as an avenue for settling unfair competition disputes, in Sweden a number of barriers were raised on the road to enforcement through the judicial process. Attempts to counteract an allegedly unfair conduct were channelled through the criminal law system with public prosecutor, strict culpa rules and harsh evidentiary requirements. Indeed, competitors and their associations were granted right of action for damages also under the Swedish system. However, by linking this right of action to substantiation of criminal offence, the opportunities for efficient enforcement were significantly curtailed. Considering all the formal difficulties of producing evidence of causality and subjective intent, as well as the psychological reluctance to resort to threat with criminal sanctions in the competitive struggle, it is not surprising that the system did not prove conducive to frequent litigation. Civil law injunction was never introduced as a remedy, something that led a subsequent legislative committee to exclaim:

> Sweden is for all we know, the only country in the West European cultural domain that does not grant injunction in this legal area.[373]

All this raised the costs of participation and representation of competitors' interests and diminished the attractiveness of litigation for the intended beneficiaries of the system. Eventually, by creating an inefficient and clumsy machinery, the problem of

[373] "Sverige är veterligen det enda land i den västerländska kulturkretsen, som inte har förbud som påföljd på detta rättsområde." SOU 1966:71, 287.

fair trading was for decades surrendered to the market and decision-making processes associated with it.

The emergence of an active self-regulation system was a natural attempt at self-help in the absence of adequate statutory response. Yet even self-regulation had to evolve 'in the shadow' of statutory law. Soft law standards could undoubtedly go further than legislation. However, the chance of effective enforcement drastically decreased for all instances where no credible threat of litigation could be communicated.

In their original design, neither enforcement system allowed for genuine representation of broad consumer interests. This important collective interest remained absent from the deliberations of the court. One can of course argue that the courts were able to consider this interest *ex officio*. However, as Komesar argues, interests that are badly represented before the decision-making forum tend to be in a poor position to influence the flow of factual and doctrinal information reaching the decision-maker.[374] This tends to find its expression in the substantive quality of the decision.

4.5.4 The standard of fairness

Given the above differences in interest structure, choice of decision-making forum and enforcement design (all of which constitute the static, created elements of the institutional framework), it is not surprising that the evolving standard of fairness shaped through the different decision-making bodies demonstrates important differences as well. Under German unfair competition law, and especially under the general clause of *gute Sitten*, an expansive net of restrictions and prohibitions evolved which covered constantly changing expressions of competitive ingenuity on the part of businessmen and lawyers. Active 'professional' litigants were constantly testing the limits and giving rise to new waves of litigation and doctrinal response.

In Sweden, by contrast, the standard of fairness remained confined to different forms of deceptiveness, strictly construed. Even under the auspices of self-regulatory arrangements the standard of fairness was carefully interpreted. Following Komesar's terminology one can say that the German model demonstrated signs of a minoritarian bias, over-regulating an area where free competition might have benefited a dormant majorty of uninformed and non-consulted consumers. In Sweden, the reluctance to serve the interests of small and medium enterprises left individual and group competitors' grievances largely unremedied in the name of a higher public interest of free competition.

4.5.5 Institutional trajectories and institutional fossils

Where are we to seek for a deeper explanation for these different institutional paths? Searching for reasons and explanations in comparative legal and institutional analysis is a risky enterprise. The course of history is influenced by so many different factors that any attempt at selective treatment is open to criticism for reductionism or incompleteness of analysis. In the following I shall try to connect the institutional developments described above with the three sets of macro-institutional factors presented at the beginning of his chapter, namely: the divide between liberalism and

[374] Komesar (1994), 133.

interventionism; constitutional conceptualisations of division of power and the role of courts and, finally, the delineation between private and public law.

In the early legislative debate on unfair competition law in Germany, interested actors faced an institutional environment still perceptibly influenced by mercantilist attitudes. The strong position of the guilds arguably floated into a generally favourable view of corporations (*Genossenschaften*), transforming into a broad political support for the *Mittelstand* and finding recognition in judicial practice and doctrine. Enacting legislation that would be openly sympathetic to the interests of the entrepreneurial middle classes was obviously regarded as fully legitimate and even a matter of national importance. The short period of full-scale liberalism could arguably not alter deeply embedded expectations and patterns of action of economic actors. The UWG was more openly responding to a reality of growing state interventionism and protectionist collectivism.[375]

In the wake of guild-control, existing competitive positions were readily perceived as deserving protection. The issue of fair trading was thus not a matter solely of individual, but also of collective and public interest. Aggressive methods of competition and marketing were regarded as in conflict with good commercial practice. These attitudes were further enhanced by political programs of state interventionism, implemented already in the 1880s, carrying the flavour of unmitigated protectionism. The needs of different interest groups which were satisfied by a specific type of regulation may have been transient and accidental. What is persistent on a long-term basis is the readiness of the political process to respond to such concerns. Expectations are thus spread among interest groups that legislation can be used as a re-distributive instrument for satisfying temporary interests.

The choice of decision-making process can arguably not remain uninfluenced by constitutional tradition and practice. I already stressed the fact that, at the time of drafting the Unfair Competition Act, Germany was a young state with only a few decades of unified existence and common institutions for all the *Länder*. This fact transpired in the parliamentary debates and was brought out as one reason for the hesitant attitude of the legislature to delegate decision-making competence to the courts in the deliberations on the first UWG of 1896. It was a question of reasserting the authority of central government, of underlining centralised vs. decentralized rule. Any doubts as to the primacy of the power and authority of central government had to be ruled out. However, there are deeper institutional currents than those stirring political actors at a given moment of time. In this case one can conjecture the existence of a strong position of the courts that have been key decision-makers in many areas of human life before the unification of the German state in 1871. Moreover, in a federal state where there is always a potential tension between local and central government, the courts automatically play a important balancing role.

In contrast, Sweden has a long-lasting tradition of a centralized state with central institutions and an admirable continuity in administrative infrastructure. In this constitutional model of strong parliament and strong administration the courts have not been a welcome competitor. The political consensus at an early stage assigned the

[375] Brüggemeier (1980), 46 ff.

courts a rather modest role of interpreters of the political will and the intent of the legislator. Leaving them with the open and potentially controversial task of providing content to a vague general clause clearly intertwined with economic policy would probably have strained the traditional attitudes of the courts. It has been argued in the Swedish debate, especially after the entry into force of the Law on Obligations (*avtalslagen*) of 1915, that the introduction of a general clause in this statute deprived objections against granting law-making powers to the judiciary of a sound foundation.[376] However, commentators forget the particular role traditionally played by the general clause in a law of unfair competition of German fashion. In such legislation the general clause is not an *ultimum refugium*, addressing inequitable solutions produced by the ordinary rules. Quite to the contrary, the general clause is the heart of the statute, forming the real basis for judicial law-making. The delegation of powers to the courts is thus a much more radical and comprehensive measure.[377]

Finally, the flexibility of German unfair competition law could be explained in view of the predominantly civil law profile of the model. Given the dominance of private law in view not only of Pandectist but also of constitutional tradition and *Rechtstaat* doctrine, the classification of UWG in the domain of private law was not surprising. What appears as a puzzle is the readiness and ability of scholars to keep up with this categorization despite a changed emphasis in the law on collective and public interests. A communitarian approach visible in German legal tradition and in particular in Gierke's conceptualisation of a social private law actually provided a sophisticated (albeit contradictory) impetus to such trends.

Exploring the broader institutional context brings us to the status of private law. In Germany the historical moment of drafting the Code of the Century has undoubtedly influenced the general attitude towards civil law as a broad and ambitiously conceived field. Gierke's advocacy of a social vision of private law arguably opened the doors towards a creative and expansive interpretation of private law as a concept and subject-matter. The debate on *Sonderprivatrecht* and on the dividing line between public and private law leads almost invariably to acknowledging the primacy of private law and its advantages over public intervention. In the field of fair trading law this vision of private law permitted the conceptualising of fair trading law as a branch of private law despite the right of action granted to business organizations, and despite the growing integration of public interest objectives.

More importantly, the lingering legacy of mercantilism and the guild system presumably account for the endorsement of self-regulation through corporations and for the particular system of enforcement in German unfair competition law. Gierke's theory of *Genossenschaften* can again be seen as having provided a theoretical and philosophical foundation for the unhampered acceptance of corporate action.[378] In the words of a respected expert on German legal history:

---

[376] See Eberstein (1951a), 5 ff.

[377] Strömholm, 'Equity in Swedish law' in: Newman, R. (ed.), *Equity in the World's Legal System* (Brussels: Bruyant, 1973), 443 ff.

[378] According to Fukuyama, "[i]n Germany, then, the guilds were never ruthlessly destroyed as they were in France. They survived and were transmuted into a modern form, becoming the basis of the country's postwar apprenticeship system."..."The Germans hardly preserved the guild system intact ...., but neither did they

> There was a change in the economy from individualism to pluralism: conflicting interests were no longer conducted by the individuals affected but by collectives representing them, and it was through such organisations that resolution of disputes was sought...[379]

In Germany the practice of judicial interpretation of general clauses was much alive and influenced by the French *code civil*, but also by the Pandects. The decision of the RG to reject an expansive interpretation of tort law to encompass fair trade was influenced by the political wish to emphasise the unity of the German state and the primacy of the decision-making power of the central state vs. the courts. At the same time, the tradition of awarding courts considerable room for interpretative freedom clearly had deeper institutional roots than German unity. The technique of the UWG is ingenious in that it on the one hand, by the very fact of specialized legislation, recognizes the supremacy of Parliament as a lawmaking institution and thus pays a lip service to trends of statist centrism. On the other hand, by formulating a broad general clause with quite free and unimpeded access to the courts, the decision-making power is by the same token restored to the courts.

The expansion in the different categories of possible infringements (*Tatbestände*) can partly be explained with the specific legal method applied by German courts for concretization of the general clause. In the process of interpretation precedents gradually acquired what Ohly calls an intermediary function ("*Mittlerfunktion*").[380] Precedents were seen to be in a position to provide the much needed short-cut to deciding on a particular case, while avoiding the complex meandering required by methods based on ethical, constitutional of economic reasoning. According to Ohly, in 'distinguishing precedents' German judges tend to apply the deductive way of thinking characteristic of continental lawyers. They seek to subsume the facts of the case under a norm elicited from previously decided precedents. Using terminology from logic, the quest is for finding a relevant normative 'major premise' (*Obersatz*). Unlike common law judges who carefully compare the circumstances of the case serving as precedent, German courts tend to remain on the level of abstract principles. The main tools assisting the judge in this process have in Germany become legal commentaries and the leading record (*Leitsatz*) of the case.[381] The practice of attaching a headword to each case likewise contributed to the identification and systematization of relevant precedents. The various systematization attempts described above – from Lobe and Kohler to Callmann, Nerreter and Ulmer – have served as important points for orientation for attorneys and judges.

In the quest for certainty and clear conceptualizations, decisions that were specific to the facts of individual cases were raised into abstract rules and subsequently used as a basis for subsuming new (and different) factual situations under the same abstract

---

remake society entirely anew based on purely liberal principles. Instead, the liberal framework was moderated and given cohesiveness by certain pre-modern holdover institutions." See Fukuyama (1995), 248 f.

[379] Wieacker (1995), 433.

[380] Ohly (1997), 233: "Diese *Mittlerfunktion* kommt unter § 1 UWG den Präjudizen zu. Sie liefern die konkreten materiellen Grundsätzen, die Ethik, Konvention, Verfassung und wettbewerbsfunktionale Topoi nicht zu bieten vermögen."

[381] *Ibid.*, 283.

category.[382] It could be added that precedents with their immediate, concrete existence provide the appearance of certainty and authority, lost through the open-language of a general clause. In a proverbial sense, it is part of the judges' quest for the 'lost paradise' of systematic clarity and consistency. Judges in other words seek to create good conditions for neutral and impartial application of the law by an independent and law-bound judiciary.

Importantly, the abstract categories deduced through the above-described method appear to gain a life of their own. In the words of Ohly:

> Das Richterrecht bleibt nicht beim Vergleich isolierter Präjudizien stehen. Im Laufe der Zeit verfestigen sich die aus Einzelfällen gewonnenen Wertungen zu Normen. Ihre Bindungskraft nähert sich mit zunehmender Konsolidierung derjenigen eines Gesetzes an. ... [I]n der wettbewerbsrechtlichen Spruchpraxis des BGH [ist] die Aufgabe einer bestimmten Rechtsprechung eine seltene Ausnahme.[383]

In Sweden systemic ordering never appeared to be of particular interest. Yet it is impressive how quickly and consistently unfair competition law was classified in the domain of public law. The acceptance of an intermediate solution was not at all problematized in doctrine or in preparatory material.

Another major and readily apparent difference is the status of legal doctrine. Although the authority of *Professorenrecht* was in decline after the foundation of the German state and the emergence of an authoritative legislator, the prestigious position occupied by scholarly legal opinions, the living link between doctrine and judicial decision-making, remained intact. In one sense one can say that the whole scholarly conundrum around the UWG is due to the attempt to apply the systemic thinking and logical demands characteristic of private law juridical science (*à la* BGB) to an area which is completely different in character. Unfair competition law deals with a subject matter which invites economic considerations, is virtually laden with value judgments and is open for discretionary measures. To try and build a conceptual system that can constrain this discretion and move the UWG application closer to the scholarly ideal of neutral and disinterested application of the law in the spirit of the *Rechtstaat* has been a longstanding project for generations of UWG specialists. The techniques of conceptual jurisprudence provide the crucial connecting link between public and private law. In Sweden, there was never a similar exhilaration around private law. In its long history as a centralized and administratively unitary state much of the functions of everyday life were not fulfilled by the courts but by administrative units. Doctrine in many respects only echoed the German debate.

Finally, after this account of institutional factors determining the evolution of fair trading institutions, one must pay attention to a 'legal fossile' that has come to play an awkward role in the Swedish institutional context. By 'legal fossile' I mean the issue of freedom of the press and its indirect relevance for the regulation of advertising. The particular status of freedom of the press, as a law of constitutional rank and with

---

[382] The legal method for concretisation of the general clause is well-illustrated and analysed by Ohly (1997), 253 ff.

[383] Ohly (1997), 300.

exclusive application on all printed matter, has exerted a powerful deterring influence on legislative developments in the area of unfair competition. Referring to this institutional factor as an institutional 'fossile' is not intended to diminish the social and political importance of freedom of the press. However, what is worth discussing are the often unintended consequences of formal rules regarding press freedom and their inhibitive effect on legal change.

There is nowadays widespread agreement that concerns about a possible conflict between a broad-based unfair competition law and freedom of the press have long been exaggerated. As a matter of fact, in the first half of the 20th century the TF proved an insuperable barrier to change, undermining attempts at rationalization and adaptation of Swedish unfair competition law to new economic realities. In the terminology suggested by North, given the constitutional rank of the TF, its rules were simply too costly to amend. More importantly, the near-'sacred' position which freedom of the press occupies in the value system of Swedish lawyers and politicians has blocked change.[384] In popular jargon one regularly speaks of Swedish mass media, and not the courts, as 'the third power' in the institutional setup of the state.[385] The above review of legislative developments above seems to confirm this popular wisdom. Given the comparatively weak position of the judiciary, and a underdeveloped formal system of checks and balances between the different branches of government, the institutional gap elsewhere occupied by the judiciary appears to have been filled by the press exercising a vigilant control over the exercise of public power.

4.5.6 Institutional symbiosis

The institutional framework in Germany was shaped in a way providing rich incentives for organized business and individual traders to seek to fortify and expand their economic position not only through economic performance, but also through intense litigation. The mutual policing of entrepreneurs, not only on grounds of immediately affected interests but also on the basis of abstract violation of the interests of traders from the same industry or the those of the general public, was encouraged by the UWG and the judiciary. The effective remedies of interlocutory injunction and damages and the wide open avenues to the courts produced a steady stream of litigation and a large number of decisions. The system produced its repeat players: *Wettbewerbsverbände* and lawyers specialized in unfair competition law.

Within the described system, the courts at an early stage felt authorized to set the limits of fair competition. In countless decisions, carefully scrutinized by legal doctrine, the courts gradually wove a web of 'formulae', setting the institutionalised guidelines that came to shape the development of German unfair competition law for

---

[384] Indicative of this blocking effect of TF is a statement in the parliamentary debate on the 1931 IKL made by MP Löfgren, who had been involved in the legislative work that led to the 1919 failure of adopting full-fledged law in the area. Commenting on his reserved attitude to the 1915 Draft on unfair competition act, the deputy admits that he at that time did not act out of conviction that the law proposal was unnecessary or not useful. His main motivation was his fear not to enter into conflict with the TF. "At that time one was indeed terribly afraid not to be seen to act against the Constitutional laws", he adds. Riksdagens protokoll 1931 FK nr. 37, 110 ff. quoted after Persson (2002), 97 (my translation).

[385] See reference to this trait of the Swedish constitutional system in Lindblom, 'Civil and Criminal Procedure' in: Bogdan, *Swedish Law in the New Millennium* (Stockholm: Norstedts Juridik, (2000b), 201 ff.

decades to come. The self-perpetuating institutional effect is well understood in German legal scholarship. In his study on statutory breach and breach of *gute Sitten* in unfair competition law, Schricker provides the following assessment of the role of institutions in human behavior:

> Daher haben die Institutionen von eingelebter Rechtsgeltung eine ungemeine Bedeutung für die innere Verfassung des einzelnen: Sie entlasten ihn von der fallweisen mühsamen Erfindung anständigen Verhaltens, weil sie es schon vorgeformt und vorentschieden darstellen.[386]

In Schricker's view the building of such institutions is a distinctive aspect of German unfair competition law. Institutions persist due to the certainty and automation ensuing from repeated application rather than because of the viability of underlying reasons.[387] It is exactly this role of judicial decisions as institutions, constraining behaviour and working as short-cuts to save intellectual and psychological effort, which provide certainty and the confidence of rituals that are of interest to our analysis.

In institutional terms an explanation could be ventured as to why exactly competitive conduct like price-binding and comparative advertising emerge as institutions with particularly strong constraining effect. Such practices arguably tend to negatively affect a broad consumer majority. Despite occasionally acknowledging the interests of the general public in its decisions, the courts understandably did not and could not develop a systematic routine of taking these interests into account. It was always competitors and organised associations which brought and argued cases before the courts. This intense communication forms an instance of institutional symbiosis where change is slow and difficult.

An institutional framework has emerged in which the interests of specific economic groups (*Mittelstand*) are over-represented. The system creates an opportunity for gains from litigation for the so-called *Wettbewerbsverbände*, organizations specialized in policing unfair competition. They control the flow of cases to the courts and thus define the information material on the basis of which the courts form their judgment on what is fair and unfair competition. The system entails a clear bias for minoritarian interests – group interests at the expense of the consumer collective and society/tax-payers at large - with probable anti-competitive effects and overburdening the courts with litigation as a result.

In Sweden, due to different general institutional constraints, the system never offered such opportunities. It may be argued that traders were rather enticed to take the road of negotiations and self-regulation. The particularly restrictive enforcement design of the Swedish IKL seems to have thwarted attempts to offer expansive interpretations of the substantive provisions of the law. Moreover, the system has obviously exerted a severely discouraging effect on prospective claimants.

---

[386] Schricker (1970b), 206, quoting Gehlen, *Die Seele im technischen Zeitalter.* Rowohlts deutsche Enzyklopädie, Bd. 53, 1957, 74.

[387] „Im Wettbewerbsrecht tritt die Bildung solcher ‚Institutionen' besonders deutlich z.B. beim Fall der Preisbindungsvertöße und der vergleichenden Werbung hervor. Es bedarf erheblicher Anstrengungen, das Augenmerk auf die tragenden Gründe zurückzulenken, auf die sich die herausgebildeten Normen stützen, um eine Revision der einmal getroffenen Vorentscheidungen zu ermöglichen;" Schricker (1970b).

5 THE INSTITUTIONAL CHALLENGE OF CONSUMERISM: POLITICIZING PRIVATE LAW VS. DEPOLITICIZING PUBLIC LAW?

The late 1950s and 1960s brought consumerism from the American continent to Europe. Consumers in all modern industrialised states were facing similar market trends: a constantly growing variety of goods and services, increasing technical complexity and hazard of consumer goods, internationalization and anonymisation of production and marketing, new media with a powerful potential for suggestive advertising. Against this backdrop the paradigm of free consumer choice was increasingly perceived as illusionary.[388] At the same time, postwar economic and social developments in the industrialised world had brought about increased welfare, generating public resources that could be used for a boader range of regulative policies.[389] Whereas the interest of the consuming public earlier had found indirect expression in legal acts and provisions, in the 1960s consumer protection was treated as a political and legislative problem of its own right. Consumers were addressed as a definable group with particular needs and interests requiring respect, representation and protection. The call was for a functional and integrated approach, challenging established doctrinal classifications.

The legal policy discussion was strongly influenced by the dynamic consumerist developments in the United States. Consumer advocates of the rank of Ralph Nader managed to mobilize public opinion by focusing attention on consumer safety, openly accusing big American corporations of patent disregard for consumer interests.[390] These popular movements had political repercussions. On 15 March 1962 President Kennedy issued his Special Message to the Congress on Protecting the Consumer Interest and announced four categories of consumer rights, namely the right to safety, the right to be informed, the right to choose and the right to be heard.[391]

The rise of consumerism induced reform endevours in fair trading law in both Germany and Sweden. Among the essential consumer rights announced in President Kennedy's Message of 1962, the right to information occupied a prominent position. The consumer would "be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling or other practices, and to be given the facts he needs to make an informed choice, Kennedy had pledged".[392] It was therefore only natural to direct the attention to unfair competition law as the main regulative tool of advertising and marketing practices. Both substantive rules and procedural rules were subject to extensive scrutiny with the purpose of integrating the interests of consumers. From an institutional perspective the reforms can be described as attempts to relax the existing institutional constraints so to accommodate new interests and give access of new actors to the shaping and enforcement of the standards of fairness.

---

[388] See Galbraith, *The Affluent Society* (London: Hamish Hamilton, 1958); Galbraith, *The New Industrial State* (London: Hamish Hamilton, 1968). On the history of consumerism see Stearns, *Consumerism in World History* (New York: Routledge, 2001).

[389] On different theoretical approaches for explaining the growth of consumer policy see Tarschys, 'Hur mycket konsumentpolitik?' in: *Måste konsumenten gå till Verket?* (Stockholm: Industriförbundets Förlag, 1978).

[390] Nader, *Unsafe at Any Speed: The Designed-in Dangers of the American Automobile* (New York: Grossman, 1965). On Nader's role in the American consumerist movement, see Pertschuk (1982), 29 ff.

[391] The text of the message is reprinted in v. Hippel, *Verbraucherschutz*, 2 Auflage, (Tübingen: Mohr, 1979), 225 ff.

[392] *Ibid.*, 226.

As is well known, in the implementation of this policy goal Germany opted for delegating the main responsibility for the enforcement of the consumer dimension of UWG to private actors and organizations: competitors, business associations and most of all consumer associations, leaving decision-making to the civil courts. The debates in Germany on representation, remedies, litigation costs and jurisdiction are examples of efforts to improve the access of consumers to the courts and to adjust the capacity of the judiciary as a decision-making institution to tackle diffuse consumer interests. By contrast, in Sweden the emphasis was placed on the need for active state intervention in defence of the consumer interest. This led to an overwhelming reform of marketing practices law in the name of consumer protection. Decision-making and enforcement were entrusted to a special public agency with responsibility to identify, formulate and defend the consumer interest in fair trading. Consequently, the main focus of law-makers and doctrine was on adapting the functioning of a public agency to the expression of collective interests. The difference in approach can without much exaggeration be labelled a choice between politicizing private law or depoliticizing public law.[393]

A brief review of the legislative developments in the two countries might at this juncture be in order. In Germany the first legislative steps towards opening unfair competition law to the notion of the consumer interest were undertaken with the 1965 amendment of the UWG. One should from the outset state that there were no signs of ambitions for comprehensive reform or reversing the order of priorities in UWG. It was rather a matter of careful tinkering, introducing amendments though changing as little as possible in the inherited legal and institutional framework. Instead of altering the substantive standards of fair competition, the law-makers preferred to take a 'procedural' approach and create opportunities for access to court to consumer organizations. Subsequent amendments of the legislative provisions were undertaken in 1969, when some specific amendments of the rules on promotions and sales were introduced.

The 1970s witnessed an extended debate on changing the UWG in a consumer-friendly direction. The discussed drafts were rich in innovative proposals. New substantive rules addressing marketing practices particularly detrimental to consumers were proposed. Rules on alleviation of litigation costs were considered, along with measures for improving access to courts, more effective remedies and other aspects of the institutional framework. After more than 10 years of debate the modest outcome was the 1986 amendmend of UWG, the only openly consumer-friendly provision being the possibility to retreat from contract concluded on the basis of false advertising. The rest of the amendments were generally assessed in doctrine as clear examples of *Mittelstandschutz.*

In Sweden developments took a different turn. The consumer protection upsurge coincided there with a time of new efforts at a comprehensive legislative solution in

[393] Mertens, 'Kollektivrechtlicher Schadensersatz als Mittel des Verbraucherschutzes' (1975) *ZHR*, 438 ff., 442: "Class action und Geltendmachung gebündelten Interessen durch Verbände, die diese als Bürgerinitiative kanalisierende Funktionsträger und letzlich als Wahrer öffentlicher Interessen auftreten läßt, sind in ihrer Tendenz nicht auf politische Neutralisierung von Konflikten vor Gericht, sondern eher auf "Politisierung" von Gerichten zum Zwecke der Durchsetzung gesellschaftlicher Interessen gerichtet."

the area of unfair trade practices. In 1966 a specially appointed Commission of Inquiry submitted its proposal for an Unfair Competition Act carefully elaborated in the framework of Nordic legal cooperation. However, the Government took a radical stance and, abandoning a respected tradition of legislative drafting, disregarded the Commission's proposal and submitted an alternative Bill, fundamentally influenced by consumer protection ideology.

The 1970 Improper Marketing Act (*Lag om otillbörlig marknadsföring*, hereinafter 1970 MFL)[394] introduced significant amendments to the proposed substantive rules of fair trading. The consumer interest was explicitly declared a dominant concern of the Act. Most importantly, central role in the enforcement of the act was assigned to a new public body, the Consumer Ombudsman (*Konsumentombdusmannen*, KO). The reform of marketing practices law was brought further with the 1975 Marketing Practices Act (*Marknadsföringslagen*, hereinafter 1975 MFL).[395] The consumer protection element in the substantive provisions was enhanced and the KO merged with the recently formed Consumer Protection Agency. The Agency was assigned the task of elaborating – in cooperation with industry – of specific marketing standards to give more substance to the general clause of proper marketing. Some signals for reconsideration of the institutional framework came in the early 1980s. A Government Committee (the so-called Guidelines Committee) was appointed with the task to investigate the system of enforcement of marketing practices law. Despite certain criticisms voiced by the Committee, the system was generally assessed as working satisfactorily and no major changes were recommended.

This brief story of divergent institutional response to a similar problem will in the following be analysed in more detail. I will first look at the macro-institutional context. The major question will again be to try to establish to what extent long-standing institutional constraints are determinative for the modifications of old and creation of new institutions (and thus for the potential of change). Then I will pay closer attention to the evolution of fair trading institutions and trace the attempts in legislation, doctrine and jurisprudence to adapt the institutional design to accommodate the collective consumer interest. The interests and stakes of the affected actors will be analysed as well as the costs of participation and representation of these interests in the different institutional processes. Has the consumer protection idea brought about a break with the institutional constraints of the past or do the new institutions essentially remain on the same path? More specifically, I will search for instances of symbiosis between institutions and organizations, trying to establish to what extent such symbiosis prevents rebuilding the institutional framework to accommodate changed interests and preferences. Special attention will be paid to enforcement design as a 'transmisson belt' between interests, organizations and institutions.

5.1 The macro-institutional context

In Germany the time after the Second World War was a time of painful dealing with the National Socialist past and of massive state and law-building in many important respects. But it was also a time of return back to classical principles of economic

[394] Lag om otillbörlig marknadsföring (SFS 1970:412).
[395] Marknadsföringslagen (SFS 1975:1418).

liberalism, liberal political philosophy, principles of individual autonomy and social justice. Sweden, by contrast, was less dramatically affected by the political and economic calamities of the war and emerged economically strengthened, with unbroken continuity in legal and political institutions and vindicated in its option for gradual but comprehensive welfare reform.

5.1.1 Between market liberalism, Sozialstaat and social engineering

With the collapse of the National Socialist regime in Germany, ideas of centralisation and statism in the economy were grossly discredited. At the same time there was a widely spread perception that liberalism in its pure form was at least partly to blame for the economic and political disasters of the Third Reich. Ideas of socialisation and land reform therefore enjoyed widespread support not only among Social Democrats but also among Christian socialists.[396] In this complex ideological environment one trend of economic thought won enormous political and ideological recognition in West Germany, namely the Freiburg School of Ordoliberalism.[397] This school of thought had evolved from the intellectual cooperation between an economist (Walter Eucken) and two laywers (Franz Böhm and Hanns Grossmann-Doerth), working during the 1930s in the little academic town of Freiburg in Southern Germany. The main credo of this intellectual current was liberty and individual autonomy. In contrast to classical liberal economic writers, however, ordoliberals combined a belief in the 'invisible hand' of the market with an understanding about an important and active role for the state and law in promoting and safeguarding the framework conditions for free and fair competition. Although their focus was on the economy, the ultimate goal of ordoliberals was the attainment of a democratic and humane society, providing equal and fair opportunity for participation to all its members.[398]

The denomination of the school originates from the concept of *'Ordnung'* developed by Walter Eucken and central to the whole theory. According to Eucken one could distinguish between two main economic orders: an economic order based on transactions (*Verkehrswirtschaft*) and an economic order based on central administrative command (*Zentralverwaltungswirtschaft*). These two orders were fundamentally different and incompatible and any mixture of components from the two threatened to lead to detrimental economic and political results. A transaction economy would thus be seriously harmed by any instance of government intervention.[399] The related concept '*Ordnungspolitik*' (or at least its core) is defined by Müller-Graff as:

> ...die Gewichtung (und das zugrundeliegende Richtigkeitsverständnis) der Rollenverteilung von marktgemässene Selbststeuerung und staatlicher Fürsorge für die wirtschaftlichen Handlungsabläufe.[400]

---

[396] On socialisation tendencies in the early legislative activities in the Länder of Hessen, Württemberg-Baden and Schleswig-Holstein, see Eisenhardt (1999), 510 ff. Cf. Gerber (1994), 25.

[397] The following account on the Freiburg school builds extensively on Gerber (1994), 25 ff. For a comprehensive review of ordoliberal economic thought, see also Drexl (1998), 106 ff. Building on ordoliberal ideas, Drexl proposes a novel approach to consumer protection based on the idea of 'normative efficiency', *ibid.*, 162 ff. See also Fikentscher (1958), 14 ff.

[398] *Ibid.*, 36 f.

[399] *Ibid.*, 41 ff.

[400] Müller-Graff, 'Ordnungspolitische Divergenzen und wettbewerbliche Lauterkeit in der Verfassung des Gemeinsamen Marktes' in: *Festschrift Carstens* (Köln, Berlin: 1984), 209 ff., at 213.

The philosophical foundations of ordoliberal economic thought and of Eucken's work in particular may be traced back to Kantian ideas of individual autonomy and liberty guaranteed by the *Rechtsstaat*. According to Eucken:

> It is the responsibility of the state to find a form in which there is room for sociable coexistence and at the same time the greatest possible opportunity for the free development of individual capacities. The absolute freedom of natural condition should be constrained by statutes, through which the individual is protected against the discretion of others. But on the other hand the free activity of the many individuals in competition with each other should advance the community.[401]

The vision of an active and powerful but constrained state was linked to another core element of Ordoliberalism, namely the notion of a subtle interdependence between economy, law and politics.[402] Central in this respect is the idea of an economic constitution (*Wirtschaftsverfassung*). According to ordoliberals it was not the economy which determined how society is, but the other way around. A polity had to make a fundamental choice on the character of its economic system much in the same way as it decided on the character of its political system. A choice for transaction economy had therefore to be integrated in the constitutional framework.[403]

On a more operative level an essential element of *Ordnungspolitik* was seen to lie in a rigorous competition law, which would maintain the framework conditions of a genuinely free competitive market economy. According to Fikentscher ordoliberalism or, as he calls it, 'ordered' liberalism, implies liberalism that maintains competition. In fact, this is the decisive distinction from classical liberalism.[404] In regard to competition law and policy the ordoliberal program was compellingly powerful and simple. Using the taxonomy developed by Nipperdey in the 1930s in the context of unfair competition law[405], Eucken and Böhm saw the desirable standard of competition to lie in 'performance competition' (*Leistungswettbewerb*). This standard was seen to yield to sufficiently clear and predictable scientific analysis as to allow for objective implementation by the competent authorities and courts.[406]

A central theme in ordoliberal theory was the idea of dispersion not only of political, but also of economic power. As a result, any concentration of economic power was viewed with suspicion. To the contrary, the existence and economic freedom of small and medium sized businesses were identified as an important antidote to excessive

---

[401] Eucken, *Grundsatze der Wirtschaftspolitik* (Bern: A.Francke, 1952), 360, quoted after Gerber (1994), 39 f.
[402] In this respect there is a close kinship between the Freiburg School and modern neoinstitutional analysis. The link is emphasised by Williamson (1996), 221. Similar Drexl (1998), 108 ff.
[403] The exact meaning of the concept, however, is controversial in contemporary German scholarship. From an economic perspective, the notion 'economic constitution' is understood in the sense of 'economic order'. Viewed as a normative concept, the term is either limited to the Constitution or extended to the legal order as a whole. On the different understandings with analysis of the jurisprudence of the Federal Constitutional Court see Drexl (1998), 218 ff.
[404] Fikentscher (1958), 15.
[405] See above Ch. 4.4.1.3.
[406] According to Böhm, the body of doctrine (*Lehrgebäude*) of classical economic philosophy had to be translated from the language of economics into the language of legal science. See Gerber (1994).

economic power. Consequently an active *Mittelstandspolitik* was conceived as a legitimate objective of economic and competition policy.[407]

Despite the strong influence of ordo-liberal ideas, the Basic Law of 1949 (*Grundgesetz*, GG) did not take an express stand on the question of the preferred economic order.[408] Nevertheless, a number of provisions in the catalogue of fundamental rights and freedoms, like the right to free development of one's personality, protection of private property, etc. exclude a totally planned economy.[409] Read in conjunction with the provisions on the *Sozialstaat*, notably Art. 20 Sec. 1 proclaiming the German Federal Republic to be a democratic and social federal state, these rights paved the way for a mixed economic order of market economy with substantial influx of welfare and social justice elements.

Finally, the impact of ordoliberalism is strongly felt in the antitrust legisation adopted in Germany in 1957, after more than ten years of legislative deliberations. Despite expectations that an American-style antitrust law would be introduced in Germany, the 1957 Act Against Restraints on Competition (*Gesetz gegen Wettbewerbs-beschränkungen*, GWB) was in many respects a child of ordoliberal thought. In contrast to antitrust statutes existing at the time in some European countries and to the German Cartel Ordinance of 1923, the new statute contained not only a prohibition of horizontal cartels, but also banned abuse of a monopoly position.[410] In a manner unique not only in Europe but also in the world, the enforcement of the statute was vested in an independent Federal Office of Cartels with substantial prosecutorial and adjudicative powers.

The success and diffusion of Ordoliberalism in post-war West-German society was remarkable. Leading German politicians such as the architect of the German Wirtschaftswunder Ludwig Erhard[411], as well as the conceptual father of Germany's social market economy Müller-Armack, were strongly influenced by ordoliberal ideas. Gerber provides a convincing account of the high degree of penetration in the academic community and in public administration. German politicians, lawyers and economists in the ordoliberal tradition also took an active part in the formation of the European Communities and of European Community competition law.[412]

Sweden never needed to pass through a massive postwar political and economic transformation or ideological reorientation. The war had left Swedish economy intact, and the immediate postwar period even bolstered the economy. The position of social democracy on the Swedish political stage was similarly strengthened and there were few obstacles to the project of building the Swedish welfare state. The intellectual

---

[407] According to Reinhard Blum (as cited by Gerber) the ideal of Wilhelm Ropke's economic policy (a member of the Freiburg school) was "a comprehensive Mittelstandspolitik which should free the market economy from its two weaknesses – monopolies and the proletariat." (Blum, *Soziale Marktwirtschaft: Wirtschaftspolitik zwischen Neoliberalismus und Ordoliberalismus*, 1969, 94.)

[408] Eisenhardt (1999), 545; Drexl (1998), 219 ff.

[409] Eisenhardt (1999).

[410] These prohibitions were not absolute, however, and were mitigated by a long catalogue of exemptions, such as crises cartels, etc. See Gerber (1994), 65 ff.

[411] Ludwig Erhard was a liberal economist, minister for economics in Adenauer's government and succeeded Adenaur in the post of FRG Chancellor from 1963-1966.

[412] See Gerber (1994), 71 ff.

impetus to the Swedish 'middle way' or 'people's home' (*folkhem*) came from a limited number of individuals, among whom were economics minister Ernst Wigforss, influenced by Robert Maynard Keynes, and the internationally renowned economist Gunnar Myrdal. Along with his wife Alva, who was active in social policy, Myrdal professed a radical form of Keynesianism and support for government intervention. The Myrdal couple came to represent an utilitarian, instrumentalist ('social engineering') approach to welfare economics.

The trend towards industry concentration silently sanctioned through the non-intervention by the state continued after the war, when Swedish enterprises boldly sought expansion to new markets. The 1957 Restrictive Trade Practices Act (with the unassuming title: Act on counteracting in certain cases of restraints of competition in the economy) was built around the principle of abuse.[413] It was directed against restrictive practices that had 'harmful effects' by being contrary to the public interest. A key position in the enforcement of the Act was occupied by the Freedom of Competition Ombudsman (*Näringsfrihetombudsmannen*, NO), who upon identifying illegal restraints first tried to negotiate their elimination in a voluntary manner. Only if these negotiations failed could the Ombudsman bring the perpetrator before the Freedom of Competition Board (*Näringsfrihetsrådet*). The latter body did not deal with adjudication proper but initiated a new round of negotiations and, in case of failure, turned the matter to the Government. Notably, the Council had no power to impose real sanctions under the Restrictive Trade Practices Act.[414]

5.1.2 Constitutional constraints

Postwar Germany and Sweden evolved as democratic societies based on modern parlamentarism. There were, however, major differences in constitutional theory and the further development of existing doctrine.

In Germany constitutional law evolved as a reaction to the bitter experience from the recent National Socialist past and was driven by a desire to establish safeguards against a relapse into political turbulence, militarism and totalitarian tendencies. The process was closely observed and partly guided by the Allies.[415] The postwar German constitution, which entered into force on 23 May 1949, rests upon three fundamental concepts: democracy, federalism and the rule of law. Democracy implies a political order respecting the will of the majority and found its most salient expression in provisions on general elections with free and secret suffrage and a government formed by representatives of the majority. At the same time, the GG breathes of guarded distrust towards unlimited majoritarian rule. Experience with the populist and demagogical practices of the extremist parties during the Weimar Republic and National Socialism, along with the living example of communist totalitarian rule in eastern Germany, help explain efforts to play down the role of popular will in the text of the constitution.[416] The GG was designed with a strong desire to introduce effective checks and balances on the exercise of political power and to safeguard individual rights not only against the villain-dictator, but also against the tyranny of the majority.

---

[413] Lagen (1953:603) om motverkande i vissa fall av konkurrensbegränsning inom näringslivet.
[414] See Bernitz (1969), 426; Bernitz/Draper, *Consumer Protection in Sweden*, 2nd ed. (Stockholm: IFIM Series, No.12, 1986), 32.
[415] On the legislative history of the GG, see Eisenhardt (1999), 513 ff.
[416] *Ibid.*, 540.

The legislative process was divided between the *Bundestag* and the *Bundesrat* with a complicated procedure requiring several rounds of deliberations. Generally, one can say that the federal structure makes the legislative process a protracted and cumbersome activity creating bias in favour of the *status quo*.[417]

Against this background it is not surprising that the GG strongly emphasized individual rights. The idea of the *Rechtsstaat* thus acquired new meaning and vigour, and received multiple constitutional guarantees. An extensive catalogue of economic, social and political rights and freedoms was included in the GG, radically conceived not only as political goals but as self-executing provisions offering every German citizen a right of recourse to the courts.[418] The overall importance of these fundamental rights was underscored by the symbolic gesture of awarding them the most prominent place in the constitutional document. By setting up of a specialized constitutional court, the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) in Karlsruhe, with broad competence for constitutional review, the self-executing character of the rights and freedoms was given a concrete procedural and institutional guarantee. In postwar jurisprudence, the importance of constitutional law in general was additionally stressed.[419] The constitutional design ensured the pervasion of constitutional rights into all areas of law, both public and private.[420]

The reinvigorated principle of the *Rechtsstaat* had two important implications for the development of postwar German public administration. The first was an insistence on a law-bound administration (*Gesetzesbindung der Verwaltung*). The principle of binding the administration by law implied that public administration should serve the application of the law rather than policy-making. Consequently, German public administration was structured in a hierarchical manner, guided by a dense net of laws and administrative regulations, issued in accordance with strict principles of delegation.[421] In the same vein, German civil servants were to be regarded as servants of the state, led by principles of legalism and proceduralism. They were to be held accountable not to society, but to the state and to law. It is important to note that legal administrative control placed emphasis on the protection of subjective individual rights rather than on the participation of the public in administrative decision-making.[422]

On the other hand, the revival of *Rechtsstaat* thinking provided a new boost to the institute of judicial review of administrative acts.[423] As indicated in the previous

---

[417] Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) *Public Administration*, 239 ff., at 255.

[418] In the words of Carlo Schmid, one of the social-democratic participants in the Parliamentary Council drafting the GG the basic rights had to be created so that they: "nicht bloss Deklamationen, Deklarationen und Direktiven sind, nicht nur Anforderungen an die Länderverfassung, nicht nur eine Garantie der Ländergrundrechte, sondern unmittelbar geltendes Bundesrecht, aufgrund dessen jeder einzelne Deutsche, jeder Bewohner unseres Landes vor den Gerichten soll Klage erheben können", Eisenhardt (1999), 542.

[419] On the different models of constitutional review in Europe and the reasons for preferring the Kelsenian before the American approach see Favoreu (1990), 38 ff.

[420] On the *Drittwirkung* of human rights see Eisenhardt (1999), 543.

[421] Hellstern, 'When Courts Intervene: Judicial Control in a Comparative Institutional Perspective' in Kaufmann/Majone/Ostrom, *Guidance, Control and Evaluation in the Public Sector* (Berlin: de Gruyter, 1986), 663 ff. See Knill (2001), 65.

[422] See Knill (2001), 69.

[423] See Knill (2001), 65.

chapter, arguably due to the late development of parlamentarism, the courts in Germany had at an early stage been called to play a prominent role in the process of ensuring the legality and accountability of public administration.[424] The relatively early differentiation of a separate system of administrative courts is an embodiment of a strong idea of separation of powers and further evidence of the notion of courts as main guardians of the rule of law.[425] It also enhances the predominant outlook of a strict separation between public law aiming to promote 'the public interest', and private law with its purpose of protecting private property and freedom of contract from government intrusion.[426]

In Sweden the end of the war did not unleash similar processes of rethinking constitutional law. The RF of 1809 formally remained in force, although the shift to a parliamentary form of government had since the 1920s become an undisputed political and constitutional reality. When a new RF was adopted in 1974, it was rather a matter of formally acknowledging the predominant majoritarian constitutional practice. According to the first paragraph of the Constitution "[a]ll public power in Sweden proceeds from the people."[427] The second paragraph of the first article adds that Swedish democracy (*folkstyre*) "is founded on the free formation of opinion and upon universal and equal suffrage. It shall be realized through a representative and parliamentary polity and through local self-government." (RF 1:1). There is clearly a strong emphasis on parliamentary and popular sovereignity in these texts. The norm-making power rests with Parliament (RF 1:4) and it is only following clear rules and in strictly defined situations that this power should be delegated.[428]

The dominant trait of majority parliamentarism is also evident from the position of executive government. The government appointed as a result of parliamentary elections, by its command over the voters' majority, possesses impressive powers to direct the legislative process and implement its political programmes in decisive and radical ways.[429] The Government is indeed accountable to the Parliament and there are various procedures under which Parliament monitors and controls its performance. According to Strömberg, however, Parliament would rarely obstruct governmental initiatives, since these initiatives are considered to have received the support of the people through the means of elections.[430] Although the ultimate law-making power is concentrated in the Parliament, the Government has multiple ways to influence the Parliament in the legislative process. Most importantly the Government is the most frequent initiator of new legislation and of Inquiry Commissions, paving the way to

[424] See Heady (1979). Cf. Knill (2001), 66.
[425] See Eisenhardt (1999), 348 ff. and 401 ff.
[426] On these distinctions from an American perspective, see Pierce/Shapiro/Verkuil, *Administrative Law and Administrative Process* (Westbury, NY: The Foundation Press, 1992), 2 ff.
[427] RF 1:1 "All offentlig makt i Sverige utgår från folket".
[428] Strömberg, *Sveriges författning*, (Stockholm: Studentlitteratur, 1999), 100 ff.
[429] See Lidbom, 'Lagstiftningsmaktens gränser' (1993) *JT*, 283 ff., critical Strömholm, 'Skall lagreglerna spegla eller påverka den allmänna rättsuppfattningen' (2001) *SvJT*, 101 ff.
[430] Strömberg (1999), 101. This feature was particularly distinctive during the time of uninterrupted Social Democratic rule from the mid-1930s to the mid-70s. Recently things have changed and the legislative process has become more complicated as well as genuinely deliberative. See Lejonhuvud, 'Förarbeten' in: Bernitz (ed.), *Finna rätt* (Stockholm: Norstedts Juridik, 1996), 102 ff.

change in existing law. Immergut characterizes the Swedish political process as one where the executive has substantial capacity for unilateral action.[431]

Apart from majority parliamentarism, the Swedish political model of government, especially in the post-war decades, has exhibited marked features of corporativism. Generally, interest-group participation in the post-electoral process of government, when resting on principles of equality, openness and accountability, may strengthen democratic practices. Where, however, certain groups are awarded an institutionalized privileged position in practices of government, 'corporativism' becomes associated with deficiencies in the operation of a politico-economic system.[432] Ever since the tripartite agreement from Saltsjöbaden, strong organized actors in organized industry and the trade unions have had influence over a whole range of public policies and their implementation in Sweden. Whether as a positive or negative example, Sweden has therefore in the social science literature been often given as an archetypical example of a democratic system with strong elements of corporativism.[433]

Corporativism found its way into the legislative process as well as at the level of implementation and enforcement. An important mechanism ensuring increased interest representation in the political process is the procedure of government committees and commissions of inquiry, which are assigned to investigate different issues and to propose adequate legislative and other measures (*kommitteväsendet*). The reports of these committees are then subject to a process of consultation with interested groups, authorities and bodies (*remissförfarande*). This procedure has traditionally ensured a smooth avenue for representation of corporate interests in the political process. At the level of administrative decision-making, corporativism has been mostly visible in the structure of free-standing agencies. Representatives of the most important interest groups have traditionally been awarded strong positions in the Management Boards of such agencies.[434]

Both a strong notion of representative parliamentary democracy and well-diffused elements of corporatist government coexist uneasily with strict implementation of the doctrine of separation of powers and especially with legalisation and judicial control. This is confirmed by the Swedish example, where the executive government is only partially 'checked and balanced' by other branches of political power. Historically, as mentioned above, the doctrine of separation of powers was introduced in Swedish

---

[431] "In Sweden the political executive could count on decisions being routinely confirmed by the parliament. This pattern of executive dominance was made possible by institutions established to conserve the power of monarchy and the Conservative party during the transition to democracy. Proportional representation and an indirectly elected first chamber helped the Social Democrats achieve stable parliamentary majorities. Because the executive government rested on secure parliamentary majorities executive decisions were automatically ratified by parliamentary votes." Immergut (1992), 57 ff., at 67.

[432] Corporativism should be distinguished from a corporate society where corporate representation is the only form of government. On the distinction between corporate society and corporativism see 'Avkorporativisering och lobbyism – konturerna till en ny politisk model', SOU 1999:121, 10 ff.

[433] See Lewin, Samhället och de organiserade intressena (Stockholm: Nordstedts, 1992); Hermansson, Politik som intressekamp. Parlamentariskt beslutsfattande och organiserade intressen i Sverige (Stockholm: Nordstedts juridik, 1993); cf. SOU 1999:121.

[434] The authors of a government-commissioned report distinguish between decision-making corporativism and implementation corporativism, SOU 1999:121, 22 ff.

public law as early as 1809.[435] But the present RF came to reflect a different conception of public government. By emphasising popular sovereignty in the 1974 RF it rejected the idea of other branches of power constantly policing the executive. According to Strömberg, public power in Sweden is indivisible.[436] It is only the functions of the state that are distributed among different organs, and not the power. Certainly, the present RF expressly provides for the independence of public authorities (RF 11:7) and of the courts (RF 11:2). Yet the competences of the courts to control the government in the exercise of political power are limited.

Illustrative of this point is the discussion on the major issue of judicial review of constitutionality. A possibility for constitutional review was not envisaged in the 1974 RF. An explicit proposal in this sense by the parliamentary Commission on Rights and Freedoms was not implemented with the 1976 amendment. Only in 1979 a provision on judicial control of constitutionality was included as RF 11:14, but subsequently given a limited scope and effect. Notably, rules enshrined in parliamentary acts or in an act of government can only be waived if the error is manifest.[437] It is also interesting to note that the right to refuse application of a rule on grounds of conflict with the RF was awarded not only to courts but to other public bodies, thus refusing to grant the judiciary a privileged position.

The issue of judicial review underscores the primacy of democratic popular rule and lingering misgivings towards vesting broad decision-making powers in the courts. The judiciary is seen as enforcer of the political will of the democratically elected Parliament rather than as a guardian of the constitutional values or bulwark of individual rights and freedoms against public power.[438] This mundane and 'non-heroic' position of the judges is evident in other issues of form and substance. Thus under the 1974 RF judges are appointed by the cabinet and are generally treated along with other governmental authorities in the RF.[439] In practice it is not unusual that lawyers with long experience in governmental legal services are promoted to judges, and vice versa. The borderline between the judiciary and the executive is often described as thin.[440] The authoritative role of *travaux préparatoires* as a source of law remains undiminished.[441] Finally, the judiciary has for decades played a modest role in supervising the legality of actions by the public administration and the government. Control over enforcement practices of administrative agencies and their impact on

[435] The first Swedish Instrument of Government of 1809 laid down detailed rules on the different powers of the king, the government and the courts, with each of these institutions being endowed with particular powers and in a position to exert some control over the others. *Ibid.*, 72.
[436] Strömberg (1999), 101.
[437] RF 11:14 "If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest." For the debate around this rule see Nergelius (2000), 65 ff., at 79.
[438] According to Lindblom, 'the third branch of power' is a term which by no one in Sweden will be associated with the courts, but rather with the media. See Lindblom (2000), 201.
[439] See in particular RB 4:4.
[440] See Nergelius (2000), 65 ff.
[441] See Lejonhuvud (1996), 90 ff.

individual rights were for many years mainly exercised by higher branches of government, or by the semi-detached ombudsmen.[442]

The issue of constitutional review is intimately related with the debate on the status of fundamental rights and freedoms in the RF. Having been spared the horrors of the war of totalitarianism and of mass human rights violations, the issue of protecting individual rights and freedoms – with the notable exception of freedom of press and access to public information – occupied a secondary position on the Swedish political agenda. Especially in the area of economic rights, the continued expansion of the Swedish Welfare State in fact implied further stressing the interests of the majority and the common good at the expense of (relatively speaking) certain individual rights, notably the right to property and to freedom of enterprise. While Sweden became party to the European Convention on Human Rights in 1953 [443], but due to Swedish dualist tradition this convention was not made part of domestic law. In the same vein, until recently the country extended every five years a conditional and limited recognition of the jurisdiction of the European Court of Human Rights.[444]

The question of providing constitutional guaranatees of human rights and freedoms came to the fore with the process of drafting the 1974 RF. Whereas the Social Democrats insisted on stipulating explicit safeguards of social and welfare rights, their conservative and centrist opponents were mostly concerned with political rights. A compromise was found in taking a reticent attitude to human rights and freedoms altogether. Social rights were recognised as general goals of the state and were enshrined in Ch. 1 RF, but were not made justiciable. Despite recurring attempts to improve the constitutional regime of protection of individual rights and freedoms, this was advanced through piecemeal and hesitant measures. There were particular reservation concerning economic rights, not least the right to property and the freedom of economic enterprise.

Another feature of Swedish public order that survived the test of time and became expresely recognized in the 1974 RF was the principle of independence of public administration and special administrative agencies. The specific structure of Swedish public administration has its roots in late medieval and early modern times and is often connected with the name of the Axel Oxenstierna, the powerful Royal Chancellor of Gustaf II Adolf in the early 17th Century. Under Oxenstierna the royal administration was divided into five branches led by higher public officials and organized into so-called '*rikskollegier*'. One of these entities, '*kanslikollegiet*', gradually acquired particular importance and developed into what later became the government composed by '*departement*' (ministries).[445] Others among the '*rikskollegier*' evolved into public offices (*ämbetsverk*) which dealt with a wide range of questions and were characterised by considerable specialization. Interestingly, and distinctive of Swedish administration, regardless of the breakthrough of majoritarian democracy, the

[442] See Nergelius (2000), 65 ff.
[443] The Convention was signed by Sweden on 28 October 1950, only 14 days after its opening for signature. It was ratified by Sweden on 4 February 1952 and entered into force on 3 September 1953 upon gathering ten ratifications.
[444] On the subsequent (imperfect) incorporation of the Convention in Swedish law see Bernitz, 'Europakonventionens införlivande med svensk rätt – en halvmesyr' (1994-95) JT, 259 ff.
[445] Söderlind/Petersson (1986), 35. Inger (1997), 81 ff.

'*ämbetsverk*' were not wholly subordinated to the ministries but retained a significant measure of professional discretion and independence.[446] The rise of the Swedish welfare state clearly challenged the system of public administration. Instead of expanding government, however, Sweden remained true to a governmental design with small and relatively weak ministries and big and powerful specialised agencies. The ministries do not as a rule have the potential to summon resources for investigation and policy implementation.

The long tradition of independence of public agencies found its constitutional sanctioning in the 1974 RF. Certainly 1:6 states that "the Government governs the Realm" and 11:6 RF adds that "...the central administrative boards and the county administrative boards are responsible to the Government." Yet as scholars in administrative law and public administration point out, the administrative boards are not accountable to any specific Ministry (departement), but to the Government as a whole. Moreover, according to the exact wording of RF 11:7 "[n]either a public authority nor the Riksdag nor the decision-making body of a local authority may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis a private subject or a local authority, or concerning the application of law." This means that in Sweden there is no ministerial government in the sense that the ministers decide and carry the utmost reponsibility. The formal responsibility is born by individual officials. In administrative law this principle is called the principle of independence.[447] Although formally accountable to the government they enjoy a rather broad margin of discretion.

Instead of judicial or governmental control, the independence of administrative boards was to some extent mitigated by an important element of collective participation in the work of these boards. The collective element in the work and management of state organs has centuries old tradition in Sweden. Already during the 19th century decisions in the central public agencies (often called '*Kollegium*') were taken collectively by the Head of the agency together with the highest ranking civil servants, as a rule – the heads of the different divisions (*byråchef*). Since this decision-making procedure was too cumbersome and time-consuming to meet the needs of an ever-expanding modern technocratic government, gradually a transition to a more hierarchical, one-man decision-making system was carried out (*enrådighetssystemet*).[448]

During the 20th century the collective element in agency management was reinvigorated in the form of the so-called layman Management Boards attached to the central governmental authorities. The Management Boards are appointed by the Government and include parliamentarians, interest representatives and other non-bureaucrats. Several arguments have been advanced in support of this layman input in the management of public agencies. The first one is a democratic argument. It is rooted in a general skepticism towards the rule of bureaucrats and sees the Boards as a way for 'the people' to gain insight into the work of the agencies and to exercise control over this work. Other arguments have referred to benefits in terms of efficiency and levels of expertise. The model of shared management between a Director and a

---

[446] *Ibid.*, 105 ff.
[447] See also Strömberg (1999), 66, RF 11:7 (självständighetsprincipen).
[448] Söderlind/Petersson (1986), 88.

collective steering organ was inspired by private stock companies. The lay members of the Board were expected to contribute with their experience and knowledge.

5.1.3 The status of private law

In Germany private law was virtually restored to its previous grandeur after the war. Both the economic dimension of providing the framework for a 'transaction economy' as projected by ordoliberals, and the constitutional dimension of protecting individual autonomy, regained topicality. The fact that the liberally inspired BGB was deeply disliked by the Nazi regime may even have contributed to it being attributed pivotal importance in the reconstruction of law and society, providing a link with the longstanding commercial traditions of the German lands.

Among the constitutionally guaranteed rights and freedoms Art. 2 (1) GG proclaimed the right to free development of one's personality (*freie Entfaltung der Persönlichkeit*), a right that is understood as protection of the general freedom of individual action (*Schutz der allgemeinen Handlungsfreiheit*). This provision is in constitutional theory regarded as containing an element of negative division of competences. Through ensuring the free development of the individual the principle of subsidiarity in the economic order is laid down. The state should not interfere where the economy itself is in a position to bring about reasonable results, in the sense of safeguarding freedom and upholding the politico-economic order introduced by the lawmaker.[449] In turn, this means assuring the maximum autonomy and freedom of action to the individual in his economic as well as his spiritual activity.

With the rise of the welfare state a number of new problems sought their solution and challenged the established system of private law. Gierke's appeal for 'some drops of socialist oil' in the BGB was taken up and transformed into a principled debate on the function and role of private law under the new conditions. The two main camps in this debate were formed on the one hand by those who advocated the unity of private law (*die Einheit des Privatrechts*), and on the other hand by those who pleaded for a parallel system of social law unfettered by the dogmatic structures of existing private law. In the footsteps of Gierke, lawyers in the first group insisted on social justice values to permeat classical private law, without abandoning its main principles of private autonomy, validity of contract and protection of private property.

Representatives of the second camp were concerned to demonstrate the intrinsic link between formal private law and liberal values and thus emphasised the impossibility of existing private law to adequately accommodate changing social conditions. They demanded a radical departure from, and correction of, these assumptions. Systemically speaking, this group preferred to see legislative responses to social injustice gathered in a branch of special private law (*Sonderprivatrecht*)[450] or as belonging to economic law (*Wirtschaftsrecht*).[451]

In Sweden the ambitious social reforms carried out in the years after the war inevitably had an impact on private law. The project of redistribution of national wealth

---

[449] Drexl (1998), 232.
[450] Damm, 'Verbraucherrechtliche Sondergesetzgebung und Privatrechtsystem' (1978) *JZ*, 173 ff.
[451] See the symptomatic title of the book by Assmann/Brüggemeier/Hart/Joerges (1980).

envisaged by the dominant social-democratic ideology implied redefinition of basic private rights, like property rights, freedom of contract and freedom of enterprise. Curiously, it appears that adaptations in private law often were introduced without provoking major doctrinal and legal policy debate. The lack of ideological and theoretical edge in the relevant legal discussion can probably be partly explained with the continued influence of the Uppsala school of jurisprudence. This school that purported to be "skeptical in aim and empricial in method"[452] had somewhat paradoxically strengthened the positivist thinking in Swedish legal scholarship. For lawyers in all spheres of social life, the banishment of 'moral values' and 'natural rights' from the world of law was equal to adopting a pragmatical and instrumental attitude to law and policy making. This in turn facilitated legislative change. As Källström puts it:

> ...Hägerström's value-nihilism can be summarized in a number of propositions, each of which could in its own way nourish the readiness "to change things" as Myrdal called it.[453]

Insistence on systemic cohesion, conceptual harmony and notions of private rights were here looked upon with suspicion as the embodiment of natural law thinking and dangerous '*Begreppsjurisprudenz*'. While the 1960s and the 1970s witnessed massive reforms of the law of obligations, doctrinal systematisation were in comparison with Germany less tainted by the strife to achieve ultimate cohesion. A more pragmatic 'functional' approach (which arguably has its roots in early Swedish law-making during the Middle Ages) was applied. According to Bernitz, functional concept-building is dominant in contemporary Swedish law.[454]

5.2 The consumerist debate

5.2.1 The consumerist debate in Germany

Consumer policy surfaced as a specific issue in the German political debate in the mid-1960 and, as in the rest of the industrialised world, was apparently inspired by the consumerist initiatives in the USA. Under the influence of ordoliberal economic thought, the emphasis was initially placed on antitrust policy as the best protection of the interests of consumers. The Act Against Restrictions of Competition (GWB) was thus recognized as a conspicuous example of consumer protection law.[455] The main task of the state was to guarantee a free competitive order, which in turn would allow an upswing of private initiative and realisation of consumer sovereignty on the basis of private law (the notion of unity of the economic system and private law).[456]

In parallel with a general reference to *Ordnungspolitik*, however, some measures addressing the consumer interest as a specific policy issue were advanced already in

---

[452] Hart (1983), 161.

[453] "...den hägerströmska så kallade värdenihilismen kan sammanfattas i ett antal teser som var och en på sitt sätt kunde underblåsa den beredskap till att "ändra på saker och ting" som Myrdal talade om." Källström (2002), 21 ff., at 26.

[454] "I själva verket framstår den funktionella begreppsbildningen numera närmast som förhärskande." Bernitz (1969), 64.

[455] See Hart/Joerges, 'Verbraucherrecht und Marktökonomik: Eine Kritik ordnungstheoretischer Eingrenzungen der Verbraucherpolitik' in: Assmann/Brüggemeier/ Hart/Joerges, *Wirtschaftsrecht als Kritik des Privatrechts* (Königstein: Taunus, 1980), 87 ff., at 124.

[456] Hart/Joerges (1980), 95.

the mid- 1950s. Thus, between 1950 and 1955 a process of creating consumer organizations was promoted by the state. As a result, the so-called Working Community of Consumers (*Arbeitsgemeinschaft der Verbraucher*, AGV) was set up. This organization was not composed by individual consumers but by corporate members, such as associations of housewives, religious groups, cooperatives, and later the Consumer Centres of the *Länder*. In cooperation with the AGV another important institutional step was made in 1965, namely the founding of the *'Stiftung Warentest'*,(a non-profit foundation testing consumer goods).[457] *Stiftung Warentest* was conceived as a mixed institution with representation of different private interests but also of scientific communities and the state.

5.2.1.1 The political debate

The consumerist discussion received a fresh impetus with the coming to power of the first postwar government dominated by Social Democrats in 1969.[458] The change in political power visibly increased the intensity of the debate and the number of consumer-oriented law and policy measures. At the same time, it did not substantially alter the priorities and the ideological foundations of public consumer policy.[459] In 1971 the Federal Government published its First Report on Consumer Policy,[460] to be followed by a second Report in 1975.[461] While recognizing the need to treat consumer policy as a separate issue, both reports emphasised the framework conditions for an undistorted functioning of the market guaranteeing freedom of personal choice and development, and preventing the abuse of market power. The Second Report states:

> In der Marktwirtschaft ist der Wettbewerb das entscheidende Ordnungsprinzip. Er schafft die günstigsten Voraussetzungen für die bestmögliche Versorgung der Verbraucher sowohl in quantitativer als auch in qualitativer und preislicher Hinsicht. Der Staat muss durch geeignete Massnahmen sicherstellen, dass sich der Wettbewerb entfalten kann und nicht duch den Missbrauch von Marktmacht gestört wird. ... Die Wettbewerbsordnung bedarf des aktiven Verbrauchers. ....[462]

The policy priorities remained within the limits of consumer policy understood as a complement and correction, and not as an alternative, to the market. The variety of law and policy measures could be divided into three groups: information measures to improve market transparency of the market; measures improving the legal positions of consumers so as to reinstate contractual freedom, and measures for the protection of fair competition.[463]

Throughout the 1970s the *topos* of consumer protection engaged not only the government, but all political parties from social democrats to the conservative CDU/CSU and the Free Democratic Party (FDP). Apparently competition and

---

[457] BT-Drs. IV/2236, Entwurf eines Gesetzes zur Errichtung eines Warentestinstituts of 6 May 1964.
[458] This was the coalition SPD/FDP government of Willie Brandt. The coalition government between the Social Democrats and the Free Democrats lasted from 1969 to 1982.
[459] Hart/Joerges (1980), 87 ff.
[460] Erster Bericht der Bundesregierung zur Verbraucherpolitik, 18.10.1971, BT-Drs. 4/2724, reprinted in v. Hippel (1979), 175.
[461] Zweiter Bericht der Bundesregiernung zur Verbraucherpolitik, 20.10.1975, BT-Drs. 7/4181, reprinted in v. Hippel (1979), 239 ff.
[462] *Ibid.*, 239.
[463] Joerges/Hart (1980), 129.

information served as common ground for the major parties, even if the emphasis shifted somewhat depending on political affiliation. The CDU in its Consumer Policy Principles of 1976 (*'Verbraucherpolitische Grundsätze'*) stressed 'performance competition' as an organising concept not only of public economic policy, but as a fundamental principle of constitutional rank. The ordo-liberal idea of the interrelationship between economy and constitutional order had found direct reflection in this programme.[464]

A similar emphasis on competition as a bearing principle of economic policy could be found in the consumer programme of the Free Democrats.[465] Consumer policy was in no way to be understood as paternalizing consumers, the programme insisted, but would strengthen the freedom and independence of consumer choice.[466] In addition to competition and information measures in institutional terms, the FDP insisted on promoting consumer unions based on individual membership as a sort of 'help-to-self-help'.[467]

The programme of the Social Democratic Party was most articulate about what was seen as the existing power imbalance between consumers and producers, and in underlining the importance of institutionalisation of consumer policy. Representation and organisation by consumers were regarded as necessary counterbalance to organised producer interests. Consumer information was to be shaped according to the needs of particularly week target groups; in advertising certain consumer interests were to be given preference over producers' needs; independent institutions were to provide additional and counter-information. Also this programme clearly proceeded from market- and competition-oriented theories. For instance, the most serious consumer problems were perceived to emerge in oligopolistic markets with limited competition.[468] Measures to strengthen competition policy were likewise recommended. According to some commentators the programme was a mixed bag of contradictory propositions based on incompatible theoretical premises rather than a feasible action plan.[469]

Other important actors in the political debate were the trade unions, on the one side, and industry unions on the other. Due to alleged parallelism in the interests of consumers and workers/employers, labour unions perceived themselves as a sort of consumer organisation. Analysts, however, discerned an underlying contradiction of interests, which for instance found expression in the demand for price stability in the Unions' consumer programme. The ambivalent position of trade unions can arguably be identified in the incoherent set of measures advanced, giving expression of trust in *Ordnungspolitik* though simultaneously seeking the active intervention of the state (i.e. local ombudsmen, participation rights, etc.).[470]

---

[464] See Joerges/Hart (1980), 133.
[465] Biervert/Fisher-Winkelmann/Rock, *Verbraucherpolitik in der Marktwirtschaft* (Rowohlt, 1978), 57.
[466] *Ibid.*, 57.
[467] Biervert/Fischer-Winkelmann/Rock (1978), 57. Czerwonka/Schöppe, 'Verbraucherinformationspolitik und Funktionsfähigkeit des Wettbewerbs' (1981) *WuW*, 165 ff, 286. Joerges/Hart (1980), 134.
[468] See Biervert/Fischer-Winkelmann/Rock (1978), 55; Joerges/Hart (1980), 134.
[469] Czerwonka/Schöppe (1981), 268; Joerges/Hart (1980), 134.
[470] *Ibid.*, 66 ff.

The most critical stance to an expansive consumer protection policy was formulated, not surprisingly, by the employers organisation. In the text of their program document one can note major concerns about radicalisation of the debate in direction towards an alternative system of economic order (consumer protection as a transition to socialisation).[471] The fundamental belief in the rational operation of the market economy and competition as a principal mechanism for distribution of scarce resources was reiterated throughout the report.

As the only organisation primarily concerned with the representation of consumer interests, the position of AGV is of particular importance. The AGV proceeded from a critique of the consumer sovereignty assumption, but accepted it as a point of departure for consumer policy initiatives. There was a focus on the possibilities for strengthening the position of consumers in the economy and on the position of socially weak consumers. When it comes to specific measures and policy instruments, the programme remained vague. Hart and Joerges view the conceptual disparity of the programme as a clear evidence of the conflict-averseness of an organisation dependent on governmental subsidies and unable to rely on a stable individual membership.[472]

The approaches described bear witness to the predominance of the ordoliberal conception of the economy and the ensuing understanding about the position of the consumer. At the centre of the political consensus are measures designed to strengthen the competitive process and compensate for possible information disbalances. Any attempt to define the limits of an independent consumer policy tends to stumble upon difficulties to pinpoint the substance of such policy and to elaborate a coherent set of measures that would form its core. Among the most slippery issues is the definition of consumer interests and eleciting a workable scheme for the enforcement of these interests.

5.2.1.2 Legal doctrine

Already at the time, the unwieldy issues of consumer policy and consumer-related law provoked a heated debate in legal doctrine, which in part has not yet been exhausted.[473] The intensity of the debate is partly explained by reference to its ideological connotations and the radicalisation of the social-political environment in the 1960s. Another reason is the challenge that consumer-oriented law and policy represented to core areas of private law, such as contract and tort law. Different taxonomies have been suggested for ordering the various theoretical approaches. The dichotomy between market complementary, or 'information' models, and market-compensatory, 'social' models, seems to enjoy wide acceptance.[474] Authors in the first

---

[471] *Ibid.*, 61 ff.

[472] Joerges/Hart (1980), 132.

[473] For a comprehensive account and critical analysis, see Drexl (1998), 25 ff.

[474] The distinction is introduced by Norbert Reich, with reference to Claus Offe's *Strukturproblem des kapitalistischen* Staates (1973) and Jürgen Habermas's *Legitimationsproblem im Spätkapitalismus* (1973). See Reich, 'Allgemeiner Teil und Einleitung' in: Reich/Tonner/Wegener, *Verbraucher und Recht* (Göttingen: Verlag Otto Schwartz & Co., 1976), 20 f. The same classification is followed by Dauner-Lieb, *Verbraucherschutzrecht durch Ausbildung eines Sonderprivatrechts für Verbraucher* (Berlin: Duncker & Humblot, 1983). Drexl also proposes a dichotomous classification, but redubs the two groups into 'Ordnungspolitische Informationsmodel' and 'Soziale Alternativmodelle'. See Drexl (1998), 29 ff. Also Simitis uses the notion 'information model' as a summary concept for all approaches proceeding from the premises of liberal economic theory. See Simitis,

group do not question the primacy of the market as 'ordering principle' (*Ordnungsprinzip*), and accept the idea of consumer sovereignty as a key point of departure for consumer law and policy. Proponents of alternative approaches, in contrast, emphasize the power imbalance in the relations between consumers and producers and tend to see these realtions as antagonistic. Solutions are therefore not exclusively sought at the level of the market, and not only in private law, but envisage an active role for state intervention and participation.

Beyond this admittedly crude dichotomy, more refined classifications have been proposed in order to do justice to the variety of often quite sophisticated approaches. Thus within the market-based group Joerges and Hart identify at least three streams of thought, respectively associated with prevalent economic and social theories.[475] (i) Neo-liberal economic theories nurture reliance on the autonomous, self-regulatory process of competition. In terms of legal policy this implies an emphasis on measures supporting the classical system of formal private law. (ii) In *Ordnungspolitik*-reasoning, the function of law is, somewhat differently, seen as guarantor of the basic framework conditions for free and fair competition. Antitrust law and (private) unfair competition law are here highlighted as basic components of a legal system in the interest of consumers, securing freedom of contract and property rights.[476] (iii) In a third sub-group, functionalist theories of competition open the prospects for law and policy measures intervening to correct market failures and suboptimal market performance. Not only competition structure and behaviour but also performance is taken into account, i.e. a substantive test of the outcome from the competitive process is allowed and targeted interventions in direction towards influencing performance in the desired direction.[477] Legally, the functionalist approaches seek to give substance to the formal values of private law. This can assume the form of specific prescriptions and prohibitions following the traditional private law method, but often through general clauses defined only as to the result to be achieved.[478]

Common to these approaches is that they accept the primacy of the economic system and seek to adapt the law to the demand for predictability and flexibility set by a competitive economy.[479] The need for consumer protection is regarded to flow from the constitutional principle of social market economy enshrined in the GG.[480] Consumer interests have to be considered, but they must be balanced against other legitimate interests, and most of all against the overarching goal of a workable economy.[481] Importantly, consumer interests and traders' interests are not perceived as

---

Verbraucherschutz: Schlagwort oder Rechtsproblem? (Baden-Baden: Nomos, 1976). Von Hippel finds the dichotomy between market-complementary and market-compensatory too simplistic, but offers no alternative.

[475] This classification is said to apply beyond legal theory: „Wir unterscheiden zwischen vier Ansätzen oder Stadien von Theorie, Politik und Recht und sehen dabei Verbindungen, die von allgemeinen theoretischen Premissen über rechtstheoretische Positionen bis hin in dogmatische Einzelaussagen reichen." Joerges/Hart (1980), 118.

[476] Tilmann, 'Zur Rechtsstellung des Verbrauchers bei Wettbewerbsdelikten' (1977) *ZHR*, 32 ff., at 33; Tilmann, 'Das Haftungsrisiko der Verbraucherverbände' (1975) *NJW*, 913 ff.; Tilmann, 'Irreführende Werbeangaben und täuschende Werbung' (1976) *GRUR*, 545 ff. See Joerges/Hart (1980), 161.

[477] Hart/Joerges (1980).

[478] Schricker (1970a), 40.

[479] See Tilmann (1977), 32 ff.

[480] Schricker (1970a), 40.

[481] Schricker, 'Wettbewerbsrecht und Verbraucherschutz' (1972) 36 *RabelsZ*, 315 ff., at 316.

antagonistic, but as largely compatible and working in the same direction. The main goals for consumer protection law and policy in this model is, on the one hand, preventing abuse by traders of their position and, on the other hand, better informed consumers.[482] Both objectives are aimed at restoring consumer sovereignty.

In dogmatic terms, most proponents of the market approach conceive of consumer law as part of private law. Consumer interests smoothly fit into the system and no compromise with the dogmatic postulate of the unity of private law is warranted.[483] As to the instruments of consumer protection apart from general competition law and policy, the exponents of the information-based approach emphasise the need to compensate for the information failures of markets. The classical doctrines of private law should thereby be modified to take account of information asymmetry between consumers and producers. Among the remedies preferred are those of mandatory information disclosure. The ultimate goal is to restore consumer sovereignty and to create conditions for the exercise of free and unimpeded consumer choice. However, some representatives of the market-based approach to consumer protection are prepared to go beyond private law to tackle specific consumer protection problems by using alternative means, associated either with administrative or criminal law and policy-making.[484] Thus one of the most vocal advocates of consumer potection Eike v. Hippel, while not challenging the primacy of the market and the goal of consumer sovereignty, advocates decisive intervention on the part of the state through an administrative agency as the best strategy for achieving this goal.[485]

Clearly, the variety of alternative approaches is extensive. A common denominator may possibly be found in the critique of the dominant market paradigm, assessing assumptions associated with efficient competition, consumer rationality, preference stability, transparency and information, as unrealistic.[486] On this view, the core problem of consumer protection is perceived to lie in the power imbalance between consumers and producers/traders.[487] The efforts are consequently directed towards finding alternatives to the market for levelling the playing field between consumers and producers. The most prominent exponents of alternative consumer theories are Norbert Reich,[488] Konstantin Simitis[489] and Udo Reifner.[490] All of them are in some degree influenced by Marxist theory and more particularly by the doctrine about the dialectial relationship between exchange-value and utility-value of a product. Viewed

---

[482] Simitis (1976), 84.

[483] „Das Wirtschaftsrecht und speziell das Wirtschaftsprivatrecht kann dann nur der Aufrechterhaltung der Funktionsbedingungen des allgemeinen Privatrechts als Sicherung von Eigentum und privatautonomer Entscheidungsfreiheit durch Garantie des ökonomischen, prinzipiell sebstregulierenden Funktionsmechanismus Wettbewerb dienen, nicht aber sich einer folgenunsicheren politischen Detail- und Ergebnissteuerung öffenen. Tilmann (1977), 35, referring critically to the positions of Norbert Reich and Konstantin Simitis.

[484] Schricker (1970a), 44.

[485] v. Hippel (1979), 82 ff. with references to the experience with administrative agency in Sweden and in the US.

[486] See Simitis (1976), 108 ff., with reference to Gunnar Myrdal's classic *An International Economy, Problems and Prospects* from 1956 and Galbraith (1968).

[487] „Verbraucherschutz ist also eine Frage der Verteilung wirtschaftlicher und der sich daraus ergebenden politischen Macht." Simitis (1976), 161.

[488] See Reich (1976), 1 ff.

[489] Simitis (1976).

[490] Reifner, Das Recht des Konsumentenkredits – Soziale Zivilrechtsauslegung im Verbraucherschutz, Diss. jur., (Berlin: 1977).

from this perspective the relations between consumers and producers/traders appear antagonistic and irreconcilable.[491] Consequently, the authors attack the concepts of freedom of contract and formal equality to be found in the BGB as masking actual relationships of power in society, namely the power of producers over consumers and workers, and of investment capital over utility value.[492]

On the level of legal policy the proposals vary, partly due to the different subject matter disussed by the authors. Thus Reifner, focusing on the example of consumer indebtedness, seeks to advance a critical theory and dogmatics of civil law. He tries to develop an alternative logic of civil law, one that would not question the very existence of the structures and techniques of private law but would provide a method for intervention and correction in cases of systematic injustice.[493] To this end he advances a method of so called "social interpretation" of civil law (*'soziale Auslegung'*).[494]

The alternative consumer policy advocated by Simitis and Reich is an actively intervening constitutive policy. The emphasis is on procedural and participatory approaches.[495] In the words of Simitis "the bearers of economic power have to be subject to public control and to be made responsible to consumers."[496] At the same time, recourse to state intervention is not the solution, since the objective is not to substitute the producers' decision with the decision of a bureaucrat. Instead, the proponents of this view call for building of a counterpower of the affected consumers to influence the decision-making process of producers.[497] In summing up, the normative gist of the argument seems to boil down to politicizing consumer protection law through consumer participation in political structures and processes. Correspondingly, the instruments of consumer policy are predominantly sought in measures intended to level the power imbalance and to increase protection for socially weak consumer groups.

The theoretical argument developed by Joerges and Hart deserves particular mentioning.[498] The authors oppose the dominant ordoliberal paradigm and in this sense represent the 'critical (social) approach'. They consider the most serious drawback of the market-oriented, private-law model to lie in the inhibitive effect on the 'discovery process practice'. Attempts at preserving doctrinal coherence and integrating consumer law into private law at any cost tend, in their view, to fortify established equilibria and to preempt innovative institutional solutions. In contrast to other representatives of 'social' consumer law theorising, Hart and Joerges acknowledge the overwhelming difficulties of defining the consumer interest and of turning the postulates of consumer

---

[491] See Reich (1976), 11; Simitis (1976), 144; Reifner (1977).
[492] Reifner refutes an understanding of private law as abstract (formal), being able to make the right decision "with eyes closed to social realities". Reifner (1977), 9.
[493] Reifner (1977).
[494] Reifner (1977), 109.
[495] Joerges/Hart (1980), 120.
[496] „Die Träger der wirtschaftlichen Macht müssen daher der öffentliche Kontrolle unterstellt werden und sich gegenüber den Verbrauchern verantworten." Simitis (1976), 157.
[497] See Simitis (1976), 157; Reich (1976), 204 ff. and in particular at 221 ff. on extending the possibilities of counterpower through consumer unions.
[498] Joerges/Hart (1980). The approach receives further elaboration in Joerges, *Verbraucherschutz als Rechtsproblem* (Heidelberg: Recht und Wirtschaft, 1981); Joerges (1986), 142 ff.

counterpower into practical and feasible programmes. The greatest impediment to effective consumer policy is thus conceived as an institutional and organisational one. On a normative note, the authors propose (even if in somewhat vague terms) a strategy of conscious incorporation of the consumer perspective in law-making processes on all levels. Consumer participation in legislative deliberations, innovative schemes of coordination between legislature, administration and organised interests, and a sensitive and reflexive judiciary, would all be conceivable components of this strategy.[499] The model advanced thus reveals certain neo-corporatist features, in the sense that law-making does not necessarily take place in the setting of formal procedures. Above all, Joerges and Hart insist on a plurality of law-making processes in the field of consumer protection.[500]

5.2.1.3 Institutional implications

Despite a variety of scholarly approaches in the field of consumer protection, the dominant paradigm remained that of consumer protection integrated in the texture of private law, at the most seen as a complement to the market process. In institutional terms, the scepticism with respect to increased administrative control and public intervention was widely spread not only among proponents of the information approach, but also among those arguing for an alternative theory of consumer protection. The issue of representation of consumer interests was consequently regarded as best solved by way of consumer organizations supported by the state but preserving their status of independent private associations. Enforcement by way of consumer organizations presented a neat compromise between the two opposite views on consumer protection. This compromise could relatively easily be integrated in the formal substantive and procedural rationality of private law. At the same time, it suited the postulate of counterpower defended by proponents of alternative consumer policy.

5.2.2 The consumerist debate in Sweden

As in Germany, the rise of the consumer question in Sweden is to be traced back to the years after the Second World War. What finally emerged as a system of rules and regulations protecting consumers in a sophisticated affluent capitalist society ironically seems to have had its origins – at least in Sweden – in strategies for dealing with deprivation during the crisis years of the war.[501]

5.2.2.1 The political debate

At the time of the war, the Swedish State encouraged the existing women's guilds to work for efficient household management under conditions of scarcity and under-supply of consumer goods. In the early 1940's the work was institutionalised through bodies such as the Public Bureau on Active Household Management (*Aktiv Hushållning*) the Household Economics Research Institute (*HFI*) with the Housewives Co-operation Committee (*Husmödrarnas samarbetskommitté*) and the Association of Household Management Teachers (*Hushållslärarinnornas samorganisation*) as main founders. Already from its inception the Institute was subsidised by the state. The activities of the Bureau and of the Institute were broadly conceived and directed at research and information about consumption of food, housing, apparel, etc. The main

[499] The link to Teubner's reflexive law and to Selznik's responsive law is evident, see Teubner (1993).
[500] Hart/Joerges (1980), 236 f. For a critique of this approach see Drexl (1998), 34 f.
[501] See SOU 1971:37, 155 ff., Thorelli/Thorelli *Consumer Information Systems and Consumer Policy* (Cambridge, MA: Ballinger Publishing Company, 1977), 192 ff.

objective was to work for "rationalisation of the working conditions in the home seen as a consumption centre and a workplace."[502]

After peace was restored, the above mentioned institutions shifted their focus to problems of a different nature. Scarcity of consumer goods was gradually replaced by affluence and oversupply, and the main issue for consumers was how to exercise well-informed choices. The Home Economics Research Institute nevertheless retained its broad focus on the home environment, dealing with childcare, home maintenance, etc. Two government inquiry commissions were set up to inquire into such issues in the late 1940s: one devoted to Family Life and Housework[503] and the other one to Research on Quality and Consumer Information.[504] As a result of the commissions' work, active steps were undertaken to institutionalize the dissemination of consumer information and home economics research. Two other government commissions of inquiry – the Distribution of Goods Commission[505] and the Price Control Commission[506] –supported the conclusion about the need for expanded resources in this field.

These early initiatives bear the imprint of a traditional outlook based on welfare competition theory. As summarized by a subsequent Commission on Consumer Policy, the efforts were mostly directed at competition and price supervision. A distinctive feature of the early measures was also the emphasis on gathering knowledge on consumer goods and research on rational forms of household work. The underlying idea was to improve consumers' ability to use their resources and to influence price-levels, product quality and other aspects of the market.[507] This view of consumer policy as an integral part of a free market economy was obviously accepted by all parties across the political spectrum. In its postwar reconstruction programme, the Social democratic party made it clear that "outside of the nationalized and regulated industries it stood for a liberal system of vigorously competitive private enterprise. The free play of market forces was to be promoted by antimonopoly and consumer information policies."[508]

A new impetus to the consumer policy debate was given in the mid-1960s, when a clear tendency towards radicalization could be observed. In 1966 a joint study group on prices, organised by the ruling Social Democratic Party and LO under Skoglund, recommended a government subsidy for testing local committees for consumer advice which would work closely with LO's local branches. In 1968 the study group submitted a report evaluating the experiment.[509] The report, however, went far beyond its limited mandate and lay down a vision for future public consumer policy in general.

---

[502] SOU 1971:37, 156.
[503] SOU 1947:46.
[504] SOU 1949:18.
[505] SOU 1955:16.
[506] SOU 1955:45.
[507] SOU 1971:37, 12.
[508] Thorelli/Thorelli (1977), 191 f., referring to Arbetarrörelsens efterkrigsprogram, Stockholm 1944, sections 24 and 26.
[509] Vill Du komma till tals?, Rapport om försöksverksamheten med lokala konsumentkommitteér, 12 maj 1967 – 30 juni 1970, Bilaga 2 Skoglundsgruppen slutrapport, "Om konsumentpolitik" (herinafter the Skoglund Report). See also SOU 1993:59, 119.

It is claimed that this report introduced the concept 'consumer policy'for the first time in the Swedish discourse.[510]

The report characterized consumer policy as economic policy from the consumer's perspective. It proceeded from an understanding of power imbalance in the relations between producers and consumers on the market. To compensate for this imbalance, the Skoglund group promoted a 'consumer economic' standpoint, to be contrasted to the prevailing 'competition economic' outlook. Consumer economics implied that "households should weigh their expenditures and incomes in terms of time and money along the same principles that apply to undertakings." [511] However, since it would be unrealistic to expect individual households to save time and energy for such planning, the state should be assigned the task to represent the aggregate consumer interest. Thus the report strongly advocated active involvement of the state in consumer policy issues. Two main messages can be inferred from the Skoglund Report. First, consumer policy should be understood broadly, in the sense of achieving optimal time and resource utilisation in individual households. Competition policy, price controls and consumer information and advice were integral parts of consumer policy and ultimately geared toward household economics. Secondly, the primary responsibility for such broadly conceived consumer policy should institutionally speaking lie with the state.

The Skoglund Report was adopted as basis of the chapter 'consumer policy' in the economic action plan of the ruling Social Democtratic Party at its congress in 1968.[512] It was followed by dozens of governmental commissions dealing with different aspects of consumer policy. The ambition was to implement a comprehensive package of consumer protection laws addressing collective aand individual consumer interests. A central figure in this massive legislative enterprise was Carl Lidbom. As a consultative member of Cabinet (*konsultativ statsråd*) he led the legislative work that prepared new consumer protection laws adopted under the first half of 1970s. In the sphere of marketing the Advertising Inquiry Commission (set up in 1996) and the Consumer Inquiry Commission (set up in 1967), deserve special mentioning.[513] The Advertising Inquiry carried out comprehensive research on a broad spectrum of issues. Among the issues analysed were the need for specific regulation of advertising, allowing or prohibiting television advertising, possible disclosure requirements, and taxation of advertising.[514]

The Consumer Inquiry Commission had the more comprehensive task of studying the fundamental prerequisites for, and objectives of, a governmental consumer policy. It submitted its conclusions in the Report bearing the ambitious title "Consumer Policy: Guidelines and Organisation (SOU 1971:37)". The Report discussed the existing institutional structures of consumer policy, offered tentative proposals for the objectives to be pursued through a governmental consumer policy and came with

---

[510] Fjellström/Ring, 'Rödluvan behöver inga råd, sa vargen. En orättvis betraktelse över konsumentpolitiken' (Stockholm: Prisma, 1982), 42.
[511] SOU 1971:37, 216. Cf Skoglund's Report .
[512] See Bernitz/Modig/Malmén (1970), 52.
[513] Konsumentutredningen, SOU1971:37; see also Government Bill with Guidelines for and Organisation of Society's Consumer Policy, prop. 1972:33.
[514] Reklamutredningen, SOU 1972:7; SOU 1973:10; SOU 1973:11.

specific proposals mainly regarding the organisational aspects of this policy. Following the advice of the Skoglund group, household economics was the dominant approach in the committee's work. At the centre of attention was not the individual consumer and his/hers market transactions, but rather the household as a production unit in the economic process. As indicated in the report of the Advertising Commission, this approach did not pursue a realistic description of factual consumer behaviour but mainly worked from normative assumptions.[515] From the start, this approach and the associated definition of consumer policy placed consumer problems in a very broad perspective. Thus, in the Commission's report competition policy, the choice between different systems of distribution, questions of commercial service in scarcely populated regions, etc, were all treated as potential aspects of consumer policy.

One of the most controversial issues in the political and legislative debate on consumer policy concerned the legitimate goals to be pursued by public institutions involved in consumer policy, and the basis for their decision-making. Given that public institutions should forward in defence of the consumer interests, the queestion is how this interest can be defined and measured . The Commission on Quality Research and Consumer Information of 1948 described its vision about the objectives to be pursued as: "to give consumers the possibility to balance their needs better and to help them satisfy these needs in an economical and appropriate way." Thereby the Commission underlined that "it was not a question of violation of the individual freedom of consumers to choose the objects of consumption as clever or careless, planned or capricious as they liked."[516] Viewed from the perspective of consumer law and policy discussed in the German context, the approach of the Commission can be classified under the liberal market-oriented information model. Consumer research and information were intended to improve market transparency and thus to help consumers exercise rational choices on the basis of their individual preferences.

This liberal understanding was challenged by the Skoglund group. Referring to the standards for consumer information, the report noted that:

> [I]t is important from the point of view of both society and the individual, to be able to prevent an *unsatisfactory utilization of resources*, in other words, production of goods and services that are not *appropriately* designed and do not satisfy *reasonable requirements* for fitness for use and which are therefore *undesired by consumers*." (my italics)[517]

Here is a notable shift of emphasis from a traditional information approach, where the ultimate choice is left to the individual consumer, to normative standard-setting by institutions at the central level. From the area of information and market transparency, consumer policy was reassigned to the area of preference formation. 'Satisfactory utilization of resources', 'appropriate design' and 'reasonable requirements for fitness'

---

[515] SOU 1972:7.

[516] This definition was first launched in SOU 1949:18, 18 and then quoted in SOU 1971:37, 159.

[517] "Det är viktigt att ur samhällsekonomisk synpunkt lika väl som ur den enskildes synpunkt kunna förhindra ett otillfredställande utnyttjande av resurser, dvs. framställning av varor eller tjänster som är olämplig utormade och ej fyller rimliga krav på användbarhet och som konsumenterna därför inte önskar." Skoglund's Report, op. cit., 46.

were terms to be defined by experts not from the position of the individual consumer but proceeding from an objectified perspective. The stress is thereby shifted to aggregate welfare.[518]

Following the directives of the Skoglund group, the Consumer Commission in its final report insisted that consumer policy was not to be based on existing consumer needs and preferences as they were expressed through consumer demand. Different reasons could make this demand inadequately low, the report argued. Instead, public institutions should formulate 'normative needs' on the basis of 'objective' expert analysis considering "society's ambitions with regard to the welfare of the individual."[519]

In other words, it was accepted that consumers were incapable (due to information imperfections or the power imbalance between consumers and producers) to assess their own situation and to adequately formulate their preferences. This view logically led to the conclusion that information remedies are insufficient, since consumers would often fail to make rational use of the information provided. Therefore alternative instruments were suggested for a successful consumer policy, notably different ways of direct intervention and levers to influence entrepreneurs in their production and marketing strategies (*producentpåverkan*).

The findings and suggestions of the Consumer Inquiry Commission were subject to a wide consultation procedure. On the basis of the Commission's Report and taking account of the opinion of the parties in the legislative process, the Government issued a Bill on future consumer policy.[520] It is noteworthy that the Minister (*departementschefen*) was much more restrictive than the Committee in his definition of consumer problems and consumer policy. In the Bill on Consumer Policy the minister defines consumer policy as: "those problems associated with consumers' purchase and use of goods and services, which are offered on private markets and on markets that work along similar principles."[521] This functional definition draws up the boundaries of Swedish consumer policy to the present day and is repeated in subsequent legislative considerations of consumer questions. The basis for analysis and evaluation of performance is indeed household economics, but not in the broadest sense.

When defining the basic goals of consumer policy and the tasks before public institutions in the field, the Bill on Consumer Policy approved many of the recommendations of the Consumer Inquiry Commission. In particular, the need for a normative assessment of consumer needs was acknowledged.[522] Some of the excessively bold and formulations in the Commission's report were, however,

---

[518] See in this sense prop. 1972:33, 8.

[519] "Vid bedömningen av hushållens behov kan man i konsumentverkets arbete inte i någon avgörande grad bygga på konsumenternas anspråk uttryckta genom efterfrågan av produkter och på andra sätt. Det är känt att anspråksnivån på många viktiga områden kan vara alltför låg. Exempelvis kan anspråken beträffande kost vara alltför låga i förhållande till näringsbehoven. Behoven måste – som i annat samhällsarbete – formuleras normativt med utgångspunkt från samhällets ambitioner om individernas välbefinnande." SOU 1971:37, 13 ff., 52.

[520] Prop. 1972:33.

[521] Prop. 1972:33, 62.

[522] Prop. 1972:33, 64.

substantially mitigated. The Minister conceded that, given market imperfections, complete reliance on existing consumer preferences was an unsatisfactory point of departure for policy making. At the same time, he emphasised that governmental policy should be carried out within the framework of a market economy where the main information about preferences is generated and communicated via the price mechanism.[523] The task of public consumer policy was said to be: "to strengthen consumers' position on the market and to create better possibilities for the households to use their resources."[524] This definition turned out to be particularly practical and resistant to change, and is even today echoed in most documents on public consumer policy. Importantly, the legitimacy of producer influence (*'producentpåverkan'*) was accepted. As the Minister inferred: "in some cases it may be rational that the consumer policy organs turn directly to the producers in order to achieve improvement in certain respects."[525]

The chronological account of the development of Swedish consumer policy allows for some interesting observations regarding the main actors that shaped this policy. Like in Germany and by contrast to other countries, such as Britain or the U.S.A., Sweden had no grass-roots consumer movement that could naturally identify with these ideas and that was ready to shoulder a commitment toward their practical accomplishment. The only organisations that could be said to genuinely represent a consumer perspective were the housewives' associations, dealing with issues of efficient house work, resource allocation in the household, rational consumption under scarcity conditions, etc. The consumer issue was consequently a 'vacant' political issue with no clear bearer on the political stage. This vacuum came soon to be filled by other actors, notably by the governing Social Democratic Party. The consumer issue, with its popular appeal, emphasis on rational consumption and on the supposedly weaker party in market exchange, suited the political programme of this party which in other areas emphasised aggregate welfare and rational decision-making.

What appears characteristic of consumer policy developments in Sweden is the active involvement of labour organisations in drawing up the guidelines for this policy, at least in the initial stage. Certainly, trade unions have shown interest in consumer policy issues also in other industrialised countries. This ties in to a widespread perception of the interests of consumers and producers/traders as antagonistic, and an ensuing understanding of consumer policy as a policy in defence of the weak party in market relations. Such an outlook has an obvious parallel in the field of industrial relations, where organised labour is seen as a counterpower to well-organised and powerful capital. An additional reason for involvement has been the identification of labour organisations' members (workers and employees) with the broad consuming public. The involvement of Swedish trade unions started almost accidentally with the experiment with local consumer advisers. This first initiative appears to have preconditioned their further participation in the consumer debate and in the organisation of the main consumer institutions (KOV, KO, Market Court). Development was further enhanced by the political ties of the LO with the governing

[523] Prop. 1972:33, 60.
[524] Prop. 1972:33, 61.
[525] Prop. 1972:33, 65. See the devastating criticism in Thorelli/Thorelli (1977), 189. ff.

Social Democratic Party, and the decision of the latter to firmly place consumer policy on its political agenda.

Another actor that gained recognition on the consumer policy stage was the Swedish Co-operative Union (*Konsumentföreningen*, KF). The KF is another of the highly influential Swedish popular organisations (*folkrörelser*) that emerged with the explicit objective to provide - through the cooperative principle - a countervailing power to private capital. Also in this instance a natural relationship was seen to exist with consumer policy, perceived as *Gegenmacht* to the producers. The activism of the KF was more critically scrutinized since it openly performed as a market actor on the side of producers and traders. The conflict of interest was arguably even more conspicuous than in the case of Labour organizations. Nevertheless, KF was among the first sponsors of all major consumer initiatives and figured as a focal point for the collective interests of consumers in decades to come.

Predictably, Swedish industry and trade actively participated in the consumer law and policy debate of the 1970s. As noted above, some of the more radical proposals launched in this debate were openly anticapitalist in spirit and the advanced reforms proposed a degree of state intervention that could challenge the decentralised way of resource allocation associated with free competition. That the critique launched under the guise of consumer protection sometimes was aimed against the market economy as such was no secret.[526] Many of the proposals of different inquiry commissions of the time met with strong criticism from industry representatives.[527] Yet it seems that industry and trade for the most part chose to keep a low profile, preferring to accept "a great many things than running the risk of being labeled reactionary or anticonsumer."[528]

5.2.2.2 Implications on institutional choice and design

A clear institutional implication of the predominant view on consumer policy in Sweden was a tendency toward expanding state intervention. The early public involvement in the institutionalisation of consumer-oriented initiatives intensified in the 1950s. In 1954 the Household Research Institute (HFI) merged with the Bureau on Active Household Management, but preserved the dominance of private organisations. In 1955, however, a discussion of establishing two new bodies, a consumer council and a consumer institute with decisive public influence, was initiated. The proposal met with objections from both popular movements and industry. Some commentators pointed out that consumer information carried out by the state would risk having to walk a fine line between offering vacuous information and being accused of bias. Despite this criticism the reforms were moved forward and in 1957 the first public bodies for consumer issues were set up: the National Institute for Consumer

[526] See Bernitz, 'Consumer Protection: Aims, Methods and Trends in Swedish Consumer Law' (1976) *SSL*, 13 ff., at 26 f. Thorelli/Thorelli characterise the political climate in Sweden since the late 1960s as "extensions of statism ... accompanied by considerable antibusiness, antimarketing and, particularly, antiadvertising fanfare." Thorelli/Thorelli (1977), 197.

[527] See, for instance, the massive objections on the part of industry against most of the proposals of the Consumer Inquiry Commission, especially the normative definition of the consumer interest and the programme for 'producer influence', prop. 1972:33, 31 f. Industry also directed sharp criticism against the way in which the Inquiry Commission described the functioning of a competition economy and the weak position of consumers in respect to producers and traders, see *ibid.*, 28.

[528] Thorelli/Thorelli (1977), 199.

Information (*Statens institut för konsumentfrågor*) and the National Council for Consumer Goods Research and Consumer Information, later renamed the State Consumer Council (*Statens konsumentråd*).[529]

Finally, following the Bill on Consumer Policy of 1972, these institutions together with the Board for Product Information (*Varudeklarationsnämnden*)[530] merged into one central consumer protection body, named the Swedish Consumer Agency (*Konsumentverket*, KOV).[531] The expressed goal of the merger was to achieve better co-ordination and transparency in the implementation of the governmental consumer policy. The widely dispersed institutional structure of many institutions, with partly overlapping functions, was creating conflicts of competency and sub-optimal efficiency.[532]

5.2.2.3 Implications for legal doctrine

As in other areas of law and policy, the role of legal doctrine in the consumer law and policy debate was more modest in Sweden than in Germany. This is partly to explain with the brand of legal positivism inspired by the Uppsala school of jurisprudence. The legitimate role of legal scholars was not perceived to lie in critical analysis of legal policy arguments, but rather in providing 'technical' instruments for implementation of the legislative will of the parliamentary majority.[533] Another explanation is to be sought in the particular involvement of legal scholarship in *travaux préparatoires*. Thus through expert participation in parliamentary investigatory commissions, many legal scholars were directly involved in the legislative process, which to a certain extent limits the opportunitiesfor detached and critical legal policy analysis.

The new consumer protection legislation and institutions also in Swedish legal doctrine raised the question about the place of this complex of rules within the legal system and its overall effects on system coherence. Yet this issue was addressed with pragmatism. In the area of protection of consumers in their individual transactions, a number of laws were enacted that modified the principles of classical private law and introduced mandatory rules applicable exclusively in relations between entrepreneurs and consumers.[534] These new pieces of legislation did not wreak doctrinal havoc, but were interpreted as piecemeal interventions to solve real-life problems.[535] Describing the Swedish approach, Bernitz speaks of a "marked tendency to tread the path of partial reforms" and doing so "with some success".[536]

Clearly, the strong engagement of public institutions in the area of protection of collective consumer interests rendered this legal area a public law flavour. At the same

---

[529] See prop. 1956:105, Statsutskottets utlåtande nr. 124, rksd nr. 282. English translations are taken from the official summary of Konsumentpolitik, Riktlinjer och organisation, SOU 1971:37.
[530] On the KO, see below.
[531] Until 1994, the official English translation was National Board for Consumer Policy.
[532] Prop. 1972:33, 12, 67.
[533] See above, the quote of Alf Ross in Hart's critical analysis of Scandinavian legal realism.
[534] See the Consumer Sales Act (Konsumentköplag , SFS 1973:877), later on replaced by (SFS 1990:932); Consumer Services Act (Konsumenttjänstlag, SFS 1985:716).
[535] On the position of consumer law in relation to general civil law, see Wilhelmsson, 'Consumer Protection and the Rules and Principles of General Contract Law' in: Wilhelmsson, *Twelve Essays on Consumer Protection* (Helsinki: University of Helsinki, 1996a), 120 ff.
[536] See Bernitz (1976), 13 ff., at 21.

time the rules were often enforceable upon private action in situations where predominantly private interests were concerned. This hybrid nature of consumer law was noticed at an early stage. In his timely monograph "*Marknadsrätt*" published in 1969, Bernitz proposed a practical approach to the classification problem, outlining the contours of a new legal area, namely Market Law.[537] He defined market law as this part of the legal order, which by way of framework rules governs the carrying out of business or trade and the conduct of enterpreneurs in the marketplace. Here belonged rules on establishment, marketing and competition, as well as consumer protection.[538] In a later publication taking account of the dynamic development of consumer law and policy under the 1970s, Bernitz adds that all market law rules "to a large extent aim at consumer protection".[539] Market law consequently defined, but also limited, the fundamental freedoms in a market economy, namely freedom of establishment, of competition, of contract, of consumption and of association.[540]

It appears that the choice of terminology was prompted not only by doctrinal considerations. By using the 'market' as a summary concept for the area, Bernitz underlined the fundamental choice for a market economy essentially based on free competition. At the same time, the concept implicitly allowed for a broad range of regulative interventions in the market process to govern the conduct of entrepreneurs. The whole concept was left sufficiently open to be able to adapt in conformity with legal developments and to absorb new areas of intervention.

The scope of market law was in Berntiz' own words 'functionally determined' by social and economic realities. In this conceptualisation, however, it differed substantially from the systemic approach characteristic of German legal doctrine and especially the BGB, the latter based on abstract legal concepts.[541] It was difficult to find any general principles characteristic for the whole area, apart from the fact that the rules related to the framework conditions of a market economy. Moreover, the broadly defined area of market law was admittedly difficult to place in the classical dichotomy between private and public law. Both these objections, however, were dismissed by Bernitz as too formalistic. In the relations between civil and public law, he readily admitted that market law is neither genuinely civil law nor truly public law. Whereas the purpose of the rules never was to govern relations between individuals, they could not be unequivocally seen as an exercise of public authority either. Market law thus had the twofold function to be an instrument for social policy and at the same time lay down norms for the relations between individual market actors. In this market law could accommodate both civil law and public law aspects.[542]

---

[537] The term 'market law' was first advanced by Sven Tengelin in Juristnytt 1968, 415. See Bernitz (1969), 63, fn. 35. On the impact of the systemic approach developed by Bernitz in other Nordic countries see Madsen, *Markedsret*, Band I (Copenhagen: Jurist- og Økonomforb.:s Forl., 1990), 15 ff.

[538] "Marknadsrätt kan på det nationella planet definieras som den del av rättsordningen, vilken har till uppgift att normera bedrivandet av näringsverksamhet och företagens handlande på marknaden genom ramregler om företagens etablering, marknadsföring och konkurrens samt skydd för konsumenterna."Bernitz (1969), 63.

[539] Bernitz, 'Market Law as a Legal Discipline'(1979) *SSL*, 55 ff., at 62. In this article Bernitz draws the so called 'Heptagon' of market law rules, *ibid.*, 63.

[540] Bernitz (1979), 56 ff.

[541] Bernitz (1969), 63.

[542] "Sedd som helhet utgör den [marknadsrätten] uppenbarligen varken genuin civilrätt eller genuin offentlig rätt. Dess regelsystem har inte till uppgift att normera privata rättigheter eller överlåtelser och upplåtelser mellan enskilda men heller inte att ensidigt utgöra ett instrument för offentlig myndighetsutövning.

5.3 Changing the institutional framework in Germany: incremental change within the institutional core

The consumer law and policy discussion of the 1960s inevitably influenced the political, legislative and doctrinal debate on fair trading law in Germany. Reactions spanned over a broad range of suggested approaches. Whereas some defended the systemic unity of the area of unfair competition law and proposed only limited integration of consumer-oriented considerations in the substance and procedure of unfair competition law, others promoted more radical solutions. Involving the state in the protection of the consumer interest in fair trading practices was an alternative that often surfaced in the legislative and scholarly debate.

5.3.1 The legislative process: evolution and interests involved

5.3.1.1 The 1965 UWG Novelle

The first steps towards integrating consumer interests in unfair competition law were undertaken at the beginning of the 1960s. In 1964 the Social Democratic Party (*Sozialdemokratische Partie Deutschlands*, SPD) submitted a draft, at the heart of which lay the proposal to grant legal standing to consumer unions in unfair competition disputes, analogous to the existing right of action of business associations.[543] In order to compensate for the relatively weak position of consumer unions and the organizational difficulties facing diffuse interests the draft envisaged specific instruments for relief from litigation costs. In the course of the preparatory work, however, the centre-right government trimmed the draft, significantly limiting the substantive and procedural competence of the unions. Given the limited scope of the legislative proposals, it is hardly surprising that the amendments failed to trigger much resistance. The Bill was adopted as a law without substantial changes.[544]

Generally speaking, the first initiatives towards integrating consumer interests into the law of unfair competition were hesitant. It was not a question of comprehensive reform or changing the order of priorities in the UWG. The objective was rather to introduce careful, incremental amendments, changing as little as possible in the inherited legal and institutional framework. Consumer protection was not pronounced as an open, let alone dominant, objective of the amendments. On the contrary, the Bill underlined the neutrality of the provisions and a desire to promote a wide spectrum of individual and collective interests: those of individual competitors, business unions and associations and consumer unions. Importantly, one obvious avenue towards integrating consumer protection into the body of unfair competition law, namely through change in the substantive standards and through explicit incorporation of consumer protection as an objective in the legislative text, was not considered at this early stage of legislative debate.

Marknaslagstiftningen fyller den dubbla funktionen att utgöra ett instrument för samhällets styrning och kontroll av marknadens förhållanden och att uppställa normer för relationerna mellan de enskilda rättssubjekt, som agerar på marknaden. Den förra uppgiften har ett offentligrättsligt drag och den senare ett civilrättsligt. Marknadsrätten som helhet kan sägas utgöra ett "blandat" rättsområde, som rymmer både civilrättsliga och offentligrättsliga moment." *Ibid.*, 77.

[543] BT-Drs. IV/2001. See Rogge, 'Verbraucherklage und Streitwertsherabsetzung im gewerblichen Rechtschutz' (1964) *WRP*, 336 ff.

[544] Act of 21.7.1965, BGBl I 625, which inserted § 13 Ia UWG (Klagebefugnis der Verbraucherverbände).

In procedural respect, the 1965 Novelle proceeded from a philosophy of treating consumer associations on equal footing with other litigants under the UWG, probably following the formal logic of private law. Attempts to alleviate the access of consumer associations to the courts automatically extended to business associations and to individual competitors. This approach found vivid expression in the discussion on litigation costs. One objective with the reform was to come to grips with the inhibitive effect of high litigation costs on the exercise of substantive and procedural rights. In this, the concern appeared to be for the position of consumer unions, which were at least theoretically intended as the main beneficiaries of the reform. However, the Bill did not set out to tailor a special rule for the needs of consumer associations. Instead it made clear that the proposed changes were undertaken equally, if not predominantly, in the name of small and medium size enterprises and their unions. The Government stressed that small-size undertakings would equally often shy away from litigation due to the risk of litigation costs, even when their claims were well-founded.[545]

As mentioned above, at the time the SPD draft was submitted to the attention of Parliament the first more ambitious consumer associations and unions had already stepped onto the political stage and had been granted some governmental support.[546] Among them the Working Community of Consumers (*Arbeitsgemeinshaft der Verbraucher*, AGV), established in 1953, occupied a central position.[547] This organisation had not emerged without difficulties and had at the time of initiation only seven collective members, among them the activist Consumer Co-operatives.[548] The issue of access of consumer association to the courts was actively discussed within the auspices of the AGV. With a mandate from AGV an expert lawyer elaborated a much more ambitious draft providing for right of standing of consumer unions beyond the scope of strict unfair competition law.[549] This draft nevertheless remained unpublished and consequently unobserved in the preparatory works. In the words of the draft's author, the *Gemeinschaft* decided to concentrate its effort on the setting up of a Consumer Information Institute (the subsquently much popular *Stiftung Warentest*).[550] It may be argued that the information model of consumer policy prevailed over a more confrontational (combative) model of consumer protection through legal proceedings.

---

[545] Notably, in the course of presenting the arguments in support of the draft the order of interests was swapped. Whereas initially, on p. 6 of the Bill, the unions and in particular the consumer unions were mentioned as the main target of the new legislation, on p. 7 the government expressed its belief that "the possibility of reduction of the value in dispute would serve the needs of the small and middle size economy and of the unions in § 13 UWG". *Ibid*, 7. " Der Bundesregierung ist bekannt, dass gerade in Rechtsstreitigkeiten wegen unlauteren Wettbewerbs kleinere und mittlere Unternehmen häufig von einer an sich aussichtsreichen Rechtsverfolgung absehen, weil ihnen das damit verbundene Kostenrisiko nicht tragbar erscheint."

[546] See Borck (1964a), 217 ff.

[547] See Brinkmann, Die Verbraucherorganisationen in der Bundesrepublik Detschland und ihre Tätigkeit bei der überbetrieblichen technischen Normung (Köln: Carl Heymanns, 1976), 5 ff.

[548] The seven members were more specifically: the German Housewives Association (*Deutscher Hausfrauen-Bund*), the Women Section of the German Consumer Co-peratives (*Frauengilde Deutscher Konsumgenossenschaften*), the Federation of German Consumer Co-operatives (*Zentralverband Deutscher Konsumgenossenschaften*), the Institute for Self-help (*Institut für Selbsthilfe*), the Consumer Federation, Stuttgart (*Verbraucherverband*), the Federation of Public Dwelling Facilities (*Gesamtverband gemeinnütziger Wohnungsunternehmen*), the Managing Director of the Assistance Board of the Central Union of the Evangelist Church in Germany (*der Geschäftsführer des Hilfswerkes der Evangelischen Kirche in Deutschland*). See Brinkmann (1976), 6.

[549] Borck (1964a), 217.

[550] See Drs.

Despite the modest scope of the reform, the 1965 Novelle could be seen as having symbolic significance for the evolution of German unfair competition law. Through the new standing of consumer unions, consumer interests were recognised as direct objects of the law and not just as an effect of its enforcement.[551] Nevertheless, the reform did not provoke a notable stir in academic or political cirlces associated with unfair competition law. In legal scholarship the prevailing reactions ranged from neglect to irritation at disrupted doctrinal coherence. The new edition of the authoritative commentary of Baumbach/Hefermehl hardly mentioned the reform, devoting it just a few lines.[552] Indicative of these perceptions is the historic overview of the evolution of UWG given in 1975 by the president of the *Wettbewerbszentrale.* Referring to the years between the Rebate Act of 1933 and the 1969 Novelle, he states:

> Nun herrschte – abgesehen von *einigen formell-rechtlichen Änderungen* – für Jahrzehnten Ruhe an der Gesetzgebungsfront, bis mit der Novelle vom Juni 1969, also 34 Jahre später, das Wettbewerbsrecht materiell wesentlich verbessert würde.... (my italics) [553]

The 1965 Novelle was described as a formal-technical change and not as a reform in substance. The introduction of standing for consumer organisations was not interpreted as influencing the general understanding as to the objectives and interests protected by the law in its entirety.

5.3.1.2 The 1969 UWG Novelle

The 1965 Novelle was followed by a number of initiatives to change both the substantive standards and the avenues for enforcement of UWG. Many of these reform attempts were undertaken in the name of the consumer. At a closer look, however, these initiatives seem to form a mixed bag of measures, responding to a variety of political concerns.

The first reform of UWG after the explicit recognition of consumers as a protected group with the 1965 UWG Novelle was undertaken with the 1969 amendments. Despite the increased presence of the *topos* of consumer protection in the political debate, the reform was not concerned with consumer interests but explicitly directed towards providing more favourable conditions for the *Mittelstand.* The legislative process was initiated and promoted by representatives of the small and medium-size enterprises in the Christian Democratic faction of the German Bundestag.[554] The small and middle-sized retail businesses felt threatened in their position by wholesale traders and other big business, using aggressive marketing methods. In a critical article on the course of legislative debates, the ministerial expert Alfred Krieger wrote of a situation comparable with that of German economy in the 1930s, which had then provoked the introduction of the Ordinance on Protection of the Economy and the Act on Rebates of 1933. He openly blamed radical centre-right forces to try to exploit fears of the small

---

[551] On the UWG as a reflexive consumer protection law see Schricker (1970a), 32 ff., at 33.
[552] See Fezer, 'Europäisierung des Wettbewerbsrechts' (1994) *JZ*, 317 ff.
[553] *Ibid.*, 19.
[554] See Bundestag Ds.V/2324. On the political history of this reform, see Krieger 'Die Bestrebungen zur Änderung des Gesetzes gegen den unlauteren Wettbewerb' (1968) *GRUR*, 511.

and middle-sized retail trade (the so-called *Tante Emma* shops) for their own political benefit.[555]

In the draft submitted to the *Reichstag* in 1968, the prohibition of a long list of trade practices was envisaged. Among them were: prohibition of eye-catching price advertising, deceptive price-list practices, direct marketing of production and wholesale prices, coupon trade and advertising with recourse to the authority of a third person.[556] Most of the proposed restrictions aimed directly at preventing or at least slowing down structural changes in retail trade. Of more fundamental importance were the changes suggested into the text of the core provision on misleading advertising, § 3 UWG. Also here the initial proposals were quite radical in direction to widening the scope of the prohibition.

After reconsideration of the draft and taking into account the critical views in industrial and legal circles, a more limited list of amendments was adopted as the 1969 UWG Novelle.[557] The standards of § 3 UWG were sharpened. The rule now covered misleading (and not only incorrect) statements, statements made in the course of personal communication, and did not require advertising to evoke the semblance of a particularly advantageous offer (*'den Anschein eines besonders günstgen Angebots hervorrufen'*). Two provisions severely restricting the possibilities for direct marketing by wholesalers and producers to end-consumers (§ 6a and § 6b) were added.[558] Despite serious editorial and legal deficiencies in the proposal, along with devastating criticism by legal commentators and some industry representatives, all parliamentary factions and national industry unions aligned behind the draft.

Equally important were the amendments in procedural respect. The 1969 Novelle introduced a rule on optional jurisdiction of the court in the place of effect from the tortious act. Later on this rule became known as the rule on 'flying jurisdiction'. In addition, an opportunity to concentrate unfair competition disputes before the commercial chambers of the courts was granted. Both rules can be described as particularly friendly to the litigious activity of 'repeat' players by facilitating the concentration of unfair competition lawsuits on the part of 'professional litigants' as well as by professional courts.

5.3.1.3 The futile reform discussions in the 1970s

The 1970s constituted a period in which consumer protection activism reached its peak. This coincided with a relatively extended mandate of a coalition government between Social Democrats and Liberals. The combination appeared particularly advantageous for taking more decisive steps towards integrating consumer protection into the UWG. At the same time there were signs of recession in the economy. The beginning of the 1970s witnessed the oil crisis that was to have devastating effect on

---

[555] See Krieger (1968), 512.

[556] "Preislistentäuschung, Werbung mit Lockvogelangeboten, Fabrik- und Großhandelspreisen, Kaufscheinhandel, Werbung unter Einschaltung der Autorität Dritter." Some of these practices had already been considered by the judiciary to fall under the prohibition of § 3 UWG whereas others had still not been a matter for litigation. Krieger (1968), 511.

[557] Act of 26 June 1969, BGBl I 633, amending §§ 3, 23, 24 und introducing the new §§ 6a und 6b as well as § 27 II-IV.

[558] BGBl I 1969, 633.

economic growth worldwide. Meanwhile, the regulative optimism of the 1960 in the western industrialised world gave way to a period of critical reappraisal of cost and efficiency of various bold measures associated with an expansive welfare state. The reform movement was further impeded by endevours of the CDU/CSU to implement its own agenda in unfair competition law. The UWG-reform thus proceeded on double tracks, often leading in opposite directions.

On the 'government track', in 1972 the Ministry of Justice set up an Expert Commission with the overriding objective to intensify the combat with economic crime (*Sachverständigenkommission zur Bekämpfung der Witschaftskriminalität*). Among other things the Commission was given the task to work out a proposal for reform of the UWG, particularly considering consumer interest questions. In the course of deliberations policy makers considered the possibilities to involve the state more directly in the area of consumer protection, for instance by setting up a public Consumer Protection Agency. Proposals in this direction had already been submitted by the Consumer Advisory Council, and were supported by the Federal Ministry of the Economy. These legislative initiatives were, however, discarded in the course of deliberations. The efforts instead concentrated on refining the enforcement design through consumer organisations.[559]

In order to guard itself from attacks on the part of involved stake-holders, the Ministry of Justice commissioned two ambitious legal-empirical studies to be conducted under the scholarly guidance of the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law. The first study had as its immediate objective to summon empirical evidence and to evaluate the practical effect of enforcement of fair trading standards of the legal standing of consumer associations.[560] On a policy level, this study was expected to produce answers to the central question, namely if reliance be retained in the existing system or whether one should consider alternative institutional arrangements (increased involvement of the state). The second study dealt with the need and feasibility of introducing a damage compensation claim for consumers in cases of deceptive and unfair advertising.[561]

On the 'alternative track' the conservative opposition parties initiated their own consultation process on revision of the UWG.[562] A group of MPs submitted a first draft to the *Bundestag* in 1974. Interestingly, in the comments to the Draft consumer protection arguments were given a particular emphasis.[563] In the introductory sentence it was underlined that the area of unfair competition "required constant adaptation to the realities of economic life in order to improve consumer protection besides

[559] See Schricker (1975).
[560] v. Falckenstein, Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände (Köln: Bundesanzeiger Verlag, 1977).
[561] v. Falckenstein, *Schäden der Verbraucher durch unlauteren Wettbewerb* (Köln: Bundesanzeiger Verlag, 1978).
[562] Meanwhile, some amendments in the UWG were carried through as part of a more general reform of criminal legislation with the overriding purpose to combat economic crime. See EGStGB of 2nd March 1974, BGBl I 1974, 469. The following sections of UWG were amended: §§ 4I, 6 II, 8, 10, 12, 15 I, 17 I and III, 18, 20a, 22, 23 I, 27a V and XI. §§ 11 IV, 26 were repealed. With a statute of 10 March 1975, BGBl I 1975, 685 a new § 7d was introduced.
[563] See BT-Drs. 7/2049. See Stellungnahme der Deutschen Vereinigung für Gewerblichen Rechtschutz und Urheberrecht, GRUR 1974, 456.

safeguarding fair competition."[564] The Draft contained three main proposals: prohibition of eye-catching price comparisons with earlier prices, regulation of abusive practices with bankruptcy and season sales and, finally, restrictions upon sale under production cost (*Einstandspreis*).

These suggestions were taken on board and further complemented and developed by the so-called *Mittelstand Disskusionszirkel* (Discussion Circle) and *Mittelstand Vereiningung* (Association) of the CSU/CDU. In 1977 the Bavarian Prime Minister hosted a Competition Congress in Munich. Partly as a result of the debate at this Congress, an amended proposal for reform of the UWG was submitted to the attention of the interested economic circles.[565] Apart from substantive law restrictions, the number of which had increased, the draft contained a much more radical innovation, namely giving standing to the *Bundeskartellamt* (Federal Cartel Office) to bring an injunctive action under the UWG in case there would be a substantial public interest at stake. It was likewise proposed to equip the Cartel Office with surveillance competencies over the activity of business associations, mainly with the purpose to avoid abuse of the substantive and procedural rights enjoyed by these associations.[566]

After consulting the proposal with interested circles, an amended draft was introduced in Parliament in the name of the whole CDU/CSU faction.[567] In comparison with previous proposals the Draft could be described both as more daring and as more restrained. It contained important innovations in the area of substantive rules, notably an amendment of the general clause of § 1 UWG. At the same time, apparently as a reaction to the criticism on the part of business unions and in doctrine, the proposal on a right of action for the Federal Cartel Office was withdrawn. Likewise, the suggestion to vest supervisory powers in the Cartel Office with respect to the activity of the *Wettbewerbsverbände* was dropped.

The Governmental Bill was finally submitted in 1978.[568] It aimed at rendering more consumer-friendly substance and enforcement design to the UWG. Building on the Falckenstein report, the proposed changes in substantive law were few. Among them was a prohibition of chain systems of customer sales known as 'snow-ball' systems (or *Progressiver Kaufzwang*) under threat of criminal liability, as well as the easing of general requirements for criminal liability for deceptive advertising in § 4 UWG.[569] The emphasis was, however, on enforcement and remedies. The Bill's most radical suggestion was to grant action for damage compensation to indvidual consumers. In addition, some of the ideas in the CDU/CSU preliminary drafts were taken up in the Governmental Bill submitted in 1978. In the presentation of the 1978 Bill, the speaker

---

[564] „Dieses Rechtsgebiet einer ständigen Anpassung an die tatsächlichen Gegebenheiten im Wirtschaftsleben bedarf, um neben einer Erhaltung des lauteren Wettbewerbs auch den Verbraucherschutz zu verbessern." BT-Drs. 7/2049, 1.

[565] The draft is published as attachment to the article of Gaedertz, 'Ist eine *UWG*-Novelle erforderlich?' (1977) *WRP*, 681 ff., at 686 ff.

[566] *Ibid.*, 687, proposal for a new § 13 Abs. 1 c.

[567] BT-Drs. 8/1670, Entwurf des CDU/CSU Bundestagsfraktion vom 22. März 1978.

[568] BT-Drs. 8/2145, Entwurf der Bundesregierung, 1 ff.; Stellungnahme des Bundesrat, *ibid.*, 33, Response by the Federal Government (Gegenäusserung der Bundesregierung), *ibid.*, 40.

[569] From a consumer perspective the most important proposal was the lowering of the subjective threshold for liability through requiring only *dolus eventualis*. Schricker (1975), 929.

of the Ministry of Justice, A.Krieger, reassured industry and trade that such ambitions were being put on ice.[570]

The multiple drafts, ambitious empirical and legal research, and lengthy parliamentary debates of the 1970s did not produce any notable results. The 1978 Bill was rejected in both the *Bundesrat* and the *Bundestag*. A revised Bill was submitted by the Government in 1978, but followed the same fate. At the end of the 1970s the political winds in Germany changed course and the reform opportunities waned.

The reasons for the failure of the ambitious reform plans of the 1970s are complex. Some tend to find the main explanation in the lack of consensus on the main direction of reform within the govering coalition and chiefly in the opposition of the Liberal Party (FDP) to the proposed changes.[571] Another important factor was the massive resistance on the part of organized industry. The Central Board of the Advertising Industry (*Zentralaussschuss der Werbewirtschaft*, ZAW) at numerous congresses and meetings maintained a high profile in the discussion, and actively worked to thwart radical changes of the UWG.[572]Already in 1975, with the legislative debate in an embryonic stadium, ZAW published its "Diskussionspapier zur Werberechtspolitik".[573] In this document a strong protest was voiced against the planned penalization of misleading advertising. Most importantly, the advertising industry firmly resisted any attemt to transfer decision-making in the area of marketing from the judicial to the political and administrative process. Particularly critical was the position of ZAW on proposals to involve public agencies, be it in the form of special Consumer Protection Agency, or the Federal Cartel Office, in the process of enforcement of the UWG.[574]

The arguments of ZAW could be divided into legal-systemic ones and efficiency ones. From a dogmatic perspective ZAW referred to the risk of "disrupting the well-proven system of civil sanctions in UWG through giving a right of action to a public agency".[575] The existing system was praised as providing rapid and effective measures againsts unfair trade practices. The judiciary had proved able to adapt to the changing conditions and practices in competition, ZAW asserted. From an efficiency perspective, it was further argued, such a reform could "damage the efficiency of this system instead of improving it."[576] A general misgiving was that individual competitors and business and consumer unions would have less motivation for enforcement of the UWG and would tend to turn to the respective public agency and shy away from litigation. The institutional change could thus dampen the litigation-friendliness of the system and decrease the level of enforcement. To substantiate this view, the low level of enforcement from the area of foodstuffs and drugs were given as

---

[570] Krieger, 'Möglichkeiten einer Verstärkung des Schutzes gegen unlauteren Wettbewerb' (1978) *WRP*, 1 ff.
[571] Tonner, 'Verbraucherschutz im UWG und die UWG-Reform von 1986' (1987) *NJW*, 1917 ff., 1918 and 1922.
[572] See ZAW, *Diskussionspapier zur Werbepolitik Dezember 1975* (Edition ZAW, Band I); ZAW, Stellungnahme zum Entwurf einer UWG-Novelle, WRP 1978, 255 ff.
[573] See ZAW, WRP 1978, 255 ff.
[574] The objections were raised already in 1975, and were then reiterated in the Position Paper to the 1978 Government Bill, *Ibid.*
[575] "Die bewährte zivilrechtliche Sanktionssytem des UWG würde durch die zusätzliche Einführung der Untersagungsbefugnis einer Behörde gesprengt und die Effizienz dieses Sytems nicht verstärkt sondern im Gegenteil beeinträchtigt." ZAW, WRP 1978, 255 ff., at 260.
[576] *Ibid.*, 260.

examples. Finally, explicit reference was made to the already visible overstrain of the regulatory welfare state and the financial situation of the public agencies.[577]

Another important player in the legal and policy debate was the *Wettbewerbszentrale*. It is not surprising that the Ministry's official responsible for the draft, Alfred Krieger, chose to present the latter at the annual meeting of the *Wettbewerbszentrale* as the most active litigants on the basis of the UWG. Although a foremost concern of the reform was to improve the litigious position of consumer associations, the draft sustained the familiar philosophy of treating consumer and business associations alike, something underlined in the presentation of Krieger.[578] Despite the rather moderate provisions envisaged in the draft, the *Wettbewerbszentrale* took a hostile stand to almost all initiatives targeted at consumer interests. These attitudes found vivid and unconcealed expression in the statement of its President delivered at the festivities on the occasion of the 75th anniversary of the organization, where the latter rejoiced in the failure of the reform:

> Erfreulicherweise misslangen seit 1972 alle Versuche, das UWG erneut zu novellieren, bis dann nach der Wende in Bonn und Mitwirkung aller massgeblichen Verbände der Wirtschaft eine Reform zustande kam, die diese Bezeichnung verdient und die am 1 Januar dieses Jahres in Kraft trat. [579]

Another serious player that could be identified in the discussions is the Association on Industrial Property and Copyright Law, GRUR. One could of course classify this association among experts rather than the interest-representatives. Yet it should not be underestimated that many of the lawyers that are heavily represented in GRUR are highly dependent on the present construction of unfair competition law and are therefore interested in preserving the *status quo*. Any far-reaching changes in the opportunities for enforcement of the law may palpably affect lawyers' income and well-being. This circumstance, combined with the concentration of legal expertise, turns the *GRUR Verein* into one of the most influential players in the legislative debate.

Interestingly, also consumer unions declared themselves as fierce opponents to any radical departure from the private law character of the UWG. Representatives of the AGV condemned any ideas of building new administrative agenies as flawed and leading to planned economy. At the most he could accept granting standing to existing agencies (i.e. the *Bundeskartellamt*) to initiate consumer related proceedings.[580] Apparently, from the point of view of established consumer associations, a government agency was perceived as an unwanted competitor interfering in the smooth functioning of the associations as *Gegenmacht* to producers and traders.

---

[577] *Ibid.*, 261. "Gegen die Schaffung von noch mehr Behördenkompetenz und staatlichen Eingriffsbefugnissen bestehen inzwischen nicht nur bei der Wirtschaft, sondern auch bei den Politikern aller Parteien weitverbreitet Bedenken, insbesondere unter dem Gesichtspunkt der Personal- und Finanzsituation der öffentlichen Hand."

[578] Krieger (1978), 1 ff.

[579] Lindow, '75 Jahre Zentrale zur Bekämpfung unlauteren Wettbewerbs' in: *75 Jahre Zentrale zur Bekämpfung unlauteren Wettbewerbs* (Bad Homburg: 1987), 15 ff., at 21.

[580] See Jaschick, 'Verbraucherpolitik in eigener Verantwortung' (1974) *MA*, 242 ff., at 246.

5.3.1.4 The 1986 UWG Novelle

The new middle-right coalition government of CDU/CSU and FDP formally continued the reform endevours. However, instead of building upon the consumerist initiatives of the previous government, the legislative proposals gradually acquired a different character. The substantive rules were shaped much after the requirements of the *Mittelstand.* The Act for Amendment of Economic, Consumer, Labor and Social provisions of 1986[581] introduced two new paragraphs in UWG: § 6d banishing advertising of quantity-bound rebates and § 6e prohibiting eye-catching comparisons with own previous prices.[582] Through these innovations the law-maker finally responded to the long cherished desire of the *Mittelstand* to regulate stricter the so-called 'abstract and objective deception', i.e. situations in which the deception was treated not even as a presumption but rather as *fictio legis.* In addition, the sensitive matter of sales (*Sonderveranstaltungsrecht*) was taken up and regulated anew in §§ 7-8 UWG.[583]

The changes in the procedural provisions drifted away from the bold proposals of the 1970s. Little was left from the ambitious plans for procedural alleviation of the situation of consumers. One, minimalist change was the introduction of a right of cancellation of contract, in favor of the buyer induced to enter a contract through false advertising in a new § 13a UWG.[584] Despite the warnings of legal commentators that this right would remain a dead letter if not supplied with a viable mechanism of collective enforcement, the legislator preferred to continue to rely on the traditional civil law system of individual enforcement. Instead of enhancing consumer representation, the 1986 Novelle expressly introduced the right of action of Chambers of Commerce and of Handicrafts in § 13 II Nr. 4 UWG. By this the lawmaker only confirmed the wide scope of procedural right of business associations. Finally, looking at the provisions on litigation costs, the long planned reform was carried through without any dramatic steps to improve the situation of consumer unions. The neutrality and equality of arms principle between consumer and business associations was upheld, and a compromise solution benefiting both business and consumer unions was sought.[585]

The reform received its warmest welcome from the Centre for Combatting Unfair Competition. The amended UWG was celebrated as a victory for the long-term lobbying activity of the *Wettbewerbszentrale*, and as a vindication of its legislative strategies.[586] In legal doctrine the reactions were mixed. The majority of commentators, however, tended to be sharply critical of the outcome of preparatory work stretching over three legislative periods. Taking an openly consumer friendly

---

[581] Gesetz zur Änderung von wirtschafts-, verbraucher-, arbeits- und sozialrechtlicher Vorschriften vom 25.7.1986 BGBl I 1169, ber. 1867 I 565.

[582] § 6e (Öffentliche Werbung mit mengenbeschränkenden Angaben) and § 6e (Gegenüberstellungen eigener Preise mit vorher höheren eigenen Preisen) UWG.

[583] §§ 7a-7d sowie §§ 9, 9a, 10, 11 UWG were repealed. See Baumbach/Hefermehl (1990).

[584] See *ibid.*, § 13a Rücktrittsrecht für Abnehmer, die durch unwahre Werbung zum Vertragsschluss bestimmt wurden

[585] See in particular § 23a, facilitating the reduction of the amount in controversy. More details on this amendment follow below.

[586] See the speech of the President of the Zentrale, Ernst Wilhelm Lindow (1987), 15 ff., at 21.

stand, they purported to reveal the real character of the reform as pursuit of structural policy (in favor of the *Mittelstand*) behind consumer protection phraseology.[587]

5.3.2 Substantive rules: true vs. false consumer concerns

If we try to recapitulate the results from more than two decades of legislative reform endevours in the area of unfair competition, one distinctive feature is that the changes remained generally within the limits of the *status quo*. Despite boldly announced intentions to integrate consumer protection into the structure of the UWG, in effect very little was achieved to challenge the existing interpretations or venues of enforcement. Most apparent is the incrementality of the changes in the area of substantive law. Thus the efficiency and the overall success of the approach with general clauses and adjacent catalogue rules have been a matter beyond dispute and reproach.

5.3.2.1 The general clause

By way of paradox, the general clauses of §§ 1 and 3 UWG with their extreme openness and flexibility proved particularly resistant to legislative intervention and modifications. Any attempt of the legislative process at steering the standard of the general clauses into a particular direction stumbled upon objections that the desired protection is attainable under the existing wording, if creatively interpreted by the courts. With its half-a-century-long history of intensive enforcement and refined interpretation, the clauses had evolved into complex organisms living a life of their own. An intervention by an opportune legislator was seen capable of disrupting the delicate equilibrium reached through decades of interaction between courts and legal doctrine. The flexibility of the clauses and its adaptiveness to a changing economic and social environment were often praised in scholarly and legal policy documents.[588]

The interest the clause had provoked among foreign legal practicioners, academics and lawmakers was likewise a source of national pride. The impressive record of disputes and scholarly debate were invariably taken as a positive symptom of respect and resonance among interested circles. Indicative of this attitude of high self-esteem among political and legislative circles was the reaction of Albert Krieger, responsible Director at the Ministry of Justice to the 1968 UWG draft. Praising the fact that the legislative proposals did not include any amendments to the general clause of § 1 UWG, Krieger noted that:

> Eine solche Aufspaltung der Generalklausel des § 1 UWG würde nicht nur das in Jahrzehnten bewährte System des deutschen Recht gegen den unlauteren Wettbewerb, um das uns das Ausland immer wieder beneidet hat, geradezu in sein Gegenteil verkehren, sondern darüber hinaus die Gefahr heraufbeschwören, den durch das UWG schon heute gewährten umfassenden Rechtsschutz gegen unlauteren Wettbewerb entscheidend einzuschränken.[589]

Clearly, this starting position implied a very high threshold for change in the general clauses. The only registered attempt to amend the general clause was made in the 1978

---

[587] See Lehmann, M., 'Die UWG-Neuregelungen 1987 – Erläuterungen und Kritik' (1987) *GRUR*, 199 ff.; Treis, M., '1986 års revision av tyska UWG – konsumentskydd eller strukturpolitik?' (1988) *NIR*, 165 ff.

[588] Schricker (1975), 216 ff.

[589] Krieger (1968), 513.

draft of CDU. According to this proposal, the standard of '*gute Sitten*' was to be supplemented by a standard of workable competition ('*die Wirksamkeit eines leistungsgerechten Wettbewerbs*"(the workability of a competition based on performance). As has become evident from the discussion on macro-institutionalcontext above, the concept *'Leistungswettbewerb*' had been at the heart of ordo-liberal economic theory and, at least since Nipperdey's famous treatise, central to the theory and practice of unfair competition law. Arguments for this daring move were found in an emerging pattern in the case law of the Federal Supreme Court (*Bundesgerichtshof*, BGH) and appeal courts, which not only took account of ethical aspects of trade but increasingly considered structural, holistic arguments in their decisions. The aim of the CDU opposition faction was thus to perpetuate this trend in case law through legislative amendment and to openly integrate '*Strukturpolitik'*, protection of the *Mittelstand* into the legal standards of the law. Given the heated debate around this issue in legal doctrine and the hesitancy of the judiciary, this proposal was eventually abandoned.

It is noteworthy that, during the whole debate, no proposals were made to expressly mention consumer interests among the interests protected by the UWG. Thus the integration of the notion of consumer protection (*den Verbraucherschutzgedanken*) into the texture of unfair competition law was passed on to the judiciary and to legal doctrine. It seems the general clause of § 1 UWG with its open standards of '*gute Sitten'* helped shift discussions about the interpretation of the standard of fairness from the legislature to the courts.

5.3.2.2 Excessive prohibitions of certain promotional techniques

As we saw from the brief review of legislative developments, successive law reforms extended the catalogue of prohibitions with four new provisions, complementing and fleshing out the general clause. It is interesting to probe into the content of the provisions from a consumer interest perspective. The 1969 Novelle introduced two new paragraphs. § 6a set the marketing of direct sales by producers and wholesalers to end-consumers under strict conditions.[590] § 6b in its turn prohibited purchase authorization, i.e. the issuing of authorization cards, identity cards or the like and selling goods upon presentation of such authorization. Both provisions addressed specific grievances experienced by the *Mittelstand* in the competitive process with big-scale producers and wholesalers. They were carefully tailored to limit particular innovative and aggressive forms of trade, which tended to attract consumers. The reform was openly announced as *Mittelstand*-oriented and is best understood as increasing the protection of established competitive positions, mainly by SME's in retail trade. The gain for consumers from this reform is rather questionable.

In the 1970s consumer protection was the leadstar to the whole legislative discussion. As elaborated above, however, little of the initial consumerist pathos could be found in the 1986 Novelle. § 6d introduced prohibition of advertising offers restricting the quantity of goods per client. Such offers typically tended to create the impression of a particularly advantageous offer and to exert pressure on consumers to buy.

---

[590] This was allowed only if producers (§ 6a, 1) and wholesalers (§ 6a, 2) sold exclusively to endconsumers, charged endconsumers and retailes or commercial users the same price, or indicated that consumers are charged a higher price than retailers.

Probably the most controversial substantive amendment was § 6e 1986 UWG Novelle, prohibiting so-called 'moonprice'. The main argument for the prohibition of eye-catching price advertising was the alleged deception of consumers regarding the general price-attractiveness of the store. Through announcements of so-called '*Mondpreise*' a general impression of a low-price policy was created with the consumers, which more often than not did not correspond to reality. The draft pointed to results from empirical studies about consumer purchasing behaviour, confirming that a majority of consumers perceived supermarkets to be in average 15-20 percent cheaper than other stores. In reality the price differences between alternative distribution channels in retail trade were about 4.9 percent at the highest. An argument for the need for legislative intervention featured in the recent case law of the BGH, which refused to take into consideration possible deception with the end-consumers in relation to the general price policy of a retail store.[591]

Both proposals were invariably winged by consumer phraseology. Thus prohibitions on so-called 'moonprice' comparisons were said to be required "on grounds of consumer protection."[592] In legal doctrine the proposed reform provoked mostly critical voices.[593] The substantive law changes were easily deciphered as pursuing questionable protectionist objectives (*Mittelstandschutz*). Notably, advocates of consumer interests were also critical of these prohibitions, especially those on price comparisons. Reich accused the drafters of "acting as [uninvited] guardians of consumers and exercising *Mittelstand* policy under the guise of consumer policy".[594] He further pointed to constitutional objections against the prohibition of price comparisons with own previous prices, at least without evidence of deception.

The only measures that could be assessed as genuinely consumer-oriented were the prohibition of the snowball marketing system and the lower threshold for criminal liability for deceptive advertising. These amendments, however, hardly possessed potential for dramatic improvement. The chain marketing systems could have been successfully combatted via the general clause of § 1 UWG, whereas criminal liability for deceptive advertising was anyway a rarely invoked rule. The reasons for the low intensity of enforcement were probably in the high evidence threshold needed for proof of subjective intent. This type of misdemeanor was not likely to enjoy a high profile with the *Staatsanwaltschaft*. More importantly, one could assume a reluctance among consumers to invoke criminal law remedies for what was perceived as minor offences.

5.3.3 Enforcement: the persistence of the choice for private ordering

With the modest intervention of the legislature in the substantive standards of the UWG to the interest of consumers, the political process did not assume more active responsibility for decision-making and balancing of interests in the area of fair trading. Balancing of interests was therefore transferred from the sphere of competence of the legislator to the level of enforcement. The question of which institutional process was better equipped for such activity, and where to place the weight of decision-making,

[591] See BGH WRP 1974, 264 ("Intermarkt").
[592] Drs. 7/2049, 1.
[593] Gaedertz (1977), 681 ff; ZAW Organ Werbung 1977/78.
[594] Reich, '*UWG*-Reform und Verbraucherschutz' (1978) *ZRP*, 100 ff., 104.

acquired primary importance. Two alternatives were close at hand. The first one was to give more room to the administrative process in the form of criminal and administrative sanctions imposed by public authorities, or in the form of representative action (*actio popularis*). The second alternative was to continue to trust the ability of the courts. This second option was supported by a large and influential group of policy-makers and legal writers, mainly offering arguments of systemic and historical character. Both alternatives, however, required careful consideration of adaptating the administrative and the judicial processes to accommodate representation of diffuse interests.

What is important to note, and what I hope will become evident from the following sections, is that institutional choice is never made once and for all. The different institutions are in a constant dialogue with each other and the scope of decision-making competencies is unstable, shifting and constantly redefined.

5.3.3.1 The choice between administrative agency and courts

The option for delegation of decision-making powers to an administrative authority was constantly present in the background of the German legislative and doctrinal debate of the 1960s and 1970s. This is not surprising given the decisive role played by the United States as a source of inspiration and an institutional model in the field of consumer protection. The American influence did not remain concealed in the draft for the 1965 UWG reform. The reference to the experience of the Federal Trade Commission in the United States speaks quite conspicuously of the powerful impact exerted by the American consumer protection initiatives. As the Bill puts it: "in the United States the Federal Trade Commission has successfully stepped in as a representative of the case of consumers."

Yet, interestingly, in 1965 the German lawmaker did not seriously consider following the American public agency model. The option for a public agency as a prosecutor and advocate of the consumer interest was neither mentioned as a viable alternative in the German context, nor was it considered necessary to provide reasons for disregarding this avenue. The only possible German counterpart to public involvement in the enforcement of fair trading law was seen in the powers of the Office of the Public Prosecutor. These powers were, however, necessarily connected with the criminally sanctioned provisions of the law and were only triggered upon private complaint. They were therefore regarded as inadequate to provide an efficient enforcement solution.

The real political and scholarly debate on institutional choice in fair trading law took place about a decade after the 1965 reform. The activist stance taken by the Federal Trade Commission in the United States and the legislative innovations introduced in Sweden at the beginning of the 1970s, spurred a fresh and intensive debate on the optimal form of enforcement in fair trading law. By that time one also could already make a preliminary evaluation of the 1965 Novelle and the introduction of the *Verbandsklage*.

Among the most active proponents of the administrative approach in the area of unfair trade practices was von Hippel.[595] Referring to the developments in the USA and in

[595] v. Hippel, 'Verbraucherschutz' (1976) 40 *RabelsZ*, 513 ff., 522.

particular to the positive experience of Sweden, he argued in favour of introducing public control over advertising in the Federal Republic.[596] In case a specialized consumer protection agency was to be created, which was v. Hippel's prime proposal, he defended a 'Swedish model' with a privileged position of this agency over consumer unions also in litigation matters. The reasons for such a solution were summarized under several points: (i) a centralized agency was in a better position than a plurality of consumer unions to develop and enforce a holistic concept of control over marketing practices; (ii) the agency as an organ of the state could be equipped with powers that were not compatible with the private character of consumer unions, such as issuing rules and recommendations, demanding documentation and carrying out investigations on the premises; (iii) the agency could carry out a global, preventive control rather than the selective-repressive control typical for the unions; (iv) an agency was not threatened by costs and liability as are the union; (v) the agency could be expected to be more successful with damage compensation than are the attempts to introduce a right of damage compensation for the unions.[597]

Among the different options of involving the administrative process in the decision-making on fair trading law, the closest to ever be implemented in practice was the proposal on giving standing to the *Bundeskartellamt* to bring an injunctive action on grounds of the UWG. This proposal was made in the preliminary draft of the *Mittelstand* working group within the CDU/CSU.[598] Interestingly, the proposal was not made in the context of increased consumer protection, but rather with the view of supplanting the antitrust law with the tools of unfair competition law. It could be described as administrative participation but with a view of expanding the antitrust element in unfair competition law and coordinating the enforcement of antimonopoly and fair trading law.

Theoretically, the proposal built on the views developed by Peter Ulmer before the Competition Congress of the CDU/CSU.[599] An even more sophisticated analysis of possible participation of an administrative agency in the enforcement of unfair competition law was apparently presented by Merkel.[600] The integrated view on antitrust and unfair competition law was animated by developments in the practice of the courts. Several decisions, including a decision of the BGH, indicated possibilities for expansive interpretation of the general clause so as to integrate broader concerns of structural and competition policy in the balance of interests.

Yet, the second German debate coincided with a period of economic crisis and critical reevaluation of the role of public regulation in both USA and Sweden.[601] The regulative optimism of the 1960s was beginning to wane, giving way to inquiries into the practical results from governmental intervention. Cost-benefit analysis and a talk

[596] His proposal was, however, conditioned upon failure within a reasonable time-limit to develop viable consumer unions which could manage to provide an adequate control of unfair advertising, something he thought highly unlikely, if judging from the experience so far, see v. Hippel (1976), 522. For an evaluation of the Swedish model see also Günther (1972) *WuW*, 427 ff.
[597] v. Hippel (1976), 523.
[598] See above, Gaedertz (1977).
[599] Ulmer, 'Der Begriff "Leistungswettbewerb" und seine Bedeutung für die Anwendung von GWB und *UWG* Tatbestände' (1977) *GRUR*, 565 ff.
[600] Ulmer (1977), 566 ff.
[601] See SOU 1983:40.

about deregulation were entering the public policy debate. This found its expression also in Germany. Reich, one of the proponent of public intervention[602], in 1984 summarised his observations from the work of the American FTC in a study with the sobering title: "*Public Regulation Between Market Failure and Regulation Failure*".[603] The German model suddenly revealed an unexpected appeal with its concept of enforcement through private actors and organisations, not excessively burdening the state budget.[604]

The opponents of government intervention in the area of fair trading did not miss the chance to point at these new developments. The many arguments against new administrative solutions can be summarized into two main categories: those based on assessment of alternative (often foreign) models of public regulation, and those based on assessment of the existing German system of private enforcement. In both categories considerations regarding effectiveness of enforcement and system-conformity played an important role. Looming through the web of arguments one can identify the familiar topics of choice between liberalism and interventionism, constitutional constraints, division of decision-making powers and the status of private law.

When assessing the possibilities of adopting foreign institutional models, the argument of 'intransplantability' was often advanced. In a number of scholarly commentaries, the specific character of German administrative law was pointed out as a major barrier to following the example of the United States and of the Scandinavian countries. The different context and tradition of German administrative and constitutional law, and the particular administrative tradition in the respective foreign jurisdiction, were underlined. More specifically, Schricker shared the view that the complex mixed nature of the FTC with the melting of legislative, executive and adjudicative functions within one single authority would be problematic from a German constitutional law perspective. [605] From the perspective of German administrative law, intervention was warranted only in areas of technical character requiring expertise and precision, which was not the case of marketing and unfair competition.[606] In the case of the Swedish KO it was pointed out that the Ombudsman institution enjoyed a one hundred years long tradition in Sweden, whereas in Germany the first comparable institutions were introduced first in 1959 with the Special Representative for the Military (*Wehrbeauftragte*).[607]

---

[602] See Reich/Tonner/Wegener (1976), 210 ff. The specific proposal was of reforming the Federal Office of Cartels into a Higher Market Authority with competencies of a consumer protection agency.

[603] Reich, Staatliche Regulierung zwischen Marktversagen und Politikversagen (Heidelberg: C.F. Müller Verlag, 1984).

[604] On FTC, Grimes (1971), 1770 ff.; Report in 80 Harv. L. Rev. 1064, fn. 14 (1967).

[605] „Soweit es um die aufklärende und wegweisende Tätigkeit der FTC geht, so wird sie schon heute in der Bundesrepublik von zahlreiche Behörden in Bund und Länder, wie von Verbrauchervebänden und Institutionen der gewerblichen Wirtschaft wahrgenommen. Diese Aktivität sollte zweifellos stärker gefördert und ausgebaut werden; systemsprengender neuer Institutionen bedarf es dazu aber wohl nicht." Schricker (1975), 235.

[606] „Detaillierende Sondernormierungen haben ihren Platz in Wirtschaftsbereichen spezieller Technizität, etwa auf dem Gebiet der Lebensmittel und pharmazeutischen Erzeugnisse, der Verkehrssicherheit von Kraftfahrzugen und Maschinen, der Deklaration von Preisen, Massen, Gewichten und des Inhalts von Fertigpackungen u. dgl. Schricker, *ibid.*

[607] v. Falckenstein (1977), 21, Fn. 12; Neumeyer (1973) *GRUR Int.* 686.

Apart from pointing at tradition and national idiosyncracies, foreign administrative models were also rejected on efficiency grounds. From an efficiency perspective Schricker pointed at statistical data on the budget of the Agency earmarked for consumer protection (17 Mln. Dollars), and the relatively few cases heard by the Commission. These figures were compared with the German system of civil law enforcement exhibiting higher number of cases within a single State (*Land*). Likewise, the record of some of the established German consumer unions was said to be more impressive than that of the FTC. Another example chosen by Schricker referred to the length of judicial proceedings necessary to enforce FTC decisions.[608] Clearly the prospect of 16 years litigation against the 'few hours' allegedly needed for obtaining preliminary injunction from a German court held little attraction for reform planners.

The efficiency advantages with an administrative agency of the FTC type lied, according to Schricker, in its educational and rule-making (standard-setting) activity, where the FTC had developed a whole array of non-binding recommendations in co-operation with industry to regulative instruments of a more binding normative nature. The need for such instruments in the United States was according to Schricker only justified in the view of lacking efficient private law instruments of enforcement through the civil courts. The absence of a tradition with a general clause interpreted by the courts was in principle seen as one important reason for making recourse of public law instruments of enforcement not only in USA, but also in England.[609]

Finally, on a more fundamental level, administrative control systems were opposed as an undesired input of public control in the economy, provoking associations with the National Socialist past. With reference to proposals on preventive control of advertising contents made in Italy, Schricker gives the example of the regulatory regime, based on censorship, on advertising in Germany during the Second World war. The implementation of this regime was entrusted to the *Deutscher Werberat der Wirtschaft*.[610] The author's attitude is probably symptomatic of a scepticism towards any excess of public power, shared by many contemporary German legal scholars.

Considerable energy in the scholarly discussion was attached to the positive appraisal of the *status quo*. The terms 'flexibility' and 'efficiency' were often used to describe the merits of the existing mechanisms of enforcement. The advantages were seen to lie in the particular combination of an open general clause, reliance on private incentives for enforcement, and the capacity of the judiciary to shape the standard of fairness in constant touch with social reality. Emphasising the particular advantages of the judiciary over an administrative agency as a decision-making instituton in matters of fair trading, Schricker categorically stated that:

> Eine besondere Verwaltungsbehörde zur Produktion von Verordnungen über den lauteren und unlauteren Wettbewerb brauchen wir in der Bundesrepublik m.E. nicht. Die richterrechtliche Rechtsfortbildung passt sich an Gegebenheiten der Materie besser an.

---

[608] Schricker (1975), 235.
[609] Schricker (1975), 237.
[610] Elster (1984), Wettbewerbrecht, 1941, 21 ff. Einschlägige Vorschriften, 69.

Schricker was praising the openness of the general clause, allowing for creative judicial interpretation and shaping the legal standards to changed social realities. A convincing example for this creativity was the doctrine of breach of statutory duty (*Wettbewerbsverstoss durch Rechtsbruch*) providing a remarkable opportunity to subsume conduct in violation of standards outside the scope of the UWG, though under the general clause.[611]

The injunction claim, together with the possibility for preliminary injunction, had proven to be a particularly powerful weapon. The initiative for enforcement came essentially from competitors and their unions. The lawmaker had correctly shown confidence that the businessmen were the best guardians of efficient competition, monitoring the market behavior of their competitors. Even the most inventive public prosecutor would lack such an information advantage.[612] Also in this debate, the most compelling argument was the advantages of the *status quo*. The intense litigious activity of individual competitors and their associations on the basis of the UWG was put forward as having indirect beneficial effect for consumers.

As we will come to see later on in this study, Schricker is in a later stage equally critical of the over-enforcement of unfair competition law by the business unions and individual competitors. In fact, he has become one of the main proponents of a more lenient right of action for these litigants. Lehmann will deplore this flexibility as he observes the expansion of the general clause beyond any comprehension.[613] In the 1970s, however, confidence in the system was high.

Interestingly, throughout the debate different policy-makers and scholars referred to Falckenstein's empirical studies. Thus the study on the litigious activity of consumer unions had demonstrated that more than 15 000 consumer complaints with relevance to unfair competition law were filed annually with the consumer unions. Another 30 000 consumer complaints were submitted annually to the Chambers of Industry and Commerce, 20 percent of which concerned unfair trade practices. Given the tendency of consumer to shy away from enforcement of their rights, the numbers were clearly only the tip of the iceberg. At the same time only few of these complaints reached the courts. The consumer associations were, as a rule, understaffed and underfinanced. The burden of high litigation costs and the risk to stand for substantial compensation claims proved to exert a prohibitive effect on the readiness of consumer unions to be involved in litigation, especially against promotional activities on the part of big economic actors.[614] The study remained ambiguous and open as to the need of public intervention. Increased administrative control of advertising and marketing practices with the specific task of intensified consumer protection. The studies of Simitis and v. Hippel were referred as supporting such alternatives, whereas a study by Brinkmann's on consumer organisations in the process of standardisation was critical.[615]

---

[611] Schricker (1975), 243. The examples – BGH 29.11.1963 Grobdesin, GRUR 1964, 269 (271); LG München 22.4.1958, WRP 1958, 219 (221). See Schricker (1970b), 34 ff.
[612] See Schricker (1975), 233.
[613] Lehmann, 'Zur Notwendigkeit einer massvollen Liberalisierung des deutschen Wettbewerbsrechts' (1995) *GRUR*, 380 ff.
[614] See v. Hippel (1977), 180.
[615] Brinkmann (1976), 162 ff. v. Falckenstein (1977), 20.

The conclusions drawn by policy-makers from these studies were nevertheless quite contradictory. On the one hand, Falckestein's report was regarded as giving ground for devastating criticism against the existing system of enforcement.[616] At the same time, there was a surprising consensus that the study generally substantiated the efficiency and fundamental rigourousness of the option for private enforcement. Statements to that effect were anyway made by senior governmental officials.[617] A similarly high evaluation of the existing civil law system of enforcement was offered, as we saw above, by ZAW. The system had been working successfully and efficiently for decades.[618] Why exactly these conclusions were drawn and how these somewhat contradictory interpretations possibly could be reconciled does not become clear from the comments.

Apparently, many commentators, while admitting the inefficiency of the present system with consumer unions and unsatisfactory level of implementation, insisted that all possibilities for improving the existing system had to be exhausted before embarking on new, untested solutions.[619] In this line of reasoning the constitutional principle of subsidiarity had obviously exerted strong influence:

> Geht man vom Subsidiaritätsprinzip als Organisationsgrundsatz aus, so erschiene es als richtig, zunächst zu versuchen, der Selbsthilfe der Beteiligten Raum zu geben, ehe der "große Bruder" Staat auf den Plan tritt.[620]

The above presentation of the debate on alternative institutional arrangements convincingly demonstrates that leaving the already chosen institutional avenue was never a serious proposition, even in the most reformist years of the 1970s. It appears that there was a political and doctrinal consensus about the advantages of private ordering. Therefore it is not surprising that the debate rapidly went in the direction of improving the system of remedies and enforcement of unfair competition law in favour of consumers, mainly through assuring better access to the courts and through reshaping the representative action. The arguments refer to familiar themes: Savigny's insistance on the coherence and unity of private law (*die Einheit des Privatrechts – Allgemeines und Sonderprivatrecht*), and Kant's legacy as to the legitimate domain of the state.

---

[616] See Regierungsentwurf, Drs.

[617] See for instance the comments of the Parliamentary Secretary de With with the Federal Ministry of Justice in an interview with ZAW, December 1977: „Ein vor kurzem veröffentlichtes, im Auftrag des Bundesministeriums der Justiz erstelltes Gutachten des Münchner Max-Planck-Instituts hat ergeben, daß sich die zivilrechtlichen Sanktionen des UWG, die Klagebefugnisse der Mitbewerber, der gewerblichen Verbände und der Verbraucherverbände (§ 13 UWG) in der Praxis bewährt haben, wenn hier auch weitere Verbesserungen möglich und nötig sind. Diese Verbesserungen sollten aber im Rahmen der privatrechtlichen Struktur des UWG vorgenommen werden und zunächst auf ihre Wirksamkeit geprüft werden, bevor man Überlegungen über ganz andersartige, etwa öffentlichrechtliche, Sanktionen anstellt, die sich im übrigen mit der weitergehend generalklauselartigen Ausgestaltung des UWG nur schwer in Einklang bringen ließen. Der Entwurf hat sich daher bewußt darauf beschränkt, bestimmte Verbesserungen bei den zivilrechtlichen Ansprüchen des Gesezetzes und bei bestimmten Verfahrensvorschriften vorzusehen.", as quoted by ZAW, Stelllungnahme, WRP 1978, 261. Similar view was expressed by Krieger (1978), 1 ff.

[618] ZAW, Stellungnahme, 261. See also ZAW Diskussionspapier zur Werbepolitik.

[619] Schricker (1975), v. Falckenstein (1977).

[620] Schricker, 'Wettbewerbsrechtliche Aspekte des Verbraucherschutzes' (1976) 40 *RabelsZ*, 535 ff., 574.

5.3.3.2 Right of action of consumer associations

With the choice to discard alternative modes of enforcement such as administrative agency or public prosecution, the lawmaker clearly opted for private ordering. This implied continued reliance on the judiciary as a decision-making institution, but required adaptation of the judicial process to the protection of diffuse consumer interests. The main instrument for such adaptation was the collective right of action to consumer organisations. By granting a right of action to consumer unions an existing discrepancy between the interests of competing tradesmen and those of consumers was recognized. Certainly, individual competitors and their associations were taking good care of the enforcement of fair trading standards. Yet many violations that were not directly affecting business interests but were undesirable from a consumer and public interest point of view remained unsanctioned. The reason for passivity often lay in the circumstance that competitors were inclined to tolerate unfair practices that were primarily harmful to consumers, or simply that competition in a certain area of the market was limited. In such situations the possibilities for consumers to influence law-enforcement were practically non-existent and limited to the classical instruments of civil procedure.[621] The introduction of a separate and independent right of action of consumer unions was the only way to compensate for this inadequacy.

Whereas the decision to grant a right of standing to consumer unions in unfair competition law disputes was welcomed, the positive shaping of this right proved controversial. Together with the advantages of opening unfair competition law for enforcement by consumer associations, the lawmaker was conscious of the difficulties associated with such a construction. On the one hand, incentives had to be provided to make legal prosecution more accessible and attractive for consumer associations. A major problem was the assumption of party equality of private law (formal rationality), which could not be easily reconciled with granting "privileged positions". On the other hand, the looser connection between interest and right of action (and, respectively, procedural standing) prompted concerns about possible abuse of the granted substantive and procedural rights. Safeguards had to be introduced against the risk of abuse of procedural rights. The task was in other words to create incentives for the 'right' kind of consumer unions.

The concept 'consumer union' and the scope of the right of action

The first question that had to be answered when laying down a right of action in defence of the consumer interest in unfair competition law was how to define associations to be granted such a right.[622] The 1965 Governmental Bill considered using the concept 'consumer union' in the legislative text, but rejected this concept as imprecise and open to different interpretations. Spontaneous associations of individual end-consumers presumably corresponded best to the ideal of the lawmaker. Yet the experience of and knowledge about the problems of consumer organization did not leave much hope that such spontaneous associations were to constitute the typical

---

[621] BT-Drs. IV/2217, 3. These were some of the arguments in the Bill to the 1965 UWG Novelle. The motives referred to the limitations of the then existing legal framework to take consumer interests into account.

[622] One alternative discussed already at the time of the 1965 Novelle was the possibility to grant standing not only to consumer associations but also to individual consumers. The Swiss Unfair Competition Act, which had served as a source of inspiration for the 1965 UWG reform, had indeed granted such right. This option, however, was rejected as too far-reaching and because the prospects for making effective use of the individual consumer's right of standing were estimated as meagre. BT-Drs. IV/2217, 4.

litigant under the law. Reliance was vested in the newly founded, state-promoted consumer organizations charatcerised by corporate membership. The preferred solution was therefore to fully abstain from any legislative prescriptions as to the type of membership required. Instead, the definition focused on the activities of the union.

Also here different alternatives existed. One possibility for setting clearer limitations for subjective procedural legitimation was to require proof of factual activity in the interest of consumers. However, this approach was discarded as unnecessarily burdensome for consumer associations, and impractical for the courts. Eventually the option was for a formal criterion regarding the objectives of the organisation, as reflected in its constitutive charter. The agreed formula laid down in § 13 IIa read:

> ...associations, whose chartered purposes include the promotion of consumer interests through information and advice, provided that the associations themselves are competent to file complaints in civil disputes.[623]

The defined requirements *in personae* were clearly minimalistic. The law did not set any threshold as to minimum number of members, nor was a system of administrative supervision or registration envisaged. The generous approach, in terms of subjective scope of action of consumer associations did not exclude abusive litigation on the part of less serious consumer associations. The lawmaker considered the risk for such abuse to be minimal and expressed its trust in the capacity of the judiciary to successfully bar such attempts.[624]

More importantly, the right of action of consumer associations was not limited to protection of the economic interest of their members. In the government Bill it was explicitly stated that consumer organisations should be authorised to initiate proceedings on the basis of violations affecting or merely endangering the interests of non-members.[625] In this way the right of action of consumer unions was from the outset defined as a right to act in the interest of a more abstract group of consumers, one that was not confined to the individual union members. The legal institute was in other words emancipated from a strictly private law understanding of a necessarily close connection between protected legal interest and right of action. One justification for this broad standing was the similarly broad design of the standing of business associations.[626]

Again in parallel with business organizations, the standing of consumer organisations was not limited geographically. This was meant to facilitate the work of ambitious national or cross-regional unions and reflected the same broad understanding of the protected interests. In the doctrine commentators spoke of "*überindividuale Interesse*",

---

[623] § 13 UWG, old wording of 1965: „Sachbefugnis von Gewerbetreibenden und Verbänden, Abs. 1a, 1 Satz" „In den Fällen der §§ 3, 6, 7 Abs. 1 und des § 11 kann der Anspruch auf Unterlassung auch von Vebänden geltend gemacht werden, zu deren satzungsgemässen Aufgaben es gehört, die Interessen der Verbraucher durch Aufklärung und Beratung wahrzunehmen, soweit die Vebände als solche in bürgerlichen Rechtsstreitigkeiten klagen können."

[624] BT-Drs. IV/2217, 4.

[625] *Ibid.*

[626] Ibid.

but still hesitated to place consumer interests on an equal par with the public interest.[627]

Clearly, not all of the rules on fair competition stipulated in the law and developed in case law, were of immediate concern for consumers. Therefore the right of action of consumer associations had to be limited not only *ad personaem*, but also *ad materiae*. There was a general consensus as to the interest of consumers in truthful advertising. Correspondingly, the 1965 UWG Novelle granted right of action to consumer associations under all sections which touched upon situations of misleading advertising and marketing (§ 3 on misleading advertising, § 6 on sale of goods from bankruptcy estates, § 7 I on liquidation sales and § 11 on units of sale). Beyond this narrow area, however, the views diverged and reflected different understandings as to the role of consumer organizations in unfair competition law in general. According to a widely spread view, the right of action of consumer unions was not to go much further than in the case of regulating deception. Consumer organizations like AGV and consumer-oriented lawyers instead argued for a broad right of action, without limitation encompassing the general clauses of §§ 1 and 3 UWG, the Rebates and Promotions Acts, as well as other legal areas of interests to consumers.[628]

Given the central place of the general clause for the continuous shaping of fair trading standards by the judiciary, the question of the competence of consumer unions to sue under § 1 UWG was of considerable importance. The Governmental Bill originally proposed to confine the right of action of consumer associations under § 1 UWG to violations consisting in deceptive statements about goods or commercial services which were likely to create the impression of a particularly lucrative offer.[629] This carefully selected wording purported to limit the substantive scope of the right of action to § 1 violations representing continuation of, and a complement to, § 3 UWG violations. More specifically, the governmental Bill took into account the fact that § 3 in its current version was limited to statements made for a broader public, whereas statements with more restricted target audience could only be covered by § 1 UWG. As a matter of principle, the role of consumer associations in the field of unfair competition was seen as limited to promoting consumer interests in information and transparency. Consumer interests were to be narrowly construed and the interests of consumers and the general public interest were not be put on an equal footing. One remark in the Bill on the substantive scope of right of action of consumer organisations casts some light on the distinction between consumer interest and the interest of the public.

> Die Bundesregierung verkennt dabei nicht, dass es auch einzelne unter § 1 UWG fallende Arten von Wettbewerbsverstössen gibt, die nicht in dem Bereich der Irreführung liegen, an deren Unterbleiben aber gleichwohl auch ein öffentliches Interesse besteht. Hierher gehört beispielsweise eine Werbung, mit der die Öffentlichkeit belästigt oder die Spielleidenschaft ausgenutzt wird. Die

[627] On the geographical limitations of the right of action, see v. Falckenstein (1977), 48.
[628] See Borck (1964a), 218.
[629] See § 13 Ia UWG-E: "Das gleiche gilt in den Fällen des § 1, soweit der Anspruch unrichtige Angaben über Waren oder gewerbliche Leistungen, die geeignet sind, den Anschein eines besonders günstigen Angebots hervorzurufen." BT- Drs. IV/2217, 2.

> Bundesregierung is jedoch der Auffassung, dass es nicht zu den Aufgaben der Verbraucherverbände gehört, allgemein öffentliche Belange wahrzunehmen.[630]

In the course of parliamentary deliberations this very restrictive design of the right of action of consumer unions was somewhat relaxed by an important amendment. A more abstract criterion was added, implying that the right of action could also be exercised to pursue § 1 UWG violations, provided that the action concerns "some other act for purposes of competition through which essential interests of the consumer are affected."[631] The interpretation of this rather open formula was again left to the courts.

Despite the attempt to set clear, easily applicable and balanced criteria for the right of action of consumer associations, the provisions produced mixed reactions among legal scholars. On the part of consumer advocates criticism was voiced mainly at the limitations on the concept of consumer union and the narrow scope of the right of action.[632] Others were, in contrast, critical of the vague and open definition of the subjective and material scope of the right of action, asserting that it created fertile soil for abusive litigation. Pastor proposed a set of limitative criteria concerning the formal standing as well as the substantive right of action of consumer associations, and thereby hoped to enhance clarity over the identity of legitimate claimants under § 13 1a.[633]

The problem of abusive litigation

Generally, it could be said that the entry of consumer unions onto the premises of unfair competition law was not welcomed by the judiciary. Reporting on the first experiences with the right of action of consumer unions, and in particular of the Union for Protection of Consumers from Unfair Competition[634], Borck complained of the tendency of the judiciary to interpret restrictively all legal prerequisites for the right of action for consumer organisations. Some courts set a high threshold of procedural legitimation, whereas others attached importance to the substantive limitations of the right of action and in individual cases questioned whether substantial interests of consumers were actually affected or endangered by alleged violations.[635]

---

[630] BT- Drs. IV/2217, 5. Die Bundesregierung ist jedoch der Auffassung, daß es nicht zu den Aufgaben der Verbraucherverbaende gehört, allgemein öffentliche Belange wahrzunehmen. Aus diesem Gründe braucht sich die Klagebefugnis der Verbraucherverbände auch nicht auf § 7 Abs. 2 und 3 und die §§ 7a-7c UWG erstrecken. Bei diesen handelt es sich vorwiegend um Ordnungsvorschriften."

[631] „..oder eine sonstige Handlung zu Zwecken des Wettbewerbs betrifft, durch die wesentliche Belange der Verbraucher berührt werden."

[632] Proceeding from an alternative draft elaborated on behalf of the AGV Hans Borck defended a broader right of acion encompassing all situations of unfair competition, but also stretching beyond the scope of UWG to cover other areas of relevant consumer legislation. Borck (1964a), 217.

[633] Pastor (1969), 575 f.

[634] See Borck, 'Erste Erfahrungen im Umgang mit der Aktivlegitimation für Verbracherverbände' (1968) *WRP*, 1 ff. He reports in particular on his experience from representing the Verein zum Schutze der Verbraucher gegen unlateren Wettbewerb (Verbraucherschutzverein) e.V., an association constituted on the initiative and with the participation of the Verbaraucherzentrale der Länder and Arbeitsgemeinschaft der Verbraucher, especially with the objective to process the complex of problems connected with unfair advertising that concern and burden all of these organisations.

[635] See Borck (1968), 2.

The situation was not made easier by reports on the emergence and intensified activity of 'pseudo'consumer associations (*'Scheinverbände'*) in the years following the amendment. These associations often consisted of a few members, not infrequently a couple of lawyers and their relatives. Pastor's assessment reflects the sentiments of the time:

> In letzter Zeit werden im ganzen Bundesgebiet Firmen jeglicher Größenordnung, vor allem aber auch mittelständische Unternehmen in ansteigendem Maße von Verbraucherverbände oder neu erstandenen Vereinen zur Bekämpfung unlauteren Wettbewerbs mit Verwarnungsschreiben überzogen, in denen die verschiedenartigsten Wettbewerbsvertöße gegen das Heilmittelwerbegesetz abgemahnt werden. [636]

The question rapidly acquired political relevance, something evidenced by a parliamentary inquiry report addressed to the Federal Government.[637] In his response to the inquiry the Federal Minister expressed concern with abuse of the newly granted right of action, risking to discredit the activity of consumer organizations as a whole. Aware that the question was the subject of a pending legal dispute, the Minister said he was not willing to preempt the judgement of the court. At the same time, he failed to conceal his view that such conduct should be qualified as abuse of the law.[638]

The most problematic case concerned the Union for Protection of German Endconsumers (*Schutzverein des Deutschen Endverbrauchers e.V.*) in Frankfurt, which had recently registered as a non-profit organisation with the objective to "strengthen and protect the right of consumers and to provide information and advice to its members."[639] Acording to information provided by its founders, the organisation consisted of no more than 48 members, including the attorneys that had initiated the proceedings. In this particular case the association claimed injunctive relief against the advertising of a farmaceutical company allegedly violating the Drugs Act.

Not surprisingly, in a judgement issued one month after the parliamentary inquiry, the Appelate Court in Cologne followed the Minister's view.[640] Indeed, much in the activity of the association was questionable and approximated extortion. Evidence was brought by the defendant to show that the attorneys in the name of the association had threatened a drugs company with massive litigation and bad publicity, if the latter refused to make substantial monetary contributions to the association and reimburse the attorney fees.[641] The methods of recruiting new members also arose suspicion. The lawyers had spread newspaper advertising offering membership in the association against a symbolic fee of 1 DM and were urging consumers to report unfair trade practices. Moreover, the lawyers had attempted to establish contacts with other lawyers and organisations for the coordinated prosecution of offences under UWG.

---

[636] Pastor (1969), 571.
[637] Pastor (1969).
[638] Stenographischer Bericht der 240 Sitzung des Deutschen Bundestag, GRUR 1969, 471.
[639] OLG Köln GRUR 1969, 484 („Verbraucherverband I"). Cf. Pastor (1969), 571; Wilke, 'Über den Unsinn einer Reform der §§ 13 und 23a *UWG*' (1978) *WRP*, 581 ff., at 584.
[640] OLG Köln GRUR 1969, 484 ("Verbraucherverband I")
[641] The threat was all the more effective because it did not refer to injunctive relief, but to a request for punishment due to violation of an already issued preliminary injunctive court order. The fine in these cases could be substantial. *Ibid.*, 485.

Understandably, the court wanted to send a strong signal against abuse of the right of standing for personal profit purposes. Yet in its zeal to strike down on such behaviour it appears that the court became guilty of overshooting the mark. The threshold was set so high that it became almost impossible for a newly established consumer association to pass it, particularly as the prospects for spontaneous founding grassroot consumer associations seemed unlikely anyway. The court interpreted the text of § 13a restrictively and set strict requirements for the subjective and the material competence of associations claiming to sue in the interest of consumers. In the opinion of the court, the chartered objective of the complaining association could not be to strengthen and protect the rights of consumers, since the UWG was not granting any explicit rights to individual consumers. Moreover, an association aiming to provide information and advice only to its members was not considered qualified to use the right of action under § 13 a UWG. Despite the statements of the lawmaker in the opposite direction, the Court attached great importance to the actual exercise of consumer-oriented activity by the complaining associations. Finally, the court held any membership of tradesmen and commercial entities to be contrary to the very concept of consumer association.[642]

In a subsequent decision concerning the same assocation, the BGH showed a more reticent attitude and tried to strike a balance between effective prevention of abuse and the promotion of legitimate and genuine consumer associations.[643] The BGH did not take a stand on all of the requirements advanced by the Appelate Court in Cologne, but confirmed the most important of them. Thus, indirectly the BGH endorsed the demand that the chartered objectives of the consumer association should include both information and advice, moreover to consumers as a whole and not only to its members.[644] More importantly, it confirmed the view that the actual exercise of consumer-oriented activity, including the organisational and financial potential of the association to achieve its objectives, should be the touchstone of legitimacy. Not to endanger the activity of genuine consumer associations, the Court held that the main criterion for such entities should be whether they are in a position to actually perform their chartered tasks. The presumption should always be that the association truly pursued its chartered objectives. In the case of the *Verein*, the Court found that it was in fact making trustworthy efforts to develop an activity for information and education of consumers, and that it had more than 100 members. A deeper probe into the actual activity of the association would be required only when there were *indicia* of abusive conduct.[645]

However, the decision of the BGH did not put an end to the troubles of the *Verbraucherverein*. Only two years after this decision, another Appelate Court subjected the activity of the association to a fresh assessment and eventually denied it a right of action.[646] The case concerned sausage labels with false fabrication date and was *prima facie* to regard as of interest to consumers. The District Court, in turn, found that the association could not bring evidence of genuine activity in the interest

[642] OLG Köln GRUR 1969, 484 („Verbraucherverband I").
[643] BGH GRUR 1973, 78 („Verbraucherverband II"). See Wilke (1978), 586.
[644] BGH GRUR 1973, 78 ff., at 79 („Verbraucherverband II").
[645] BGH GRUR 1971, 516 ff. WRP 1971, 264 ff. ("Brockhaus Enzyklopädie").
[646] OLG Frankfurt GRUR 1974, 228 ff. („Verbraucherschutzverband III")

of consumer. The main argument in this respect was the absence of premises where the envisaged information and advice to consumers could take place. Moreover, the association did not prove to have sufficient financial means to carry out its chartered tasks. The District Court did not consider itself bound by the decision of the BGH, since the circumstances had changed and the association (four years after registration) was no longer to be regarded as being under formation.[647] Wilke reports that the *Verein* was forced to terminate its activity in 1973.[648]

The story of the Frankfurt consumer *Verein* is symptomatic. It demonstrates, first, that the market-oriented idea of 'help to self-help' behind this construction was never accepted in its full dimension. In the area of litigation, the market principle of acting in one's own egoistic interest to achive generally beneficial results was seen to have severe limitations. The violations prosecuted by the *Verein* were genuine offences against fair trading standards. Yet put in the context of self- interested action the outcome was perceived as intolerable. Theroretically at least, the right of action of consumer associations relied on two main alternatives for mobilization of consumers: public subsidies, or private schemes that in turn rest on incentives to achieve personal benefit. In many respects the restrictive line of jurisprudence described above is bound to have undermined the second type of initiatives.

The potential abuse of litigation rights is clearly not confined to consumer unions, but relates even more seriously to *Wettbewerbsverbände*, whose main task it is to combat unfair competition. It seems that the introduction of standing to sue for consumer associations intensified the activities of non-genuine business unions.[649] Like the consumer associations, *Wettbewerbsverbände* did not have any interest of their own in fair competition. Nor were they necessarily in a position to demonstrate such interest among any of their members. As held by the RG, these unions were believed to sue in the interest of the general public.[650] Given the loose connection between substantive and procedural interest, these unions were also often regarded with suspicion and distrust.

The risk of abuse and the existence of such unions were issues differently assessed in the doctrine. Many found the concerns about abuse to be exaggerated. Some pointed at the fact that the risk of abuse was not specific of the unions or of consumer unions in particular.[651] Others, like Pastor, regarded the problem to lie in the very nature of the *Verbandsklage* and therefore to be unavoidable.[652] To put it in the words of Pastor:

> Mißbräuchliche Ausnutzung der Klagebefugnis des § 13 UWG durch Prozeßverbände läßt sich nicht verhindern, sie läßt sich nur erschweren."[653]

---

[647] Ibid.
[648] Wilke (1978), 582.
[649] See in this sense Kur, 'Der Mißbrauch der Verbandsklagebefugnis' (1981) *GRUR*, 558 ff., 559.
[650] See RGZ 120, 47 („Markenschutzverband").
[651] Borck (1968), 2.
[652] Pastor, 'Die *UWG*-Reform und der Mißbrauch der Verbandsklagebefugnis aus § 13 *UWG*' (1978) *WRP*, 245 ff., 248.
[653] Ibid.

Indeed the problem was only a variation of the larger difficulty of disciplining the exercise of non-individual rights. The strategy proposed by Pastor in order to come to grips with abusive litigation closely reflects the decision of the Appelate Court in Cologne, which he himself most probably authored as a judge at this court. As in the decision, Pastor suggested to proceed in several steps, scrutinizing the membership of the association, its chartered objectives and its actual activities. In a last step, and independent of the preceeding analysis, a test on possible abuse of the right of action was proposed. Whereas the procedural standing and substantive right of action were to be evaluated *ex officio* by the courts, the question of possible abuse was only to be discussed upon objection by the defendent.[654]

Much of the argument had to do with the divergence of opinions as to the very definition of the notion "abuse of the *Verbandsklage*". Some authors were inclined to attach particular importance to a pattern of excessive litigation in the activity of *Wettbewerbsverbände* or *Verbraucherverbände*, and especially of systematic prosecution of non-complicated, standard procedure cases with guaranteed positive outcome.[655] At the same time a differentiated approach to different categories of unions and associations was advocated. An average annual number of 394 proceedings could appear an excessively high number for a small regional union, but it was hardly sufficient for a central association combatting unfair competitive practices.[656] Others, by contrast, argued that the mere fact of active exercise of legal rights could not be held against such associations. A high number of disputes brought before the courts by a specific union could not in itself be treated as an indication of abuse. Attention should rather be devoted to the association's activity taken as a whole and judgement passed by weighing different factors, like membership, chartered objectives, resources, litigation record, etc., against each other. [657]

Another sign of abusiveness was the aggregate pursuit of multiple equivalent cases or litigation carried out by the same attorneys. But also in this respect it was hard to argue *per se* abusiveness. Many serious associations would cooperate with the same attorneys and pursue similar and often legally uncomplicated offences. Provided that action was filed against genuine violations, it was difficult to condemn such practices.[658]

Kur put her finger on the problem. Many of the standards of the UWG and its accompanying laws (the Rebates Act and the Free Gifts Act) dated from times long past. If intensive enforcement of these standards was condemned as injust and even outrageous, then probably because the rules were generally perceived as outdated and obsolete.[659] The best way to streamline litigation was consequently through change of substantive law, or through more restrictive interpretation on the part of the judiciary. To require self-restraint in the exercise of one's rights was highly questionable. From a legal policy perspective Kur argued that an attempt to limit the right of action of

---

[654] Pastor (1969), 576 ff.
[655] Ibid.
[656] In this example Pastor referred to the activity of the influential *Zentrale* zur Bekämpfung unlauteren Wettbewerbs e.V. in Frankfurt a.M. , see Pastor (1978), 248.
[657] Wilke (1978), 581 ff.
[658] Kur (1981), 561;Wilke (1978).
[659] Kur (1981), 561.

consumer unions, while leaving the right of action of business associations untouched, would send the wrong signal.[660]

Interestingly, despite many heated discussions provoked by the issue of abusive legislation, the attempts to introduce effective restrictions by way of legislation failed. In the 1978 reform efforts based on the MPI empirical study, the Federal Ministry of Justice submitted several proposals aimed at providing guarantees that the procedural standing of consumer unions would not be abused for purposes of individual enrichment.[661] In parallel to the developments in the area of standard contract terms, the standing of consumer and business unions was to be made conditional on membership. Capacity to sue was to be recognised only for umbrella unions, i.e. such unions consisting of other associations, or of unions having at least 75 individual members.[662]

The Government Bill proceeded from equal treatment of consumer and business associations. Following criticism and proposals in legal doctrine, the Governmental Bill abandoned this approach in favour of differentiated treatment.[663] The procedural requirements were formulated while taking account of the specific features and risks of abuse for each type of association, i.e. interest associations (*Verbänden zur Förderung gewerblicher Interessen*), competition associations (*Wettbewerbsverbände*) and consumer assosiations (*Verbraucherverbände*). No quantitative requirements were set for the membership of interest unions, thus authorizing unions consisting of only a few members. The situation was different with competition unions, which had to demonstrate a membership of at least five tradesmen (*Gewerbetreibende*) or of an unspecified number of non-profit associations working in the same area. These associations had moreover to prove that they seriously dealt with litigation (and not only with notification).[664] Consumer associations were likewise granted standing only if they consisted of other corporations or if they could demonstrate at least 75 individual members. Common for all categories of collective litigants was a registration procedure with a supervisory authority, conditioned on providing evidence that membership and other requirements were fulfilled.[665]

---

[660] Kur (1981), 565 ff.

[661] The proposals were prompted not only from a desire to suppress existing abusive litigation, but also to prevent future abuse. In particular, there was a fear that the proposed possibility of aggregating damage compensation claims could be abused. See Referentenentwurf des BJM, WRP 78, 277 ff.

[662] *Ibid.*, 278.

[663] It was in particular Pastor who pointed at the very different nature of the existing business and consumer associations. The divergence in founding principles, objectives, activity and membership called in his opinion for carefully drafted rules adapted to these specifics. The risk of abuse for instance was highly present in the activity of the so-called "socially useful associations" but was negligible for classical interest organizations and, after curbing initial attempts for abuse through a balanced case law, also for consumer unions. The same reasoning was valid when assessing other factors like risks of litigation costs, economic situation of the union, need for promoting litigious activity, etc. Pastor proposed a rule introducing a more rigorous classification of the different organisations and treating differently the respective categories. Pastor (1978), 248 ff.

[664] Proposed § 13 II 3 UWG-E read: „von rechtsfähigen Verbänden, zu deren satzungsgemässen Augaben es gehört, Zuwiderhandlungen gegen Vorschriften dieses Gesetzes im Interesse der Gewerbetreibndn durch Erhebung von Klagen entgegenztreten, wenn si in diesem Aufgabenbereich tätige Verbände oder mindestens fünf Gewerbetreibende als Mitglieder haben."

[665] See § 13 V UWG-E BT-Drs. 8/2145, Regierungsentwurf, 4 f. Wilke (1978), 582 ff. The registration was to take place at the local court, who also had the authority to cancel the entry into the Register if the requirements were no longer met. On the reform proposals, see Kur (1981), 565 ff.

The proposal was criticized from all quarters, but the reactions were most negative among lawyers involved in litigation on the part of interest or competition unions.[666] Many pointed at the fact that a high number of members was no guarantee against abuse.[667] The different membership threshold for competition and consumer unions was also criticized as discriminatory.[668] Borck summarized the reform as an attempt at decimation of smaller associations.[669] Most devastating was the criticism directed at the proposed registration procedure. Given the fact that the registering court was only to examine formal prerequisites (such as membership and chartered objectives) the potential of such procedure to restrain abusive activity was strongly put into question. Fears were expressed that a formal registration procedure could render legitimacy to abusive unions and dissuade the courts from conducting an independent test.[670] After about a decade of discussions under two legislative periods, legislators refrained from any changes as to more restrictive definitions of the right of action of associations. The only amendment which sought to delimit abusive litigation was linked to the costs of litigation.

5.3.3.3 The cost of prosecution and litigation

One of the important factors influencing the access of consumer associations and of other interested actors to the courts is the cost of litigation. The risk of having to bear high litigation costs can directly weaken the willingness of affected actors to pursue their interests in a court proceeding, be it in a capacity of plaintiff or as defendant. According to general rules of civil procedure in Germany (§ 91 ZPO), litigation costs are to be fully borne by the losing party (the loser pays all principle).[671] In case of partial win and loss, litigation costs are divided between the parties accordingly (§ 92 I ZPO).[672]

The cost of litigation consists of three components: court costs, attorney's fees and other expenses incurred in connection with the trial, such as expenses for witnesses and experts, transportation and income loss. A significant feature of the German regime of litigation costs is that both court costs and attorney's fees are solely a function of the amount in controversy, i.e. they are calculated on the basis of the pecuniary sum at issue in each particular case.[673] The complexity of the dispute, the work required by the court and by the attorneys, or the duration of the proceedings do not have any bearing on litigation costs. Separate court and attorney's fees are charged

---

[666] See Wilke (1978), who emphatically described the reform proposal as nonsense (*Unsinn*).

[667] Pastor (1978), 274; Wilke (1978), 587; Schricker, 'Verbraucherschutz - ein neues Rechtgebiet?' (1979) *GRUR Int.*, 315 ff.

[668] Kur (1981), 566.

[669] Borck, 'Zuckerbrot und Peitsche für Verbände?' (1978) *WRP*, 161 ff.

[670] Pastor (1978), 247; Wilke (1978), 588.

[671] Bender/Strecker, 'Access to Justice in the Federal Republic of Germany' in: Cappelletti/Garth, *Access to Justice*, Vol. I (Alphen aan den Rijn; Sijthoff and Noordhoff, 1978), 520 ff., 530.

[672] Similar rules apply by appeal proceedings: an unsuccessful appellant stands for his costs, whereas by partial success § 92 I ZPO is applied accordingly (§ 97 I ZPO). By voluntary settlement litigation costs are regarded as waived, if nothing else is agreed between the parties. The parties can however request a court decision on the division of costs under § 91a ZPO. Melullis (1995), 382 ff.

[673] § 7 Federal Ordinance on Attorney's Fees (*Bundesrechtsanwaltsgebührenordnung*, BRAGebO) BGBl. I 1957, 861, 907. Nevertheless, there exists a possibility for the client and the attorney to agree on the size of the attorney fee (which does not affect the court's decision).

at different stages of the proceedings. Thus the first court fee is incurred with filing the suit, a second - if evidence is taken, and a third one – with the issuance of the judgement (§ 25 GKG). For attorneys the first fee arises with the commencement of litigation, the second with an appearence before the court and the third with a possible taking of evidence (§ 31 BRAGebO).[674] A fee is also paid for lawyers' mediation in search for a voluntary settlement of the dispute.[675] Students of German procedural law observe that as a result of these principles concerning costs, "litigation involving rather small amount can become relatively expensive for the loser."[676] This assessment explains some of the difficulties of effective enforcement of consumer rights.

Setting the value in dispute

The strict dependency of litigation costs on the amount in controversy turns the latter's determination into a question of crucial importance. One of the serious problems in unfair competition law procedure is the uncertainty surrounding the determination of the amount in controversy and eventually of the litigation costs. The most frequently used avenue for prosecution of unfair trade practices is the claim for injunctive relief. Whereas the amount in controversy is relatively easy to determine in traditional pecuniary claims, such as contractual or property claims, or even damage compensation, the situation is more complicated with the injunctive action. Here it is a question of litigation involving economic interests, but where no money claims are present. The decisive question is to weigh and value the plaintiff's interest of having the allegedly offensive conduct of the defendant terminated.[677] For this type of dispute the amount in controversy is determined by the court at its own free discretion.[678] Naturally, the tentative value in controversy indicated by the plaintiff is important and is often approved by the courts. The courts are, however, not bound by it and can correct it to a higher or lower sum.[679] For commercial litigants the court would normally take into account the size and turnover of the plaintiff, the seriousness of the unfair trade practice, and incidentally also the 'size' of the defendant.[680]

In an analogous manner, it was accepted in case law and in legal doctrine that the amount in controversy in proceedings filed by interest unions (i.e. unions composed of undertakings in the same industry or trade) would be determined on the basis of the sum of interests of affected union members.[681] This did not imply a simple mechanical addition of pecuniary interests, but required an adaptation of the amount in controversy to the multitude of interests involved, usually resulting in the amount

---

[674] *Ibid.*, 531.

[675] § 31 II Nr. 4 BRAGebO.

[676] Bender/Strecker (1978), 531. The same authors estimate in 1979 that for litigation involving approximately DM 14,400 the cost can total approximately one half of the amount in controversy. Under the present BRAGebO a single attorney's fees for a sum in controversy of 5 000 EUR amounts to 313 EUR.

[677] Kur, Streitwert und Kosten in Verfahren wegen unlauteren Wettbewerbs (Köln: Bundesanzeigerverlag, 1980), 14, 27 ff.

[678] § 3 ZPO „Der Wert wird von dem Gericht nach freiem Ermessen festgesetzt; es kann eine beantragte Beweisaufnahme sowie von Amts wegen die Einnahme des Augenscheins und die Begutachtung durch Sachverständige anordnen." See Bender/Strecker (1978), 532 ff.

[679] Kur (1980).

[680] Kur (1980), 27. Kur points to the very divergent practices of the various District and Local Courts, with differences between 1600 to 10000 for the same violation; *ibid.*, 14.

[681] In this sense already the Imperial Court, see Callmann (1929), 444; cf. Kur (1980), 28; BGH GRUR 1968, 106, 107, ("Ratiomarkt").

being increased. The difficulty of this approach in the case of consumer unions and other non-profit associations like the *Wettbewerbsverbände* is self-evident. According to a long and consistent string of jurisprudence these associations were seen to act in the interest not of their members, but of the general public.

> Denn diese (gemeinnützige Verbände) verfolgen nicht die Interessen Dritter, sondern eigene. Das ergibt sich aus ihrer Satzung, mit der sie sich die Aufgabe der Bekämpfung unlauteren Wettbewerbs gestellt haben. Sie machen damit die Interessen der Allgemeinheit an der Erfüllung dieser Aufgabe zu ihrem eigenen Interesse.[682]

The latter have their own material right of action and an independent standing to sue, not derivative from the substantive and procedural rights of their members. The question is then what factors should be considered for setting the amount in controversy at a realistic – neither too high, neither too low - level. The difficulty again stems from the attempt to integrate collective and public interest litigation in a traditional scheme of civil procedure based on individual private interests.

The claims of consumer and business associations present a challenge to the system in many respects. Injunctive claims filed by these associations as a rule do not concern specific, identifiable pecuniary interests of their members. The right of action is based rather on safeguarding a more loosely defined public interest (*Interesse der Algemeinheit*).[683] The value of the protected interests is consequently difficult to gauge. Any approach proceeding from aggregation of the interests of association members would risk leading to unreasonably high amounts in controversy and therefore to an unjustifiably heavy burden of litigation costs.

In a quest to put an end to conflicting practice of the lower instance courts, the BGH held in 1967 that for *gemeinnützige Verbänden* the value in dispute should neither be determined on the basis of the number of members, nor on the sum total of the interests of members. Instead, the interest of the general public of eliminating the allegedly unfair conduct would to a greater extent depend on the free discretion of the court. Important factors to consider were the general importance of the objectionable conduct, the risk of imitation by other competitors, the size of the undertaking of the infringer and the scope of his act. The capacity and the financial strength of the association were, by contrast, deemed of no consequence. For the case in point the plaintiff had indicated an amount in controversy of DM 150,000. In appeal proceedings the OLG Celle set the amount in dispute at DM 5 million. The BGH opted for a compromise sum of DM 600,000.[684]

Whereas this decision contributed to greater harmony in the case law of the lower instance courts, it could not provide clear guidelines for tackling the subtleties and

---

[682] BGH GRUR 1968, 106 ("Ratiomarkt").

[683] BGH GRUR 1956, 279 ("Olivin"); BGH GRUR 1957, 606 ("Heilmittelvertrieb"); BGH GRUR 1958, 32 ("Haferschleim"); BGH GRUR 1960, 379 ("Zentrale"); BGH GRUR 1964, 567 ("Lavamat").

[684] The case concerned an innovatory retail practice used by a powerful wholesaler to enter the end-consumer market. Retailers could enter a contract with the wholesaler and acquire the right to distribute authorisation purchase cards to their customers. The retailers who entered into such an arrangement were granted 4 percent of the purchases of the recruited customers. The practice was attacked as unfair and contrary to the Rebates Act and the Free Gifts Act. See more on the legislative reaction to this type of practice above.

uncertainties of a variety of individual situations. The factors pointed out by the BGH remained sufficiently open to allow for alternative assessments, something confirmed by subsequent jurisprudence. Thus in the so-called *Kaffeverlosung* case, a nation-wide marketing campaign for coffee using free samples was attacked by a number of competition associations, initiating proceedings in different regions of the country. Different District courts reached different conclusions as to the amount in controversy.

Reporting on the findings of the Max Planck Institute study, Kur came to the conclusion that the risk of high amount in controversy and high litigation costs remained a substantial deterring factor for the litigious activity of consumer unions, especially when suing big companies or when large scale advertising campaigns were involved. One of the main objectives with the introduction of the consumer association suit, namely combatting unfair practices on the part of big business, was evidently prejudiced by financial limitations.

The financial risks of litigation did not end there. Another institute of German civil procedure, the so-called *Zweitschuldnerhaftung*, meant that the successful party was to bear all litigation costs in case the losing party was insolvent.[685] This rule created a risk for the suing associations to have to bear the costs of litigation even in case of positive outcome. In the case of 'fly-by-night firms', this was a particularly unattractive scenario. Alternatively, an economically strong opponent could counterattack with a claim for damage compensation.[686] The combination of these counter-remedies tended to exert an additional dampening effect on consumer associations' willingness to sue.

The rule on costs relief

Already from the outset the lawmaker has been well aware that the risk of high litigation costs could significantly hamper the effectiveness of consumer associations in prosecuting unfair trade practices. Apparently, the Government saw one of the important tasks of consumer associations to lie in combatting misleading advertising campaigns of big enterprises in the retail sector, where competitors were not so keen to intervene.[687] Exactly in these cases, however, the risk of incurring high litigation costs could be a problem. Without an alleviation of the burden of potential litigation costs consumer associations could not be expected to fulfil their objectives and would be forced to accept premature and weakly founded settlements. Therefore the 1965 Novelle, while granting standing to sue to these associations, tried to introduce appropriate measures for reducing that risk. The issue of high litigation costs was addressed in a new § 23a UWG (now § 23 b).[688]

---

[685] Kur (1980), 149 ff.

[686] § 945 ZPO: „Erweist sich die Anordnung eines Arrestes oder einer einstweiligen Verfügung als von Anfang an ungerechtfertigt oder wird die angeordnete Maßregel auf Grund des § 926 Abs. 2 oder des § 942 Abs. 3 aufgehoben, so ist die Partei, welche die Anordnung erwirkt hat, verpflichtet, dem Gegner den Schaden zu ersetzen, der ihm aus der Vollziehung der angeordneten Maßregel oder dadurch entsteht, daß er Sicherheit leistet, um die Vollziehung abzuwenden oder die Aufhebung der Maßregel zu erwirken."

[687] BT- Drs. IV/2217, 6.

[688] § 23a Litigation costs in civil disputes: "(1)If a party to a civil dispute in which a complaint was filed under this Act presents a credible showing that the payment of costs according to the full amount in controversy would substantially endanger his economic situation, the court may direct pursuant to a motion by such a party that the obligation of this party to pay court costs be measured by an amount in controversy that is adjusted according to said party's economic position. The effect of the order is also that the beneficiary party shall have to pay the fees

The task, however, proved more difficult than at first glance. One major obstacle to achieving a satisfactory solution is the double function of litigation costs in unfair competition disputes. Litigation costs are, on the one hand, understandably a burden for the complaining association, especially in case of loss. One can assume that the higher the amount in controversy, the greater the costs and hence, the more averse would the associations be to litigation. Measures aiming at reducing the amount in controversy appear *prima facie* to benefit these associations. On the other hand, in unfair competition lawsuits litigation costs have partly acquired the character of a sanction. As pointed out by a number of authors, an injunctive claim in itself does not have a serious deterring effect. A party accused of having violated fair competition standards can easily commit itself to cease and desist from the allegedly offensive conduct without suffering notable economic loss. Only when it is a question of a particularly unique and successful marketing channel can its termination have serious pecuniary effect as such. The real deterring effect of injunctive relief suits has in German law been connected with the burden of litigation costs, and not with the injunction. Only with high amounts in controversy are litigation costs substantial enough to induce law-abiding conduct. [689]

Another crucial point for understanding the paradox of litigation costs is that in clear-cut 'routine' cases not requiring substantial preparation, a high amount in controversy could provide a good earning for the lawyers of the litigious association and the association itself. As mentioned above, the German system of litigation costs allows, by being bound to the amount in controversy and not to the actual resource expentidure on each particular case, for a serious margin between actually incurred costs and compensated costs. In this way a high amount in controversy may turn into a source of profit, especially for repeat players who, on the basis of extensive know-how accumulated in numerous proceedings, can realistically estimate the prospects for success.

A final piece in the puzzle relates to the inherent conflict of interests between lawyer and client when determining the amount in controversy and hence the probable litigation costs. For a lawyer, the bigger the margin between amount in controversy and time invested in preparation of the case, the greater of course the incentive to be involved in litigation. For the client bringing a suit a low amount in controversy is

---

of his attorney based only on such portion of the amount in controversy. To the extent that this party is charged with the court costs or assumes these costs, the court fees paid by the opposing party and the fees of his attorney must be reimbursed by this party based only on such portion of the amount in controversy. To the extent that the opposing party is obligated to pay or assumes the out-of-court costs, the attorney for the benefited party can recover his fees from the opposing part based on the amount in controversy applicable to the latter.
(2)The court can make the order contingent on the fact that the party also makes a credible showing that the costs of the legal dispute to be borne by it will not be directly or indirectly paid by a third party. Translation from the German text in Beier/Schricker/Fikentscher, *German Industrial Property, Copyright and Antitrust Laws, IIC* Studies (Munich: Verlag Chemie, 1989), 94 ff., 101. With the 1986 UWG Novelle § 23a UWG became § 23b and a new § 23 on determination of the value in dispute by injunctive claims was introduced (BGBl. I S. 1169).

[689] Borck (1978), 161 ff. A similar function of litigation costs is suggested by Kur. She rejects proposals of setting a ceiling (of DM 50,000) to the amount in controversy with the argument that this would favour the violator. "Damit würde es dem Verletzer zu einfach gemacht werden, die Kosten eines möglicherweise zu führenden Wettbewerbsprozesses als leicht zu verschmerzenden Kostenfaktor einer grösseren Werbekampagne einzukalkulieren. Die Neigung zu aussergerichtlichem Einlenken würde verringert." Kur (1980), 123 f.

preferable (not considering the above-mentioned repressive and deterring aspect of high litigation costs on the violator), also when the case is clear-cut. As Kur notes, even the simplest cases may take a surprising twist, for instance as a result of change of testimony of witnesses or other problems with evidence.[690]

All this explains the quandary experienced by plaintiffs (and their lawyers) when declaring their estimate of the amount in controversy, and consequently the difficulty for the courts to rule on this amount. By setting too low value in controversy, litigation costs would be less of a risk for the litigious association, but would no longer exert a deterring effect on the defendant (and on future perpetrators) or guarantee a profit to the association's lawyers. And conversely, by setting too high an amount, the risk of litigation costs on top of possible losing the suit increases, while the deterring effect and the profit prospects increase. The efforts to provide an effective solution to the litigation costs problem by way of legislation proved to be like squaring a circle. The familiar dilemma between promoting the interests of the right associations and stifling abuse can be recognized.

A major impediment to finding an appropriate solution is associated with the already mentioned philosophy of treating all plaintiffs equally. Consumer associations were singled out as main beneficiaries of the reform, but they were peculiarly enough not awarded any privileged position. With the rule on formal equality at the core of classical civil procedure, a deviation could arguably be regarded as violation of constitutional law.

In substance § 23a UWG almost literally followed a similar rule in the Patent Act (§ 53a PatG). The core of the rule consisted in a one-sided reduction of the amount in controversy, in favour of the economically weak party, leading to respective alleviation of the burden of litigation costs. The reduction was designed as asymmetrical and universal. It was asymmetrical in that it was exclusively granted in favor of the beneficiary. It was universal in that it applied irrespective of the beneficiary's capacity of plaintiff or defendant. When unsuccessful with a case, the beneficiary party was to pay court costs and attorney's fees (both its own and the opponent's attorney) calculated on the basis of the reduced value in dispute. Conversely, if the case was lost by the opposite party, the latter had to accept to pay litigation costs (including the fees of the beneficiary's attorney) on the basis of the full amount in controversy. For litigants in dispute with economically weak parties, this arrangement meant that even when winning a case they had to bear themselves the difference between the attorney's fees recovered from the loosing party (on the basis of the preferential value in dispute) and the actually disbursed attorney's fees (according to the full value in dispute). In effect, the arrangement increased the litigation risk for parties in dispute with economically weak opponents.[691]

One of the main weaknesses of this solution was the inequality of treatment between the parties on grounds of economic status.[692] Another aspect of the amendment that

[690] Kur (1980), 122 ff.
[691] Pastor, 'Die Streitwertherabsetzung nach dem Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb, des Warenzeichengesetzes und des Gebrauchsmustergesetzes vom 21.7.1965' (1965) *WRP*, 271 ff., at 279.
[692] Ibid.

prompted powerful objections from within the legal profession was what could be called its attorney-hostile implications. For the attorney of the beneficiary party, an order on reduction of the amount in controversy meant lower attorney's fees. Only in case of success could he claim fees on the basis of the full value in controversy by the opposing party. Obviously attorneys were hardly to be expected to advise their clients to apply for the reduction of such fees. In addition, a party could theoretically demand a reduction of the value in controversy without the consent of his attorney.[693] Filing an application for reduction of the amount in controversy did not require attorney representation and the attorney would not be notified and heard at issuing a court order. In general terms, attorneys in unfair competition cases could not be expected to welcome the proposed arrangement. The sole category of attorneys that could possibly benefit from the new provisions were those acting as initiators of clear but abusive disputes, toying with the possibility of reduced value in dispute to talk economically weak clients into litigation and relying on compensation of their fee if successful. In such cases § 23a UWG could play a role similar to contingency fees in the United States, an institute that is considered to violate *gute Sitten* in Germany.[694]

The Bill devoted special attention to alternative solutions discussed in the literature. Particularly interesting were the reactions of the Government as to the last of the discussed alternatives, namely that part of the litigation costs of the weak party be paid out of the public purse. The Government made the telling remark that it could not be the task of the state, beyond the limits of the institute of legal aid, to intervene and bear the litigation costs of private parties.[695] Despite the mixed and admittedly "*überindividuale*" (non-individualistic) nature of the interests entrusted to the procedural initiative of the consumer unions, in crucial instances of legislative decision-making the unions are consistently treated as private parties. The initial choice for private ordering thus predetermines the solutions and sets strict limits on the flight of legislative imagination.

In legal doctrine the rule was met with devastating criticism by the majority of legal writers, experts in procedure as well as in unfair competition law. Concerns were voiced as to the possible abuses of the rule. Since the preferential rule theoretically was applicable to all parties, plaintiffs as well as defendants, some predicted that it would in reality be mostly used by defendants.[696] On the other hand, the reduced risk of litigation costs was seen to promote the litigious activity of associations that would not earnestly pursue the general interest in fair competition.[697] The rule if actively invoked by parties and by consumer unions in particular, threatened to diminish the general attraction of UWG litigation[698] and to marginalize consumer unions as potential clients in the eyes of competent lawyers.[699]

---

[693] See Pastor (1965), 281.

[694] See in this sense Pastor (1965), 279 (womit das Gesetz seinen Gebührenanspruch zu einem (an sich unzulässigen) Erfolgshonorar umgestaltet hat).

[695] Drs. IV/2217, 8.

[696] Pastor (1965), 271 ff., 276.

[697] Borck, 'Nochmals: Aktivlegitimation für Verbraucherverbände und Wettbewerbsarmen-recht' (1964b) *WRP*, 398 ff., at 402.

[698] See in this sense Pastor (1965), 271 ff. and the reference there to the Position Paper of the Attorney Association, AnwBl, 1964, 169, 170. The Position Paper spoke according to Pastor of an intervention "close to expropriation".

[699] See in this sense Borck (1968), 4.

Despite taking a step in direction towards reducing the risk of litigation costs for economically weak parties, the legislator opted to leave the final word to the courts. § 23a was consequently not formulated as an unconditional rule, but as an opportunity. The court had the power to approve or to disprove an application and could thus exercise a considerable margin of discretion. The discretion of the court was moreover not only decisive for granting the reduction, but also for the size of reduction. [700] Given the array of different situations and possible combinations of economic positions, types of proceedings, and parties, the goal of achieving harmony between the decisions of the various courts and predictability of outcome was already from the outset a weak point of the regime.

The reactions of the judiciary to the rule were predictably disparate, a response enhanced by the dispersed character of litigation in UWG matters. In the course of its ambitious study on the activity of consumer associations, the Max-Planck Institute conducted a separate empirical and legal investigation on the role of litigation costs for the litigious activity of the associations and the practical effect of the rule on cost relief.[701] The overall conclusion of the study was that the courts revealed a reserved if not hostile attitude to this procedural institute. They tended to interpret the main criterion of "endangered economic situation" utterly restrictively.[702] Some courts expressed the view that the rule on cost relief was intended for associations consisting of individual end consumers, who were not in a position to make sufficient financial contribution to the associations's budget. When an association was composed by corporate members and prevailingly financed by public subsidies, the courts concluded that the economic position of the union could not be considered as 'threatened' and that consequently there was no room for applying § 23a UWG.[703]

The practice of the courts was discordant also in respect of the amount of evidence needed to substantiate an economically imperiled situation. Whereas some courts were satisfied with a declaration under oath by the unon's managing director, others required excerpts from fiscal books, statistics over pending and finalized trials and out of court settlements.[704] An interesting argument for dismissing a claim for reduction of the value in dispute was advanced by LG Bremen. Without contesting the difficult economic situation of the claimant association, the court found the dispute to concern such a minor violation that it did not justify the decision of the association to start legal proceedings in the particular case.[705] One finding of the Max-Planck Institute study was that the District Court in Berlin where the *Verebraucherschutzverein*, i.e. the litigious association of the VZ, had its seat and filed most of its claims, demonstrated a much more positive attitude to the work of the association. This court was

[700] See Pastor (1965), 283.
[701] Kur (1980).
[702] Borck (1968), 1. Kur (1980), 122.
[703] Most courts rejected attempts on the part of consumer associations to have their economic situation assessed on the basis of their aggregate litigious activity throughout the year. Cf. the analysis in Kur (1980), 113 ff. with further references to case law.
[704] Kur (1980), 114.
[705] „Ein Verein, welcher die Interessen der Verbraucher zu vertreten hat und dessen Mittel gering sind, solle mit diesen Mitteln haushalten und sie bei praktisch bedeutsamen Wettbewerbsverstössen einsetzen. Es sei unangebracht, in einem solchen Falle zu Lasten der Staatskasse und des den Verein vertretenden Rechtsanwalts eine Streitwertbegünstigung anzuordnen." Quoted after Kur (1980), 116.

conspicuously relaxed on all issues connected with determining the value in dispute, applying the cost relief rule, evidence of economic situation, etc.[706]

As in the case of the right of action of consumer associations, the discussion on the costs of litigation demonstrates widely differing views as to the role and place of consumer organization in the institutional texture of unfair competition law. Some (including the legislator, at least nominally) wanted to see indispensable agents of underrepresented diffuse interests in these organizations, fulfilling an important function in instances where the other remedies under the UWG failed. Others tended to trivialize the tasks of these organizations and to limit them to pure policing of minor, clear-cut offenses. Attempts of consumer associations to set their ambitions higher and to bring more risky, precedent setting litigation were met with disproval by the courts and could entail living with the risk of full litigation costs. Strangely, even consumer adocates argued that the rule would be irrelevant for consumer organizations since their main task was enforcement in manifest and indisputable cases of violation.[707] These cases did not necessarily involve controversy, but were under all circumstances non-risky, since they were 'rehearsed'in previous disputes. According to this opinion, consumer unions are strangely expected to take care only of the clear misdemeanors, whithout actively shaping the standards of fair trading.[708]

The whole debate, legislative as well as scholarly, was permeated by mistrust in the human capacity to act on idealistic, non-profit grounds. The risk of abuse of the right of action in order to pursue egoistic material interests, e.g. by fee-chasing lawyers or by hidden competitors, formed a central point in the discussion and influenced the specific formulation of the legal rules. The discussion failed to tackle the particular situation of consumer unions, namely the obstacles to organizing and representing consumer interests, the economic situation of consumer union and, respectively, the effect of the risk of high litigation costs on their readiness to sue. Consumer unions were treated on equal terms with other organisations and more attention was actually devoted to the effect of the rule on other actors, such as small or big enterprises.

Renewed attempts to improve the regime of litigation costs for unions and associations were made in the course of the reform debate of the 1970s. Alleviation of litigation costs was the main thrust of the reform proposals of both the CDU/CSU and of the Government. Although consumer unions were always at the center of the proposals, the drafts invariably proceeded from the assumption of equal treatment of all litigants. The different drafts advanced different technical solutions to the problem, remaining, however, within the same basic model. A ceiling on the value in dispute, with the aim of limiting the litigation risk for associations, was one alternative.[709] In addition, a rule was proposed which would oblige courts to take the financial situation of the

---

[706] Kur (1980), 114.
[707] *Ibid.*, 401.
[708] Borck (1964b), 398 ff., at 401. See also Borck's view reiterated in his later article, Borck (1968), 4. Kur is critical of such views. She rightly points at the distorted priority setting that would follow, if consumer associations were to select and litigate only the simple, deadsure cases of competition offences. Kur (1980), 123.
[709] For a positive view on this proposal with the sole reservation that the ceiling was set too high, see Reich (1978), 104.

union into account, while not considering state subsidies.[710] As already discussed above, these reforms never passed parliament.

The twists and turns concerning the cost of litigation for consumer organisations clearly demonstrate the institutional difficulties of pursuing public policy with the means of private law and through the ordinary civil law courts. [711] Evident from the analysis of this legislative innovation and its 'internalization' by alternative institutions is that the choice not to transgress the borders of private ordering, but to follow principles of equality of arms and equal treatment of all parties, has created problems in all settings. The desire to create a beneficial climate for consumer unions was never supported by clear, viable and efficient legislative measures. By confusing the justifications for intervention and placing equivalent weight on all groups, which purportedly represented interests protected under the UWG, the government failed to send a clear signal to the addressees of the statute and to the judiciary. Trapped in the self-imposed private law confines, the reform remained a flop. As for the procedural amendments, they were regarded as partly cosmetic, not providing the necessary radical shift towards a consumer-friendly constitution of the UWG.

Costs of pretrial notifications
Even when successful, the plaintiff can still be obliged to bear the costs if the defendant has not given sufficient cause for instituting judicial proceedings. This is in particular so if the defendant promptly admits the claim in the first hearing (*Verhandlung*) (§ 93 ZPO).[712] This feature of civil procedure has acquired substantial importance in unfair competition cases. Since the injunctive relief constitutes a relatively mild intervention in the legal sphere of the defendant, the latter would often have an interest in admitting the claim and thereby avoiding litigation costs. For the plaintiff, the only way to insure him- or herself against such eventuality is by serving a pretrial notification, requiring that the infringer voluntarily undertakes to cease and disist from the infringement under threat of penalty.[713] The failure of the infringer to submit such a declaration would normally be treated as giving sufficient ground for a lawsuit and would in turn invoke the ordinary rules on allocation of litigation costs. By contrast, to proceed to litigation before requiring voluntary injunction would for the claimant entail a risk of of being charged with full litigation costs.[714] A pretrial notification is required prior to instituting preliminary injunction proceedings, but also before starting the main trial after preliminary injunction has been granted. This

[710] BT-Drs. 8/1670, 12. Similar proposals were advanced in the Government Bill BT-Drs. 8/2145. Stellungnahme des Bundesrates, 33, Gegenausserung der Bundesregierung, 40.
[711] Hart/Joerges (1980), 105.
[712] § 93 ZPO, „Hat der Beklagte nicht durch sein Verhalten zur Erhebung der Klage Veranlassung gegeben, so fallen dem Kläger die Prozeßkosten zur Last, wenn der Beklagte den Anspruch sofort anerkennt." See Baumbach/Hefermehl (1998), Einl.. UWG, Rdnr. 526, 420.
[713] Melullis, *Handbuch des Wettbewerbsprozesses,* 2 Auflage (Köln: Dr. Otto Schmidt Verlag, 1995), 404 ff. It is to be underlined that the a declaration to cease and desist would not make judicial proceedings obsolete and would not respectively have the effect on the allocation of the costs secured by penalty (strafgesicherte Unterlassungserklärung). Only then can the defendant really prove that his commitment to cease with and desist from the infringement is seriously intended. Baumbach/Hefermehl (1998) Einl. UWG 528, 435.
[714] In any case the plaintiff has to prove in the proceedings that he has given the necessary notification, or that such notification for some reason is obsolete. The defendant has in his turn to prove that he has submitted a voluntary cease and desist declaration under penalty and thus has deprived the plaintiff of his/her cause of action ("klaglos gestellt hat"). Baumbach/Hefermehl (2001), Einl. UWG, Rdnr. 525 ff. with further references.

notification is called finalizing notice (*Abschlußschreiben*) and is considered equally desirable in order to avoid unnecessary trials.[715] A notification procedure does not require, but is often handled by a lawyer experienced in unfair competition law matters.

A controversial issue in both case law and legal scholarship regarded the costs of this pre-trial activity. The rules on litigation costs in the ZPO referred to costs incurred in the course of judicial proceedings and failed to cover pre-trial expenses. More importantly, in case a trial was avoided by way of voluntary cease and desist declaration, the question of who should defray notification costs remained unsettled. The problem was a general one, though raising particular difficulties in regard to the *Verbandsklage*. Individual competitors possessing a right of action could show that they were directly affected by a particular violation of the UWG. Therefore the costs of pretrial notification were easily qualified as consequential damage (*Folgeschaden*) under general rules of the BGB.[716] The situation was different in the case of associations. They were generally considered to sue in the public interest and therefore constructions from tort law were ill-suited.

The case law of the Local Courts (*Amtsgerichte*) and the Regional Courts (*Landgerichte*, LG) was inconsistent in this regard. Whereas some courts insisted on restrictive rules for compensation of notification costs by referring to the general regime of damage compensation,[717] other courts were generous in recognizing the costs, either as part of litigation costs or by relaxed interpretation of general tort law rules. In 1970 the BGH put an end to this discordant practice by expressly recognizing the costs for pre-trial notification procedure of competition associations as recoverable.[718] The doctrine elaborated by the Court in order to sustain this conclusion deserves particular attention. Unable to find support in stringent procedural rules or rules on damage compensation, the Court resorted to an expansive interpretation of a rarely applied institute from the BGB, namely 'agency of necessity' (*Geschäftsführung ohne Auftrag*).[719] It was considered in the interest of the infringer to be dissuaded from his illegal conduct in a pre-trial consultation, so that to avoid burdensome and costly litigation. Under the doctrine compensation was awarded without proof of fault (*Verschulden*).[720] The lower instance courts diffidently followed this precedent.

---

[715] This notification is called a finalizing notice (*Abschlußschreiben*) and is equally useful to avoid unnecessary trials. See Melullis (1995), 405.

[716] § 823 BGB, cf. Melullis (1995), 431, 436.

[717] The courts tended to accept that there was no general duty of compensation of costs in German law. The protection of one's own legal sphere was a task of each legal person and the costs connected with such protection should only be compensated in case of damages, or in case of special rules of civil procedure. See GRUR 1970, 189 ("Fotowettbewerb").

[718] BGHZ 52, 393; GRUR 1970, 189 ("Fotowettbewerb") (NJW 1970, 243) „Wer einen Wettbewerbsverstoss begangen hat, muss einem Verein zur Bekämpfung des unlauteren Wettbewerbs die notwendigen Aufwendungen für eine vorprozessuale Abmahnung erstatten." According to Reich the doctrine extended only to business unions, Reich (1978), 103, but the dominant opinon seems to be that the rule applies equally to consumer unions.

[719] §§ 683, 670 BGB, Melullis (1995), 436 ff.

[720] See reference in Reich (1978), 103.

As to the size of costs recognized, according to the BGH these should cover attorney's fees only to the extent that the services of an attorney were necessary.[721] In a subsequent decision, the BGH introduced a qualification in the sense that an attorney could be regarded as necessary in difficult and atypical cases, which the *Verband* could not be expected to handle with own expertise.[722] This judgment implied that a certain level of organisation and professional competence should reside within the litigant associations. When no attorney was involved the first and second instance courts established the practice of awarding a lump sum reimbursement for the expenses of the association in connection with justified pretrial notifications. These sums are usually calculated as a percentage on the basis of the organisation and staff costs of the association.[723]

Opinions in legal doctrine as to this quite ingenious string of jurisprudence differed widely. Many lawyers involved in unfair competition disputes supported a generous line of interpretation and even argued in favour of an express legislative provision recognizing attorney fees for pretrial notification as recoverable.[724] A similar view was held by numerous consumer advocates. Commenting on the 1978 Government Bill for reform of UWG, Reich regretted the failure of the Government to address the issue of compensation of losses suffered by consumer unions in the course of law enforcement, i.e. attorney costs, costs for pre-trial notification, expertise, etc.[725]

On the other hand, a number of legal scholars and practicioners were critical of this turn in the federal case law.[726] Part of the criticism was based on systemic arguments, namely that the new judge-made rule was stretching concepts from classical civil law far beyond their legislative intent and reasonable interpretation. More importantly, the new doctrine, helped to convert prosecution of UWG offences into a rewarding, income-generating activity and thus opened the door to widespread abuse of legal rights.[727] The cost of pretrial notification usually consisted of attorney fees (calculated as a percentage on the basis of the value of controversy in a main trial), a lump-sum for expenses (postage, etc.) and a value added tax. When costs of notification were claimed in a separate trial, the cases were normally filed at the lowest instance courts (the *Amtsgerichte*) due to the low value of controversy.[728] These courts were as a rule inexperienced in unfair competition disputes and tended to accept an excessively high

---

[721] BGH, GRUR 1970, 189 ("Fotowettbewerb"). See Halfmeier, 'Der Anspruch der Verbraucherverbände auf Kostenerstattung anlässlich der Durchsetzung von Unterlassungsansprüchen nach *UWG* und AGB-Gesetz' in: Brönneke (ed.), *Kollektiver Rechtsschutz im Zivilprozess* (Baden-Baden: Nomos, 2001).

[722] See Halfmeier (2000), 146 with reference to BGH NJW 1984, 2525.

[723] Halfmeier (2001). See Baumbach/Hefermehl (1998), Einl. UWG, Rdn. 556, 432.

[724] See Borck's appeal for a specific rule assuring coverage of attorney fees for correspondence and pretrial notification procedure, Borck (1968), 4.

[725] In his view these were the real damages suffered by consumer unions whose compensation was vital for the effective work of the unions. Reich (1978), 100 ff., 103.

[726] See Klaka, Comment on Fotowettbewerb decision (1970) *GRUR*, 190 ff; Kisseler, 'Das Klagerecht der Verbände in der Bewährungsprobe' (1977) *WRP*, 151 ff.; Pastor, 'Kostenerstattung bei erfolgeicher Verwarnung' (1979) *WRP*, 423 ff.; Borck, 'Ansichten und Argumente zur Erstattung der Abmahnkosten' (1981) *WRP*, 438; Melullis, 'Zum Unkostenerstattungsanspruch bei der Verwarnung durch Verbände im gewerblichen Rechtsschutz' (1992) *WRP*, 1 ff.

[727] Pastor (1978), 249 ff

[728] It was then, as a rule equal to the amount of the notification costs.

basis for calculation of the attorney fee costs.[729] This enhanced the tendency towards abuse of the collective right of action.[730]

This inventive piece of judicial lawmaking has apparently been prompted by a desire to redirect the incessant stream of litigation from the courts to voluntary settlement.[731] In institutional terms, this was a way to redistribute decision-making competences by creating more clear, predictable and attractive conditions, and hence increased incentives, for out-of-court settlement. In other words, it was hoped that a shift of decision-making burden from the courts to the marketplace could be accomplished. The doctrine that was used to justify the move was, however, unorthodox if not outright bizarre.. As noted by Schricker, it is hard to understand how someone who claims his or her rights and files a pretrial notification for avoiding future litigation costs could be acting as an agent (or in the interest) of the adversary:

> Dass jemand, der ein eigenes Recht geltend macht und dies aus Prozesskostengründen mit einer Abmahnung einleitet, die Geschäfte des Gegners nach Massgabe von dessen Interesse und Willen führt, leuchtet jedoch nicht ein. Vollends zur Fiktion wird die Fremdgeschäftsführung, wenn das Ganze der Einnahmenerzielung des Verbandes dient oder wenn Aufträge von Wettbewerbern des Abgemahnten ausgeführt werden.[732]

At the end of the day, it is doubtful whether the institute of 'agency of necessity' really brought about the expected reduction of case load before the courts. Whereas the doctrine may have induced some potential litigants towards voluntary settlement, the reform has created a major stimulus for the existence and prosperity of abusive *Wettbewerbsverbände* (or as they also became known *Abmahn-* and *Gebührenvereine*). Thus it has arguably contributed to the excessive increase of the total amount of prosecutions under UWG.[733]

The 1986 UWG Novelle tried to limit the negative effects of the 'agency by necessity' doctrine and to reduce the attractiveness of pre-trial prosecution of offences. The proposed § 13(5) expressly denied compensation for the first pre-trial notification, while endorsing the judicial interpretation in respect to subsequent notifications.[734] Even this soft attempt to set reasonable limits to the collective right of action was met by criticism from all quarters and was eventually abandoned.[735]

---

[729] The courts tended first, to accept an unrealistically high sum in controversy for the main trial, and in addition calculated the attorney fees on the basis of a higher percentage from the normal attorney fees than usual (7/10 instead of 5/10). Pastor (1978), 249.

[730] One way for the courts to circumvent the risk of abuse was to recognize the right to use the assistance of an attorney only for associations that could demonstrate a regular litigious activity. The expected effect was to suppress the activity of so called "Abmahnvereine" dealing mainly with pretrial notifications as a source of remuneration.

[731] In this sense Schricker, 'Hundert Jahre Gesetz gegen den unlauteren Wettbewerb – Licht und Schatten' (1996a) *GRUR Int.*, 473 ff., 478: „Die Rechtsprechung hat gewiss bei der richterrechtlichen Ausgestaltung der Institution der Abmahung rechtsschöpferische Kraft gezeigt; das im Laufe der zeit aufgebaute Regelwerk dient der Vermeidung von Prozessen und der Rechtssicherheit."

[732] Schricker (1996a), 478.

[733] In this sense see Schricker, *Ibid.*

[734] BT-Drs. 10/4741, 6, 17.

[735] Melullis/Eheckelmann, 'Beibehaltung der Kostenpauschale – ja oder nein?' (1982) *WRP*, 560 ff.; Uedelhofen, Die kostenlose Erstabmahnung – eine wirkungslose Waffe gegen den unseriösen Abmahnveren, WRP 1982,

5.3.3.4 Problems of decentralized decision-making

Multiple litigation

Treated as a private law area, unfair competition law logically required application of the general principles of civil procedure. This implied court decisions in unfair competition law having effect only *inter partes* (between the parties). Consequently, a decision even after taking effect allowed for other claimants to sue on the basis of the same unlawful conduct. It sufficed to demonstrate that the procedural prerequisites were fulfilled. The fact that there already was a valid injunction concerning the same infringer and the same violation was irrelevant.[736]

This principle, as seen in the previous chapter applied not only to individual competitors, where the connection between personal interest and right of action was easy to prove. As a result of constant accumulation of case law, the principle was extended also to competition associations. The courts regarded business associations as exercising an autonomous right of action, independently of the rights of their members, which entailed the possibility of multiple litigation in the same matter. This was the gist of the seminal *Markenschutzverband* decision of the RG pronounced already in 1928.[737] The BGH carried the doctrine further and logically extended it to consumer associations.

The main justification for this aggressive interpretation of the right to sue lies in the fact that the interests of other potential plaintiffs and the general public are not considered fully safeguarded by a valid injunction issued upon action by an individual plaintiff. There were no assurances that the initial plaintiff would pursue the matter seriously and would require the imposition of the penalties by subsequent violations of the injunction. Only when the interests of other plaintiffs and of the general public were guaranteed "with a probability close to certainty" could subsequent injunctive actions by other plaintiffs be rejected as obsolete. For instance, in case the first plaintiff had agreed with any subsequent plaintiffs that he would pursue violations of the injunctions upon notification on the part of those same plaintiffs, this could be considered a sufficient guarantee. The interest of protection was in such cases no longer present.

The doctrine of multiple litigation in the same matter provides ample evidence of the excessive litigation-friendliness of the German unfair competition law. Due to its extreme consequences, it had attracted criticism beyond the profession of legal scholars. In 1981 the conservative newspaper *Die Welt* published a spectacular story about a small car repair shop which had received multiple pre-trial notifications on grounds of a minor violation of the Legal Advice Act. Among the complainants were one competition union, one interest union, and several attorneys. After the failure of the owner of the shop to quickly concede to the demands of the complainants, the latter filed separate claims for preliminary injunction at the Regional Court in Munich, which were granted by the court.[738]

564; Loewenhein, 'Die Erstattung von Abmahnkosten der Verbände in der neueren Rechtsentwicklung' (1987) *WRP*, 286 ff.

[736] Baumbach/Hefermehl (1998), § 13 UWG, Rdnr. 7 ff., 1330.

[737] RG 120, 47; cf. Ch. 4.32.3.2 above.

[738] See Kur (1981), 558 ff., 564.

The doctrine of multiple litigation in the same matter has its roots in the dominant private law understanding of the right of action in unfair competition law.[739] In legal doctrine proposals were advanced to treat the right of action of collective entities (unions and associations) not as based on independent substantive 'private' right (*materielles Recht*), but as a limited and isolated procedural authorization of quasi-public character. This would allow the unions to act as a sort of economic police.[740] In case the public interest would be considered as safeguarded by a single court proceeding, multiple actions might be avoided. The risk of abuse could be limited by offering other associations the right to enter into the proceedings. Interestingly, the first draft of the 1896 UWG stipulated that a pending case would preclude other associations from filing an independent lawsuit. Instead an opportunity was envisaged for these associations to enter the procedure as joint plaintiffs.[741]

Naturally, a broad opportunity for a number of potential plaintiffs to bring an injunctive action before a court against the same infringer, on the basis of the same conduct, raises the question of how to reconcile the decisions made in parallel proceedings. There is an obvious risk that proceedings may be instituted before more than one court, which in turn might produce different decisions on substance. In order to avoid competing decisions it is crucial that the *res judicata* of the original decision can be lifted.[742]

It is interesting to note the decision of the Court in Hamburg that in prosecuting infringements against fair competition different unions and associations are not in competitive relations with each other. The court held that the unions do not act "with a competitive end" (*zu Zwecken des Wettbewerbs*), thus refusing to treat enforcement under UWG and the associated cashing of *Abmahgebühre* as a market activity[743]

Jurisdiction (Gerichtsbarkeit)
The fact that the ordinary courts are competent in matters of unfair competition law brings about significant diversity of decisions and uncertainty for the relevant parties regarding the outcome of legal dispute.[744] That different courts tend to develop different practices, especially in the absence of authoritative precedent by the BGH, is evident to anybody with insights into German unfair competition law. This on the one hand depends on the varying competence of the courts, and, on the other, on the

[739] By contrast, in case the perpetrator has submitted to a negatively affected "*Gläubiger*" (creditor) a cease and desist declaration secured by a penalty ("*strafgesicherte Unterlassungserklärung*"), then the danger of repeated infringements is usually regarded as eliminated also in view of the interests of other affected parties. The substantive rights of action of these latter parties can therefore be considered extinguished. Everything still depends on the individual case, though. Decisive are the opportunities for sanctioning the infringement, and in particular, the willingness of the *Gläubiger* to leave no doubt that the cease and desist declaration is seriously intended. Baumbach/Hefermehl (1998), § 13 UWG, Rdnr. 8b, 1330. BGH GRUR 60, 379/381 ("Zentrale");
[740] See Kur (1981), 565.
[741] Kur (1981), 565, fn. 68 with reference to Hadding, JZ 1970, 306.
[742] On this question, see Baumbach/Hefermehl (1998), UWG § 13, Rdnr. 9, 1330-31. Parallel proceedings may also have an effect on litigation costs and in particular on the value in controversy (*Streitwert*). According to Hefermehl, there may be a reason to set the value of subsequent lawsuits somewhat lower than in the original lawsuit. Even here, however he underlines that this should not be taken as a rule and has to be weighed for each particular case. See Baumbach/Hefermehl (1998), UWG § 13, Rdnr. 9, 1330-31.
[743] Baumbach/Hefermehl (1998), § UWG § 13, Rdnr. 10, 1331.
[744] See the complaints of Borck (1968), 3.

frequency with which its individual members face unfair competition disputes. In the critical words of Pastor:

> Für die Anwälte kommt es dadurch nicht so sehr darauf an zu weisen, was Recht ist, sondern was das eigene OLG dazu meint." [745]

One reason why one should be particularly concerned about the dispersed jurisdiction of different courts and court chambers is the fact that unfair competition law is so vague and open to interpretation. It is not the need for expertise, in the sense of empirical and theoretical knowledge (i.e. about economic relations and theories) that requires concentration. It is the need to achieve acceptable uniformity of interpretation of exceedingly broad and flexible standards. Whereas there in many areas of law are clear guidelines in the legal text or in the preparatory material as to interpretation, in this field it is almost entirely left to the judiciary. The disparity of outcomes turns chance and arbitrariness into constant elements of unfair competition law.

A move towards concentration of adjudication in unfair competition law had been spontaneously taking place within a few Regional Courts und Higher Regional Courts (*Oberlandesgericht*, OLG). Following the 1969 UWG reform this concentration was institutionalized in the new § 27 II UWG. The *Länder* Governments were urged do designate certain Regional Courts as specialized courts for unfair competition law disputes for the territory of several Regional Courts. The explicit objective was ensuring uniformity in case law. A concentration of the revision within the *Erstes Zivilsenat* of the BGH was another factor in attaining a measure of uniformity and consistency in case law.

Regarding territorial jurisdiction developments took a different turn. The original rule of § 24 UWG allocated jurisdiction to the courts of the place where the defendant has his place of business or his residence. In case law, however, an alternative practice on evolved, being particularly favourable for the suing competitor. Rather than applying § 24 UWG, the courts followed the rules on jurisdiction applicable for torts, allocating jurisdiction to the place where the act of infringement occureds.[746] Given the fact that unfair competition claims often concern marketing campaigns with a broad geographic spread, the plaintiff was frequently in the position of being able to choose between several courts (the rule was therefore called 'flying jurisdiction'). This favorable interpretation was, however, not extended to the actively litigating unions, since the latter did not sue on the basis of direct infringement of their interests. To remedy the situation the 1969 UWG Novelle took the radical step of granting all litigants the option to sue at the place of infringement. The implications of this broad rule on optional jurisdiction were criticised in legal doctrine. It often exposed undertakings to the excessive litigation by certain professional litigants causing substantial costs and administrative nuisance.[747]

---

[745] Pastor (1978), 245, 253 ff.

[746] See § 32 ZPO, "Für Klagen aus unerlaubten Handlungen ist das Gericht zuständing, in dessen Bezirk die Handlung begangen ist."

[747] See Borck (1968), 3. With the 1994 UWG Novelle the provision on "fliegende Gerichtsbarkeit" was abolished, see Ch. 7.3.1.1 above.

5.3.3.5 Remedies: the debate on damage compensation for consumers

The injunction as a most typical remedy

In the process of enforcement a particularly important role is played by the institute of preliminary injunction (*einstweilige Verfügung*). Only when a it is easily accessible and effective can one speak of the injunction as an appropriate tool for combatting unfair trade practices. In the 1970s it was according to Schricker possible to get a preliminary injunction within a matter of hours.[748] The order on preliminary injunction often brought about a final settlement of the dispute, with the defendant voluntarily submitting himself to the order and thus avoiding high litigation costs.

Damages

Genuine belief in consumer protection as a full-fledged and independent objective of the UWG would require adequate remedies at the disposal of individual consumers and consumer associations. The injunctive action of consumer associations was admittedly a very weak remedy, producing only *ex post* redress with practically no consequences for the already completed unfair conduct. The trader involved in unfair marketing would normally be able to profit from his unlawful conduct. At the same time, consumers who had suffered damages as a result of the marketing campaign would not receive compensation. This situation had a negative impact on the incentives of consumer organisations to litigate and reduced the preventive effect of the law.

The question of new and more efficient remedies had preoccupied lawmakers on a number of occasions. Yet it was the 1978 governmental Bill for UWG reform which submitted the most radical proposals. The Bill envisaged a right for damage compensation to individual consumers in case they were induced into purchasing a good through an unfair and deceptive trade practice under §§ 1, 3, 4, 6-6c, 7 Abs. 1 §§ 8, 10, 12 UWG (draft § 13a UWG).More importantly, for the first time a proposal for collective damage compensation (to be claimed aggregately by consumer unions) was put to parliamentary deliberation in Germany.[749] Finally, a right of the individual consumer to retreat from a contract that had been concluded as a result of misleading or unfair marketing was stipulated. The parallel CDU/CSU draft also envisaged a right of damage compensation for the individual consumer, though without attempting to solve the tricky issue of joining the claims (*Bündelung gleichgerichteter Ansprüche im Prozess*).[750]

The drafters were aware of the difficulties accompanying the enforcement of individual consumer damage claims. Common sense reasoning concerning the disproportionality between the size of the damage and the resources required by a lawsuit, as well as expericence from foreign jurisdictions (e.g. Switzerland), reinforced pessimism as to the ability of consumers to use this remedy. The introduction of a damage compensation claim for individual consumers had mostly a symbolic character. As the Bill proclaimed in a subheading, the purpose of the amendment was to achieve equality between producers and consumers under the law (*Gleichstellung*

[748] Schricker (1975), 231. See Baumbach/Hefermehl, Einl., § 25 UWG

[749] The reform proposals built on the well-known empirical study conducted by the Max Planck Institute, attempting to estimate the damages suffered by consumers as a result of unfair and deceptive trade practices. See v. Falckenstein (1978).

[750] See Reich (1978), 104.

mit Mittbewerbern). The Government sought support in the dominant opinion in legal doctrine, according to which the UWG with equal zeal protected the interests of market competitors, consumers and the general public. It also referred to an authoritative opinion that the law in its then valid version did not live up to these declarations. Consumers were not given similar remedies and incentives to seek protection under the law.[751]

An important component in the draft was therefore the attempt to include a provision allowing for multiple consumer claims to be aggregated and collectively asserted before the court by consumer associations. In this part the draft came closer to the American institute of class action, which at the time was quite a revolutionary idea. The scope and ambition of the proposal were softened by a number of conditions. For instance, a collective damage compensation would be made possible first after the affected consumers had relinquished their individual claims (*Abtretung*). Moreover, the consumer union making use of the opportunity to pursue damage compensation was to request a permit by a relevant supervisory public authority under the Act on Legal Advice.

In cases of incorrect advertisement inducing the buyer to conclude a contract, damage compensation was to be calculated according to one of two alternative models. According to the first model, damage compensation was to cover the costs inflicted on the consumer calculated as the difference between the price and the 'real' value of the goods, services or rights. Alternatively, damage compensation would be awarded according to the difference between the 'real' value and the value of the goods cited in the advertising statement. Notably, even damages beyond the scope of these two alternatives were not excluded.[752]

The reform on remedies was prepared and shaped by the scholarly debate. An expert opinion in 1975 was submitted by Mertens to the Commission for Combat of Economic Crime. Mertens highlighted the fundamental impact which a reform of tort law and granting right of compensation, to be collectively exercised by consumer unions, could have on the system of private law in Germany. In particular, he indicated that the aggregate enforcement of individual damage compensation claims might 'politicise' courts towards effective protection of social interests. Actions on damage compensation, which would go beyond the pure recovery of economic loss suffered by an indivudual legal subject, were predicted to have reallocation effects of a macroeconomic nature. It was a question of 'social' damages, whose consequences could bring about a pradigm shift in the functions of private law and of the judicial process. From the perspective of legal policy, Mertens emphasised the desirability of channeling private initiatives through appropriate legal avenues. Inspiration was drawn from the U.S. experience with class action.[753]

Schricker, on the other hand, was critical of the class action. He advanced a variety of arguments. One group of objections were related to efficiency. Here the costs of distributing and paying back the awarded damages and in general the organisational

[751] BT-Drs. 8/2145, 15.
[752] See proposed § 13 a III UWG-E, BT-Drs. 8/2145, 5.
[753] Mertens, 'Kollektivrechtlicher Schadensersatz als Mittel des Verbraucherschutzes' (1975) *ZHR*, 438 ff.

difficulties of the practical implementation of the class action were emphasized. In a different vein of argumentation, Schricker questioned the conformity of class action with constitutional principles of due process.[754]

With the change of government and increased calls for regulative restraint, the governmental Bill of 1978 remained without legislative effect for the duration of the legislative mandate. In the next parliament the Bill was submitted anew, but failed to reach a first reading. Some of the proposals resurfaced in the course of the next round of legislative reform related to the UWG, in 1986. But the only amendment in the area of remedies that found its way into the statute was the right of consumers to retreat from contract, admittedly a restricted solution. To many, this was a disappointing end to a long and ambitious legal policy debate.

Information remedies

Another attempt to improve the quality of the judicial process as a decision-making institution in marketing practices concerned the rules on evidence. The very rationale of consumer protection in UWG was grounded on recognition of the existing information gap and asymmetry between consumers and traders. By shifting the decision-making from the market to the judiciary, the existing gap tended to reappear under a different guise. In a judicial process based on the assumption of parity and equality between the parties, the plaintiff had to bear the burden of proof. To compensate for this deficiency of the judicial process many argued for a rule placing the burden of proof with the party that had easier access to the necessary information.

In the course of the reform discussions of the 1970s a legislative proposal for reversal of the burden of proof was advanced in the Bill of the It was suggested that the burden should be on the defendant as long as the evidence "lay in his sphere". The reversal was conditioned in multiple ways. On the one hand, it would be triggered only in case there were "sufficient supporting facts" (*hinreichende Anhaltspunkte*) indicating that the advertisement at issuedid not correspond to the truth. On the other hand, it would only concern the proof of such circumstances that lay within the defendant's sphere (*Bereich*), and that he could reasonably be expected to present and prove. Finally, the reversal would take place only if a clarification of the respective circumstances was desirable but could not be delivered by the plaintiff. The proposal was based on the so-called *'Sphärentheorie'* (sphere doctrine) developed in a decision of the BGH. The Court found the reversal possible because "the factual circumstances that were decisive for determining the truthfulness of the advertising claims of the defendant were outside the reach of the plaintiff and the plaintiff does not have any possibility to conduct own investigation in the matter."[755] As the Bill admitted, in this respect it did not propose any grand revolution, but rather aimed at codifying the existing case law and making it generally applicable for the sake of predictability.[756]

---

[754] Schricker (1975), 246.

[755] BGH GRUR 1963, 270 ("Bärenfang"). The dispute in this much celebrated decision concerned a honey liquer traditionally produced in Eastern Prussia. The defendant was marketing his product as "being produced after an old East-Prussian recepy". The matter was refered back to the second instance court, extensively motivating a possibility to reverse the burden of proof towards the defendant in case the decisive circumstances for the case are in his sphere of control. It should be noted that the reversal in this case was not in any way inspired by concerns for higher protection of consumers.

[756] BT-Drs. 8/1670, 12. For positive comments on this proposal, see Reich (1978), 103.

The governmental Bill strangely did not tackle the problem of allocation of the burden of proof. In this respect it gave no consideration to the recommendation of the Consumer Council (*Verbraucherbeirat*).[757] Together with the other initiatives discussed in the 1970s also this proposal thus ran into the sands.

The analysis of the notion of consumer protection as part of unfair competition law demonstrates that the real implementation has been fraught with difficulties. Historical, political and dogmatic factors have united to prevent the proclaimed equality of objectives from becoming reality. Historically, the fact that consumer protection was to be integrated into a well developed legal area with its sophisticated terminology, expert language and 'clientelle' of specialised lawyers, business unions and small and middle-sized traders represented a formidable barrier to new approaches and experiments.

Politically, the lawmaker never gave ample expression of consumer protection concerns in the UWG. The only mention of consumers remained the one in § 13 II UWG. Likewise, measures to adapt the judicial proces to the needs of collective interest representation were always adopted while considering the situation of business associations. This is true about provisions on litigation costs as well as in the case of burden of proof. More specifically, the lawmaker refused to allow damage compensation as a remedy available to individual consumers or consumer associations.

Dogmatically, the classification of the UWG under private law posed problems on all levels. Reform proposals had to be systematically ordered according to the complex structure of German private law and procedure. Protection of abstract collective and public interests stood out as a foreign body in this system of rules oriented at individual protection. Likewise, treatment of collective entities such as consumer and business associations within the context of traditional civil litigation, based on individual interests, led into the unknown.

5.3.4 Organizations as a bi-product of the institutional framework

5.3.4.1 Preserved position of business associations

The changes in the UWG in the course of two decades, from the 1960s to 1980s, in effect strengthened the position of business associations in unfair competition law. The level of industry organisation in Germany was traditionally very high and there is multiple evidence of the preserved influence of professional and corporate associations.[758] All amendments in the procedural rules of the UWG that were primarily intended to promote the litigious activity of consumer associations served to benefit business associations. The position of the lawmaker was that business and consumer unions should enjoy equivalent standing and consumer unions not be granted a privileged position. Rules on litigation costs and on standing were consequently formulated in a neutral manner, and could be used by organisations of consumers and of traders similarly. In addition, the vague and open provisions on standing made it possible for business organisations to step forward as agents of their

[757] See Reich (1978), 103.
[758] See Fukuyama for further evidence.

members' interests, but also in defence of the interests of consumers and of society at large.

With the introduction of new special provisions on marketing and advertising in §§ 6a-6d the substantive scope of the right of action of business unions expanded substantially. Moreover, given the fact that the rules were formulated as 'objective' perpetrations, the burden of proof on plaintiffs diminished greatly. No actual misleading of consumers, or even a likelihood of deception, had to be proven in court. A verdict was guaranteed simply after providing evidence that the respective marketing practices had occurred.

The litigious activity of the business unions under the UWG hardly yields to statistical generalizations. In an article from 1975 Grimms estimates the business associations' share of disputes on the basis of the general clauses of UWG to amount at one third of all such disputes, whereas the rest of about two thirds are individual competitors' complaints.[759]

Among the corporate litigants in unfair competition matters the (already mentioned) *Wettberebszentrale* stands out with the scope and ambition of its litigious record. This organization uninterruptedly continued its activity under National Socialism and reemerged after the war with seat in Bad Homburg and a number of local representations. As members of the *Wettbewerbszentrale* entered the Chambers of Industry and Commerce, all central industry and trade associations (*Spitzenverbände der Wirtschaft*), along with many individual businesses and associations.

On the 75th anniversary of the *Wettbewerbszentrale*, managing director Manfred Kisseler reported of 1,000 proceedings before arbitration committees (of the Chambers of Commerce) and 700 court proceedings for 1986 alone. These formal proceedings, in turn, are estimated to make up only 10-20 percent of all files, meaning that a total of about 8,500 of disputes are dealt with annually by the *Wettbewerbszentrale*. The number of court proceedings for 10 years is reported to be around 6,000, whereby the *Wettbewerbszentrale* had been successful in approximately 90 percent of the cases.[760] More than 125 lawsuits filed by the *Wettbewerbszentrale* had reached the BGH in a period of 50 years.[761]

From the account on categories of cases brought by the *Wettbewerbszentrale* to the BGH, it becomes evident that the organization is not satisfied with prosecution of clear-cut offences and frequently tests the limits of the general clauses. Many decisions of the courts that were taken in the direction of a more extensive interpretation of the clauses seem to originate from action taken by the *Wettbewerbszentrale*. We will return to this report when discussing the evolving standard of fairness. Here it suffices to mention that, as a result of the litigious zeal of the *Wettbewerbszentrale*, the BGH had pronounced prohibitions of emotional

---

[759] Grimes (1971), 1769 ff.

[760] Kisseler, 'Verfahren der Wettbewerbszentrale vor dem Bundesgerichtshof' in: *75 Jahre Zentrale* (1987), 131 ff.

[761] In 1995 Lehmann gives similar estimates, which speaks for a rather stable rate of litigious activity. See Lehmann (1995), 380 ff.

advertising[762], excessive advertising (*übersteigerte Werbeleistung*)[763], value advertising (*Wertreklame*). The BGH allowed trying false advertising not only under § 3 but also under the general clause of § 1 UWG, and sharpened the standards of deception. It could safely be said that the *Wettbewerbszentrale* has emerged as a main actor, actively and deliberately shaping the standards of fair trading.

Even more importantly, the occasional failures of the *Wettbewerbszentrale* to convince the courts to accept controversial applications of the law have often been transferred from the litigation to the legislation sphere. Thus in the late 1950s the BGH refused to consider marketing by wholesalers to end-consumers at wholesale prices as a violation of § 1 UWG, or of the Rebates Act.[764] This 'oversight' was gradually remedied through the 1969 UWG Novelle, introducing § 6a UWG. As Kisseler puts it:

> Seit dieser Entscheidung verstärkte sich deshalb die Meinungsbildung für eine gesetzliche Regelung wie sie später in der Novelle von 1969 in § 6a UWG getroffen wurde.[765]

Similar was the fate of another of the test trials pursued by the *Wettbewerbszentrale*. In two decisions from the 1970s the BGH did not find a possibility to enjoin sales at so called 'loss-leader price' (*Lockvogelangebot*), i.e. sales of individual items at a loss for marketing purposes.[766] In the opinion of the Court such marketing strategies were not, in and of themselves, contrary to good commercial practice. These decisions were subsequently 'overruled' through legislation via the 1986 UWG Novelle, introducing § 6d UWG. Instead of directly prohibiting sale at a loss, the legislative provisions banned the marketing of such strategies, which had an effect nearly equivalent to prohibition.[767] The eventual success of such initatives reflects the weight of the organization as a lobbyist in UWG-matters.

With the rise of consumerism and its advancement as a rationale for regulating fair business practice, the *Wettbewerbszentrale* has increasingly emphasised the consumer protection effects of its litigious activity. According to a recent assessment of the *Wettbewerbszentrale,* about 57-64 percent of all complaints handled concern alleged infringements of provisions with consumer protection content (deception about price, quality and origin of products, misleading superlative advertising, violations of regulations on price indications, of foodstuffs advertising rules, misleading lotteries and unsolicited advertising). The prevailing portion of these complaints (85-90

---

[762] BGH GRUR 1959, 143 ("Blindenseife"); Leistungswettbewerb, rejected in BGH GRUR 1983, 374 („Spendenbitte"); BGH WRP 1984, 399 („Werbung in Schulen").

[763] The leading case was BGH GRUR 1971, 162 („Diagnose-Zentrum"). The defendant was enjoined from offering free car inspection (worth 10-18 DM) in its garages, in so called "diagnosis centres". Such offer was qualified as violating good commercial practice while marketing an excessively advantageous offer. It is worth quoting the summary of the case by Kisseler: „Der Bundesgerichtshof sah hierin ein übertriebenes Anlocken von Kunden und ließ demgegenüber auch nicht den Gesichtspunkt gelten, dass die kostenlose Überprüfung von Kraftfahrzeugen der Verkehrssicherheit diene" Kisseler (1987), 136. See also BGH GRUR 1981, 746 ff. ("Ein-Groschen-Werbeaktion").

[764] BGH, GRUR 58, 557 („Direktverkäufe").

[765] Kisseler (1987), 134.

[766] BGH, WRP 1974, 26 („Intermarkt"); BGH, WRP 1979, 300 ("Verkauf unter Einstandspreis").

[767] Kisseler (1987), 136.

percent) are lodged by competitors, and only 5 percent by consumers.[768] In the same position paper, the *Wettbewerbszentrale* passionately defends the German model of enforcement, with injunction claims by competitors and their economic associations, as the most efficient and extensive consumer protection.[769]

The *Wettbewerbszentrale* is just one, even if the most influential, among plenty other so-called unions of general public utility (*gemeinnützliche Verbände*). Despite the fact that the *Wettbewerbszentrale* often emphasises the indirect useful effects of its activity for consumers, the role of the organisation as defender of business interests is rather inconspicuous. More problematic is the position of so-called *Zwitterverbände* (or hybrid unions).[770] Given that the UWG in its earlier fashion required nolinkage between membership, affected interests and procedural standing space was created for the *gemeinnützliche Verbände*, mainly involved with litigation and pretrial activity. These are corporate entities specialising in the prosecution of unfair competition infringements. Before the 1965 amendment these unions declared themselves as business associations (although not always composed of interested tradesmen). After the introduction of the notion of consumer protection in the UWG, they expanded their activities into this field. The emphasis on consumer protection objectives in the UWG had obviously been perceived by the already existing *gemeinnützliche Verbände* as an opportunity to extend their goals and the basis for their litigious activity.

Apart from the *Wettbewerbszentrale* the v. Falckenstein study of 1977 identified 15 other *Wettbewerbsverbände* active in the area of unfair competition law. The names of these organizations can often be read among the plaintiffs in leading unfair competition cases, including those decided by the ECJ.[771] The v. Falckenstein survey on the litigious activity of these associations concludes that the focus of the litigious activity of these associations is essentially in the interests of competitors.[772]

Procedurally, the extensive right of action was not circumscribed in any significant respect. The generous line of reasoning of the Imperial Court was reaffirmed and even enhanced. The BGH repeatedly emphasised that the right of action of business associations did not require that the interests of individual members of the union were affected, or that individual members had to demonstrate their own individual right of action.[773] By recognizing a right to compensation for the costs of pretrial notification on the basis of the institute of agency of necessity (*Geschäftsführung ohne Auftrag*),

---

[768] Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., Stellungnahme zum Grünbuch der Kommission zum Verbraucherschutz in der Europäischen Union, February 2002, to be found at the site of the Commission DG SANCO:
http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/responses/business_germany/zbuw.pdf.

[769] „Erst der – etwa im deutschen UWG verankerte – Wettbewerbschutz mit Unterlassungsansprüchen für Wettbewerber und deren Wirtschaftsverb'nde führt damit effektiv zu einem umfangreichen Verbraucherschutz.", *ibid.*, 4.

[770] See v. Falckenstein (1977), 189.

[771] Among them were Verein gegen die Unwesen in Handel und Gewerbe, with a seat in Köln, pro virtute, Vereinigung gegen unlauteren Wettbewerb, Singen, Schutzveband gegen Unwesen in der Wirtschaft, München. Verein zur Förderung des lauteren Wettbewerbs, Bielefeld, etc. See v. Falckenstein (1977), 188.

[772] v. Falckenstein (1977), 168.

[773] BGH GRUR 1957, 606 ff., at 607, („Heilmittelvertrieb"); BGH GRUR 1966, 267 ff., at 270, („White Horse").

the judiciary has provided powerful incentive for excessive litigation as a source of profit.[774]

In doctrine, criticism of the generous admission of business unions in unfair competition proceedings used to be rare. The negative assessment early advanced by Manfred Wolf is therefore interesting to note.[775] Wolf approached the issue from the principle of party disposition (*Dispositionsmaxime*). He proceeded from an analysis of the grounds for ban on popular action (*actio popularis*), namely the risk of unjustified intervention in another party's freedom and the risk of materially wrong judgement. An important pont in Wolf's critique was the circumstance that the parties are expected to possess optimal knowledge of the factual circumstances of the case, and to thus assist the court in reaching a maximum informed and balanced decision. By disrupting this connection between interest, knowledge and procedural rights, it could be argued that *actio popularis* undermines the very fundament of civil procedure. Furthermore, the criterion for admissibility remained at the formal level of showing that the prosecuted offence corresponded to the chartered objectives of the association.

5.3.4.2 Consumer associations as new actors

In the 1950s, when consumer protection started to surface in the public discourse and in discussions on unfair competition law, the organisational status of consumers in Germany was rather weak.[776] There was practically no organization devoted exclusively to consumer protection. The oldest entities that dealt with consumer-related issues were housewives associations and cooperatives (*Konsum-genossenschaften*), each doing so from its particular perspective.[777] The task of building an organizational network for consumers was consequently assumed by the state at federal and *Länder* level. After two years of negotiations and considerable pressure on the part of the state, the so-called *Arbeitsgemeinschaft der Verbraucher* (Working Community of Consumers, hereinafter AGV) was established on 30 April 1953. The AGV was conceived as a nationwide umbrella association.[778] Initially, it had problems of even summoning the minimum of seven (corporate) members necessary for registration as a non-profit organisation. In the course of the 1960s the membership grew, reaching 20 organisations in 1970.

Major progress in institutionalisation of the consumer movement was marked by the setting up of the so-called *Verbraucherzentralen* (Consumer Centres –hereinafter, VZ) at the *Länder* level between 1957 to 1961. These associations emerged after the initial plans of building local branches of AGV had failed. The VZ were founded with the decisive organizational and financial support of the *Länder* governments. Like the AGV, the VZ were associations of associations, i.e. their membership predominantly consisted of other non-profit corporations, such as religious and housewives

---

[774] Schricker (1996a), 478.

[775] Wolf, 'Zur Zulässigkeit der Verbandsklage' (1971) *BB*, 1293 ff. with critical comments on BGH, *BB* 1971, 1297 („Spezialklinik").

[776] On the early history of the consumer organisations in Germany, see Brinkmann (1976).

[777] During the time of the Weimar Republic these organizations achieved even some political representation. They were granted 30 (of 326) seats in the Imperial Economic Council. The situation changed drastically with coming to power of National Socialists, which were generally hostile to independent grass root associations. See Brinkmann (1976), 5ff. On early forms of consumer organisation and representation in Germany see Geyer (2001).

[778] Brinkmann (1976), 5 ff.

associations, trade unions, cooperative associations, and the like. The 1977 v. Falckenstein study established that the number of members spanned between 7 to 29 and only three unions had indvidual consumers as members (respectively 175, 15 and 5 consumers). At the beginning of 1970s the VZ entered the AGV, thus giving the latter the shape of a genuinely nationwide umbrella association. [779]

Initially the AGV was mainly financed by the Central Federation of German Cooperative Associations. Public financing was declined on grounds of preserving the independence of the consumer movement. With the retreat of the Cooperative Union from membership in AGV, however, the financing was gradually taken over by the state. Im 1974 the AGV was assigned 1,6 Million DM from the Federal budget.[780] The VZ were from the start almost entirely financed by public means, partly from the central budget but predominantly through contributions from the *Länder* governments.[781] These contributions were, however, far from generous, so that the majority of the VZ in the 1970s complained about their dire financial situation. In 1974 the Federal Government had assigned the eleven VZ a total sum of 3,5 Million DM. The strongest VZ, the one in Northrein-Westfalen, in 1974 had a budget of 2,5 Million DM, of which 1,8 Million came from two *Länder* governments, 485 000 – from the Federal government and the rest – from own activities and from different city administrations, savings banks and from individual members. Individual contributions formed an insignificant part of the overall budget of the VZ.[782]

Soon after acquiring formal right of standing in unfair competition disputes, the state-supported consumer associations, i.e. AGV and the VZ, joined efforts to build a common association to deal with litigious activity in the area of fair trading pratices. In 1967 the *Verein zum Schutze der Verbraucher gegen unlauteren Wettbewerb* e. V. was founded (Association for Protection of the Consumer Against Unfair Competition) in West Berlin. This concentration of litigious competences was, however, not consistently upheld and local centres could likewise be involved in litigation.[783] After three years of existence this Association could report final action in 545 cases. Half of the cases had been finalised through voluntary settlement. In about two hundered cases (out of two hundred and seventeen filed altogether) the courts had granted temporary relief.[784]

The concept 'consumer union' is, as we saw above, notoriously vague. Apart from the official unions mentioned above a number of other religious, agricultural, political and professional associations existed which were involved in consumer protection issues as a complementary activity.[785] The Falckenstein study of 1977 identified about 46 relevant organisations that corresponded more or less closely to the concept of consumer union as normatively defined by the law-maker in § 13 Abs. 1 a UWG. The Falckenstein study went on to divide consumer organisations into several categories:

---

[779] Falckenstein (1977), 32. Critical Brinkmann (1976), 148.
[780] See Brinkmann (1976), 12 f.
[781] Initially the AGV was mainly financed by the Central Union of German Cooperative Associations.
[782] See Brinkmann (1976), 22 f.
[783] Falckenstein (1977), 33.
[784] Borck, 'Fälle entgültig abgeschlossen' (1970) *Verbraucher Rundschau*, 2 ff.
[785] See v. Falckenstein (1977), 26.

- consumer centres at the *Länder* level with corporate (other unions) membership;
- nationwide associations and unions acting as umbrella organisations;
- consumer unions composed by end-consumers;
- hybrid unions, representing interests of consumers and traders
- other institutions dealing with consumer protection exclusively or marginally
- purchase clubs
- pseudo-consumer associations

Among the unions with individual membership, the study identified and contacted 19 organisations of which only 9 responded. Most of them were formally organised as consumer communities (*Verbrauchergemeinschaften*) at the local level, mainly dealing with consumer advice. Politically speaking, these unions were particularly welcome due to the legitimacy they derived from individual memberships.[786] Still, they represented a fragmented picture and were in terms of service to consumers only in a position to offer a modest contribution. Specifically in respect to complaints and litigation, only few of these 'grassroots' consumer unions demonstrated an appreciable level of activity.[787]

When studying the activity of the consumer organisations and their ability to adequately process consumer complaints, the Max-Planck study focused on the work of the state-supported organisations, namely the Consumer Centers and the AGV. The tentative conclusion was that the centres were poorly equipped to provide quality advice to consumers. Few had constant legal expertise at their disposal.[788] At the time of the study the aggregate staff expenses of the centres for complaint settlement was estimated at about 1.8 mln. DM.[789]

From the above review it becomes evident that notions of relying on help to self-help[790] and the own initiative of consumers (*Einsatz der Eigeninitiative der Verbraucher*)[791] are not particularly effective to represent the status and evolution of consumer associations in Germany. An interventionist understanding of the state underlies this conceptualisation of consumer protection, even under the guise of private rights and private enforcement. From a legal-constitutional perspective the collective representative action raises questions of the proper definition of the collective interest. Consumer interests are notoriously diffuse whereby different groups of consumers tend to reveal different preferences. Claims to represent the collective interest of consumers thus suffer a clear legitimacy deficit.[792]

---

[786] v. Falckenstein (1977), 34, fn. 40 with reference to the Consumer Report of the Federal Government, Bonn, 1975, 59.

[787] The largest organisation, the *Deutsche Verbraucherbund* (with 50,000 members) specifically aimed to protect consumer interests by purchase of package tours and other travel services, and offered a defence and recovery service up to 500 DM. See v. Falckenstein (1977), 35.

[788] For processing of complaints the VZ of the Länder employed altogether 33 employees, of which 10 full-time lawyers. v. Falckenstein (1977), 41 ff.

[789] *Ibid.*, 42.

[790] Schricker (1976), 574.

[791] Kur (1980), 122.

[792] See Wolf (1971), 1293.

Private adjudication has not been an easy task for German consumer organisations. Courts have tended to treat consumer unions as ordinary private litigants, with strict requirements on burden of proof, costs distribution and the like.[793] Symptomatic in this respect are the views expressed by Pastor, judge in the OLG in Cologne and author of the main commentary on procedure in unfair competition law.[794] Pastor consistently showed reluctance to open UWG too widely for consumer union litigation. His arguments could be summarised in two points. First, he tried to summon evidence that concern for the consuming public was present in UWG already at its conception in 1896, and as a consciously formulated legislative objective.[795] So the reform of 1965 was only an additional step in this direction, the importance of which should not be overestimated.[796] Second, Pastor insisted that the dominant objective remained the protection of competitors, which is why he tried to draw a number of procedural and substantive limitations in the exercise of the right of action by consumer associations (under what then was § 13, 1 a UWG). According to Pastor the UWG was not and could not be subverted into consumer protection law. Consequently:

> Nicht was die Verbraucher oder Verbraucherverbände meinen, was Wettbewerb ist oder sein soll, bestimmt das Wirtschafts- oder Wettbewerbsleben, sondern die Wettbewerber geben dem Wettbewerb und damit das Wirtschaftsleben Ausgestaltung und Dynamik.[797]

On a more general note, Pastor defended the view that it was not the task of consumer unions to litigate on matters of principle or bringing test cases under the UWG. In his view, consumer unions ought not to litigate in situations concerning interests of traders or of competition, as this might interfere in the judicial shaping of the standards of fair trade in other areas. The right of action of consumer unions was explicitly classified as having a private character. Any right of standing in the public interests was denied.[798] More surprisingly, similar views on the role of consumer associations in unfair competition law were sometimes expressed by lawyers engaged in the activity of consumer unions.[799]

5.4 Changing the institutional framework in Sweden: dramatic change and a new institutional core

As demonstrated above in the sections on consumer policy, consumerism was given a much more prominent role in the political debate in Sweden than in Germany. It fitted well with the 'social engineering' twist in the policy of the dominant Social Democratic Party, pushing towards sweeping and radical societal changes and towards elaborating the Swedish welfare state. This consumerist trend also proved crucial for the development of fair trading law. The legislative developments during the first half of the 20th century had left Swedish fair trading law with a rather rudimentary set of formal rules, a rigid and unattractive system of enforcement, and a weak

---

[793] Kur (1980), 16 ff.
[794] Pastor/Ahrens, *Der Wettbewerbsprozess* (München: Beck, 2001).
[795] See Pastor (1969), 571 ff., 574.
[796] Pastor (1969), 572 ff.
[797] Pastor (1969), 576.
[798] Pastor (1969), 576.
[799] Borck (1964b), 399.

organizational basis. The need for change was voiced from many quarters. Yet in the vortex of consumerism reform endevours took a somewhat unexpected turn.

5.4.1 The legislative process: twists and turns and interests involved

5.4.1.1 The Unfair Competition Inquiry Commission (SOU 1966:71)

Within an environment of increasing attention to consumer interests, in 1957 the Trademark Legislative Committee was assigned the task of investigating the possible adoption of a new law on unfair competition. A special Inquiry Commission on Unfair Competition was appointed for this pupose. A strong reason for the legislative initiative was the desire to bring Nordic legal rules and practices in this field closer to each other, within the wider framework of regional legal cooperation.[800] The name of the Inquiry Commission (Utredning om illojal konkurrens), and the general terms of reference, demonstrate that this legislative enterprise was conceived in the light of the traditional understanding of unfair competition as a business interest domain. The legislative work was viewed as part of the harmonisation efforts of Scandinavian intellectual property law. In a systemic regard, unfair competition was thus treated as a complement to industrial property law and being in closest connection to trademark law.

The Inquiry Commission submitted its proposal on an Act against Improper Competition (Lag om otillbörlig konkurrens) in 1966.[801] At the center of attention were the interests of competitors. The main novelty advanced by the Commission was the much expected introduction of a general clause on unfair competition. Apart from unfair advertising, appropriation of trade secrets and different forms of economic corruption were the main types of conduct addressed by the law. At the same time, the Commission demonstrated a high awareness of the relevance of the law for consumer interests. Thus the proposed substantive provisions were broadly construed, with a clear purpose to cover situations detrimental to consumers. The general clause on unfair competition was formulated as a ban on "competition methods in carrying out business activity, which set aside honesty and good commercial practice *in relation to consumers* or businessmen"(my italics). It is to be noted that the interests of consumers were ranked above those of traders, thus acknowledging their important position in the draft legislation. In addition, a broad clause on misleading advertising was proposed.[802]

Procedurally, the 1966 Inquiry Commission on Unfair Competition followed the classical approach of entrusting the enforcement of the legal provisions on fair trading primarily to individual competitors. The Commission nevertheless devoted special attention to the representation of collective interests and of consumer interests in particular. The Commission openly recognised the difficulties of collective interest representation. It therefore proposed an unconditional legal standing to be granted to organizations of consumers, employees and traders.[803] More interestingly, this avenue

---

[800] On the history of Nordic legal cooperation, see Sevon, 'Några reflexioner kring det nordiska lagstiftningssamarbetet' (1988) *TfR*, 509 ff. For a critical legal analysis of the use of legal material from other Nordic countries, see Wilhelmsson, 'Den nordiska rättsgemenskapen och rättskälleläran' (1985) *TfR*, 181 ff.

[801] SOU 1966:71.

[802] With the limitation of appreciable effect on consumer behaviour "ägnad att påverka efterfrågan". See SOU 1966:71, 333.

[803] SOU 1966:71, 295 ff.

was not considered sufficient. Noting that the system of private consumer organisations in Sweden was weak, the Commission turned to discussing the form and scope of public intervention.[804] One suggestion was to set up a special office of the Public Prosecutor with a focus on issues of unfair competition. Another possibility was to broaden the competencies of the NO to encompass issues of unfair trade practices.[805]

Importantly, the Commission devoted significant attention to the idea of setting up of a special office of a consumer ombudsman. This idea had first been launched by an Inquiry Commission on Price Co-operation and Competition.[806] This Commission had underlined the importance of effective avenues for enforcement of legislation in the area of marketing practices. It had suggested that consumers should have their own representative with resources to monitor compliance with the legal standards and to intervene in case of violations.[807] In the view of the Price Co-operation Commission, the office of a consumer ombudsman had to enjoy similar status as the NO. The office had to be equipped with the right to bring injunctive action before the court and to report cases to the public prosecutor. The Unfair Competition Commission opted not to take such a decisive step towards institutional innovation. Instead, it supported the less radical version of granting legal standing to an unidentified agency, the latter to be determined by the government. The Commission also saw a continuedly important place for self-regulation in the system of shaping and enforcement of fair trading standards. Self-regulatory measures were expected to be a step ahead of formal legislation.[808]

5.4.1.2 The 'velvet revolution' of 1970: marketing a consumer policy issue

Despite the visible efforts of the Unfair Competition Commission to integrate the interests of consumers in the draft legislationthe Commission Report did not satisfy the policy visions of the Government. The Government was in the process of preparation of its 'consumer protection package' and fair trading legislation was immediately identified as forming an integral part of consumer protection policy. In a rather unusual manner, the Minister of Justice rejected the proposal of the Inquiry Commission in its most important points and advanced its own draft substantially differing from the conclusions of the Commission.[809] This development was all the more surprising considering the ambitions for Nordic legal unification at the core of the preparatory work.

Ideologically, the consumer interest stood at the centre of the newly advanced regulatory framework. The responsible Minister critically noted that current legislation against unfair competition primarily was conceived as a means of protection of traders against offensive forms of competition. The standards of fair competition reflected the

---

[804] *Ibid.*, 296.

[805] Although the Commission did not make an explicit reference to the American model with a Federal Trade Commission, references at other points in the report demonstrate the awareness of and perceptible influence of this model. Proposals in the direction of the US model were nevertheless rejected, but for the most part without comprehensive justification. See SOU 1966:71, 286.

[806] SOU 1966:48, 122.

[807] Prissamverkan och konkurrens, price co-operation and competition., SOU 1966:48, 122.

[808] SOU 1966:71, 49; prop. 1970:57, 59.

[809] See prop. 1970:57, L3U 1970:45.

views of the entrepreneurs, he argued. Repudiating this narrow outlook, the Minister declared that:

> It has already become clear that I, for my part, see the building of norms for the marketing as a consumer policy issue.[810]

Despite recognizing an interest of traders in fair competition and confirming that this interest need not conflict with the interest of consumers, the clear political goal was to place consumers at the centre of attention. It was stated that the purpose of a marketing practices act was, among others, to "direct the attention of consumers to those factors that in the first place *should* influence consumer choice and to increase their resistance to irrational arguments of sellers." (my italics)[811]

Echoing the Skoglund report, the Government Bill expressed the categorical and (at the time) pioneering viewpoint that consumer protection and fair trading should be elevated to a primary responsibility of the state. As the Minister put it:

> My principal belief is that society should have primary responsibility for a fair ethical standard to be respected in advertising and marketing. The legislation should be as advanced as need be in order to form the basis for the development of satisfactory ethical norms and norm-making should be a task for public organs.[812]

As we will see, this radical understanding left its clear mark both on the substantive texture and on the institutional framework of fair trading law in Sweden.

Substantively, there was a departure from the previous unfair competition approach in the sense of legislation focusing on the interests of traders. The scope of the new marketing practices legislation was to be both broader and more limited. It was to be broader in that the statute covered all marketing practices, and not only those referring to a competitive relationship between traders. And it was narrower insofar as the statute did not address some basic categories of internationally acknowledged unfair competition acts, such as slavish imitation, protection of trade secrets and corruption of employees. Even if the approach was in line with the continental tradition of general clauses from the viewpoint of legislative techniques, the contents and the underlying philosophy of the general clause were fundamentally different.

The most radical innovations were in the area of enforcement, procedure and institutional structure. The pluralist model of enforcement advanced by the Unfair Competition Commission did not correspond to the growing ambitions in the area of consumer policy. The Government preferred to respond to the problems of collective

---

[810] "Det har redan framgått att jag för min del vill se uppställandet av normer för marknadsföringen som en konsumentpolitisk fråga." Prop. 1970:57, 57 f.

[811] "Ett vikigt del i konsumentpolitiken är att rikta konsumenternas uppmärksamhet på de faktorer som i första hand bör påverka konsumtionsvalet och öka deras motståndskraft mot säljarargument av irrationell art ..." Prop. 1970:57, 56.

[812] "Min principiella ställning är att samhället bör ha ett förstahandsansvar för att en god etisk standard iakttas i reklam och marknadsföring. Lagstiftningen bör vara så avancerad som behövs för att den skall kunna utgöra grundvalen för utbildandet av fullt tillfredsställande etiska normer, och normbildningen bör vara en uppgift för offentliga organ." Prop. 1970:57, 59.

interest representation by setting up a special public office, devoted to the problems of consumers in fair trading. The 1970 MFL therefore embraced the idea of charging a consumer ombudsman with broad competences in the field. This institution had a particular appeal because it provided 'flesh and blood' to the consumerist idea. Initially, the Ombudsman was designed as a public commissioner equipped with a small secretariat and well-defined legal competencies of monitoring the market and enforcing the MFL (and later the Unfair Contract Terms Act). The Freedom of Competition Board was reformed into a Market Board to decide in marketing and antitrust cases.

The Minister provided several justifications for the new institutional arrangements, all of which can be summarised under four points: independent capacity, authority, competence and speed. He underlined the need to have specialised institutions with sufficient resources and authority to assure the effective implementation of the law. The general prosecutors and the ordinary courts were according to him not experienced enough to deal with economic relations and in particular with consumer markets.[813] Finally, it was asserted that the ordinary three-instance procedure was too cumbersome to correspond to the requirements for speedy reaction of changing economic realities.

Granting standing to a public authority was also proposed by the Unfair Competition Commission. However, according to the latter proposal a public institution had merely to complement a system of private enforcement. In the Government Bill, the vision on the position of the Ombudsman system of enforcement was effectively turned upside down. Private litigants occupied a subsidiary position. Competitors, trade and consumer associations could initiate proceedings only if the KO had decided not to sue. The Ombudsman was to be the master of the enforcement stage under the statute. In addition to his prosecutorial functions, the KO had important mediating and quasi-adjudicative competences, in a position to negotiate voluntary settlement and to issue consent injunctive orders.

In general, the Government Bill revealed remarkable trust in public enforcement as compared to private action and self-regulation. Entrusting enforcement into public bodies was not described as just one among many venues for dealing with unfair trading. It was seen as the primary and most advantageous one. The Minister rejected outright the suggestion by the Unfair Competition Commission of continued reliance on the existing well-established system of industry self-regulation. The Minister enumerated the, as he called them, several "evident" drawbacks of self-regulation. Although consumer interests were represented on the Boards, industry representatives continued to dominate. The Boards did not dispose of efficient sanctions. The last disadvantage was the difficulty for the self-regulation Boards to reach ordinary traders and the public at large.[814]

---

[813] Prop. 1970:57.

[814] Interestingly, as evidence of the failure of self-regulation to efficiently combat unfair marketing, a reference was made to a survey within the framework of the Advertising Committee suggesting that about 11-18 percent of the daily newspapers and 20-27 percent of the popular press contained announcements incompatible with valid norms. This somewhat casual reference indicates that the ambitions of the Government as to substantive outcomes were close to complete elimination of any unfair and deceptive advertising in the media. Prop. 1970:57, 59.

In return for the powerful emphasis on the role of public bodies in the process of enforcement, the competencies of these bodies were defined with considerable restraint. Priority was given to informal methods of influence, negotiations and voluntary compliance. Injunction was defined as the standard remedy, and recourse to criminal sanctions was reserved for only a few categories of violation and then as a measure of last resort.

5.4.1.3 The completion of the regulative framework

The final touch to the regulative framework of marketing practices was made soon after the original law entered into force. In 1975 a Governmental Bill on a new MFL was submitted.[815] The Bill was a synthesis of the work of two legislative committees. The Product Declaration Committee in 1973 released its report entitled *Product Declarations: An Instrument in Consumer Policy*.[816] The Advertising Inquiry Commission submitted several reports, two of which contained proposals for amendments in the MFL.[817] The result of the legislative change was a new and expanded MFL. As the name of the statute indicated, the Act sought to adopt an integrated approach on marketing and beyond unfair and misleading advertising. The emphasis on consumer interests found its expression in the first paragraph, declaring the former its prime objective. In addition to the general clause on unfair marketing practices, a rather revolutionary general clause on information disclosure was adopted.

More important than the formal amendments in legal texts was the change in consumer protection ideology and the ensuing shift in distribution of decision-making competences. In line with the general trend in consumer policy, the *travaux préparatoires* to the new MFL proceeded from the postulate of normative criteria for defining the needs of consumers. The consumer himself, even when adequately informed about individual products, could not be expected to make a comprehensive assessment of the market and to make the most advantageous decisions, seen from the perspective of aggregate welfare interest. Therefore, pure information policies were considered unsatisfactory. The emphasis shifted from information and combating deception to influencing producers in their marketing and product development policies. In terms of implementation instruments, instead of prosecuting individual cases of offence against marketing standards the legislator wished to inform the conduct of undertakings through future-oriented guidelines.[818]

Institutionally, a merger between the KO and the KOV was intended to ensure the concentration of resources and expertise that was necessary for the successful implementation of the ambitions programme of influencing producers. The new agency KOV/KO was authorised to carry out comprehensive market surveys and product tests and, more importantly, to draw up guidelines on marketing and production in consultation with industry representatives. The *travaux préparatoires* to the new MFL thus signalled a strengthening of the central position of expert bureaucracy in defining the interests and needs of consumers.

---

[815] Prop. 1975/76:34.
[816] SOU 1973:20.
[817] SOU 1973:10; SOU 1974:23.
[818] Prop. 1975/76:34, 93 ff.

The last attempt of expanding consumer policy in the spirit of direct public intervention was reflected in the Report of the Government Inquiry Commission *Consumer Influence Through Insight.*[819] In the terms of reference for the work of this Commission, Minister Carl Lidbom inferred:

> In a number of areas, where society has taken responsibility to protect the interests of the citizens special legislation has been introduced providing possibilities for direct control and insight in the activity of undertakings. ... An area where such opportunities are still missing is consumer policy. In the public debate demands have been raised to expand the possibilities for gaining insight in the activity of iundertakings also in this area.[820]

The main task of the Commission was to investigate possible forms of ensuring public access to the marketing and production planning of private undertakings.[821] Such information was seen by the Government to be an essential prerequiste for the efficient work of the KOV, especially as part of its activities to influence producers (*producentpåverkan*). The Commission produced a draft called "Law on certain provisions on the mandatory information concerning product design, etc.", which envisioned far-reaching obligations on the part of industry to report on production and marketing strategies, as well as to allow public insight into these processes.[822] With the coming to power of a new central-right government, that draft was immediately dropped from the legislative agenda.

5.4.1.4 The Guidelines Committee

The end of the 1970s together with the shift of government brought about a visible retreat from an interventionist consumer policy. It was a time for taking a step back and critically evaluating the existing system and its first results. A Government Committee was appointed in 1979 to review the consumer policy instruments available for producer influence (the Guidelines Committee, *Riktlinjekommittén*). The Committee undertook one of the first ambitious investigations of the efficiency of public regulation in Swedish legislative history. In 1983 the Committee published its report: *Steering Instruments of Consumer Policy: Evaluation and Proposals.*[823] Although the Government in the terms of reference for the Committee's work had underlined the need for an objective and unprejudiced evaluation of all consumer policy instruments, the intention was to consider the possible dismantling of some of the most intrusive forms of producer influence, notably the guidelines. In 1982,

---

[819] SOU 1979:5.

[820] "På en rad områden, där samhället har tagit ansvar för att medborgarnas intressen tas till vara, har således möjligheter till direkt insyn i företagens aktiviteter tillskapats lagstiftningsvägen. Denna insyn är inte begränsad till situationer där åtgärder från myndigheternas sida antas vara påkallade utan ingår i en allmän tillsyn inom de områden som lagstiftningen omfattar. Ett område där motsvarande möjligheter i stort ännu saknas är konsumentpolitiken." SOU 1979:5, 11.

[821] See SOU 1979:5, 13.

[822] It may be interesting to note that in the course of its work the Inquiry Commission undertook a comparative survey by sending questionnaires to governments and public authorities in other Western countries. In its response the German Federal Government bluntly stated that any attempt on the part of public authorities to influence undertakings' decisions about product development would be in Germany perceived as unacceptable encroachment on the free market economy. See, SOU 1979:5, 61.

[823] SOU 1983:40.

however, the political power reverted back to Social Democratic government, which inevitably influenced the outcome of the Committee's work.

Considering the broad mandate given to the Committee and the ambitious interdisciplinary investigation envisaged, the results may be described as modest. The Guidelines Committee proposed only minor changes to the existing regulative framework. The work of the KOV using the guidelines was described as having produced satisfactory results. The Committee found that some of the shortcomings in procedure and setting of priorities on the part of the KOV had been eliminated in the course of its investigation, and as a result of deliberations with industry and with representatives of the Agency. The concerns as to possible distortions of competition resulting from big business influencing the content of the guidelines were not confirmed by the Committee. But the latter may very well have been due to lack of reliable methods for measurement of the competitive effects of regulative instruments.

One of the main conclusions and proposals of the Committee was the need to activate and involve new actors in the institutional framework of consumer protection. In this vein, the Committee promoted an independent right of action for individual competitors, trade and consumer associations, pointing at inefficiencies as well as injustices in the privileged position of the KO. In an attempt to enhance the efficiency of enforcement, a more speedy and simple procedure for issuing consent injunctive orders by the KO was proposed. Reinvigoration of industry self- regulation, and more active participation of voluntary consumer and other organisations, were seen as complementary to public regulation.[824]

Few of these proposals transformed into legislative changes. An amendment to the MFL in 1985 extended a provision on marketing of unsafe products to encompass unsafe services.[825] In procedural terms, a change in the Act on the Market Court granted business associations a right to intervene in proceedings under the MFL which seriously affect the interests of their members.[826] The Government Bill on amendments of the MFL concluded that the guidelines system should be upheld.[827] Nevertheless, in practical terms the role of the guidelines for shaping the standards of fair trading was reduced.

5.4.1.5 Interests in the legislative process

As inferred earlier, in the absence of active 'grass-roots' consumer organisations the consumer interest in Sweden was to a considerable extent 'expropriated' by the organised 'popular movements' (*folkrörelser*), notably the countries largest trade unions: LO, Confederation of Professional Employees (*Tjänstemännens Centralorganisation*, TCO), Swedish Confederation of Professional Asscociations (*Sveriges Akademikers Centralorganisation*, SACO), and the KF. Noteworthy is also the strong identification of the governing Social Democratic Party with an activist consumer policy. The consumer protection issue apparently appealed to these organisations as in conformity with the welfarist agenda to which they all subscribed,

[824] SOU 1983:40, 227 ff.
[825] These provisions were integrated in the MFL pending the adoption of a special Act on Product Safety. Prop. 1985/85:121, Inriktningen av konsumentpolitiken.
[826] 13 a § lag om marknadsdomstol (SFS 1970:417) as amended by SFS 1985:927.
[827] Prop. 1984/85:213; cf. SFS 1985:926.

It was perceived as providing a good opportunity to promote a popular agenda.[828] The coupling of the *topos* of fair trading with that of consumer protection consequently implied increasing involvement of these movements into the process of shaping and implementing fair trading law. The labour unions and the cooperative movement supported most of the radical innovations in the MFL advanced by the Government, like for instance the institutional organization with KO and a Market Court.[829] The connections between trade unions, the co-operative movement and consumer protection have not been seriously questioned in legal doctrine or in the legislative and political debate.[830]

Industry

The setting up of the legal and institutional framework of marketing practices regulation initially involved mainly business organisations. Business continued to be represented through its influential and powerful organisations (e.g. SI) in the legislative process. On many decisive points of principle the representatives of industry defended a consolidated position. Thus, for instance the proposed institutional framework with a KO and a Market Board raised strong objections from the point of view of Nordic and continental legal unity. The SI expressed concerns that the proposed institutional arrangement differed radically from the established patterns in other Scandinavian countries and in the Continental legal tradition. Misgivings were voiced that divergent organisational solutions might contribute to Swedish administrative practice being coloured by different values than the practice in neighbouring countries.[831] Similar views were articulated by the Chambers of Commerce, the Wholesale Union, the Market Union, the TU and the Bank Association. In some instances the massive intervention of business representatives led to change or to mitigation of bold legislative plans.

The fact that industry eventually accepted the radical arrangements can partly be explained with reference to the intricate model of soft enforcement, according to which industry was promised active participation and influence. In part it was presumably also related to the underlying threat of regulative intervention of a more direct and formalisedkind. The government made it clear that such intervention was conceivable, using this option as an instrument of pressure toward consensus.[832]

The state bureaucracy

With the growing involvement of the state in consumer policy, various special institutions with consumer-related tasks started to participate in the legislative process and their opinion carried weight not to be underestimted. A 'snow-ball' effect could be observed, whereby a growing number of state institutions tended to support increased

---

[828] Treis speaks of "Möglichkeiten politischer Profilierung", Tries (1991), 24.
One can read in the Government Bill that the KF, LO and *Husmodersförbundet* point out the economic importance of marketing questions to consumers, and that the investigations to be carried out by the new public organs ought to take the social impact of the measures on consumers into account. LO emphasizes that the new organs have a responsibility for developing a consumer-useful advertising and marketing. Prop. 1970:57, 155.

[830] See, however, the Report of the Unfair Competition Inquiry Commission noting the dual role of the KF representing the interests of consumers but also acting in its capacity of producer and retailer, SOU 1966:71, 296.

[831] Prop. 1970:57, 155.

[832] Thorelli and Thorelli call the policy of influencing producers "producer jawboning", Thorelli/Thorelli (1977), 200.

public intervention and new institutional tasks in the sphere of consumer policy. Thus the KOV and the KO, soon after their appearance on the institutional arena, commenced actively participating in the legislative process and promoting expansion of their sphere of competence.[833]

The new orientation of public consumer law and policy and of fair trading law found its reflection in legal doctrine. The debate was, however, highly averse to normative evaluations. The critical voices were few.[834] Legal scholars avoided addressing the sensitive issue of shift in the main 'ideology' of the new MFL. Nor did they openly discuss advantages and disadvantages of the choice between public intervention and private enforcement. The efforts were rather directed at finding appropriate forms of systematisation and dogmatic conceptualisation of the new substantive and procedural rules.

The fiercest criticism against the new Swedish regulative approach came from abroad and concerned the impact of the Swedish reform on Nordic legal cooperation.[835] Prominent Danish and Norwegian legal scholars were critical of the patent disregard demonstrated by the Swedish lawmaker to the results of long and careful legislative cooperation. They underlined the advantages of having a legal framework with similar content, enforcement mechanisms and underlying values. From Sweden, the defence of the lonely path chosen was, symptomatically, not mustered by representatives of legal scholarship but by the minister responsible for the novel approach, Carl Lidbom.[836]

5.4.2 Substantive rules: programmatic place of consumer protection concerns

5.4.2.1 A consumer-oriented general clause

After decades of deliberations the 1970 MFL for the first time introduced a general clause on marketing practices. Thus the long-lasting resistance to vague and open legal standards, and to delegation of broad decision-making powers to the judiciary, was overcome. At the same time, within the particular conceptual approach of the new marketing practices legislation, the delegation was partial and controlled.

First of all, the wording of the legal provisions left no doubt that consumer interests should be placed at the heart of the MFL. The general clause on good marketing practice departed from the conventional unfair competion terminology in some symbolic respects. Terms liks 'competitive conduct' (*'konkurrensåtgärd'*), business

---

[833] It is likewise specific for Sweden that the judiciary is among the consulted parties in the course of legislative deliberations. Wee should for instance take note of the Market Court, but also the ordinary courts like Svea Hovrätt, taking a stand on many specific issues that are or could become subject of individual litigation. See e.g. prop. 1975/76:34, 41, where the Market Court takes a negative stand on the desire of the KO to expand the rules on special offers, thereby interpreting the intentions of the law-maker and defending its position in specific cases.

[834] Strömholm, 'Public Rule-Making and Private: The Swedish Experience' (1971) 15 *SSL*, 219 ff.; Strömholm, 'Nordiskt samarbete – utvecklingslinjer och argument' in: *Festskrift til W.E. v. Eyben* (København: Juristforb:s forl., 1982), 173 ff.; Bernitz (1979), 53 ff., at 75.

[835] In a recent monograph Bernitz calls the appearance of the Swedish MFL of 1970 the 'first nail into the coffin' of a fruitful period in the development of Nordic legal cooperation. See Bernitz (2002b), 108.

[836] Lidbom, 'Den nordiska rättenhetens problem i dag' (1973) *SvTJ*, 273 ff.; Lidbom, 'Konsumentpolitik och lagstiftning' (1971) *SvJT*, 81 ff.

ethics (*'affärsmoral'*) and honesty (*'hederlighet'*)[837] were substituted by more neutral concepts such as 'marketing', 'good commercial standards' and 'properness' (*'tillbörlighet'*).[838] The change of name of the act also came to underline the consolidated approach to marketing practices and breaking with the traditional competitor-oriented, outlook. This focus on consumer interests was strongely emphasised in the first paragraph of the 1975 MFL, stating:

> The object of this Act is to promote consumers interests in connection with the marketing of goods, services and other commodities by tradesmen and to counteract improper marketing which adversely affects consumers or other tradesmen.[839]

Second, the importance of consumer interests in the interpretation of the standards of fairness was underlined on multiple occasions in the Government Bill on the 1970 MFL.[840] Given the authoritative status of *travaux préparatoires* in Swedish law, this provided another guarantee that the clause would be interpreted in the desired direction. As to the standard of fairness the Bill underlined that the perceptions of the targeted consumer group should be decisive. The demands for fairness and truthfulness were to be set particularly high when the advertising was addressed to less critical consumer groups such as children.[841] A strict attitude towards exaggerations in advertising was advanced with the important exception of low-price advertising.[842] Comparative advertising was expressly recognised as permissible, due to its information value to consumers.[843]

Finally, and most importantly, the competence to interpretate the clause was not vested in a decentralised judiciary, but in a specialised Market Court with features of an administrative body and elements of interest representation. The administrative process via the KO, and later on the KOV, were given an avenue for decisively influencing the interpretation of the clause through selecting the right cases and later on, through promulgation of guidelines. The combination of these factors significantly diminished the risk of judicial discretion and of uncertainty of interpretation usually associated with general clauses.

The whole field was redefined around the concept of marketing (*marknadsföring*), conceived as any act aiming at promotion of the sales of goods and services. This new approach had the effect of both broadening and narrowing down the scope of MFL, when compared with German unfair competition law. Unlike the UWG, the MFL did not concern only relationships between competitors and did not require an act with the

---

[837] See 1 § Draft, SOU 1966:71, 13.
[838] Cf. 2 § MFL (SFS 1975:1418). Improper Marketing: "A tradesman who, in the marketing of any goods, service or other commodity, advertises or takes other action which, by conflicting with good commecial standards or otherwise, adversely affects consumers or traders, may be prohibited by the Market Court from continuing therewith or undertaking any similar action. A prohibition may also be issued to an employee of a tradesman and to any other acting on behalf of a tradesman, as well as to any other person who has substantially contributed to the action." English translation as in Bernitz/Draper (1986), 321ff.
[839] 1 § MFL (SFS 1975:1418).
[840] Prop. 1970:57, 63 f.
[841] Prop. 1970:57, 69.
[842] Prop. 1970:57, 69.
[843] Prop. 1970:57, 70.

purpose of competition.[844] The law could thus be successfully applied to curb unfair marketing practices by monopolistic enterprises. On the other hand, the definition of marketing was limited to promotional activities in the sale of goods and services. Marketing methods used in the supply of goods and services (for instance by retailers) or in recruitment of workers were consciously left outide the scope of the law as unimportant from consumer point of view.[845] Likewise, a broad range of practices that could negatively affect competitors but involved competitive acts other than marketing (for instance interference in contractual relations, sale at a loss, boycotts, etc.) were not covered by the MFL.[846]

Despite the emphasis on consumer protection in the new act, the Government endorsed the practice of shaping the standard of fair competition in close linkage with the Codes of Conduct of the International Chamber of Commerce (ICC). A product of international cooperation between self-regulatory bodies, this system had naturally evolved under careful consideration of the impact of such rules on free trade. It could be argued that through the preserved coupling between Swedish and international standards of fair conduct, a system of continous balancing of Swedish fair trading law against the requirements of free trade was ensured. This generally corresponded to Sweden's liberal tradition in international economic relations and an export-oriented economy.

5.4.2.2 Information disclosure

The introduction of a general duty for information disclosure in the 1975 MFL was a pioneering step at the time and is even today uncommon in a comparative perspective. A proposal on such a disclosure rule was advanced for the first time by the Advertising Legislative Committee.[847] It was integrated in 3 § 1975 MFL, reading as follows:

> Information
>
> A tradesman who, in the marketing of any good, service or other commodity, omits to deliver information of particular significance to consumers, may be enjoined by the Market Court to give such information. An injunction may also be issued to an employee of the tradesman and to any other person acting on behalf of a tradesman[848]
> ...

One of the central points of discussion in connection with introducing a general duty on information disclosure concerned the legal technical design of such a duty and its effective enforcement. Some preferred the clause to have the character of framework legislation, whereby specific duties for information would be formulated by the governmental agency upon delegation by the government. The reporting Minister

---

[844] See Bernitz (1993), 110.
[845] See prop. 1970:59, 64.
[846] For a detailed analysis and critique of the inadequate protection of traders against interference with contractual relations in Swedish law, see Bernitz (1993), 199 ff.; cf. Treis (1991), 105.
[847] SOU 1974:23. It may be interesting to note that in part I and part II (SOU 1972:7) of its report the Advertising Committee had proposed a number of alternative measures for stimulating informative advertising. One such measure was, for instance, tax relief for particularly informative advertising and measures for restricting the volume of advertising considered as excessive. See SOU 1972:7, 32. See prop. 1976/76: 34, 121.
[848] 3 § MFL (SFS 1975:1418).

expressed preference for 'looser forms' of standard-setting, obviously referring to the informal guidelines to be drawn up by the KOV in consultation with industry. Including a general clause in the text of the law was to serve as an important instrument for strengthening the position of the KOV in negotiations with business. Guidelines were thus expected to evolve 'in the shadow' of formal legal requirements.[849]

One of the main difficulties in implementing the new information clause was early seen to lie in defining what sor of information was "of particular significance to consumers." The Advertising Inquiry Commission noted the absence of clear criteria for setting priorities in the work of competent enforcement authorities. The Commission cited an inventory of possible priorities, such as putting the emphasis on the needs of particularly weak and vulnerable consumer groups, on information concerning goods with risk for consumers health and safety, or on products of central importance in the consumer's household budget. Other tentative factors to be considered were the price and durability of the product, its expected spread and technical complexity, the frequency of consumer complaints, the information and the general situation on the respective market. Some of these criteria were obviously elicited from early studies in information economics. The Commission concluded that there was no precise model for resource allocation, according to which all variables could be weighed simultaneously. Decision wouldtherefore ultimately depend on the discretionary judgment of the respective enforcement institutions. In the Government Bill the question of priority-setting did not receive any notable attention.[850]

5.4.2.3 Special offers

Interestingly, the MFL included explicit rules on specific forms of sales promotions.[851] The discussion emphasised again the consumer perspective. Certain types of marketing techniques could substantially confuse consumers and present an impediment to rational consumer choice. The MFL consequently prohibited, under threat of criminal sanctions, the use of coupons (7 § 1975 MFL) and some forms of combined offers (8 § 1975 MFL). The ban on combined offers was narrowly defined and applied only if the combined goods "manifestly lack any natural connection" and if the marketing method "makes it difficult for consumers to judge the value of the offer". The emphasis was thus on the effect of marketing on informed consumer choice.

5.4.2.4 Annex legislation

Although only indirectly in the scope of the marketing practices law, several related legal acts have to be mentioned in order to receive a complete picture of the prevailing trend of the 1970s. I am here referring to the Alcohol Advertising Act[852] and the Tobacco Advertising Act, both of 1978.[853] Earlier attempts at prohibition of such advertising had stumbled upon objections on grounds of possible conflict with the

---

[849] Prop. 1975/76:34, 109.
[850] SOU 1972:7, 48.
[851] 3-4 §§ 1970 MFL (SFS 1970:412) = 7-8 §§ 1975 MFL (SFS 1975:1418).
[852] See lag om vissa bestämmeler om marknadsföring av alkoholdrycker (SFS 1978:763); Prop. 1977/78:178, repealed by SFS 1999:1001.
[853] SFS 1978:764, repealed by SFS 1993:581.

TF.[854] This constitutional barrier was, however, lifted with the 1973 amendment of TF, which opened the way to restrictive regulation on alcohol and tobacco advertising in the press.[855] The preparatory work for these legislative acts was carried out by a Government Inquiry Commission on Tobacco and Alcohol Advertising, which came with its report and proposal for legislation in 1976. After weighing the arguments for and against complete ban on alcohol advertising, the Committee proposed a solution which is characteristic of the already transpiring Swedish model of corporatist regulation.[856]

Eventually, the Alcohol Advertising Act introduced an outright prohibition only for advertisements of spirits, wine and strong beer in printed media.[857] At the heart of the statute lay a general requirement to industry to show 'special moderation' in the marketing of alcoholic beverages (those above 2,25 percent of alcohol content).[858] The meaning of 'moderation'' was then left to guidelines to be elaborated by the KOV, in cooperation with the concerned business circles. This arrangement had the practical effect of a prohibition, binding businesses in a web of obligations and semi-formalised relations with governmental agencies. Infringements of the prohibitions and of the 'moderation' requirement (as interpreted through guidelines) could be prosecuted as improper marketing under the general clause of MFL. A similar approach was followed in the Tobacco Advertising Act. Following the *travaux treparatoires* the ciriterion of 'moderation' was interpreted as precluding advertising on bild-boards and on the streets, in cinemas, etc.

5.4.3 The design of the administrative process

The more limited ambitions associated with the 1970 MFL were adequately satisfied by the establishment of two institutions. The small and flexible office of the KO helped improve judicial representation of diffuse collective interests, while the Market Court interpreted and applied a broad standard of fairness with the help of interest representatives. However, the growing boldness of consumer policy in the 1970s challenged this lean institutional arrangement. By accepting 'normative consumer needs' as a standard for consumer policy and law enforcement, the limits of enforcement through adjudication were apparent. A more powerful, and resourceful agency devoted to consumer issues was needed to cope with the daunting task of defining normative needs matching the power of producers. The fusion, first, of the disparate institutions in the area of consumer information and research into one big agency (KOV) and, second, of the KOV with the Office of the KO were natural steps in direction towards centralisation of consumer policy. The Ombudsman Institution's

---

[854] See, however, 69 § rusdryckförordningen (SFS 1954:521) and 7 § lagen om handel med drycker (1977:293). Cf. Persson (2002), 161 ff., 187 ff.

[855] See TF 1:9.

[856] The Inquiry Commission on Alcohol and Tobacco Advertising was of the opinion that a ban on marketing of legally produced goods would nevertheless come into conflict with freedom of speech and trade mark law. The Commission therefore proposed only a clause on 'particular moderation', to be filled in by special guidelines. See SOU 1976:63, 173 ff.

[857] See 2 § alkoholreklamlagen (SFS 1978:763). With the introduction of commercial telvision and radio in 1991, alcohol advertising was prohibited also in these media, SFS 1991:1076.

[858] "In particular, no advertising or marketing measure may be taken which is intrusive, seeks out prospective customers, or encourages the use of alcohol." See 2 § (SFS 1978:763). On the recent changes in the regulation of alcohol advertising as a result of European influences see Ch. 7.2.2.

role of 'avenger' of the disfavoured consumers was diluted at the expense of growing bureaucratisation of his office.

5.4.3.1 Management of the KOV

The KOV established after the merger with the KO was formally under the supervision of the Ministry of Domestic Affairs.[859] However, it enjoyed considerable margin of freedom in implementing the policies within its ambit.[860] The tasks of the Agency were rather loosely defined in a Regulation with instruction issued by the Government.[861] It provided a good example of Swedish administrative tradition of small ministries and big and largely independent public agencies. After the merger of 1975 the Ombudsman became the Agency's Director General. Although he preserved his exclusive authority to file and argue cases before the Market Court, his office became part and parcel of the whole Agency.

Also in line with time-honoured Swedish administrative tradition, as modified by modern corporatist trends, laymen participation in the management of the Agency was ensured through a Management Board (*styrelse*). The Management Board shared responsibility for the work of the Agency with the Agency's Director General (the KO). The layman input in agency leadership is usually motivated by the need for expertise, citizen judgement and citizens' insight in public administration.[862] At the time of establishment of the KOV, the need for adequate representation of the consumer interest in the Board was emphasised. The Consumer Inquiry Commission (*Konsumentutredningen*) proposed to have a Board with a majority of consumer representatives, though enough representatives of industry to cover the major industry organisations.[863] The Government preferred to leave the question of the exact composition and representation open. The only guidance articulated in the Bill was that the composition of the Board should guarantee that the Agency would be directed to safeguard the consumer interest. In addition, it was considered desirable that persons with varying background would sit on the Board.[864] The Parliament added to these minimalist guidelines that the Board should include members of Parliament and should amount to nine members.[865]

During the first three years of the activity of the KOV, two of the members of the Advisory Board were parliamentarians, three were representatives of consumer and employees interests, one represented the municipal sector, and one had experience from industry. The Director General of the Food Agency also sat on the Board, and the

---

[859] Inrikesdepartamentet. Since 1996 the official translation is Ministry of Public Administration.

[860] The official English translation of the agencies has changed in 1996. Previously KOV has been translated as National Board for Consumer Policies. Since 1996 the official translation is Swedish Consumer Agency. Inrikesdepartamentet has been previously translated as Ministry of Public Administration and since 1996 as Ministry of Domestic Affairs.

[861] Förordning med instruktion för konsumentverket (SFS 1976:429) with multiple subsequent amendments.

[862] "Sakkunskap, medborgerlig omdöme och medborgerlig insyn". See Verkledningsbeslutet, prop. 1986/87:99. Alternative forms of management are a one-man responsibility model where the head of agency bears exclusive responsibility (with or without "*insynsråd*") and board with full responsibility. On the discussion about the need for increased control of the executive over the work of independent public agencies see SOU 1985:40; see Söderlind/Petersson (1986), 113 ff.

[863] Prop. 1972:33, 15.

[864] Prop. 1972:33, 75.

[865] See NU 1972:40, rskr 1972:225.

KO acted as a Chairman. This composition clearly placed industry at a disadvantage. The 'balance of powers' was partially restored with Government Bill of 1975 rearranging the structure of the newly formed KOV.[866] After motions in Parliament and lobbying before the Ministry of Trade, industry representatives managed to convince the Government that a stronger representation of industry was required.[867] Consequently the Board was extended to 10 members with two of the Board members "representing experience from production and distribution".[868] Whereas business interests were readily identified and represented by interest organisations, the representation of consumer interests was never openly discussed. In practice, representation of consumer interests on the Board was appropriated by the labour organisations and by the consumer co-operative society.[869]

The tasks of the Board were first and foremost to draw up the general policy lines to be followed by the Agency. The Board was also supposed to tackle important questions of negotiations with industry and elaboration of guidelines.[870] Conversely, decisions about instituting proceedings before the Market Court in individual cases were to be made independently by the KO. The Government pointed out that it would be inappropriate for the Board to exert influence over the handling of individual files that were subject to legal proceedings. This would be to forestall the decision of the Market Court, also composed of interest representatives. Such a confusion of competencies could clearly create duplication and inconsistency of action.[871] At a later stage, however, the Government did not exclude the possibility that the Board follows up on already closed individual case and opens a principled discussion.[872] Given the prominent place of the guidelines in the vision of an active consumer policy, this distribution of competences implied shifting the gravity of decision-making from the KO to the Board.

5.4.3.2 Informal procedure and search for voluntary compliance

A large part of the activity of KOV was designed as factual rather than legal regulative activity in the proper sense of the word. The Agency was entrusted with a number of tasks like information, education and opinion-building. The Agency was likewise supposed to be the main structure to co-ordinate the contacts with voluntary organisations and to distribute governmental funds ear-marked for research on consumer-related issues. The prevailing part of the resources of the Agency was devoted to this factual activity. In this the Agency differed from other administrative bodies in Sweden.[873] Since this is a study primarily in law and legal policy, I am however, more interested in the instruments for implementation of legal rules that were placed at the disposal of the Agency.

---

[866] Prop. 1975/76:159.
[867] See prop. 1975/76:159, 25.
[868] It may be interesting to note the careful phrasing of the proposal where the word "interest representation" is only used for consumer interests. By contrast for industry the expression "experience from" or "representing experience from industry" are used.
[869] See SOU 1983:40, 66.
[870] Prop. 1975/76:159, 25.
[871] Prop. 1975/76:34, 116. See also Bernitz/Draper (1986), 70.
[872] Prop. 1975/76:159, 26.
[873] See the comparison with the Public Food Agency in SOU 1983:40, 444 ff.

The first straightforward observation is that, in contrast to many other public agencies and institutions in Sweden, the KOV and the KO were not equipped with powers to impose direct sanctions in the form of either fines, injunctions or binding prescriptions. Interestingly, such ideas were rarely voiced in the legislative deliberations. Certainly, the initial conception of a KO as a public advocate in the consumer interest was hardly compatible with vesting administrative sanctioning powers in this public body.[874] In an adjudicative model of enforcement, it was important to keep the prosecutorial and sanctioning competencies within different bodies for reasons of due process. But even after the KO merged with the KOV and the emphasis in enforcement shifted from adjudication to guidelines, the direct powers of the Agency remained weak. The restraint as to supplying the KOV with strong decision-making powers was justified with legal certainty arguments. On many occassions the lawmaker emphasised the difficulty of exercising administrative discretion in an area so much dependent on broad general clauses.[875]

With the setting up of the KOV in 1972, there was a discussion on whether to furnish the Agency with formal powers to adopt binding measures with regard to traders.[876] Some of the consulted organisations, namely the KF-LO-SACO allience, suggested that consumer policy, and in particular the guidelines for influencing producers, should dispose of the same set of measures as the antitrust policy at that time.[877] However, the government expressed preferrence for "voluntary co-operation with producers in unbound forms". The Minister underlined the innovatory character of this activity and suggested that alternative methods would be considered only when these "unbound" forms prove to be inadequate.

The preparatory works to the 1976 MFL raised the question of the competencies of the KOV in connection with the legislative objective to ensure better consumer information in advertising and labelling. The Advertising Inquiry Commission had recommended a framework law, entrusting the KOV with the elaboration of binding disclosure prescriptions in close co-operation with industry.[878] The Commission regarded penalties imposed by the Agency as the most effective sanction for violation of the prescriptions and ensuring efficient implementation of the law.[879] This proposal was generally approved by many of the bodies and interest organisations consulted in the legislative process. Interestingly, the proposal even gained the support of the influential Market Legislation Delegation of Swedish Trade and Industry (*Näringslivets Delegation för Marknadsrätt*, NDM).

Yet several judicial bodies (the Market Court and *Svea Hovrätt*), as well as the KO and representatives of trade and co-operative unions, supported a model based on non-binding norms and prescriptions (guidelines) issued by the Agency. In individual cases of non-compliance, the standards laid down in the guidelines could be tried by the

[874] The Bill to the first MFL underlined the importance of keeping a parallel between the institutional framework of marketing practices law and antitrust law. See prop. 1970:57.
[875] Prop. 1975/76:34, 96, 106. See more recently SOU 2000:29, 397.
[876] Prop. 1972:33, 65; NU 1972:40; rskr. 1972:225.
[877] The latter was based on voluntary compliance and negotiations, but there were some possibilities of using binding government measures as a last resort.
[878] SOU 1974:23.
[879] SOU 1974:23, 85 ff.

Market Court.[880] A system of centralised enforcement, with the Market Court as a last resort, was preferred from the viewpoint of legal certainty and due process. The government took note of the criticism and did not venture the introduction of new enforcement techniques based on a administrative law approach.[881]

The KOV's formal powers and instruments for implementation were further discussed by the Guidelines Commission. A comparison between five regulatory agencies demonstrated that the KOV was the only to lack formal powers to impose direct sanctions. The Guidelines Commission did not look into the reasons for this choice or question it. The objectives and the addressees of regulation of the compared agencies were widely divergent and it was therefore concluded that alternative tools may be appropriate in the work of the different agencies.

Summing up, it appears that the KOV with KO have been assigned limited formal administrative powers in the area of fair trading, despite an ambitious program and the strong message sent by the very decision to build the agency.[882] Of course, the informal powers of the agency are more difficult to assess.

In line with the Ombudsman tradition, the whole institutional and enforcement framework of marketing practices law was from the outset based on informal procedure, negotiation and compromise. Two main objectives were identified in the first Bill of 1970: (i) that intervention should take place speedily and effectively and (ii) that rules shouldbe applied without creating unnecessary conflicts between the authorities and individual traders. These objectives, in turn, required supple forms of handling the files and freedom for public institutions involved in implementation to choose among the different options of action.[883]

It was specifically emphasised that the KO should seek to achieve voluntary compliance with the law through negotiation and informal contacts. The Minister expressed the optimistic view that in the majority of cases this intervention should be sufficient. Industry was according to the governmental view willing to compromise and to act in a fair manner. Situations of unfair conduct were seen as exceptions to the rule, produced by lack of or incorrect understanding of valid legal norms.[884]

---

[880] Prop. 1975/76:34, 64 ff.

[881] At the time of the debate KOV and KO constituted two separate bodies. The arguments against stricter sanctioning competencies of KOV were therefore fundamentally of a co-ordination and efficiency character. Vesting formal decision-making powers in the Consumer Agency implied divided competence on questions of unfair marketing and on information disclosure (to be monitored and enforced by KO and by KOV respectively). The risk of overlapping and conflict of competencies was obvious. Moreover, a divided system could confuse both consumers and traders who had to comply with possibly incongruent sets of norms. See *ibid.*, 66.

[882] It may be interesting to compare the powers of KOV with the definition of agency given in the US Administrative Procedures Act (APA). "Agency is a part of government that is generally independent in the exercise of its functions and that by law has authority to take final and binding action affecting the rights and obligations of individuals, particularly by the characteristic procedure of rule-making and adjudictaion." Judging from this definition rule-making and adjudication seem to be the most important functions characterising a governmental agency. Naturally other functions may be added here: information gathering and processing, negotiation and policy formulation. Yet neither of these has the property of affecting the rights and obligations of individuals, at least not in a direct manner.

[883] Prop. 1970:57, 148.

[884] "Som jag tidigare påpekat bör ombudsmannen i första hand försöka komma till rätta med otillfredsställande förfaranden på frivillig väg. I många fall torde utsikterna härför vara goda. Erfarenheterna från den utomrättsliga

The Minister was fast to reassure that compromise should not be searched at any cost, and that unacceptable conduct and violations of the law should not be tolerated. However, if the trader would need time to bring his activity into accordance with the law and to dismantle the illegal conduct - for instance in case a packaging had to be redesigned – he should be awarded this. The same should apply to the Market Court. In general, the Minister cautioned, public authorities should avoid measures with drastic and far-reaching consequences for the individual economic actors.[885]

For the experienced student of Swedish law it would not be difficult to gauge the impact of such recommendations. Considering the strong position of preparatory legislative material as an authoritative source of Swedish law and its decisive influence on statutory interpretation and implementation, this appeal to voluntary settlement was sure to be perceived as a clear instruction towards modesty in implementation. In a manner of speaking, what the legislator proclaims on his stone tablets, is undermined by the small print on the reverse side. On the other hand, however, the explicit recommendation of 'soft' implementation sends a signal to industry that other alternatives are available. Voluntary compliance may thus be more effectively achieved against the backdrop of stringent regulation. Industry is in other words advised to conduct itself so that it does not disappoint the legislator's trust in its good will and cooperativeness.

Although an element of an authoritative legal source like preparatory works, the obligation to seek voluntary compliance is not explicitly stipulated in the law. So whereas it has strong instructive effect for the KO, it creates no procedural rights for the affected undertakings. Indeed, in the Government Bill to the 1970 MFL the Minister states that "before undertaking any measure the Ombudsman should as a rule hear the one against whom the complaint is directed and try to induce him to abstain from the questionable conduct."[886] This phrase may create an impression of a quasi-procedural right. Yet a more careful look at the precise wording (the use of "should" (*bör*) instead of " must " (*skall*) and the lack of any specific rule in the legislative text itself, reveal the true status of this statement, namely that of a strong recommendation. If the KO proceeds directly to litigation, the respondent would not be in a position to object that the action is inadmissible because of incomplete pre-trial procedure. A violation of this instruction would hardly affect the distribution of litigation costs either.

An informal settlement resulting from the contacts between the KO and the individual trader may well be sufficient to close the respective file, given that the Ombudsman perceives the commitment of the trader as serious and trustworthy. Such settlement naturally lacks any binding effect. Would the trader choose to act contrary to the agreement in the future, the KO would be left with no other choice but to resort to alternative enforcement measures.

---

verksamheten visar att den som handlar i strid mot gällande normer ofta inte har klart för sig att han gör det. När förhållandet påpekas för honom torde han i allmänhet vara beredd att självmant rätta sig." Prop. 1970:57, 84; similar at 148.

[885] Prop. 1970:59, 84.

[886] Prop. 1970:59, 84.

The Ombudsman per definition acted in the public interest and was therefore not obliged to follow each individual complaint. The Standing Instructions of KOV/KO stipulated that a complaint brought against certain marketing measure could be left without a remedy "If taking into account the general public interest, it would be of little importance to try the case."[887] This provision relates more specifically to the decision of KO to initiate proceedings before the Market Court. It should nevertheless apply *per argumentum a fortiori* in cases where KOV/KO decides not to undertake any formal measure. A private party that had lodged a complaint against certain kinds of business conduct could not challenge a decision by KOV to close the file, and remain satisfied by informal assurances on the part of the trader. Given that the MFL did not provide standing for the individual consumer, the latter was endowed with no formal powers to influence the way of action against an undesired market conduct. The only alternative for a consumer dissatisfied with the action chosen by KOV/KO was to address an active consumer organisation and to convince this organisation to use its right of action.

In the analysis of the handling of individual complaints by KOV, the Guidelines Report provided an example of at least one case when a complaining group of consumers was not satisfied with the 'soft'negotiations and voluntary compliance opted for by KOV. The case concerned safety aspects of a toy – a baby doll, whose head could relatively easily be removed and would then leave sharp cutting ends and small parts that could be dangerous for children. After negotiations with the importer (ICA), KOV received a commitment that the doll would be equipped with the necessary warning. The consumers, however, were not satisfied with the scope of this commitment and urged KO to seek an injunction in the Market Court. At the refusal of KO to act in the desired way, the group itself filed an action for an injunction before the Market Court.[888] Interestingly, the Court did not recognise the group as a valid association of consumers under the MFL.[889]

5.4.3.3 Decision-making in individual cases

The only formal decision-making power of the KO in individual cases is the right to issue consent prohibitionorders, or information disclosure orders.[890] A violation of the order can lead to penalty. There are nonetheless substantial limitations on the powers of KO in this respect. Injunctive orders can be issued by the KO only where the case is of "no greater importance" ("*inte är av större vikt*"). More importantly, the prerogatives of the Ombudsman are conditional upon the voluntary acceptance on the part of businessmen, i.e. they are limited to issuance of consent orders.

The consent orders were included among the enforcement instruments of KO already with the 1970 MFL. The instrument was apparently inspired by the rules on so-called "*strafföreläggande*" (consent punishment orders) in criminal procedure.[891] The

---

[887] 22 § (SFS 1976:429): "Anföres klagomål mot viss marknadsföringsåtgärd och är fråg endast om prövning enligt 2-4 §§ marknadsföringslagen (SFS 1975:1418), får klagomålen lämnas utan åtgärd, om det från allmän synpunkt är av ringa betydelse att saken prövas." Cf. 12 § (SFS 1995:868).

[888] See SOU 1983:40, 633.

[889] See this Ch. below.

[890] This prerogative was first intoduced in 9 § lag om otillbörlig marknadsföring. See prop. 1970:57, 84. It was taken over in 14-15 §§ MFL 1976:1418 and constitutes 21 § of the present 1995 MFL (SFS 1995:450).

[891] See Ch. 48 RB, cf. SOU 1983:40, 303.

important difference is that the consent punishment order is directly enforceable upon violation. The consent injunctive orders as laid down in the MFL require separate proceedings before an ordinary court for the penalty to be imposed. The penalty can be established individually, depending on the seriousness of the case and the risk of violation. The question has apparently not received a categorical answer in legal practice, and has not been discussed in legal doctrine.

The KO could issue two types of consent orders: a prohibition order and an information order. The prohibition orders were foreseen already in the original version of the law. The information disclosure orders were introduced in the MFL of 1975. Whereas the first category of orders prohibits certain forms of economic conduct, the second one demands specific information to be provided in repeated marketing or advertising. Prohibition orders have a negative suppressing effect on misleading and unfair information, while information orders are hoped to produce a positive, information-promoting effect. In the practice of KO such orders are less frequent.

The legal status of the consent orders was not entirely clarified in the legal text or in preparatory material. When examining the alternative regulative instruments in the area of consumer protection, the 1983 Governmental Commission distinguished between administrative decisions (*förvaltningsbeslut*) and normative decisions (*normbeslut*).[892] It appeared that the consent orders issued by KO were to be classified as 'administrative decisions'.[893] In other words, the issuing authority (KO) was always in a position to change its decision in case the decision was obviously wrong or due to other circumstances. Of course, this applied under the prerequisite that reconsideration could take place speedily, simply and without negatively affecting an individual party.[894] Yet, whereas all individual administrative decisions affecting individual rights and obligations can be appealed before an administrative court, the consent orders--exactly because of the (quasi-) voluntary approval by the addressee--cannot be challenged before a court.

On the other hand, the effect of an approved prohibition or information disclosure order is very strong and nearly equals the binding effect (*res judicata* principle) of a court decision. The Government Bill to the 1970 MFL stated that, "if the order is approved, it has the validity of a decision of the Market Council".[895] That the effect anyway was not fully equivalent to a court decision followed from a comment by the Guidelines Committee: "Clearly this cannot be understood in the sense that cases where an order is issued should be awarded the same precedent-building role as a Market Court decision. What is implied [in the Bill] is rather that the consent prohibition or the information orders have the same legal effect in relation to the respective trader as if they were pronounced by the Market Court."[896] The order is,

---

[892] SOU 1983:40, 444.

[893] This was also confirmed by prop. 1994/95:123 where the possibility of reconsideration of individual administrative decisions under 27 § Administrative Procedure Act (Förvaltningslagen, FL) is explicitly envisaged for the consent orders. In the Bill it says that a consent order has the power of a court decsion that has entered into force, this without prejudice to the possibility to appeal under 27 § FL.

[894] See Strömberg, *Allmän förvaltningsrätt* (Malmö: Liber-Hermods, 1995), 160 ff.

[895] Prop. 1970:59, 99.

[896] SOU 1983:40, 212 f.

however, not binding for the Courts and cannot respectively be regarded as a source of law-interpretation equal to the decisions of the Market Court. Finally, similar to a decision of the Market Court, the orders of the KO was sanctioned by a penalty that can be imposed by an ordinary court upon repeated violation.

The Bill to the 1970 MFL didnot give much guidance as to the rationale behind this particular enforcement measure. It only noted that in some "clear and conceded cases" the guarantee against repeated violation provided by the injunction sanctioned by penalty would be useful, even though it might be unnecessary to bring the case before the Market Council. Again, speed and efficiency appear to have been the key concerns behind the institutional design. The criteria to be used when deciding which cases are less important (and can be handled by consent order) are not clear either. The Bill states that a consent order should not be used in case of greater importance, for instance if it involves a question of principle or of considerable practical importance.[897] Clearly this instruction is vague. In the practice of the KO, one category of candidates for 'consent orders' have been situations which in their main elements replicate an already decided case. In a number of areas, however, this dividing line is also unsatisfactory.

The procedure for issuing consent orders was discussed in more detail in the Guidelines Committee' Report (*SOU 1983:40*). The report specifically noted that in a number of cases (19 out of a total of 278 orders for the years 1979-1982) the affected trader had not responded to the initial order of the KO. In 6 of these cases the KO had brought the cases further to the Market Court. In the remaining cases the Ombudsman had issued a second and a third order, which finally had been accepted by the trader. Such protracted proceedings entailed considerable waste of time and resources. Moreover, it turned out that the reported statistics showed only the tip of the iceberg. The expected readiness of the trader to respond to or to accept the order evidently was an important factor in the selection of cases and enterprises to be addressed by consent orders.[898] In other words, there was pre-selection on the basis of the experience and previous contacts of KO with the respective traders.

On the basis of the above findings, the 1983 Guidelines Committee proposed to reverse the order and attach binding effect, not only to a trader's active approval of an injunctive order, but also to his failure to respond within a given period of time.[899] The proposal provoked dissent in the Committee and was met with hostility by most parties consulted in the course of the legislative process. Particularly negative was the reaction of industry representatives. Both the SI and the Industry Delegation for Market Law (NDMR) stated that the problem was marginal and could moreover not be solved with the suggested change. In addition, NDMR feared that formalising the procedure of consent orders could disrupt the functional balance between KO and the Market Court. There was in particular a risk that KO turned into a quasi 'first instance court' under the Market Court. Such an arrangement could gradually lead to KO tackling not only trivial cases, but also cases of principle importance.[900]

---

[897] Prop. 1970:59, 84.

[898] As the Committee puts it: "Ever since the rules entered into force it had been customary to send consent orders only to traders who could be expected to respond to KO.", SOU 1983:40, 304.

[899] SOU 1983:40, 213 ff., 303.

[900] See prop. 1984/85:213, 219; cf. the reservations expressed by Holm and Tengelin, SOU 1983:40, 341.

These arguments are of a clearly institutional nature and contribute to keeping the powers of the KO within the narrow frame set up by the initial legislation. Other objections raised by the dissenting Committee members had to do with misgivings as to the overall effects of the intended rule. The main concern was that a general rule which attaches binding effect to passivity may reinforce non-action, even for traders who find a particular order acceptable. In addition, avoiding servings might make the process more complicated than a speedy preliminary injunction procedure before the Market Court. [901] The long-term negative effect worrying industry was that the simplicity of procedure might lead to shift in the distribution of competencies between the alternative institutions, in favour of KO and to the disadvantage for the Market Court.

A less discussed aspect of the consent order proceeding relates to questions of principle, such as legal certainty and material justice. From a time/cost perspective enterprises have a clear interest to try and avoid formal legal proceedings. In addition, voluntary settlement is less likely to attract public attention and to trigger negative publicity, which is another strong factor for accepting consent orders. Given that a trader who disputes the interpretation of the KO lacks opportunity to address a request for a preliminary ruling to the Market Court , his only alternative is to maintain the allegedly unlawful conduct while waiting for the Ombudsman to react. Consequently, acceptance might not always be driven by genuine agreement on the merits, and could negatively affect the chances for achieving substantive justice.

As the confession of the KO before the 1983 Guidelines Committee demonstrates (see above), there is at the same time a significant risk that the regulative agency would apply intensive enforcement in cases where approval and compliance can be expected. Thereby, the Agency may be avoiding the really difficult and important cases against fly-by-night operators and deviant traders that are more difficult to reach and influence. Such procedure could create or reinforce a tendency to regulate compliant industries so that the agency scores high performance.[902]

Finally, the fact that there is no appeal procedure of the consent orders can be problematic from an agency control perspective. The lack of judicial review and the limited publicity (they appear mostly as numbers of settled cases) allows for a rather substantial portion of activity to remain murky while escaping parliamentary and executive control. Court review of administrative action normally has an important 'signalling' function.[903]

5.4.3.4 Rule-making

As already mentioned above, the 1975 MFL put significant weight on the promulgation of guidelines by the KOV in close cooperation with the affected industry. The guidelines (*riktlinjer*) were envisaged as an instrument of concretisation of the general clauses in the MFL and in particular the information discosure clause (3 § 1975 MFL). They were gradually extended to other general standards in consumer

[901] Ibid.
[902] See Cranston (1979), 116 ff.
[903] Revesz, 'Specialized Courts and the Administrative Lawmaking System' (1990) 138 *University of Pennsylvania Law Review*, 1111 ff.

protection laws, such as the Consumer Credit Act, the Alcohol and Tobacco Advertising Acts. The guidelines were, however, not confined to legislative implementation. More generally, they aimed at working out of specific standards for marketing and product design and influencing producers outside the limits of formal legislation. The guidelines proved to be among the most controversial regulative instruments in the history of Swedish consumer protection law and policy. Especially at the end of the 1970s, a powerful critique against the system was coming prevailingly from industry.[904] It is believed that a more detailed account of the discussion at that time may serve as illustration of the complexities of institutional choice and design, and of the role of interest representation.

The practice of issuing guidelines evolved spontaneously in the work of the KO and the KOV respectively, before their merging into one authority. In the Office of the KO soon after its establishment, a need was perceived to provide general directions as to the future interpretation of the general clause. In response to business demands, KO proceeded to issue interpretative guidelines to his staff, but in effect formulating proscriptions of considerable importance for business. With time the institute of the guidelines expanded. By including industry representatives in a process of negotiations, KO through the guidelines sought to attain commitments to more precise marketing standards in some sectors of trade and industry. Between 1971 and 1976, KOV issued around 30 guidelines concerning healthcare, post-order sales, price advertising of daily consumer goods, advertising of alcohol and tobacco products, identification of advertising, and other areas.[905] The guidelines proved indispensable for achieving certainty and predictability for traders helping to elucidate interpretations of the framework legislation. At least *prima facie* guidelines appeared a cost-efficient method of legal implementation, allowing norms to be developed in relationship to categories of situations instead of relying on painstaking individual negotiations and/or case-by-case litigation.

Similarly, the KOV started using guidelines without being formally authorised to do so. Product tests and comparisons were often followed by negotiations with industry aiming at improving product standards, mainly in the area of consumer health and safety. The results from these negotiations were formalised into voluntary agreements, which since 1975 were published as'guidelines' (*riktlinjer*) in a series of KOV investigation reports.[906] The decisive difference between KO and KOV, however, was that KOV was not a law-enforcement authority in the proper sense of the concept. In contrast to the KO, the Agency did not have a framework legislation to enforce. Its main functions were 'factual', consisting in identifying and analysing consumer problems and providing consumer information. It was thus the autonomous decision of KOV about an existing consumer problem that served as a ground for a decision to open negotiations over new guidelines.[907]

With the entering into force of the 1976 MFL the guidelines acquired a different standing. First of all, they received explicit recognition in the Governmental Bill as a spontaneously evolving and successful form of administrative action. Furthermore, the

[904] The critique cooled down during the 1980s. See 1983:40, 466.
[905] SOU 1983:40, 56.
[906] *Ibid.*, 56.
[907] See SOU 1983:40, 100.

guidelines were brought to the forefront of consumer policy as an instrument of 'producer influence'.[908] The Minister praised the advantages of the guidelines compared to formal enforcement and sanction,s and especially the possibility to influence producers at an early stage of their planning activity.[909] At the same time, the Minister admitted that expansive requirements could be perceived as conflicting with the understanding that product information and design are a primary responsibility of the enterprises. Detailed guidelines required substantial resources and would be difficult to adapt to dynamic marketing developments. Therefore the content of the individual guidelines was to be discussed "to a not insignificant extent" with representatives of industry. A comprehensive system of guidelines was an unrealistic objective, it was stated.

Two types of guidelines were most commonly used in the work of KOV, namely product-related and information-related guidelines. Whereas the first type of guidelines directly prescribed certain requirements as to the design, composition and safety of a product, [910] the second type of guidelines related to the information to be provided in connection with marketing and sales of products and services.[911] In terms of their scope and addressees, the guidelines were either product specific and applied to particular industry sector, or had 'horizontal' effect seeking to establish standards for marketing practices across industry sectors. In the years 1977 to 1979 the KOV issued 29 guidelines, i.e. an average of about ten guidelines per year.[912]

The only explicit normative support for the guidelines was to be found in 3 § of the Standing Instruction for KOV.[913] This provision enumerated among the Agency's tasks, the duty "to develop guidelines for the marketing and design of products, services and other commodities by enterprises, as well as for the implementation of the Consumer Credit Act."[914] The practical work related to the guidelines was carried out by the various divisions of the Agency. Yet it was for the Management Board to decide upon "more important rule-making issues (författningsfrågor)".[915] In effect, the Board formally adopted most of the guidelines and actively participated in their initiation and planning.[916]

Legal status of the guidelines

The exact legal status of the guidelines was a matter of discussion in *travaux préparatoires* and in several government investigations, but never received a clear-cut answer in a statutory text. Born as spontaneous administrative practice, the guidelines were not explicitly mentioned in any of the legislative acts KOV/KO had to monitor or

[908] The seeds for a flexible co-operative approach were planted already with the reference to "voluntary and unbound forms" of producer influence in the Governmental Bill on Consumer Policy, prop. 1972:33, 65.
[909] Prop. 1975/76:34.
[910] Examples from this category are the guidelines on skateboards (KOVFS 1977:3), riding and skiing helmets (KOVFS 1977:7), automatic fire-detectors (KOVFS 1978:3).
[911] Examples from this category are the guidelines for information on fuel consumption of new cars (KOVFS 1977:2); for information to consumers upon temporary price promotions in retail trade (KOVFS 1977:1; for marketing of dipers (KOVFS 1977:4); for information to consumers in the marketing of potatoes (1977:6).
[912] See the statistics in SOU 1983:40, 59.
[913] SFS 1976:429 (amended 1979:826, 1980:873 and 1981:494).
[914] SFS 1976:429.
[915] 11 § 1 Standing Instruction of KOV (SFS 1976:429) as amended.
[916] SOU 1983:40, 235.

implement. It is remarkable that the preparatory materials to the 1975 MFL, in which the guidelines were described as the most important instrument at the disposal of the consumer protection bodies, did not recommendany provisions regulating their status or the procedure for their drafting and adoption. The Minister expressly stated that closer regulation of the investigative and negotiating activity of the law-enforcing authorities was unnecessary. The experience of unfettered forms of interaction was, according to the Minister, altogether positive and should be extended further.[917]

The Bill to the 1975 MFL contained some contradictory statements as to the legal status of the guidelines. On the one hand, guidelines were described as recommendations and were presented, together with voluntary agreements, as an alternative to binding legislation.[918] On the other hand, the guidelines were expected "normally to form the basis for the decisions of the Market Court in individual cases".[919] In the Bill on the organisation of the KOV the Government repeated this point but in a somewhat softer tone: the guidelines were "to serve *as a guidance* for the Market Court when deciding on individual cases." (my italics)[920]

The uncertainties flowing from these statements were noted by the Council on Legislation (*lagrådet*) in the course of preparatory work on the Consumer Credit Act. Discussing the relationship between open legal standards and their concretisation through negotiated guidelines, the Government Bill to the Consumer Credit Act used similar formulae as the Bill to the 1975 MFL. The Council on Legislation noted that the increased role and status assigned to the guidelines deserved closer scrutiny. The Council underlined that in constitutional terms, and in particular when seen in the light of the constitutional doctrine of delegation of norm-giving power ("*normgivningsmakten*"), the guidelines appeared to have exclusively the effect of non-binding recommendations. Moreover, the guidelines came close to expressing the position of one of the parties to the negotiations, namely that of the public agency.[921] In its response to the objections of the Council on Legislation, the Government accepted in all essentials ("*i allt väsentligt*") the qualifications of the Council on Legislation.[922] The Minister inferred that the guidelines were to be regarded as recommendations and that they neither could force a trader to act in a certain way, nor bind the Market Court in its judgment on the lawfulness of certain conduct. Against this backdrop, there was no appeal against the guidelines.

Despite the relative consensus about the non-binding character of the guidelines, their use and legal nature remained controversial. Behind the controversy were not so much differing legal views, but empirical observations about how the guidelines were perceived by their addressees and the public. There was mounting evidence that the guidelines were formulated by KOV like legal rules and promulgated in a way that was customary for binding agency prescriptions. The traders to whom the guidelines

---

[917] Prop. 1975/76:34, 109. See also SOU 1983:40.
[918] Prop. 1975/76:34, 93, 99.
[919] Prop. 1975/76: 34, 108.
[920] "[Riktlinjerna] kommer nu att öka i betydelse genom att de enligt statsmakternas beslut kommer att vara vägledande för marknadsdomstolens avgörande i enskilda fall." Prop. 1975/76:159, 10. See the critical comments of Stjernquist, 'Riktlinjer i svensk offentlig rätt' (1992) 15 *FT*, 233 ff., at 240 f.
[921] Prop. 1976/77:123, 345 ff., at 350.
[922] Prop. 1976/77:123, 370.

were directed obviously often perceived them to have binding effect. Among the main reasons for the inadequate public perception of the guidelines was seen in KOV/KO choices of wording and terminology. The guidelines were published in a series called "Collection of rules of the KOV" (*KOV's författningssamling*), and the use of this conceptual category was unmistakably associated with binding normative provisions. The guidelines were worded in a language that sounded as imperative commands, rather than voluntary agreements. The division of the rules into "shall" and "should" categories (*skall* and *bör*) only enhanced the impression of binding force of the first category of provisions.

A special investigation instructed by the government to look into the legal status of different government regulations in 1982 produced the report "More clarity in the question of the legal character of different regulations".[923] The Guidelines Commission was likewise given the task to revisit the problem. Several criteria appeared crucial for determining the status of KOV's guidelines: the problem of delegation, the terminology used, the effect on the addressees, the possibility for formal sanctions and the opportunity to lodge complaints against the guidelines.

One of the decisive criteria for evaluating the legal character of the guidelines was their constitutional status in light of the doctrine of delegation of powers. All governmental investigations accepted the position of the Council on Legislation that the legal regime of the guidelines did not correspond to the stringent requirements for delegation of norm-making power stipulated in Ch. 8 RF.[924] Following the principles of strict parliamentary democracy, RF contains extensive provisions on the delegation of normative (rule-making) power. In order to keep up with the principle of popular sovereignty, the RF in Ch. 8 prescribes a direct line of delegation from Parliament to government, and only then to governmental agencies in case of delegated rule making. The scope of delegation is, moreover, limited for certain important decision-making situations.

Comparing the characteristics of the KOV guidelines with the regulative instruments used by other administrative agencies, the Guidelines Committee established that in all cases where a government agency was authorised to promulgate norm-making decisions, this authorisation was to be found in the statute and not in the Agency instruction. Although the Instruction was binding on the agency, it was insufficient to empower the Agency to issue rules that were binding on individuals.[925] The Committee agreed that the guidelines of KOV were formally to be classified as recommendations and not as binding prescriptions (föreskrifter).[926] At the same time the Committee drew a distinction between guidelines that were directly derived from the general clauses of the MFL, and other kinds of guidelines. The first category of guidelines had a solid, even if indirect, support in a legislative text. To solve the delegation problem the Committee considered introducing a specific provision on the guidelines in the MFL. The idea was nevertheless dropped because authorization in a legal act could create the wrong impression that the guidelines were legal rules. Furthermore, this could limit the scope of application of the guidelines.

[923] Ds 1982:11, Större klarhet i fråga om olika reglers rättsliga karaktär och syfte.
[924] See *Lagrådet* in prop. 1976/77:123.
[925] SOU 1983:40, 440.
[926] SOU 1983:40, 286.

By identifying the nature of the guidelines as non-binding recommendations, the Council on Legislation concluded that the KOV/KO could not impose formal sanctions for non-compliance. The Council underlined that even less formal measures which could be perceived like sanctions should be avoided, since this would create an erroneous impression regarding the legal status of the guidelines. On this point the Council on Legislation implicitly referred to the practice of KOV to give publicity to non-compliance with the guidelines. The government in general agreed and commented that, whereas it should be free to inform consumers, the Agency should not portray non-compliance with the guidelines as a non-compliance with binding rules. Publicity could, however, be given when there was violation of guidelines based on a clear precedent of the Market Court or on broad support in the respective branch of industry.

Since the guidelines lacked firm legal basis, there would be no formal means to require compliance. In the case of guidelines based on the general clauses of consumer protection laws, the only way for the KO to ensure compliance would be to initiate proceedings before the Market Court. Theoretically, the Market Court would in such proceedings be free to apply its own interpretation of the general clause and, respectively, to strike down guidelines that build on erroneous interpretation of the law. In reality, however, the Guidelines Committee demonstrated that there was not a single case where the Market Court had found guidelines to be in conflict with 3 § MFL.[927] To the contrary, in all (four) cases brought before it by the KO, the guidelines were accepted as providing a valid understanding of "good commercial practice" (*god affärssed*).[928] In several cases the Court even noted that its decision could be reversed if the guidelines subsequently were to change (which on occasion indeed happened).[929]

One important element in the analysis of the legal status of the guidelines, identified already by the Council on Legislation, concerned the legal possibility to file complaint and to challenge the guidelines before a court of law. Such an opportunity was not explicitly provided for in the relevant legal acts. The Council on Legislation concluded that challenge would not be admissible under general rules of administrative procedure either. A trader that would disagree or simply behave in ignorance of the guidelines would not be violating any binding norms, and could therefore not have a valid legal act as a basis of his complaint. For the trader who wanted to test the conformity of the guidelines with the general clauses of the MFL, the only way would hence be to act in conflict of the guidelines and to wait the case to be brought before the Market Court.

Legal vs. factual effect

Despite the general consensus as to the absence of binding formal effect of the guidelines, the Guidelines Committee reaffirmed the factual authority and weight which the guidelines possessed. The Committee underlined that:

---

[927] The Committee also noted that the Market Court always opened its deliberations by analysing whether the information was "of particular significance for consumers", as required by the legal text of 3 § MFL and only then proceeded with reference to the guidelines. See SOU 1983:40, 163.

[928] SOU 1983:40, 108 ff., 162 ff.

[929] MD 1981:20 ("Saab"); MD 1981:21 ("Ford Company"); MD 1981:22 (Svenska Renault").

> [t]he fact that the guidelines are not to be regarded as legally binding rules does not prevent them from having great efficiency as a regulative instrument and from being directly intended to have this efficiency. The guidelines are indeed not just any recommendations. They express an expert opinion and are as a rule well-grounded in industry's understanding about what requirements can and should be directed to them under the MFL as to information and product design."[930]

The Committee identified four main factors that determined the power of the guidelines as a regulative instrument: (i) the quality of the expertise on which they are based; (ii) the participation of industry in the process of their drafting; (iii) the competitive pressures that pushed towards stricter commitments to quality; and last (iv) the underlying possibility for the KO to institute proceedings before the Market Court against a deviant trader.[931]

It should be noted that at many points the distinction between factual and legal in the report is so blurred that the propositions are contradictory and the significance of drawing any such distinction is lost to the reader. Thus the Committee infers that "the guidelines are indeed not formally binding rules ... but they carry big legal weight"; "purely factually the guidelines have legal meaning ...", "in practice it is without noteworthy importance that the guidelines as such, legally seen, are not formally binding prescription" and "[i]n this case there is hardly any clear border between what is legally binding and not".[932]

More importantly, the Guidelines Committee did not come with any significant proposals to change the system. Surprisingly, despite impressive evidence that the guidelines were perceived by trader, consumers and media as binding prescriptions, the Guidelines Commission saw no need to change the established terminology. The Commission discarded the proposal of the government working group to rename the guidelines into "allmänna råd".[933] General advice had been normally used for internal instructions from the management of an agency to the staff, ensuring uniform application of general legal standards susceptible to potentially divergent interpretation.[934] The KOV guidelines were, by contrast, not directed to the internal staff but to all or some of the participants in the market process. The term recommendation was not seen as appropriate substitute either. As evident from the quotation above, the guidelines were in the view of the Commission more than just recommendations. They were developed in co-operation and after negotiations with industry representatives, and were expected to have a very strong penetration among the affected circles.

---

[930] SOU 1983:40, 103.
[931] SOU 1983:40, 103.
[932] SOU 1983:40, 111.
[933] The report "More clarity in the question of the legal character of different regulations" (Ds 1982:11) had proposed to treat the guidelines as "general advice" ("allmänna råd") since the term was conventional in Swedish administrative law. See SOU1983:40, 286.
[934] It is defined in 1 § of Regulation on the collection of administrative rules 1976:725 (Författningssammlingsförordningen, FSamlF) as "such general recommendations on the implementation of a normative act which specify how someone can or should act in a certain context". These are consequently not binding prescriptions, but at the same time classified in the category rules of the same Regulation (27 § FsamlF). See Bejstam, 'Föreskrift och föreskriftsprövning enligt 1974 års Regeringsform. En Bokanmälan' (2000) *FT*, 23 ff.

Instead of envisoning radical changes, the Guidelines Committee eventually suggested cosmetic amendments to the system. Most of the changes did not require legislative amendment because they referred to the practical procedures and the wording of the guidelines. Thus, the guidelines should make it clear that they build upon the general clauses in the MFL, and that they represent requirements raised by the KOV following consultations with industry representatives of industry.[935] All in all, the legal analysis in the report concluded that there were no major objections to the procedure.

Ironically, the fluid border between factual and legal became quite apparent in the altered position of the guidelines in the activity of the KOV. Even before the Guidelines Committee submitted its report, the Agency had drastically reduced its rule-making activity.[936] The annual number of guidelines dropped from nine in 1979 to four in 1982. In 1979, when the Government commissioned the Guidelines investigation, the Agency had 55 new projects for guidelines under way. Of these only 13 materialised into guidelines by the end of 1982.[937] In part, this reduction was a result of serious budgetary cuts.[938] In addition, the Government had commissioned an overview of the activity of the KOV. As a result the Agency's work with direct consumer advice was wound up. The Agency was specifically instructed to leave more measures under the MFL without taking action.[939] One can say that even without a legal amendment, the factual position of the guidelines was considerably weakened.

Participation

The Guidelines Committee highlighted the issue of representation at the negotiating stage of the guidelines.[940] From the analysis it appears that industry, and in particular large enterprises, have been well represented in the process. Considering the numerous rules and regulations (formal and informal) that have been directed at market actors in the 1970s, it is not surprising that industry mobilised its resources for achieving high level professional representation. Thus, for instance, the Industry Delegation for Market Law (NDMR) was set up to act as an expert advisory body and representative for a large number of industry organisations.[941] The NDMR was among the most influential participants in the guidelines debate and a diligent 'remissinstans

Decidedly less positive was the experience of small enterprises. Several (though not many) of the interviewed small companies expressed dissatisfaction at the high costs of representation (long negotiation process, necessity to follow the different stages of bargaining, complex material to be studied and analysed). As a recommendation, the Guidelines Committee advised KOV to take up contacts with the affected enterprises before the stage of consulting a guideline with the Management Board. The Committee thus sought to enhance the participation of industry at the stage of agenda-

[935] SOU 1983:40, 292. On the difference between 'shall' and 'should' ('skall' och 'bör' regler), see SOU 1983:40, 104.
[936] See SOU 1983:40, 73.
[937] SOU 1983:40, 76.
[938] See SOU 1983:40, 50. For the budgetary year 1980/81 the direct financing of the activity of KOV was reduced with 2.3 million crowns announcing additional 1.7 million cuts for the next year.
[939] See prop. 1981/82:100, bilaga 14.
[940] SOU 1983:40, 415 ff.
[941] SOU 1983:40, 693.

setting.[942] The Committee concluded, however, that representation on the whole had been satisfactory. It subsequently directed a vague recommendation to KOV to see to it that no irregularities would occur in the future (*"olägenheter ska inte uppstå"*).

Oddly enough, consumer organisations rarely participated in the negotiations. Some examples of active participation were given in the 1983 Committee report. They concerned situations where active and clear consumer groups affected by the guidelines could be identified (e.g. the Association of Skateboard-runners). In other situations, available and active consumer organisations were not invited to participate (e.g. motor vehicles owners from *Motormännens Riksförbund*). The Guidelines Committee pointed out that the large organisations that traditionally represented consumers, namely the trade unions (LO, TCO/SCO) and the KF, "did not find it necessary to be represented at the negotiations of the guidelines". It was the impression of the Committee that these organisations "have preferred to seek and influence consumer policy on a more general level, not least through their representatives in the Management Board of KOV. They have thus left the more specific measures to KOV and KO."[943]

As a consultative party in the legislative process (diligently participating in the negotiations of many guidelines), the KF objected to this statement of the Committee.[944] These perceptions may reveal the conflict of interests innate to the KF organisation, alluded to above. KF indeed participated in many of the negotiations, but chiefly to defend its interests as a major producer and retailer in Swedish economy, and not as a militant advocate of consumer interest. That KF may have a more consumer-friendly approach as a style of economic conduct does not change the fact that there may be incompatibility of loyalties, rendering it a questionable candidate for consumer representation.

The Guidelines Committee positively assessed the access of individual consumers to the Agency. Around 4,000 to 5,000 written complaints, letters and questions reached the Agency annually, and there was an efficient system of accumulating, classifying and following up on these signals.[945] Consumer complaints were, together with reports on accidents and reports from other authorities, one of the important factors for deciding to initiate a procedure for elaboration of guidelines in certain matter.[946] The Committee did not seriously address the procedural aspects of guidelines drafting and interest representation, probably because formal requirements were absent in the institutional framework of the guidelines. More or less in passing, the report mentioned the experience with 'public hearings' in the United States. Despite the complexities of this system, the Commission found it appropriate to recommend its

[942] SOU 1983:40, 235.
[943] "Det är vårt intryck att organisationerna föredragit att söka påverka det konsumentpolitiska skeendet på ett mera allmänt plan, inte minst genom sina representanter i KOV:s styrelse. De konkreta åtgärderna har man överlåtit till verket och till KO." SOU 1983:40, 238.
[944] Prop. 1984/85:213, 137.
[945] SOU 1983:40, 65.
[946] Thus 30 consumer complaints were sufficient to launch negotiations concerning the design of baby-dummies. See SOU 1983:40, 67.

further study.[947] Eventually, however, this proposal was not made a part of the Commission's conclusions.[948]

5.4.3.5 Form of control over agency action

As mentioned above, the KOV was designed as an independent public authority, with a wide margin of freedom in setting the priorities of its work. The formal legal basis for agency action consisted of broad and open-ended general clauses in the MFL and in other consumer-related legislation. The Government Instruction for the work of the Agency was likewise vague.[949] Direct control through the executive process is not characteristic of the Swedish public administration, and indeed direct instructions from the responsible Ministry have been rare.[950] The guidelines investigation demonstrates, however, that there is a panoply of other control instruments at the disposal of the government and of the law-maker. As we saw previously, control is mainly exerted through the political process. The most drastic step would be to close down the public agency, but this seems costly and unrealistic. There are alternative means of suggesting and inducing change in policy or in routines. In the legislative process, the Council on Legislation is one institution that may criticise the interpretation of legal acts. Additional instructions may come in *travaux préparatoires.*

An efficient method of supervising Agency action is via the budget. The annual budgetary oversights present occasions to regularly review agency performance and reconsider priorities.[951] By funneling fresh money to the Agency, or by reducing its financing, the Government and the Parliament can send a powerful message about possible over-enforcement and excessive activity, or about the need for intensified agency action. Another instrument of control are the so-called government investigation committees. The government holds the initiative for appointing commissions of inquiry (*kommitteväsendet*). These commissions can be effectively used for policy review and for promoting a desired shift in priority setting and working methods. It was noted that in the case of the Consumer Ageny, the mere setting up of a government committee of inquiry brought about changes in the priorities and working methods of the Agency. Other possible measures are the control through appointment or through reorganisation.

Petersson and Söderlind speak of different types of public administration based on the main source of legitimacy, namely 'law-governed administration', 'people-governed'

---

[947] SOU 1983:40, 239. In his analyis of the practice of the FTC Bernizt underlines that in the US rule-making is an extremely formalised procedure, whereby a draft is first made public, then anybody interested is invited to participate, and finally there is a possibility to appeal.

[948] For the negative reaction of KOV to the idea of public hearings see prop. 1984/85:213, 116.

[949] Similar general formulations are characteristic for the instructions of most Swedish public agencies. See Söderlind/Petersson (1986), 38.

[950] See RF 11:7 on the independence of administrative authorities in the exercise of administrative power (*myndighetsutövning*) and in law enforcement (*lagtillämpning*). The principle of independence of public authorities in relation to the executive has been a matter of debate in a number of investigations and in the public administration literature. This principle is seen by some to contravene the major premise of parliamentary democracy, namely that the process of government should be carried out and closely controlled by democratically elected parliament and government. Therefore demand for increased and more formalised control through the executive is sometimed advanced. See Förvaltningsutredningen, SOU 1983:39, 19; Cf. Söderlind/Petersson (1986), 110 ff.

[951] See prop. 1981/82:100, Bilaga 14 on the Consumer Agency.

administration and 'market-governed' administration.[952] From this overview of some of the main functions and working methods of the KOV with the Consumer Ombdusman, it transpires that the Agency during the 1970s was closer to the 'people-bound' (corporatist) model of administration. Legal provisions had limited bearing on the activity of the Agency. It was rather the political intent expressed in preparatory material that informed the work of the Agency.

Less pronounced in the Swedish public administration tradition is the control through judicial review. The informal status of many of the measures adopted by the Agency, and the reliance on negotiations and voluntary compliance, make Agency action evade formal judicial control. Certainly, a trader could challenge the guidelines issued by the KOV by simply refusing to comply, and then to wait for the case to be brought before the Market Court. This, however, puts the trader in a precarious position and cannot be compared with a direct positive action of ascertaining the legality of a particular administrative measure. Moreover, the Guidelines Committee found that the Market Court tended to accept the guidelines as a concretisation of the general standards of good marketing practice and information. The Court thus apparently accepted the 'legal effect of the factual'.

5.4.4 Adaptation of the judicial process to the new role of the state

With the shift in ideology in Swedish marketing practices law and with the active involvement of the state, the process of judicial enforcement needed adaptation. Ordinary courts were ill-equipped to handle the intricate mix of formal, semi-formal and informal norms that formed the basis of the new legal discipline. The solution was consequently found in reforming the Freedom of Competition Board, and extending its mandate so that to cover enforcement of the MFL. The new body was renamed into the Market Board and was entrusted with new functions.[953] Whereas the Freedom of Competition Board was mainly involved in negotiations with affected undertakings, the Market Board was authorized to issue permanent and preliminary injunctions and equipped with adjudicative functions. In order to indicate the new status of the Board to the public in 1972, it once again changed its name to become the Market Court (*Marknadsdomstolen*).[954] The Market Court emerged as a centralised adjudicative body competent to decide in all cases under MFL as a court of first and last instance.

As the mechanism of guidelines to influence producers (*producentpåverkan*) became a main instrument of consumer policy, the role of the Market Court in the decision-making process was reduced. Only in case of non-compliance and a violation being brought before it, was the Market Court in a position to confirm or reject particular guidelines as an authoritative standard.[955]

---

[952] Söderlind/Petersson, (1986), 23 ff. Orig.: den lagstyrda förvaltningen; den folkstyrda förvaltningen (demokratisk-parlamentarisk styrningskedja; den administrativa korporatismen; kommunal självstyre; självförvaltning); den marknadsstyrda förvaltningen.

[953] Lag om marknadsdomstol (SFS 1970:417).

[954] See Bernitz/Draper (1986), 85.

[955] The decision to join the handling of competition and marketing practices cases into one judicial body was evidently influenced by the US American experience and the Federal Trade Commission..

5.4.4.1 The design of the judicial process

The 'genetic connection' between the Market Court, the Freedom of Competition Board and antitrust regulation accounts for many of the idiosyncracies in the institutional design of Swedish consumer protection.[956] Especially the conception of the Freedom of Competition Board was originally quite distant from the classical idea of an adjudicative body. The Board was not equipped with effective law enforcement and sanctioning powers.[957] With regard to companies, it could only impose an obligation to deliver in cases of boycott and refusals to supply. More serious violations of the Antitrust Act had to be referred to the government for further consideration.[958] The functions of the Board under competition law were actually confined to conducting negotiations. The initially took over the design of the Freedom of Competition Board, which provoked discussions as to the legal status of the Court.

Legal status

For a considerable time after the entry into force of the MFL, the question of the status of the Market Board (Market Court) remained unclarified. The Minister defined the Board as "a central organ with adjudicative functions", "much resembling a court."[959] This statement, however, contradicted with the expressed intentions to preserve the organizational features and the working methods of the Freedom of Competition Board, also applying the latter in marketing practices cases.[960] In many respects the Board bore the distinctive features of an administrative organ. Competition cases were not linked to any effective remedies but were concerned with negotiations and voluntary settlement, which was hardly a typical activity for an adjudicative body. Unsursprisingly, many of the consulted stake-holders referred to the Council as an 'administrative organ' or 'administrative apparatus.'

In the context of administrative law reform in the early 1970s, the same Minister asserted that "... the [Market] Board should in principle be classified within the category of administrative authorities." This qualification was not accepted by the Council on Legislation (*lagrådet*), and the Minister, in turn, agreed that the position of the Council on Legislation was justified.[961] In doctrine the Market Court was sometimes ordered in the system of administrative courts[962], and sometimes as a special court with some features in common with administrative courts.[963]

The question was finally decided by the Supreme Court. In three subsequent petitions the Court was asked to grant extraordinary appeal in the form of relief for substantive defects (*'resning'*).[964] In the first and third cases the petitions were lodged on grounds that a decision of the Market Court had been in manifest conflict with the

---

[956] See Johansson, *Rättegången i marknadsdomstolen* (Uppsala: Justus Förlag, 1986).
[957] See Bernitz (1969), 425 ff.: Johansson (1986), 25 ff.
[958] In most cases, disputes were resolved already with the NO. Proceedings before the Board were extremely rare.
[959] Prop. 1970:57, 156.
[960] Prop. 1970:57, 167.
[961] Prop. 1971:30, 610, 695, 713.
[962] Notably by experts in administrative and procedural law, Strömberg, *Allmän förvaltningsrätt* (Lund: Gleerup, 1974), 34, 94; Heuman, *Process och straffrätt för juridisk översiktskurs*, (Lund: Juridiska föreningen i Lund, 1974), 7. Reference in Johansson (1986), 19 ff.
[963] Bernitz/Modig/Mallmén (1970), 297.
[964] On 'resning' as an extraordinary remedy, see Lindblom (2000), 229.

constitutional Freedom of the Press Act.[965] In the second case the petition was against an order of the Market Court, obliging the defendent (the Scientology Church) under penalty of a fine to submit a specimen of the marketed 'e-meter'.[966] Were the Market Court to be regarded as an administrative body or administrative court, then the petition would have been under the jurisdiction of the Supreme Administrative Court (*Regeringsrätten*). By accepting the petition, the Supreme Court indirectly, and without addressing the matter explicitly, confirmed that the Market Court was not part of the administrative system of justice.[967] Subsequent legislative developments have confirmed this judgment and the approximation of the Market Court towards an ordinary court.

Apart from the rare cases of extraordinary remedies (*resning*), the Market Court has been functioning as a central judicial body competent to decide in all matters of marketing practice law as a court of first and last instance. This central position was justified in the *travaux préparatoires* by the need for speedy precedure to attain binding decisions. The Swedish Bar Association criticized the concentration of the trial in one instance on grounds of contradiction with principles of rule of law and due process.[968] The government repudiated the critique by assuring that the Court will be given a composition satisfying the demands for protection of individual rights. This statement is nevertheless somewhat cryptic. Apparently, the Minister had the participation of interest representatives in the Court in mind, viewing such participation as a guarantee for protection of individual rights. However, this view conflicts with the declared neutrality of interest representatives. It is moreover questionable that interest representation can be equalled to hearing a case in two instances by independent judges.

Composition of the Market Court

In its first appearance the Market Court had the composition of a mediating rather than of an adjudicative body. The Board consisted of ten members. Only two of them, the chairman and the vice-chairman, had to be lawyers with experience of judges. Two other members defined as special ('*särskild*') members needed expert knowledge in competition and in marketing practices, respectively. The remaining six members of the Board represented business, consumer and empoyee interests. They were selected from among representatives of group interests – three for industry and three for consumers and employees. With the entry into force of the Competition Act of 1983, which envisaged intensified application of the antitrust rules, the number of economic experts in the area of competition law increased to three and the total number of members to twelve. This amendment did not change the composition of the Court in cases under the MFL.[969] The special members only participated in proceedings for which they possessed the respective expertise, whereas interest representatives

[965] MD 1974:23, NJA 1975, 589 ("Helg-Extra"); MD 1977:1; NJA 1977, 751 ("Vivo-Favör"); see Bernitz/Draper (1986), 86 ff. On the relations between Swedish marketing practices law and freedom of information, see Levin, 'Werbung und Informationsfreiheit' (1987a) *GRUR Int.*, 207 ff.

[966] MD 1976:6, NJA 1975, 461 ("Scientologikyrkan i Sverige"). The Supreme Court found that the application of the law forming the basis of the order was manifestly inconsistent with the relevant statutory provisions.

[967] See Johansson (1986), 22, referring to the critical comments of Ragnemalm, 'Regeringsformer 11:11, några reflektioner i anledning av ett färskt HD-avgörande' (1976) *FT*, 80.

[968] Prop. 1970:57, 157.

[969] 3 § lag om marknadsdomstol (SFS 1970:417).

participated in all kinds of proceedings.[970] The Market Court was competent to take decisions when the Chairman and four other members were present. Yet a decision was legitimate only if an equal number of interest representatives of traders and of consumers, respectively, participated.

The interest representatives were supposed to be impartial in the hearing of individual cases. They were seen as "judges with special responsibility to impartially apply the law with a view to, among other things, protecting consumers as the guiding principle in the decision-making of the Market Court."[971] It was acknowledged that these members were 'interest members'. However, they were sworn in like ordinary judges and were expected to pass judgment objectively.[972]

The reasons for introducing interest representation in the court were, according to the preparatory works, two-fold. On the one hand, interest representatives could provide knowledge about existing economic and market relations, about the standards in industry and trade as well as about the perceptions of consumers. On the other hand, interest representation would render greater legitimacy to the decisions of the Court, namely by providing that these decisions were well-grounded in the views and perceptions of the general public. Interest representatives were thus both regarded as well acquainted with the issues under examination and able to express those values that were dominant among affected interest groups. This design was not free from contradictions. Despite 'interest representation' as an agreed principle, direct advocacy of group interests in the work of the Court was rejected. At the same time, misgivings as to poor procedural guarantees of the rights of parties before the Court were met by referring to the special composition of the Court. In this context interest representatives were obviously expected to act as guarantors of the rights of individual members of the represented group.

Procedurally, there was a discussion as to what extent the rules being challenged were applicable to interest representatives. In the case of the Market Court Johansson points out that, although the rules on challenge (Ch. 4 RB) are formally applicable, they should in practice have restrictied validity for interest representatives. Quoting the Chairman of the Market Court, Johansson notes that a member of the Court would not be considered impartial simply because the party in a case is an enterpreise belonging to the organisation he or she represents.[973]

A survey of the records of the Market Court during the years characterised by interest representation demonstrates that industry representatives as a rule were nominated among persons with senior positions in industry asociations, and with competence in economic and marketing questions. The nominating organisations have been the SI, *Grossistförbundet* and SKF. The representatives of consumer interests were for the most part nominated by the dominant labour unions (LO, TCO, SACO), and by the main co-operative organisation (KF) among activists of these organisations. The equalling of consumer and employees in the matter of interest representation has never

---

[970] 9 § lag om marknadsdomstol (SFS 1970:417).
[971] See Johansson (1986), 35; Westerlind, 'Marknadsdomstolen i nuet och inför framtiden' (1976) *SvJT*, 417 ff., 423.
[972] Bet. 1992/93:NU17.
[973] Johansson (1986), 37 ff.

been subject to critical discussion, neither in the preparatory works, nor in the scholarly literature.

Despite assurances that interest representatives were to be impartial, it was not unusual that the Market Court issued decisions strongly divided along group interest lines. Symptomatically, the cases often involve considerable interests on the part of industry or consumers. One such example is the much debated product differentiation problematic.[974] This was one of the instances of action on the part of the KO, where an affirmative decision could have significant impact on the relevant industry. At the center was the power of industry to use trade marks as a means to segment the market and as argued by the KO reduce transparancy for consumers. In the first case (Alcro), one and the same paint was produced under different names and packaging to address different markets – that of house paint and that of boat varnish. A divided Court showed the difficulty to combine interest representation based on group loyalty and objective decision-making. A majority (dominated by representatives of business plus economic experts) of the Court rejected KO's claim stepping mainly on economic considerations.[975] Similar divergences in opinion were manifested in cases where an ostensibly pro-consumer decision was adopted despite strong dissent from industry representatives.[976] In most instances, however, interest representatives were seemingly acting on grounds of principle.[977]

Procedurally, a conflict could be discerned between the formal court-like structure and 'shell' of the institution and the rules on composition with interest representation. For instance, it was uncertain to what extent rules on challenge applied to the Market Court. It was, however, doubtful whether deciding on a case with KF as a party would challenge the representative of KF sitting on the Court.[978] There was a discussion as to what extent the rules on challenge were applicable to interest representatives.[979]

The institute of interest representation was not without critics, although the objections tended to be rather mild and easy to appease. Both in the *travaux préparatoires* to the MFL and in legal doctrine, voices were raised questioning the legality and constitutionality of combining adjudication with interest representation. Already during the debate on the 1970 MFL, the Swedish Bar Association expressed concerns about due process (*'rättssäkerhet'*) with a Court composed by only two lawyers and dominated by interest representatives.[980] Similar criticism was raised with regard to interest representation in an array of other special courts, like the Rent and Tenancy Court of Appeal, the Labour Court, the Insurance Board, etc. These objections did not, however, result in any serious efforts to redesign the courts.

---

[974] See MD 1977:22 ("Alcro").

[975] See Bernitz., 'Brand Differentiation Between Identical Products. An Analysis from a Consumer Law Viewpoint' (1981) *JCP*, 21 ff. The second decision on product differentiation concerned the right of the biggest producer of home electric appliances on the Swedish market, 'Electrolux', to market practially identical products under different brands and for different prices. The KO brought an injunction asking the Market Court to enjoin the defendant to give information about the equivalence of the products. This time the claim was upheld by a unanimous court. See MD 1981:4 ("Electrolux").

[976] See MD 1982:11 ("Bästa bankboken");MD 1980:19 ("Verdexa"); MD 1980:5 ("Goodyear-I").

[977] See Bernitz/Draper (1986), 83.

[978] Johansson (1986).

[979] Johansson(1986), 37 ff.

[980] See prop. 1970:57, 164.

A special member for competition cases was supposed to be an expert with relevant knowledge about economic relations. Another slot was envisaged for a member charged with marketing issues, and this person was expected to have insights in consumer issues. Interestingly, the expert on consumer issues was according to the Minister to be selected among persons with experience from public (state) consumer affairs. By contrast, it was said that expertise in behavioural sciences, suggested by some of *'remissintanserna'*, could be taken into account but was not of decisive importance.[981]

The opening of courts to technical experts has been accepted rather uncritically in Swedish doctrine and practices. Given the somewhat weak position of courts in general in the institutional landscape of Swedish government, political decision-makers have demonstrated remarkable flexibility and lack of dogma on questions like composition of courts, temporary and part-time judges, expert judges etc. This pragmatical attitude has rarely been questioned on constititutional or legitimacy grounds. Part of the background (as discussed in chapter 4) might be that the Charter of Government itself lists judges among other civil servants and treats them, accordingly, as part of the exective.

Character of proceedings
In taking the view that consumer protection and fair trading were matters of state and subsequently entrusting monitoring and enforcement chiefy in the hands of public organs, the logical continuation was to regard the proceedings before the Market Court as part of administrative law. Still, the statements on this issue in the Government Bill to the 1970 MFL were vague and sometimes contradictory. The Minister confirmed that the proceedings before the Market Court would not differ from those before the Freedom of Competion Board, which implied that the character of proceedings was to be regarded as administrative. Yet in the next sentence the Minister stated that proceedings before the Market Court should take the form of judicial proceedings, and should follow the rules in the Code of Judicial Procedure[982] One could from this statement draw the conclusion that it was a question of ordinary civil proceedings. But also this impression is misleading, because the Minister praised the Freedom of Competition Board for its smooth and informal procedure as well as that it was not strictly bound by the Code of Judicial Procedure. The overall picture was consequently puzzling.

A convincing explanation for this confusion is offered by Johansson. He believes that the intentions of the Government were no other than to create another administrative organ, and that the proceedings before this organ were considered administrative in character. In his view this is visible from the discussions on other procedural issues where the Minister explicitly referred to current rules and practices of administrative procedure.[983] The terminology applied is also borrowed from administrative law: instead of *stämning* (summons application), *mål* (lawsuit) and *judgment*, the Bill uses terms like *ansökan* (petition), *ärende* (matter) and *beslut* (decision). Johansson

[981] Prop. 1970:57, 164.
[982] Prop. 1970:57, 167.
[983] This was the case concerning rule on voting, litigation costs and possibility to review its own decision. See prop. 1970:167.

attributes the imprecision of language to the lack of special rules on administrative procedure at the time. Indeed, the first Administrative Procedure Act was adopted in Sweden in 1971.[984] Administrative bodies, which performed quasi-adjudicative functions consequently followed the general rules of judicial procedure. The reason was that these rules more efficiently guaranteed legal certainty to the affected private parties.[985] This analysis is in conformity with other analyses of Swedish public administration, underscoring the 'genetic connection' between administrative authorities and courts in Sweden.[986]

Gradually, and in particular after the Supreme Court had confirmed the judicial status of the Market Court, the practice of the Court developed in the direction of judicial proceedings in general courts and civil lawsuits. Many traits, however, remained similar to those of typical administrative proceedings.[987]

5.4.4.2 Access to the court and costs of litigation

The judicial process before the Market Court was open to a plurality of actors: individual competitors, trade associations and consumer associations. However, eEnforcement was in the first place entrusted to the KO. The Ombudsman was conceived as negotiator, prosecutor and representative of the collective consumer interest. Thus, prosecutorial and dispute-resolution functions were assigned to different institutions. In this conceptualisation, the reform proposal mirrored the available pattern from antitrust legislation, with a NO and a Freedom of Competition Board.[988]

The KO

The KO was not just one among many plaintiffs. He was awarded a privileged position on the enforcement stage. Under 10 § 1975 MFL an application for issuing a prohibition or injunction was to be lodged by the KO. Only if the Ombudsman decided against instituting proceedings could action be taken by consumer associations, trade associations or individual competitors.[989] In this arrangement private actors were only granted a "subsidiary standing".[990] The concept was thus reverse to the one under German unfair competition law. In Germany one would resort to public intervention only if private law means of enforcement proved inefficient (*Subsidiaritätsprinzip*). In Sweden, the 1970 MFL meant that private actors might only intervene when public intervention was considered unnecessary.

---

[984] Förvaltningsprocesslag (SFS 1971:291).

[985] Johansson (1986), 22 f.

[986] As Söderlind and Petersson point out, the adjudicative function was in the Middle Ages a prerogative of the monarch and was then only gradually transferred to public servants with legal competence to be finally fully separated and concentrated in the courts. Nevertheless, they observe that the impact of history can still be traced in the present functioning of Swedish public administration. Formality, legality, requirements of all-sided investigation, communication with the parties and possibility of appeal are all features of Swedish public administrative, which have much in common with judicial activity and flow from the thinking of a law-bound administration, characteristic of the *Rechtsstaat*. See Söderlind/Petersson (1986), 34.

[987] Johansson (1986), 23.

[988] On the functions of NO and Marknadsrådet, see Bernitz (1969), 425 ff.

[989] 10 § MFL (SFS 1970:418): "Fråga om förbud elle åläggande enligt 2-4 §§ uptages efter ansökan. Sådan ansökan göres av konsumentombudsmannen. Beslutar denne för visst fall att ej göra ansökan, får ansökan göras av sammanslutning av konsumenter, löntagare eller näringsidkare eller, beträffande föbud enligt 2 §, av näringsidkare som beröres av handlingen."

[990] Bernitz/Draper (1986), 91.

Subsidiary right of action of individual traders
The right of action of individual traders was limited in several respects. First, traders were only granted right of action for a prohibition or injunction under the general clause on good commercial practice. The other provisions of the 1975 MFL, notaby the information clause, did not fall within the sphere of their litigious competence. The right of action was furthermore only granted to a trader affected by a given marketing practice. No abstract rights to sue in defence of the public interest were envisaged.

Importantly but paradoxically, the right of action of individual traders was also designed as subsidiary to that of the Ombudsman. Competitors thus had to first address the KO with their complaint. Only if the latter decided not to prosecute could they proceed with a petition to the Market Court. This left a widespread impression that the Ombudsman had a duty to act whenever the public interest was negatively affected, even if there was an immediately affected competitor.[991] So instead of harnessing the private interests of entrepreneurs to indirectly serve the consumers, traders relied on the KO to lodge, in their interest, a complaint in the Market Court. Clearly, an enforcement agenda encompassing the interests of traders alongside those of consumers proved practically impossible to pursue for the KO. There were a number of limitations in his selection of cases to litigate. The Standing Instruction of the KOV stipulated that complaints under 2-4 §§ MFL should be left without legal action if the matter was of limited importance from a general interest perspective.[992] The reduced budgetary funding of the Agency likewise required more careful priority setting, demanding preference to cases of clear and consequential infringement of consumer interests.

The Guidelines Committee convincingly argued for the need to emancipate competitors from their dependence on the KO.[993] The Committee pointed out a number of adverse effects from the perspecctive of equal treatment and organisational efficiency. The interests of traders in fair marketing were expressly recognized by the MFL, thereby placing traders on an equal footing with consumers. There were thus no reasonable justifications for the subsidiary position of traders. Considering that the KO would not have the resources to prosecute all instances of unfair marketing against individual traders, the protection of traders risked being undermined. Moreover, traders were placed in a psychologically disadvantageous position, as they had to wait for their case to be classified as "not important from public interest perspective" before proceeding with litigation.[994] There was evidence that for many traders the requirement to notify the KO was perceived as offensive, and hampered their willingness to litigate even in situations where they believed to have a strong case.[995]

The efficiency advantages of an independent right of action, in terms of savings in the budget of the KOV, were obvious. A speedy procedure was another strong argument. In its reasoning, the Committee repeatedly underlined that the opportunities for the KO to intervene and to control enforcement could continue even with independent legal

[991] SOU 1983:40, 294.
[992] 22 § KOV Instruktion (SFS SFS 1976:429).
[993] See SOU 1983:40, 293 ff.
[994] SOU 1983:40, 295 ff.
[995] SOU 1983:40, 205 ff.

standing of traders.[996] The position of the Guidelines Committee was endorsed by most stake-holders in the debate, and even by the KOV itself.

Despite convincing arguments and widespread support for an independent right of action of individual traders presented by the Guidelines Committee, the Government opted against such a change. As the Minister put it: "as a matter of principle the KOV has to carry the primary responsibility for the development and for the law-enforcement even in competitor-related questions."[997] He expressed concern that if competitors were granted an independent legal standing, some situations affecting both competitor and consumer interests could in the future be prosecuted by the affected traders and not by the KOV. Even if the KOV was informed about such cases and would have the right to intervene, there was a danger that the lawsuit could be presented and argued in a way that would not be adapted to consumer interests. The representative of the public interest would in such cases enter the stage after advocates of other interests, which in the Minister's view was not appropriate.[998]

Business and consumer associations
The MFL envisaged a wide right of action for organisations of traders, consumers and employees. Organisations could lodge a petition for issuing prohibition or injunction not only under the general clause on good commercial practice, but also under the information clause and the clause on product safety (2-4 §§ 1975 MFL). As in the case of individual competitors, this right of action was designed as subsidiary in relation to the KO (10 § 1975 MFL).

Interestingly, the Gudelines Committee did not see any need for change in this specific arrangement. The Committee even considered the KO valuable from the point of view of interested organisations. With his expertise and experience, it was stated that the KO could function as a gauge for the prospects of success with a petition.[999] Following a proposal by the Guidelines Commission, however, business associations were granted a right to step into a pending trial as an intervening party.[1000]

The exact scope and legal status of the right of action by organisation was only briefly discussed in *travaux préparatoires* and in legal doctrine. In the Government Bill to the 1970 MFL, the concept 'association' was construed rather broadly. The Bill held that no requirements for representativeness or for any special qualifications should be established.[1001] The right of action of trade associations was defined even more broadly in the Government Bill to the Act on Unfair Contract Terms Between Traders.[1002] On the basis of the statements in this legislative material, Johansson considers the right of action to cover conduct that negatively affects members of the organisations, extending to any infringment of the respective legal standards.[1003] [1004]

---

[996] SOU 1983:40, 298.
[997] Prop. 1984/85:213, 52: "Konsumentverket bör därför rent principiellt ha förstahandansvaret för utvecklingen och för lagtillämpningn även i fråga om konkurrentärenden."
[998] Prop. 1984/85:213, 53.
[999] SOU 1983:40, 299.
[1000] SOU 1983:40, 308 ff.; prop. 1984/85:213, 56 ff.; 13 a § lag om marknadsdomstol (SFS 1970:417).
[1001] Prop. 1970:57, 97. See Johansson (1986), 58.
[1002] Prop. 1983/84:92, 22.
[1003] See Johansson (1986), 58.

The Market Court has interpreted the term trade association (*'sammanslutning av näringsidkare'*) to cover bodies of industry self-regulation, even though the latter may constitute an organ of industry organisations.[1005] The same was regarded to apply to actions by umbrella consumer organisations composed of corporate members.[1006] Yet, in one case the Market Court made the legal standing of an association dependent on bringing evidence that the organisation met certain formal requirements.

> Behind the case was a consumer complaint to the KOV concerning a toy-doll, which could allegedly be a serious hazard for small children. The Agency satisfied itself with commitment on the part of the retailer (ICA) to inform consumers about the hazard and refused to lodge a petition to the Market Court. The consumer built a consumer group "Safe Play"and after KO formally refused to bring the case to the Market Court instituted proceedings in its own name.[1007]

The Market Court required the names of the chairman and vice-chairman of the association, as well as written corroboration that the association existed and had held an annual meeting. Curiously, these strict requirements were demanded from a consumer association of the spontaneous type, which are both rare and difficult to set up.[1008]

The limited attention paid to actions by organisation is partly explained by the restricted application this avenue of enforcement received in practice. Of an aggregate of 487 lawsuits before the Market Court under the MFL between 1971 and 1987, trade associations were plaintiffs in only 9 cases.[1009] The cases initiated by some sort of consumer organisation were even fewer.

Litigation costs

An important implication of the administrative character of the proceedings before the Market Court was the particular regime of litigation costs. As could be expected, no express provision on costs was introduced in the MFL or in the Market Court Act. Instead the Minister in the Government Bill stated that parties should bear their own litigation costs and expenses, as is common in administrative proceedings.[1010] Following this rule, defendants in proceedings initiated by the KO could not claim reimbursement of their costs even when they prevailed in a case. In other words, poorly substantiated or ill-founded petitions by the Ombudsman could encumber

[1004] This was different from the situation in proceedings before ordinary courts. For ordinary proceedings, Lindblom notes that Swedish law, contrary to the situation in Germany and France, does not accord standing to organizations lacking an immediate and proper interest of their own in the case. Lindblom, *Konsumentmål* (Stockholm:Norstedts, 1985), 47.

[1005] MD 1974:15 ("De Handikappades Riksförbund").

[1006] See Johansson (1986), 60 f.

[1007] For a report on the background of the case, see SOU 1983:40, 633.

[1008] See MD 1980:24 ("Jönssons Livsmedel").

[1009] For full statistics, see Treis (1991), 184. For the years 1988 to 1995 I have been able to identify only a few more cases. See MD 1990:26 ("Hedberg Guld") on the petition by Sveriges Juvelerare- och Guldsmedsförbund; MD 1992:30 ("Odinsplatsens Guld och Optik") and MD 1992:31, 32 on the petition of Sveriges Optikerföretags Riksorganisation and MD 1994:8 ("Screen Guard") on the petition of Leverantörföreningen Kontor och Data.

[1010] Prop. 1970:57, 169. See also the objections raised in the course of the preparatory work by the Attorneys Association and by the Advertising Association and the reponse of the Government.

private parties with expenses. Moreover, for private parties facing a petition by the KO a dilemma emerged. Were they to prepare their defence seriously (by engaging competent attorneys, commissioning expert opinions and thus incurring significant non-reimbursable costs), or simply accept the claim of the KO and absorb the cost of interrupting the marketing practice? In many cases the latter option appeared much more attractive. In the process of weighing costs and benefits associated with litigation, the legitimate interest of parties that consider themselves 'unjustly' accused was easily compromised.[1011]

In disputes between private parties, the prevailing party was deprived of the opportunity to receive full compensation for its costs and expenses. Taking German procedural rules as a starting point for his analysis, Treis argued that this rule tended to stifle private enforcement of the statutory provisions. However, in a number of succinctly conducted interviews with representatives of the main 'interpretive communities'[1012] associated with the MFL (business representatives, KOV/KO, academic community, attorneys), the same author failed to document strong objections against the *status quo* among industry representatives. Whereas the rules were clearly not perceived as litigation-friendly, advantages were seen in the simplicity and low cost of proceedings and in the tendency to solve disputes in voluntary, out-of-court ways. It was even claimed that a shift to general rules on litigation costs in civil proceedings, i.e. the loser pays principle (RB 18:1), would increase risks associated with litigation and dampen the litigiousness of private parties.[1013] In this context one might, nevertheless agree with Treis that a more advantageous rule on cost reimbursment would benefit those who occupy the moral high ground.[1014]

The issue of litigation costs was the subject of several government and parliamentary inquiries.[1015] The 1983 Guidelines Committee suggested that since KO was the most frequent plaintiff in proceedings under MFL, there might be reasons for applying the rules for criminal proceedings by analogy. In criminal cases, where the state via the public prosecutor is responsible for instituting proceedings, the aquitted defendant is compensated for his/her litigation costs. Against such a solution the Committee noted that the files before the Market Court could not be compared with criminal law cases in their social aspects. The defendents were as a rule economic entities that could hardly be seriously inconvenienced by the relatively low-scale expenses in a lawsuit before the Market Court. On the other hand, the suggested reform could produce serious expenditures for the state. The Committee noted likewise that in proceedings between private parties, it was appropriate to consider granting the prevailing party a right to compensation for his/her litigation costs.[1016] Finally, while acknowledging the

---

[1011] In this sense also Treis (1991), 82 ff.

[1012] To borrow an expression by Weiler, 'The Transformation of Europe' in: Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 10 ff., 43.

[1013] See Treis (1991), 81, and his interviews with interested business representatives Ahlström (at 209), Svensson (at 226 f.), Utterström (at 196 ff.) and Westlund (at 218 f.).

[1014] Treis (1991), 81.

[1015] See Johansson (1986), 114 ff.

[1016] SOU 1983:40, 312 ff. In a similar vein, a parliamentary motion suggested that compensation should be granted for litigation costs incurred in proceedings before the Market Court. In response to the motion, the Council on Legislation basically repeated the arguments of the Guidelines Committee and concluded that it was unwise for the Riksdag to preempt the Government Bill. Motion 1983/84:1530; Bet. 1983/84: LU31; Cf. prop. 1994/95:123. See Johansson (1986), 115.

soundness of the Guidelines Committee considerations on litigation costs, the Government decided to leave the issue to subsequent deliberations.[1017]

5.4.4.3 Remedies: injunctions

Following the proposals of the 1966 Inquiry Commission on Unfair Competition, the 1970 MFL adopted the injunction under penalty of a fine as a main remedy against improper marketing practices (5 § 1975 MFL). This marked a turning point in the Swedish system of sanctions where injunction had previously been an unknown remedy for acts of unfair competition. Likewise, it marked a departure from the so far traditional penal sanctions (imprisonment). From the point of view of legal certainty, injunction was more suitable for factual situations that were not clearly defined, leaving a large margin of discretion and interpretative freedom.[1018] Suggestions to introduce stricter penalties did not receive the approval of the various actors consulted in the course of the legislative process. More ambiguous was the position of the 1975 MFL on the institute of preliminary injunction. While such opportunity was envisaged in the statute (13 § MFL) it was explicitely defined as an exceptional measure in the Government Bill of 1970.[1019] As a result for the first twelve years of its existence the Market Court pronounced only six preliminary injunctions. According to Treis, this reflected once again a vision of marketing practices law indifferent to the interests of business.[1020] The law has clearly been drafted with the idea of the KO as a main litigant in mind. The need for sometimes urgent termnination of infringements causing substantial damages to individual economic interests has obviously not been seen as a priority.

In a similar vein, and contrary to the proposal of the Unfair Competition Inquiry Commission compensation for damages was introduced very restrictively. Damages could only be claimed in connection with the penally sanctioned provisions of the Act (6-8 §§ 1975 MFL), and upon violation of a prohibition or injunction (19 § 1975 MFL). A conduct that was in conflict with the general clauses of the MFL would by contrast not provide an opportunity to claim damage compensation to the adversely affected competitors.

Despite the consumer-friendly zeal of the statute, individual consumers were not assigned the right to claim damages. When it came to the criminally sanctioned provisions, the circle of those with active legitimation to claim damages only extended to the competitors. The justification of this limitation was that the primary goal of the statute was to ensure that advertising and marketing were carried out with honest means in the interest of consumers as a group, and not to protect consumers and others from the consequences of their own disadvantageous transactions.[1021]

Finally, the privileged position of the KO in the enforcement of the MFL was reaffirmed in granting the Ombudsman a special information remedy. Under 11 § 1975 MFL the Ombudsman was vested with wide-reaching powers to require traders to

---

[1017] See prop. 1984/85:213, 65 f.; Prop. 1988/89:67.

[1018] SOU 1966:71, 296. "Sverige är veterligen det enda landet i den västerländska kulturkretsen som inte har förbud som påföljd på detta område."

[1019] Prop. 1970:57, 98.

[1020] Treis (1991), 90.

[1021] See prop 1970:57, 101.

submit statements or explanations, to furnish documents, merchandise samples, and similar items which may be of significance for the inquiry in the case. The Market Court was to apply a reversed burden of proof in cases under the general clause of 2 § MFL and in particular where the truthfulness of marketing claims at issue.[1022] This approach had already been accepted in the practice of the industry self-regulation and in the ICC Code of Advertising Practice and could therefore be taken over without much complications by the Market Court.[1023]

5.4.5 Institutions as a product of the institutional framework

5.4.5.1 The KOV with the KO

The institutional framework of Swedish marketing practices law that emerged in the 1970s produced its very distinct organisations. The KO and the KOV were created to breath life into the multitude of formal rules adopted as part of the ambitious consumer law package of the Government. From a modest budget of about 13 million Swedish crowns to the Office of the KO and associated bodies dealing with consumer information at the turn of the 1970s,[1024] the funding more than tripled by the end of the 1979. For 1979 the funding for the joint KOV/KO amounted at 37, 662 million Swedish crowns and at 43,532 million for consumer policy in its entirety.

Taking the legislative intent seriously, these bodies for decades became the main players in the factual and legal enforcement of Swedish marketing practices law. The intense guidelines activity carried out by the KOV at the end of the 1970s was discussed above. From a total of 487 lawsuits under the MFL between 1971 and 1987, the KO was plaintiff in 359 cases.[1025]

The institutional framework provided a mixed set of incentives for these institutions. On the one hand, their identity was closely related with an active and discrete consumer policy. KOV/KO embraced the consumer perspective and represented its institutional embodiment. On the other hand, a parallel signal was always moderation and restraint in formal enforcement and sanctions. Negotiations, voluntary agreements, mediation have been the hallmark of Swedish consumer law and policy as embodied by the KOV and Consumer Ombdusman. In the years between 1979 and 1982, 278 consent orders in all were issued by the KO (including those under the AVL). Out of these orders, as many as 104 were not accepted by the affected traders. In cases where the order was not approved, the KO may choose a different strategy. He may either close the file, issue subsequent orders in the hope that they will be approved, or bring the case before the Market Court for a binding decision. .

The KO was from the outset neither authorised to become involved in individual disputes, nor to engage in specific consumer advice. When it comes to advice and information to individual consumers, the bulk of work was to be carried out by the municipalities, and by the so-called local consumer officers in particular.[1026] The assistance provided by these consumer officers was free of charge and easily

[1022] See Bernitz/Draper (1986), 93.
[1023] See prop. 1970:59, 68.
[1024] See prop. 1971:1.
[1025] See the statistics in Treis (1991), 184.
[1026] This was also the gist of the LO project on local consumer advisors. The competences of KOV in respect to individual consumer advice were curtailed in the early 1980s.

accessible. Concerning consumer problems in contractual relations, consumers approaching the KO would normally be referred to the Public Compaints Board.[1027] In this respect the mandate of the Consumer Ombusman was designed so as to allow him/her to concentrate on collective interests of greater significance. The Ombudsman was not to be perceived as the individual's advocate in private law matters. This is probably one of the most fundamental differences between the Swedish KO and consumer organisations acting in Germany. The latter organizations are arguably focusing on individual complaints and may be overwhelmed by solving minor private law disputes, which does not leave time and efforts for pursuing issues of major importance

5.4.5.2 The retreat of voluntary and self-regulatory organisations

The demise of self-regulation

As we saw in the previous chapter, the institutional framework of fair trading in Sweden had evolved chiefly on the basis of self-regulation until 1970. Starting in 1935 the Councils carried out an intense enforcement activity handling about 100-150 petitions annually.[1028] It was a widely shared perception that the decisions of the Boards enjoyed authoritative power, and that they were respected by the affected traders.

With the coming into force of the new MFL of 1970, the elaborate Swedish system of self-regulation abruptly seized to exist. Given the new legislation and enforcement design, the priorities for industry were considered to lie at the level of consultation and information about the new legislation. In 1969 members of the NOp set up a Consulting Bureau for market law, which continued to work as a centre for legal advice and consultancy on market law issues.[1029] Another outgrowth from the NOp was the already mentioned Industry Delegation for Market Law, which transformed into an influential opinion-builder and participant in the legislative debate on market law issues.

The absent consumer organisations

In contrast to the strong public commitment to consumer protection, and even as a consequence of this commitment, the contribution of private consumer organisations has been of limited importance. It was already mentioned that Sweden lacked a strong grass-roots consumer movement.[1030] Indeed, a number of voluntary organisations tended to place consumer-related problems high on their agendas and were involved in some sort of consumer information activity. The women guilds and societies were for instance among the first spontaneous ppopular movements to be actively involved in consumer issues, and remained among the few with a consumerist profile. Pensioners' organisations have also been active in the field. Only a few of these organisations, however, could be called 'genuine' consumer organisations in the sense that they define consumer protection and information as their primary objective. What has been typical of Sweden is that the consumer debate has been 'expropriated' by the country's traditionally strong co-operative movement and powerful trade unions. While this

[1027] Bernitz/Draper (1986), 72 ff.
[1028] See statistics in Bernitz/Modig/Mallmén (1970), 43 ff.
[1029] Bernitz/Modig/Malmén (1970), 48 ff.
[1030] On the weak consumer movement in Sweden, see Hellner, 'The Consumer's Access to Justice in Sweden' (1976) *RabelsZ*, 727 ff.

activism has certainly had its positive effects, consumer objectives were often superseded by goals enjoying higher priority in the work of these organisations.

In the 1980s the dire state of public finances prompted renewed interest in self-regulation and in active participation on the part of voluntary consumer organisations. Yet there was no regular government practice of financing consumer organizations or setting up such entities.But lack of funding may not have been the most serious barrier for the activity of Swedish consumer organizations. The existence and dominance of the KO and KOV in the domain of consumer policy have undoubtedly exerted a preemptive effect on the spontaneous building of new consumer organizations and on possible litigious initiatives by private or semi-public consumer-oriented bodies.

5.5 The evolving standard of fairness

5.5.1 Germany: the persisting prevalence of competitor and *Mittelstand* interests

The consumerist discussions of the 1960s and 1970s left few traces in the body of substantive rules of UWG. The general clauses of §§ 1 and 3 UWG remained unchanged and continued to be the primary cause of action. The position of the judiciary as the main decision-making institution in fair trading practices was fortified. Naturally, the recognition of a right of action for consumer unions under the UWG clarified that also consumer interests should be taken into account in the interpretation of the broad standards of §§ 1 and 3 UWG. Yet the specific content of the principle of consumer protection and its relationship to other recognised objectives of the statute were not addressed by the legislature.

5.5.1.1 Consumer protection as a recognized **'Schutzzweck'** *in unfair competition law*

The reluctance of the lawmaker to express an unambiguous commitment to consumer protection by modifying the general standards of the UWG was often explained by the fact that the judiciary had already adapted (or could adapt) its jurisprudence to the changing economic and social environment. As discussed in the previous chapter, the RG had already in the 1930s recognized the interests of the general public (*die Allgemeinheit*) as a separate object of protection under unfair competition law.[1031] This development received theoretical bolstering by the pluralist systematisations advanced by Nerreter and Ulmer in the 1930s. In the 1950s and 60s the BGH in a series of judgments continued building on this line of reasoning, and repeatedly referred to the interests of the general public in its analysis of competitive conduct under § 1 UWG. In legal doctrine the Court was regarded to have accomplished a judicial transformation of the objectives of protection under the UWG (*Schutzzweckwandel*). On the basis of this jurisprudence, an understanding of the social function of unfair competition law, complementing and correcting the initially individualist thrust of the statute, gradually gained wide acceptance.[1032] The UWG was in this view not to

[1031] See also Ch. 4. For a critical analysis, see Schwartz, G., 'Verfolgung unlauteren Wettbewerbs im Allgemeininteresse' (1967) GRUR, 333 ff., Schwartz, 'Verfolgung unlauteren Wettbewerbs im Allgemeininteresse' (1967) *GRUR*, 333 ff.; further Pause (1984), 235; Tonner (1987), 1919.

[1032] The main exponent of the view on the social function of unfair competition law was Hefermehl, see Baumbach/Hefermehl (1998), UWG Einl., Rdn. 42. See also Sack, 'Sittenwidrigkeit, Sozialwidrigkeit und Interessenabwägung' (1970) *GRUR* , 493 ff.

protect certain individual subjective rights, but competition as an institution (*Verobjektivierung des Schutzzwecks*).[1033]

Yet the judgments usually invoked in legal doctrine to substantiate the so-called *Schutzzweckwandel* and recognition of the social function of unfair competition law failed to deal with consumer interests as such. Part of these judgments tackled the familiar problem of massive distribution of free product samples, sustaining the jurisprudence of the RG.[1034] The courts used economic policy arguments, and the public interest they referred to was said to be part of 'performance competition' (*Leistungswettbwerb*). A stronger bearing on the interests of consumers had some judgements addressing aggressive marketing methods.[1035] However, not even here did the idea of consumer protection find a clear expression. It was rather a matter of types of promotional techniques that offended public morality or threatened to divert customers from established businesses. It is consequently difficult to understand of what exactly the allegedly significant conversion consisted.[1036]

A more conscious consideration of consumer interests could be noticed in case law influenced by the 1965 UWG Novelle, introducing the right of action for consumer associations. In the light of the consumer policy debate of the 1960s legal scholars argued that consumer protection should be acknowledged as an object of protection of the UWG and a reincarnation of the social function of unfair competition law.[1037] Hefermehl, apparently inspired by the influential school of interest jurisprudence, contributed to the overcoming of the controversy around the *Schutzgut* of unfair competition law.[1038] In his view there was no one object of protection in the UWG. The task was rather to find a balance between three groups of interests affected by unfair competitive conduct, namely the interests of competitors, of consumers and of the general public. The formula used by Hefermehl reads:

> Das Kennzeichen des unlauteren Wettbewerbs liegt in dem Verstoß gegen objektive Verhaltensnormen, die den lauteren Wettbewerb im Interessen der Mitbewerber, der Verbraucher und der übrigen Marktbeteiligten sowie der Allgemeinheit schützen.[1039]

This understanding was widely accepted in legal scholarship. At the same time, the predominant opinion (*herrschende Meinung*) was that recognition of consumer interests was gradually taking place in the relevant case law. The courts were, according to this account, voluntarily (even if slowly) adapting patterns of adjudication

---

[1033] Ulmer (1932); Tonner (1987), 1919.

[1034] BGH, GRUR 1956, 223 („Anzeigenblatt"); BGH, GRUR 1957, 365 (SUWA); BGH, GRUR 1965, 489 („Kleenex"); BGH, GRUR 1969, 295 („Goldener Oktober").

[1035] Belästigende Werbung: BGH, GRUR 1955, 541 („Bestattungswerbung"); BGH, GRUR 1955, 346 („Progressive Kundenwerbung"); BGH, GRUR 1959, 277 ff. („Künstlerpostkarten"); BGH GRUR 1966, 45 („Markenbenzin"); See Baumbach/Hefermehl (1998), Einl. UWG, Rdnr. 42.

[1036] See Beater (2000a), 12 ff.

[1037] Schricker (1970a), 32 ff., at 34; Schricker (1976), 535 ff.; Ott, 'Systemwandel im Wettbewerbsrecht' in: Bauer/Esser/Kübler/Steindorff, *Funktionswandel der Privatrechtsinstitutionen.Festschrift für L. Raiser* (Tübingen: Mohr, 1974), 403 ff., at 428 ff.; Reich/Tonner/Wegner (1976), 90 ff.

[1038] Generally on *Wertungsjurisprudenz* and *Interessenjurisprudentz*, see Larenz (1979), 128 ff. On the influence of these schools of thought on unfair competition law, see Schricker (1970b), 235 ff.; Schricker (1975), 217.

[1039] Baumbach/Hefermehl *UWG Kommentar, 14th ed.* (München: Beck, 1983), Einl. UWG, Rdnr. 48.

in pace with social and political developments.[1040] In particular since the advance of consumer protection, the *gute Sitten* formula in the general clause was no longer oriented exclusively towards the average businessman. Instead it was linked to the broader basis of the moral consciousness of the general public (*"sittliche Bewußtsein der Allgemeinheit"*).[1041] A short review of some of the typical categories of cases under the UWG will serve to illustrate the extent to which consumer concerns were indeed integrated into the corpus of unfair competition law.

5.5.1.2 Categories of prohibited unfair practices

Even though unfair competition law in theory had broadened its horizon and integrated the interests of consumers in its objectives, the change was only poorly reflected in doctrinal re-systematisations. Building on the classifications by Nerreter and Ulmer, Hefermehl developed a more refined system of five main groups of unlawful conduct encompassed by the provisions of UWG that is by now dominant: *'Kundenfang'*, *'Behinderung'*, *'Ausbeutung'*, *'Vorsprung durch Rechtbruch'*. A quick look at the different factual situations recognised to fall within the scope of the general clause demonstrates that the interests of consumers continued to occupy a somewhat secondary position.[1042]

Obstructive competition

The group of cases which served to substantiate the alleged *Schutzzweckwandel* in unfair competition law in many respects represented a continuation of the strings of interpretation once initiated by the RG. In a series of judgments the BGH qualified the free distribution of large quantities of goods as a market-blocking conduct (*Marktverstopfung*) contra *bonos mores*.[1043] In *SUWA*[1044] the facts of the case were similar to those of *Persil*.[1045] Even the product at stake was the same. Vouchers for free delivery of washing powder in double packages were distributed to more than 10,000 households in a given area. The Court held that the distribution of samples in principle was allowed, but only when the free samples served to give consumers an opportunity to inform themselves on the quality of the distributed products.

[1040] See Ott (1974), 438 ff. Cf. the prognosis by Schricker: „Wo es, wie im Rahmen des deutschen Generalklausel des § 1 des Gesetzes gegen unlauteren Wettbewerb, geboten ist, die Interessen der Wettbewerber und Abnehmer abzuwägen und im Lichte der Belange der Allgemeinheit zu werten, lässt sich erwarten, dass sich der Verbraucherschutz auf dem Niveau einpendelt, das im Konsumenteninteresse erwünscht, aber auch gesamwirtshaftlich tragbar ist." Schricker (1976), 538.

[1041] BGH, GRUR 1955, 541, 542 ("Bestattungswerbung"); BGH, GRUR 1960, 558, 561; BGH, GRUR 1961, 588 (592), according to Schricker dominant opinion in doctrine and standing case law. Schricker (1975), 216. See also Schricker (1970b), 221.

[1042] Following Nipperdey one of the main categories of unfair competition under the general clause is that of "*Behindrungswettbewerb*" (obstructive competition). Here fall the following situations: *Absatz,- Werbe-, Lizenz- and Bezugsbehinderung; Betriebstörung; Preisunterbietung* (635-637), *Boykott* (645-654), *Diskriminierung* (655-660), *Geschäftsverletzung und Anschwärzung* (661), *Vergleichende Werbung* (661-715). Another category of factual situations fully devoted to the protection of competitors is the so called "Exploitation" (*Ausbeutung*). Within this group Hefermehl orders the imitation of a foreign achievement (*Leistung*, 718-745), the immediate takeover of someone else's product (749-758), misuse of foreign advertising (760-764), exploitation of someone else's reputation (767-782). Beater (2000a), 12 ff.

[1043] BGH GRUR 1956, 223 ("Anzeigenblatt"); BGH GRUR 1957, 365 ("SUWA"); BGH GRUR 1965, 489 ("Kleenex"); BGH GRUR 1959, 277 ("Künstlerpostkarten"); BGH GRUR 1966, 45 ("Markenbenzin"); BGH GRUR 1965, 315 ("Werbewagen"); BGH GRUR 1969, 295 ("Goldener Oktober"); BGH GRUR 1972, 40 ("Feld und Wald"); BGH GRUR 1976, 637 ("Rustikale Brettchen").

[1044] BGH GRUR 1957, 365 („SUWA").

[1045] RG GRUR 1938, 207 ff. („Persil").

Confirming the Persil decision of the Imperial Court, the BGH found that *mutatis mutandi* even the distribution of the product in the quantity usual for sales could be accepted as a sample, if an effective sample could not be offered otherwise. However, the giving away of goods, beyond the purpose of testing, was considered inadmissible. In the words of the court, the free distribution of original goods could have the effect of temporarily depriving small and middle-size enterprises from their previous share in competition due to lacking consumer demand.[1046] In this passage the court clearly used arguments associated with structural economic policy. Curiously, only a few paragraphs below in the same decision the Court emphatically discarded the accusation of the defendant that a positive decision would imply according a 'guild-like right over a constant turnover'.[1047]

In the *Kleenex* judgment the Court stepped back from a radical line of rule-making and explicitly recognized the right to free distribution of products when introducing a new product on the market.[1048] The Appellate Court distanced itself in a categorical way from the economic policy reasoning entertained by the RG in *Diamantine*. The concern for small and middle-size enterprises did not find support in the neutral stance of the statute. It was not the task of the courts to protect small enterprises from the excessive advertising.[1049] Eventually, the practice was nevertheless enjoined due to the possible risk of emulation by competitors (*Nachahmungsgefahr*). For consumers the risk was seen to lie in getting used to the product without comparing its qualities with alternative products.[1050] Interesting in this regard is also the continuous war of established newspapers against newcomers to the press market in the form of free advertising brochures, specialized magazines, free of charge newspapers with editorial content, etc.[1051]

The cases referred to above demonstrate the continued use of unfair competition law as a complement to antitrust law, a phenomenon lacking support in the text of the act and in subsequent legislation. In the mid-1960s Eugen Ulmer emphasized the importance of taking into account the goals of the more rigorous Act against Restraints

---

[1046] „Bei der von der Beklagte vorgenommenen Massenverteilung von Gutscheinen für den Bezug der Originalware beruht die Beeinträchtigung der Mitbewerber nicht mehr auf einer an sich zulässigen Werbung mit der Güte der Ware als solcher, sondern darauf, dass die normalen Marktbedürfnisse in einem Umfange befriedigt werden, der die ernste Besorgnis rechtfertigt, dass jedenfalls mittlere und kleinere Mitbewerber auf ihren bisherigen Absatzgebieten vom Wettbewerb für eine nicht unerhebliche Zeit mangels eines Bedarfs der Verbraucherschaft überhaupt ausgeschlossen werden." BGH, GRUR 1957, 365 („SUWA"), 367.

[1047] "Die Beklagte irrt auch, wenn sie meint, bei einer solchen Betrachtung werde die wirtschaftliche Freiheit mit einem „zünftartigen Recht auf gleichbleibenden Absatz" seitens der Mitbewerber verwechselt. Die wirtschaftliche Freiheit eines Gewerbetreibenden soll und darf grundsätzlich nich beschränkt werden." BGH GRUR 1957, 365 ("SUWA"), 367 f.

[1048] BGH GRUR 1965, 489 („Kleenex").

[1049] *Ibid.*, at 490.

[1050] "denn in dem die Originalware den Bedarf des Beschenkten mindestens für einen begrenzten Zeitraum deckt, birgt ihre unentgeltliche Verteilung die Gefahr, dass der Kunde sich an den Gebrauch oder Verbrauch dieser speziellen Warensorte oder –marke gewöhnt und auch nach Beendigung der unentgeltlichen Verteilung davon absieht, die Angebote der Mitbewerber unbeeinflusst auf ihre Güte und Preiswürdigkeit zu überprüfen, sie mit den Angeboten der Mitbewerber zu vergleichen und danach seine Wahl zu treffen. Diese Gefahr ist umsogrösser, je grösser die dem einzelnen Beschenkten zur Verfügung gestellte Menge oder Stückzahl ist. Diese Form der Werbung widerspricht damit im Ansatzpunkt dem in Allgemeininteresse zu beachtenen Grundsatz des Leistungswettbewerbs." *Ibid.*, 491. See further BGH GRUR 1969, 295 ff. ("Goldener Oktober").

[1051] On the history and recent developments, see Schricker, 'Gratiszeitungen – eine unlautere Marktstörung?' in: *Festskrift till Ulf Bernitz. NIR* (Stockholm: Jure, 2001a), 65 ff. with reference to the relevant case law.

in Competition (GWB) when deciding in unfair competition law.[1052] He even identified a tendency of German courts to allow a harsher climate of free competition. The existence of well-defined and intensely enforced antitrust legislation appeared to militate against the use of structural economic arguments in unfair competition law. Yet Ulmer's advice was only partly followed by the judiciary.[1053] Instead of drawing clearer distinctions between the two areas, the courts in many respects seemed to feel authorised to fill in the 'gaps' of cartel law, following precedents and doctrines developed in earlier jurisprudence. In any case, the absence of a coherent approach encouraged competitors to seek resolution through the courts.

Psychologischer Kaufzwang and übertriebenes Anlocken

A category of cases that at least at first blush appears to be inspired by concerns about consumers, and in particular their exercise of free consumer choice, encompasses situations of the so-called 'psychological pressure to buy' (*psychologischer Kaufzwang*). Under this category Hefermehl subsumes situations where the advertiser, by using means and circumstances unrelated to the transaction, unduly influences the free will of the addressee so that the latter feels forced to accept the offer for reasons of propriety.[1054] These judgments were in legal doctrine occasionally used to substantiate the thesis of the integration of consumer protection into the jurisprudence of the courts.[1055] Examples of such high-pressure selling methods are different promotional competitions and games, where the prize has to be collected in the shop of the advertiser. In contacting the staff, the customers would allegedly feel obliged to buy at least something trifle. Other examples concern offers of a free (or low cost) trip to a place including a visit to business premises for commercial purposes. Again, customers are presumed to be induced to buy out of obligation or embarrassment.

According to Sosnitza the term '*psycholgischer Kaufzwang'* was coined in an expert opinion submitted in 1929 by the Chamber of Commerce in Leipzig. The Imperial Court in two decisions refused to qualify such promotional schemes as unfair under the general clause of § 1 UWG.[1056] Starting in 1958, the BGH on multiple occasions was asked to investigate the compatibility of similar promotional techniques with *bonos mores*. The Court initially dismissed such claims (for instance a claim to qualify the giving of small free gifts, such as a lighter, as *psychologischer Kaufzwang*) but nevertheless used the concept in its decision.[1057] Several subsequent cases, again with negative outcomes, in passing referred to the possibility of prohibiting a promotional offer if it entailed psychological pressure to buy.[1058] Finally, in 1970 an offer of cheap transportation to the business premises was for the first time qualified as *psychologischer Kaufzwang* within the prohibition of § 1 UWG.[1059] Following this

[1052] See Ulmer (1965), 58 ff.
[1053] See Beier, 'Entwicklung und gegenwärtiger Stand des Wettbewerbsrechts in der Europäischen Wirtschaftsgemeinschaft'(1984) *GRUR Int.*, 61 ff., 65.
[1054] Sosnitza, Wettbewerbsbeschränkungen durch die Rechtsprechung (Baden-Baden: Nomos, 1995), 22.
[1055] See Ott (1974), 428 ff. See also Schricker (1976), 549 ff., who is, however, critical of the excesses in the case law in an anticompetitive direction.
[1056] See Sosnitza (1995), 24 ff. with reference to the relevant cases RG GRUR 1930, 1204 and RG GRUR 1931 278 ff.
[1057] BGH GRUR 1959, 31 („ Feuerzeug als Werbegeschenk").
[1058] See Sosnitza (1995), 26 with reference to BGH GRUR 1967, 202 ("Gratisverlosung").
[1059] BGH GRUR 1971, 322 ("Lichdi-Centrum").

decision the category was firmly established in German unfair competition law and has given rise to intense litigation.[1060]

A similar development can be traced in respect to a related category of situations under the UWG, namely that of *'übertriebenes Anlocken'* (excessive enticement). A marketing strategy is qualified as *'übertriebenes Anlocken'* when the customer is induced by impertinent means to contact the advertiser without possessing proper information about the quality and value of the offer.[1061] The evolution of the judge-made rule began with a decision of a Higher District Court. The doctrine was then adopted by the BGH and applied to a growing category of situations. As impertinent influence German jurisprudence has qualified different promotional events, cheap transportation to the business premises, promotional competitions and other free offers.[1062]

Like *'psychologischer Kaufzwang'*, the doctrine of *'übertriebenes Anlocken'* is ostensibly grounded in concerns about free consumer choice. Yet a look at the unfolding case law prompts serious misgivings as to the true implications of these doctrines for consumer interests. As Tonner has noted regarding a number of cases under the heading '*psychologischer Kaufzwang*', the courts were despite references to consumer protection effectively asked to take sides in conflicts between well-established small and middle-sized retailers in the cities and new entrants on the retail market, often large shopping centres at the city outskirts.[1063] By offering free (or subsidised) transportation to their business premises, newcomers were trying to compensate for the competitive disadvantage of a peripheral geographic position.[1064] Similar competitive 'wars' with the instruments of UWG were fought between coffee-roasting companies using different distribution forms, some using the retail shops and others relying on their own distribution networks.[1065]

The problem of substituting consumer protection for protection of established competitive positions is pertinently illustrated by the leading case *Diagnose-Zentrum* of 1970.[1066] The defendant was enjoined from offering free car inspection (worth 10-18 DM) in so-called "diagnostic centres" in his car-repair shops. The BGH qualified the practice as an excessively advantageous offer and therefore contra *bonos mores*. Arguments that the free-of-charge diagnostic of the car may improve traffic safety

---

[1060] See Sosnitza (1995), 27 ff. On the doctrine and caselaw under the concept 'psychologischer Kaufzwang see Baumbach/Hefermehl (1998), § 1 UWG, Rdn.89, 157 ff. Cf. Paefgen, 'Psychologicher Kaufzwang – A quo venis et quo vadis?' (1991) *WRP*, 85 ff.

[1061] See Sosnitza (1995), 42 ff.

[1062] See BGH GRUR 1971, 322 ("Lichdi-Center"); BGH GRUR 1972, 364 ("Mehrwertfahrten"); BGH GRUR 1972, 603 ("Kundeneinzelbeförderung").

[1063] Tonner (1987), 1919 with reference to "Lichdi-Center" and "Mehrwertfahrten".

[1064] Eventually the courts modified the doctrine to allow free transportation under strict conditions that consumers remain anonymous. See Tonner (1987), 1919; Sosnitza (1995), 42 ff.

[1065] Companies with own distribution network (notably Tschibo) were offering non-specific items (i.e. cookbooks, breakfast tablets, etc.) at very cheap prices, provided the items were purchased together with the main product, i.e. coffee. Upon action on the part of competitors, the courts enjoined such practices as being contra *bonos mores*, linking to notions such as '*Vorspannangebot*' (lead offers) and '*Verlockung*' (enticement). BGH GRUR 1976, 637 („Rustikale Brettchen"); BGH GRUR 1977, 110 („Kochbuch") See Baumbach/Hefermehl (1998), § 1 UWG, Rdn.132. Tonner (1987), 1919.

[1066] BGH GRUR 1971, 162 („Diagnose-Zentrum").

were dismissed by the Court.[1067] The logic behind this reasoning is not easy to disentangle, especially if one takes consumer interests seriously. The Court seems to proceed from a notion of easily misled and sensitive consumers which is hardly corroborated by empirical and theoretical findings.[1068] Similar assumptions can be discerned in the case "Ein-Groschen-Werbeaktion". The embarrassment of customers was assessed to be even greater when they were offered a low-value promotional gift against the symbolic payment of one Grosch/Pfenning.[1069] This symbolic consideration allegedly enhanced the feeling of having unduly received a present. In both cases, by taking the sensitive consumer as a benchmark, the courts deprived consumers of gains. That the interest of the competitor not to loose customers was given at least equal attention is explicitly stated in some decisions.[1070] It is noteworthy that the cases under the two headings have been brought before the courts exclusively by competitors and their associations.[1071] In the legal literature such decisions are controversial.[1072]

Belästigende Werbung and gefühlsbetonte Werbung
Prolific case law with constant reference to the interests of consumers (and of the general public) also evolved under the heading of 'emotional advertising'.[1073] Initially the cases concerned advertisements which provoked customers' compassion by indicating that the marketed product was manufactured by disabled people.[1074] The justification for enjoining such practices under the general clause of § 1 UWG was that consumers should not be influenced in their choice by non-substantive (*'unsachlich'*) arguments unrelated to the quality or the price of the good. With time the doctrine was extended to encompass certain types of ethical marketing. On the basis of the doctrine of 'emotional advertising' undertakings were enjoined from announcing that part of their profit goes to charity establishments, to children networks, to a public zoo, etc.[1075]

A similar logic was applied to marketing by the use of ecological arguments. The particular sensitivity of the topic and the vulnerability of consumers in this respect were emphasized. The very fact that this type of advertising is classified in the category of 'emotional' marketing is indicative of an assumption that it would be impossible to use ecological arguments in advertising objectively. The judiciary considered it contrary to *gute Sitten* to provoke purchase interest by appealing to social responsibility, compassion, ecological concerns unless the goods offered have a

[1067] Schricker (1996a), 476.
[1068] For a critical analysis see Sosnitza (1995), 29 ff.
[1069] BGH GRUR 1981, 746 ff. ("Ein-Groschen-Werbeaktion").
[1070] See BGH GRUR 1974, 156 („Geld-Gewinnspiel"). See in this sense Sosnitza (1995), 51.
[1071] The "Diagnoze-Zentrum" and the "Ein-Groschen-Werbeaktion" decisions of the BGH were reported as victories of the *Wettbewerbszentrale* at its 75th anniversary, see Kisseler (1987), 131 ff.; see Ch. 5.3.4.1 above.
[1072] For a critical view see Beier (1984), 61 ff., at 65 f. It is nevertheless surprising that, after giving a number of convincing examples of use of unfair competition law for untypical structural policy ends, Beier concludes that in Germany one has generally succeeded to prevent that the UWG is used as an instrument for protection of the *Mittelstand*.
[1073] See Baumbach/Hefermehl (1998), 582 ff.
[1074] BGH GRUR 1959, 277 ff. ("Künstlerpostkarten"); BGH GRUR 1959, 143 ff. ("Blindenseife"); BGH GRUR 1976, 308 ff. („UNICEF-Grüsskarten").
[1075] See BGH GRUR 1987, 534 ff. ("McHappy-Tag"). Numerous examples are provided by Sosnitza (1995), 90, with further references.

material connection with the ideas implied (i.e. the environment).[1076] The public interest in environmental protection could not, in the view of the judiciary, outweigh the interests of competitors, consumers and the general public in fair competition, oriented after quality, adequate prices and services.[1077]

In an abundant case law the courts had to take a stand on the use of various means of direct advertising, such as telephone marketing, unannounced visits by sales agents at consumers' homes, impertinent marketing of funeral services to old people, etc. These situations were regarded as exemplifications of the general constitutional principles of right to privacy and protection of the private sphere.[1078] The attitude of the courts was stringent, whereby aggressive and offensive methods of marketing were generally seen as prohibited.[1079] Telephone advertising was also one of the few marketing practices under § 1 UWG litigated intensely by consumer unions. The courts admitted the right of action giving a generous interpretation of the criteria of 'significant interests of consumers' in § 13 II UWG.[1080]

Vorsprung durch Rechtsbruch: a selective approach
One of the main doctrines under the general clause of § 1 UWG continued to be the doctrine of *Vorsprung durch Rechtsbruch* as developed by the Imperial Court. Under this doctrine, breach of certain statutory, and occasionally also of contractual, duties by a competitor could be prohibited as an act of unfair competition as such conduct could accord undue competitive advantage to the infringer. Despite multiple assurances of actual change in the objectives of the UWG, the Courts continued to insist on 'competitive advantage' as an element of the test.[1081] Achieving equivalent competitive conditions was a key justification behind the doctrine.[1082]

The classification of statutory norms into moral-based, value-based and value-neutral was likewise taken over from the case law of the RG and refined by the BGH, whereby planned infringements of moral and value-based norms could as a rule be enjoined under § 1 UWG.[1083] As examples of moral-based norms (*'sittlich fundierte'*) legal doctrine refers to breaches against criminal prohibitions of trade with pornographic literature or of trade with stolen goods. Value-based norms do not have

---

[1076] Consumers were being convinced to buy "Bio-Möbel" through a promise that for every purchase above a certain amount of money the cost of one bus-ticket would be reimbursed, thus responding to the ecological appeal for substitution of private auto transport with public transport. See BGH GRUR, 1991, 542 ("Biowerbung mit Fahrpreiserstattung"). Similar was the case in advertisement, stating that with every purchase consumers were contributing to environmental protection because the defendant was spending part of his profits for planting trees, support of Greenpeace, etc. See 'Umweltengagement' decision of OLG Hamburg of 9.3.89

[1077] For a critical analysis of the "Biowerbung mit Fahrpreiserstattung" decision of the BGH, see Fezer, 'Umweltwerbung mit unternehmerischen Investitionen in den Nahverkehr (1992)' *JZ*, 443. See Schricker, 'Deregulierung im Recht des unlauteren Wettbewerbs?' (1994a) *GRUR Int.*, 586 ff.; Ackermann, 'Die deutsche Umweltrechtsprechung auf dem Weg zum Leitbild des verständigen Verbrauchers? ' (1996) *WRP*, 502 ff.

[1078] Schricker (1976), 547 ff.

[1079] See Baumbach/Hefermehl (1998), § 1 UWG, Rdnr. 67 ff., 513 ff. on telephone advertising and Rdnr. 78 ff., 523 on advertising in case of death with further references to case law.

[1080] See BGH GRUR 1989, 753 („Telefonwerbung II").

[1081] For a general criticism at the "Vorspungsgedanke" see Beater (2000a), 41. See also Micklitz, 'Die Rechtsbruchsklage nach § 22 AGBG' in: Brönneke (ed.), *Kollektiver Rechtsschutz im Zivilprozess* (Baden-Baden: Nomos, 2001), 87 ff., at 89 ff.

[1082] Schricker (1970b), 261 ff. See Beater (2000a), 38.

[1083] See Baumbach/Hefermehl (1998); cf. Köhler/Piper (2002), 731 ff.

to be moral-based but usually govern the protection of important social and public interests. In the 1960s, with the introduction of extensive administrative regulations on protection of public and consumer health, such regulations were recognized as value-based. Infringements of these norms could consequently be prosecuted by way of injunctive relief under the general clause of § 1 UWG.[1084]

The breach of value neutral norms was not regarded *per se* as contra *bonos mores*, but only where particular circumstances accorded an undue competitive advantage to the infringer. During the 1960s the Court tended to treat statutes on product information as value-neutral and refuse to grant injunction on the basis of the general clause of § 1 UWG. As value neutral the judiciary for instance classified norms to be found in the regulation of price indications and textile labelling. In legal analyses the differentiation between value-based and value-neutral norms has been subject to severe criticism.[1085] From a consumer perspective Micklitz more recently points at the uncertain ground for valuation. In particular he finds the qualification of consumer-relevant norms, (such as information disclosure duties under the Consumer Credit Act and the Door-Step Selling Act, the rules on price information and on labelling) as value-neutral norms, unconvincing.[1086] An understanding of the social function of unfair competition should, in his view, militate in favour of treating these norms as value-based. Strangely enough, the very definition of the doctrine of competitive advantage failed to provide grounds for intervention in monopolistic markets and other instances where goods share common negative characteristics and incentives for enforcement are lacking. Arguably, consumer interests are genuinely at risk in the latter cases.[1087]

The doctrine of *Vorsprung durch Rechtsbruch* has proven to be one of the most unwieldy outgrowths of the general clause of § 1 UWG. The broad opportunities it offers competitors and their associations in terms of mutual policing has produced countless decisions enforcing a range of administrative norms and statutes. Among the most popular areas of application of the doctrine have been the *Rabattgesetz* and the *Ladenschlussgesetz*.[1088] Despite that the latter act was qualified as value-neutral, the courts found situations of undue competitive advantage to exist, for instance when petrol stations offered flowers for sale outside normal opening hours.[1089] The mere simplicity of these rules has helped to attract vast numbers of eager litigants. Given the dispersed jurisdiction of the courts and the high number of courts deciding in unfair competition subject matter the lack of coordination and harmony between decisions of different courts is hardly surprising.

Comparative advertising

Comparative advertising is usually the factual situation used as a touchstone for the role of consumer interests in fair trading law. At least theoretically, an objective, factual and all-sided comparison could be beneficial for consumers and improve

---

[1084] See Micklitz (2001), 91; Köhler/Piper (2002), 735, with further references to case law.

[1085] See for a thorough analysis Schricker (1970b), 34 ff., 41; Ohly (1997), 240; Mees, 'Einheitliche Beurteilung der Sittenwidrigkeit im Sinne des § 1 UWG bei Verstössen gegen wertbezogene und wertneutrale Normen' (1996) *GRUR*, 644 ff.; Beater (2000a), 35 ff.; Micklitz (2001), 98; Köhler/Piper (2002), 738.

[1086] Micklitz (2001), 98.

[1087] See Beater (2000a), 29, 35 ff.

[1088] Both acts are repealed now. See below Ch. 7.1.1.4.

[1089] See Sosnitza (1995).

market transparency.[1090] As noted in the previous chapter, the competitor-oriented approach in pre-war German unfair competition law had led to a critical stance towards comparative advertising, bordering on full prohibition.[1091] Already the subsumption of comparative advertising under § 1 UWG instead of § 3 UWG affirms the predominant position of the interests of competitors in such cases. It was not the higher potential of comparative advertising to mislead customers, but the general discomfort and annoyance caused to the affected competitor, which stood at the centre of attention.

With the supposed shift towards a social and public-interest understanding of the UWG, one could have expected a change in policy and judicial interpretation to follow. A look at the case law of the BGH from the 1950s to the 1970s demonstrates, however, that this change in attitude failed to materialize.[1092] The BGH upheld the RG approach of a general rule prohibiting comparative advertising and a catalogue of exceptions to the rule. It only simplified the sophisticated classification scheme developed by the RG (*Systemvergleich*, *Fortschrittsvergleich*, *Auskunftsvergleich* and *Abwehrvergleich*) and attempted to subsume all exemptions under a common denominator. Comparative advertising was thus generally prohibited unless the advertiser could show *sufficient reason* for the comparison (*'hinreichender Anlass'*). For a comparison to be allowed it furthermore had to be based on objective and truthful data.[1093] It should be observed that the categories developed by the RG never lost relevance and were frequently employed in court decisions and in the scholarly literature.

Following Nerreter's classification, in post-war theory and practice a distinction was also drawn between critical and parasite comparative advertising.[1094] Whereas critical comparisons usually point at disadvantages of the competitive products, services or other relevant circumstances, the parasite comparison tends to capitalize on the reputation of a popular product or trademark. Some relaxing of the stringent standards only took place in the area of critical comparison. In two decisions of the late 1960s the BGH signalled a careful rethinking of the basis for prohibition of comparative advertising.[1095] In the traditional line of jurisprudence, the exemptions were shaped mainly proceeding from the interests of competitors and of the business community. Taking a novel approach, the BGH emphasised the need to consider the interests of the public in receiving information about a product or a service.[1096]

[1090] Admittedly, designing objective comparisons in practice is not an easy task. Comparative advertising has an built-in tendency to overemphasize the advantages of the advertiser's own products, or to capitalize on the reputation of a successful competitor, thus involving elements of deception or infringement of trade mark rights. See Kur (1993), 447-48; Spink/Petty, 'Comparative Advertising in the European Union' (1998) 47 *ICLQ*, 854 ff.

[1091] RG GRUR 1931, 1299 ("Hellegold").

[1092] See Schricker (1975), 220 ff. with further references.

[1093] BGH GRUR 1962, 45, 48 („Betonzusatzmittel"). See Ohly/Spence (1999), 684.

[1094] Nerreter, GRUR 1933,

[1095] BGH GRUR 1968, 443 („40% können Sie sparen"); BGH GRUR 1970, 422 (423) („Tauchkühler"); BGH GRUR 1986, 618 ff., at 620 („Vorsatz-Fensterflügel").

[1096] "[E]in hinreichender Anlass für eine vergleichende Werbung in der Wahrnehmnung eines berechtigten Interesses liege und ... ein solches Interesse nicht ausschliesslich in der Person des Wettbewerbers vorliegen müsse, dass es vielmehr auch durch ein schutzwürdiges Bedürfnis der Allgemeinheit nach sachgemässer Aufklärung begründet sein könne." See BGH GRUR 1970, 422 ff., at 424 („Tauchkühler").

In the *Vorsatzfensterflügel* case an injunction claim was filed against a window-retailer, who on the basis of customer complaints had informed his clients on the safety risks connected with the brand of windows marketed by the claimant. Contrary to the conclusions of the lower instance courts, the BGH inferred that the comparison was necessary in order to safeguard important interests of the customers.[1097] In these decisions many saw an overhaul of the earlier restrictive approach. The Court appeared to recommend a more complacent attitude towards comparative advertising.

Nevertheless, the prohibition of comparative advertising remained in place. Even if legal doctrine acknowledged a tacit transition to a principle of admissibility of comparative advertising under specific conditions,[1098] the Federal Court never accepted this radical step. It can certainly be contended that there is no essential difference between the two approaches. Whether comparative advertising as a rule is allowed under certain conditions, or prohibited as a rule with some exemptions, largely amounts to similar substantive outcomes and *prima facie* resembles the half-empty or half-full glass metaphor. In practice, however, the choice between prohibition and permissiveness has played an important guiding role for case law.

Under a rule of prohibition the lower courts continued to interpret the exemptions from the prohibition restrictively. New conditions were added to the already familiar ones for allowing comparative advertising. The comparison had to be objective and material (*"objektiv"* and *"sachlich"*), and not unnecessarily damaging (*"nicht unnötig verletzen"*). It had to be applied with moderation and according to some, to be dignified (*"würdig"*). Other factors that could be taken into account depending on the individual case were the market structure (oligopolistic or atomistic markets), the strength of interest on the part of the general public in receiving the information, the competitive behaviour of the parties, the actions and relations between the parties before the comparison, etc.[1099] In general, however, the dominant doctrine was that the trader had to compete on the basis of his own performance and not through denigration of competitors. Moreover, the lower instance courts repeated the statement familiar from Callmann and the jurisprudence of the RG, namely that comparative advertising should be allowed only as *"ultimum refugium"* (solely in case there are no other available means to point at one's own achievements).[1100] This led to a stricter regulation of comparative advertising than could be inferred from the leading precedents of the BGH.[1101] Finally, the BGH itself did not abandon the restrictive view on critical comparative advertising altogether. On multiple occasions it restated the formula that comparative advertising was prohibited whenever it was not necessary.[1102] This was particularly confirmed in cases on price comparisons in

[1097] BGH GRUR 1986, 618 ff., at 620 („Vorsatz-Fensterflügel").
[1098] Schricker (1975), 220.
[1099] Schricker (1975), 221. For a critical view, see also Schricker, 'Zur Werberechtspolitik der EG – Liberalisierung und Restriktion im Widerstreit' (1992) *GRUR Int.*, 347 ff., at 352.
[1100] "Eine derartige herabsetzende Werbung verträgt sich nicht mit dem das Wettbewerbsrecht beherrschenden und die Lauterkeit bestimmenden Grundsatz, dass mit der eigenen Leistung und nicht mit der Herabsetzung des Mitbewerbers das umworbene Publikum angesprochen werden soll", OLG Düsseldorf WRP 1990, 177 ff., at 179 („Preisvergleich Ginkgo biloba").
[1101] See Schricker (1992), 347 ff., 352 with references to relevant cases; cf. Schricker (1996), 474. Henning-Bodewig (1999), 389; Ohly/Spence (1999), 684.
[1102] See Schricker (1975), 220, with reference to BGH GRUR 1974, 666 ff., at 668 („Reparaturversicherung"); see also Schricker (1996a), 474, with further references.

general and on comparison between prices of generics and of branded drugs, in particular.[1103]

The attitude towards parasite advertising (*anlehnende Werbung*) was even more stringent than that towards critical comparisons.[1104] Following the *Hellegold* reasoning the courts consistently held that reference to the name and products of competitors were not necessary except for certain specific circumstances. Even in cases where a reference to a competitor's product could provide useful information for consumers, such advertising was regarded as violating honest commercial practice.

The jurisprudence on drug-advertising provides a nice illustration of the distinction between critical and parasite comparison and the bifurcated, restrictive effect of the two doctrines. In its decision "*Generikum Preisvergleich*" the Court qualified truthful price comparison between a branded drug and a generic drug as a disparaging reference to competitor's product, which cannot be justified by the interest to inform the general public.[1105] The advertising was prohibited as 'critical comparison' since it underlined the high prices of the competitor.[1106] Alternatively, in case the healing effects of generics are brought out as equivalent or similar to those of branded medicines, the advertising risks prohibition as an instance of parasite comparison.[1107] In the "Bioäquivalenz" judgement the BGH held:

> Die anlehnende bezugnehmende Werbung die eine Gleichstellung des eigenen Produkts mit einer bekannten fremden Ware behauptet, um sich an deren guten Ruf anzuhängen und diesen als Vorspann für die eigene Ware und ihren Vertrieb auszunutzen widerspricht grundsätzlich dem lauteren Wettbewerb und ist deshalb regelmässig als wettbewerbswidrig anzusehen.[1108]

A significant step toward liberalisation was seen in the Cola-Test decision of the BGH.[1109] The advertising in this case did not involve a comparison proper, but instead an appeal to consumers to compare themselves the properties of two competing products ('Coca-Cola' and 'Pepsi-Cola'). The BGH held that this type of advertising did not qualify as comparative and should therefore be exempted from the restrictive tests established in case law. It was only to be scrutinized against the prohibition of disparagement.[1110] As in the case of critical comparative advertising, the decision left the impression of a reversal of the basic rule from prohibition to permission under

---

[1103] In respect to price advertising, see BGH GRUR 1992, 61 ff., at 62, („Preisvergleichsliste"). On generics, see BGH GRUR 1989, 688 ff., at 689 („Generikumpreisvergleich").

[1104] BGH GRUR 1957, 23 ff. („Bündener Glas").

[1105] BGH GRUR 1989, 688 ff. („Generikumpreisvergleich").

[1106] As Reich rightly notes, it remains unclear where the element of disparagement lies. The importer of generic drugs competes by offering equivalent products at a price four times lower than that of the branded drugs. To be prevented to mention this fact in a correct and non-misleading way clearly implies significant restrictions on the opportunities to exploit a competitive advantage. See Reich, 'Vergleichende Werbung und EG-Recht' (1988) *WRP*, 75 ff, at 78.

[1107] BGH GRUR 1986, 472 ff. („Bioäquivalenz-Werbung").

[1108] BGH GRUR 1986, 472 with reference to the authoritative UWG commentaries authored by Baumbach/Hefermehl and by v. Gamm, and to the more generous attitude defended by Schricker.

[1109] BGH GRUR 1987, 49 ("Cola-Test").

[1110] „...eine lediglich bezugnehmende und nicht hereabsetzende Werbung könnte rechtlich nur unter dem Gesichtspunkt der unzulässigen Anlehnung an den Ruf eines Konkurrenzerzeugnisses beanstandet werden." See BGH GRUR 1987, 49, 50.

certain conditions. However, in subsequent cases, the BGH returned to a more restrictive line of reasoning. In the "Therapäutische Äquivalenz" decision the BGH with reference to its decision from 1986 stated:

> Das BerG ist ferner rechtsfehlerfrei davon ausgegangen, dass eine anlehnende bezugnehmende Werbung als grundsätzlich wettbewerbs-widrig anzusehen ist und nur in besondere Umstände diese ihr regelmässig anhaftende Unlauterkeit entfallen lassen können.[1111]

The prohibition of such comparisons has attracted strong criticism in legal doctrine.[1112] It was first with the Comparative Advertising Directive that a liberalisation in this area could be noticed.

A different category of advertising related to comparative advertising, is the so called *persönliche Werbung*, or advertising referring to the personality of a competitor. In line with the earlier RG case law, the attitude also here has been utterly restrictive. In theory such personal advertising was considered permissible under specific circumstances.[1113] These circumstances remained, however, unclear and were almost never tested in practice.[1114]

In the context of a discussion about the criminalisation of unfair competition law, Schricker in 1975 commended the freedom of the judiciary to shape the standard of comparative advertising as a positive trait of German unfair competition law. All the intricate factors invoked and weighed by the judiciary could not find proper reflection in a criminal law text. If this text had been drafted and promulgated at an early stage, it would not have been sensitive to consumer protection concerns and might have frozen the adaptation of case law to changing realities.[1115] Yet, it appears that with time the inherited civil law doctrines of interpretation have revealed at least equal endurance (perseverance) and rigidity.

Misleading advertising and consumer image

It is a widely shared view in the political debate, in jurisprudence and in doctrine that the German standard of deception is among the strictest in Europe.[1116] Somewhat unreflectively it has also been taken for granted that at the heart of such strict truthfulness requirements lay consumer protection concerns. The conclusion is automatically drawn that also the level of consumer protection against deception is among the highest in Europe. For decades these self-perceptions have been a source of national pride and satisfaction. One good example provides the governmental Bill to the UWG reform of 1978:

[1111] GRUR 1992, 625 ff., at 626 („Therapeutische Äquivalenz").
[1112] See Reich (1988), 75 ff.; cf. Ohly/Spence (1999), 684.
[1113] See Baumbach/Hefermehl (1998), Rdnr. 431 zu § 1; cf. Ohly/Spence (1999), 686.
[1114] See BGH GRUR 1967, 596 ff., at 597 ("Kuppelmuffenverbindung").
[1115] Schricker (1975), 221.
[1116] See Schricker (1991a), 788 ff.

> So beruht etwa die international als vorbildlich angesehene strenge Handhabung des zivilrechtlichen Verbots irreführender Werbeangaben (§ 3) maßgeblich auf dem Gesichtspunkt des Verbraucherschutzes. [1117]

Purely textually, the small general clause of § 3 UWG indeed provides a broad basis for enjoining untruthful and misleading advertising claims. In the course of the 1969 legislative reform of UWG the scope of this provision was additionally extended.[1118] The original text of § 3 UWG required that the advertising should address a wider public and that it should create an impression of a particular lucrative offer. Both these requirements were removed from the wording of § 3 with the 1969 UWG Novelle.[1119] In this, the legislative change actually endorsed and codified a development already taking place in the courts' jurisprudence. Applying § 1 UWG the judiciary had already adapted its deception standards in direction towards covering also personal communications. Likewise the interpretation of "particularly lucrative offer" had been relaxed so that it sufficed that some advantages were promised in the advert in order for it to fall under the scope of the provision.[1120] Thus the legislative text and its judicial interpretation had gradually drifted away from the original intention of the fathers of the UWG.[1121]

One of the most heated debates in German unfair competition law concerns the benchmark consumer serving as a basis for the application of § 3 UWG. Establishing the misleading character of the advertising information requires research in collective psychology, in collective perceptions. The trickiness consists on the one hand in the subjective nature of perceptions, and on the other hand in the need to set a normative threshold for assigning legal relevance to such perceptions. German doctrine has tried to address the challenge by working with certain consumer '*Idealtypus*' whose ideas and perceptions the law protects. The test has traditionally proceeded in two steps. At a first stage subjective perceptions are empirically studied through opinion poll questionnaires. Then the statistical results are processed and a normative decision is taken as to where to draw the threshold for legal relevance. For years, the threshold has been set at the magical 10-15 percent, i.e. the advertising message has been considered legally problematic under § 3 UWG if a minority of 10-15 percent of the representative sample of consumers find the message to be misleading.

A distinguishing characteristic of German case law on misleading advertising is that the standard of deception has traditionally been based as close as possible on the actual

---

[1117] Among other documents, see Regierungsentwurf, WRP 1978, 277 ff., 284.

[1118] In its present version the provision reads: "Any person, who in the course of business activity for purposes of competition, makes deceptive statements concerning business matters, in particular concerning the nature, the origin, the manner of manufacture, or the pricing of individual goods or commercial services or of the offer as a whole, concerning price lists, the manner or the source of acquisition of goods, concerning the possession of awards, concerning the occasion or purpose of the sale, or concerning the size of the available stock may be enjoined from making such statements."

[1119] Schricker (1975), 222.

[1120] Schricker (1975), 222; Ulmer/Reimer, *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der EWG*, Band I, Deutschland (München: Beck, 1965), Rdnr. 562, 668.

[1121] On § 1 Abs. 1 UWG 1896 see Beater (2000a), 141. Beater quotes the following draft version from the preparatory works to the first UWG (of what then was Sec. 1 1896 UWG): „...das Angebot als ein besonders günstiges Erscheinen zu lassen und dadurch zum Nachteile redlicher Mitbewerber Kunden anzulocken." Reichstagsvorlage UWG 1896, Verdhlg. RT IX Legislaturperiod l, 4 Session, 1895/96, Anlagen Nr. 35, S. 102.

consumer perceptions in the particular case in point. Decisive for establishing the deceptiveness of a certain advertising message has been the meaning spontaneously attached to a statement by a not insignificant portion of the targeted consumers.[1122] When ascertaining the effect of an advert directed to the general public, the courts have proceeded from the understanding of the casual average consumer, who perceives an advert in a spontaneous and uncritical manner.[1123] Already early in the history of UWG the threshold for ascertaining deception was set at a low level. It sufficed to bring evidence that a not insignificant portion of consumers were misled (or were likely to be misled) in order to enjoin a given advert.[1124] This formula, in slight variations, was then reproduced in numerous decisions under § 3 UWG referring to 'not insignificant', 'not inappreciable' and 'not quite (fully) insignificant' (*'nicht unbeachtlichen'*, *'nicht unerheblichen'*, *'nicht ganz (völlig) unbeachtlichen'*) part of consumers.[1125] Expressed in figures, the threshold was set at 10-15 percent of the targeted (or actually reached) consumer audience. This threshold could, however, move downwards and upwards depending on the advertised product characteristics and on the addressed consumer groups. [1126]

In doctrine this approach is characterised as a descriptive one (to be contrasted from a normative approach).[1127] The aspiration is to make a positive (empirical) assessment of the way consumers understand a specific statement. If the statement is clearly untrue and misleading then judges can ascertain deception proceeding from their own experience as consumers. However, if the advertising targets a specific consumer group or if there is doubt as to how will consumers interpret a given statement, courts frequently make recourse to market surveys and opinion polls.[1128] Marketing agencies are commissioned to carry out such surveys and to measure the reactions of representative groups of consumers to the advertisement in point.

Yet as some commentators point out, even an empirical approach to the standard of deception, contains a normative element. While the courts in a first step ask how many consumers are actually misled (or likely to be misled) by a given advertising statement, this never exhausts the analysis. In a second step the courts openly or implicitly always address the question what percentage of misled consumers should be decisive for establishing deception? Naturally where a statement is blatantly deceptive, this second question remains unaccounted for. If, however, some consumers are misled and others are not, the courts tacitly or expressly weigh different interests against each other. The interests of consumers who correctly understand the message must be weighed against the interest of those possibly misled by the advert. The interests of competitors and the general public interest are also taken into account. The analysis in this second stage is not empirical but normative.

[1122] See Leible, 'Abschied von 'flüchtigen Verbraucher?' (1994) *DZWiR*, 177 ff.
[1123] Baumbach/Hefermehl (1990), § 3 UWG, 566.
[1124] See Ch. 4..4.1.2 above.
[1125] See BGH GRUR 1971, 313 ff., 315 („Bockbeutelsflasche"). See Sack, 'Die Bedeutung der EG-Richtlinie 84/450 und 97/55/EG über irreführende und vergleichende Werbung für das deutsche Wettbewerbsrecht' (1998a) *GRUR Int.*, 263 ff., at 264 with further references to the abounding case law.
[1126] Leible (1994), 178.
[1127] See Doepner/Hufnagel, 'Towards a European Consumer? Protection Against Misleading Advertising in Europe' (1998) 88 *The Trademark Reporter*, 177 ff.
[1128] See Baumbach7Hefermehl (1998), § 3 UWG, Rdnr. 113 ff., 996 ff.

It is arguably in the context of this second normative question that the concept of consumer image (*Verbraucherleitbild*) has its relevance. By choosing where to set the threshold of deception the courts give preference to the inattentive and casual consumer or, conversely, to the informed and careful customer. Grounded in analysis of abundant case law and considering the low quotas of deception accepted as sufficient by the courts, scholars infer that the consumer image in German unfair competition law is the casual and inattentive customer (*der flüchtige Verbraucher*). Judges do not expect this consumer to read carefully labels and other information. Authors speak somewhat poignantly of 'Lieschen Müller', the simple unsophisticated and naive consumer that is at the centre of German unfair competition law (in contrast to the sophisticated European 'M. Dupont').[1129]

Particular attention deserves the role ascribed to the relevance of the advertising message for consumers' purchasing decisions. The 1969 Novelle which extended the scope of the prohibition in § 3 UWG did not intend to fully abstain from any requirement of relevance of the advertising message for the exercise of consumer choice. In the course of the parliamentary discussion the Legal Commission explicitly referred to the potential [of the advertising] "to create incorrect ideas about the offer amidst not insignificant parts of the addressees." [1130] In its 1978 UWG Bill the Government pointed out, however, that the courts had gradually arrived at a very extensive interpretation of § 3 whereby not only statements with clear relevance for the purchase decision, but also advertising concerning issues or facts that can "in any way" ("*irgendwie*") be of importance for the purchase are regarded to come within its scope.[1131] The Bill welcomed these developments from the point of view of the consumer.

The dominant opinion in legal doctrine and in case law likewise supported a stricter standard. Thus, according to Baumbach/Hefermehl it suffices, if the statement "geeignet ist, Kaufinteressen anzulocken und zur Beschäftigung mit den Angabe geneigter zu machen, das sie sonst möglicherweise nicht beachtet hätten".[1132] So even if the false impression left by the offer could at a closer look be easily corrected, to an extent that it would not play any role for the purchase decision, there would be a legally relevant deception in the sense of § 3 UWG. According to Schwanhäuser:

> Nach bisheriger Auffassung reicht es aus, wenn die beanstandete Angabe geeignet ist, die Kauflust des Verkehrs „irgendwie" – im Sinne der allgemeinen Wertschätzung – zu beeinflussen.[1133]

At the same time a number of commentators pointed out that if one follows the fundamental core idea of prohibiting deception, then it is logical to require that the advertising message should be to some extent relevant to the consumers addressed. A requirement for relevance of the advertising message for the consuming public implies

---

[1129] Keilholz, K., 'Die misslungene Harmonisierung des Verbots der irreführenden Werbung in der EG und ihre Konsequenzen für die deutsche Rechtsprechung' (1987) *GRUR*, 390 ff., 393.
[1130] BT-Drs. V/4035, Bericht des Rechtsausschusses, 2.
[1131] BT-Drs.8/2145, Regierungsentwurf, 10. See Beater (2000a), 143; BGH GRUR 1962, 310 („Gründerbildnis").
[1132] Baumbach/Heferemehl (1998) § 3 UWG, Rdnr. 87 with further references to relevant case law.
[1133] Schwanhäuser, 'Die Zukunft der „irreführenden" Werbung (§ 3 *UWG*) ' (1988) *GRUR*, 180 ff.

certain grading of the different types of information in view of their importance to consumers. Such an interpretation is, however, in conflict with a long line of precedents supporting the exactly opposite interpretation.[1134]

The issue of relevance is indeed one of the main weak spots of the private law oriented enforcement in a German style lies.[1135] By taking the principle of equality of the parties before the law and of neutral application of the legal provisions seriously, the judiciary inevitably runs the risk of falling into the minutiae of banal and unimportant disputes that could perfectly well be tackled by the free market. A '*de minimis*' threshold for enforcement is close to mind. However, private law does not know the principle of enforcement discretion. The courts do not control the litigation influx. Proceedings are brought by plaintiffs and there the courts can do nothing (or very little) to change the situation. And such principle was not explicitly prescribed by the legislature despite clear possibilities for such a step. Combined with a generously defined standing of "socially useful unions" there is no wonder that the judiciary is constantly faced with trifling factual situations, moreover without proper tools for streamlining litigation.

The practice of empirical market surveys for ascertaining consumer perceptions can, according to some commentators, be traced back to the individualistic understanding of UWG, prior to consumer protection being integrated into its texture.[1136] There are no firm rules as to when opinion surveys should be invoked as evidence.[1137] However, one tendency for judges has been to rely on their own judgement only when they confirm the allegation of deception. By contrast, if the misleading element in a message is more questionable, then the empirical tests are often considered necessary.[1138] This approach is defended with the argument, that in case deception is confirmed, the judge has to decide for 10-15 percent of the consuming public. In case deception is denied, the judge must substitute his own decision for the understanding of 90 percent of the addressed 'circles'.[1139]

Different arguments have been advanced against the use of opinion polls in UWG cases. It is claimed that it is impossible to reconstruct the spontaneous purchase situation, at least not through the kind of tests that are typically commissioned and considered by courts in unfair competition law disputes. Once the participants in the tests are specifically asked to take a stand on certain advertising message the

[1134] "Die Frage, welche Verstöße aus Sicht des Verbraucherschutzes stärker oder weniger ins Gewicht fallen, wird im Wettbewerbsrecht ungern gestellt und häufig nur in der Weise behandet, daß eine bestimmte Antwort ohne weitere Begründung unterstellt wird. Versuche, die wettbewerbsrechtliche Beurteilung von der Wichtigkeit der in Frage stehende Werbeinformation abhängig zu machen, dürfen mit erheblicher Kritik rechnen. Sie wenden sich gegen eine langjährige, weitgehend anders ausgerichtete Judikatur und eine ebenso langjährige herrschende Meinung." Beater (2000a), 140.

[1135] See Beater (2000a) 143 ff. with further references.

[1136] Beater (2000a), 143 and 146.

[1137] See Beater (2000a), 175; Baumbach/Hefermehl (1998), Wettbewerbsrecht, § 3 UWG Rdnr. 111 ff., 994 ff.

[1138] BGH GRUR 1963, 270 („Bärenfang"), Baumbach/Hefermehl (1998), § 3 UWG, Rdnr. 113 ff., 996 ff.

[1139] For a critical view, see Beater (2000a), 175, 176. According to Beater, judges should resort to empricial studies only when the advertising is addressed to underpriveleged consumers, with whom the judges can poorly identify. On the other hand, if the judges are in a position to themselves evaluate the advertising message they should do this irrespective of whether their judgement brings to prohibition or to dismissal of the claim. Otherwise, the mere difficulty of conclusive evidence results in an additional sharpening of the substantive standard of deception.

spontaneity is damaged.[1140] In addition, it is hardly possible to ensure a representative coverage of potential purchasers of the product/service in point.[1141] Market surveys tend to render proceedings more expensive and generally sink the threshold of deception.[1142] Most crucial is the objection that empirical tests cannot replace a normative stand on the threshold of deception, requiring that the courts take their responsibility in the matter. Already Ulmer complained over the tendency of judges to disavow own judicial thinking and to seek refuge in outer authority.[1143] The technique used by the courts is, however, very understandable from an institutional point of view. The decision-making responsibility is vested in the courts without any clear guidance as to the normative standards for decision-making. Lacking firm ground for fine-tuning of the case law, the use of empirical material and exact quotas helps to create the impression of objectiveness and predictability which is expected by the affected parties.

The interpretation of the low threshold of deception as synonymous with high level of consumer protection in German unfair competition law has first recently been critical voices in doctrine have tried to dispel this argument. Some commentators stress that a lower threshold of deception, taking as a point of departure the illiterate and intellectually retarded does not automatically lead to higher level of consumer protection, or vice versa, that building the protection with the archetype of the informed consumer in mind results in a lower level of protection.[1144]

The above cursory review of case law and doctrine does not aim at providing an all-sided and exhaustive account of the evolution of the standard of fairness under German UWG, a task that is clearly prohibitive. It only serves to suggest broad tendencies and hopefully to give a feeling about the 'flavour' of German unfair competition law in action. The most striking observations are to be made on two levels. On a general level, what comes forward is the particular method of law-making used by German unfair competition law judges. The routine noted already in the previous chapter of seeking to deducing general principle and rules (prohibitions) and then quite uncritically subsuming new situations under these principles is one source of pushing developments toward excessively restrictive standards. On the more specific level, it is often striking when consulting the facts of the cases, that issues of this calibre can reach the courts at all.

5.5.2 Sweden: shift towards consumer interest considerations

As indicated above the scope of the MFL was defined along the central concept of 'marketing'. It thus did not provide remedy against a number of controversial competitive practices that were extensively treated under UWG, such as boycotts, sales at a loss, inducing breach of contract, etc. Given these delimitations and the key

[1140] Beater (2000a), 174, fn. 181

[1141] On the limitations of demoscopical tests: Böhm, 'Die Beweiswürdigung demoskopischer Gutachten im rahmen von § 3 UWG' (1986) *GRUR*, 290 ff. Tilmann, 'Die Verkehrsauffassung im Wettbewerbs- und Warenzeichenrecht – Möglichkeiten und Grenzen der demoskopischen Wahrheitsfindung im Prozess' (1984) *GRUR*, 716 ff.

[1142] Beater (2000a), 176.

[1143] "[Die] richterliche Neigung, das eigene rechtliche Denken als eigenes zu verleugnen und die Autorität außerhalb seiner selbst zu suchen." Ulmer, *Warenzeichen und Unlauter Wettbewerb in ihrer Fortbildung durch die Rechtsprechung* (Berlin: Julius Springer Verlag, 1929), 25. Quoted after Beater (2000a), 174, fn. 182.

[1144] See Beater (2000a), 82 ff.

position of the KO in enforcement of marketing standards, it is not surprising that the case law of the Market Court evolved with a visible emphasis on situations concerning collective consumer interests. Prime importance was attached to the principle of truthfulness in marketing and to combating misleading advertising. This was also one of the explicit instructions in the *travaux préparatoires*. According to the Minister in interpreting the general clause "consideration should in the first place be given to the interests of consumers in protection against methods that are misleading or in other way render it difficult for consumers to exercise a rational choice between the goods and services offered."[1145]

According to the Government Bill to the 1970 MFL the general requirement of good commercial practice was to be interpreted on the basis of chiefly ethical considerations and was not to be influenced by arguments of general economic policy nature, including structural policy.[1146] This statement of neutrality probably aimed at excluding cases bordering with antitrust law from the scope of MFL. In legal doctrine, however, the 'neutrality' thesis was criticised as untenable. Clearly judgments under the MFL could not remain fully indifferent to competition and consumer policy considerations. The Market Court also openly acknowledged this in a leading case concerning promotional methods used by suppliers in relation to retailers.[1147]

5.5.2.1 The information approach to misleading and comparative advertising

The principle of truthfulness was seen to require that any information in marketing be objectively true. However, also correct information could be prohibited on the basis of the general clause if presented in a misleading way. This was confirmed in a series of judgments of the Market Court, where the misleading effect was produced by omission, or by unclear and suggestive presentations.[1148]

Following the instructions in the Government Bill of 1970 the Court applied the principle of reversed burden of proof.[1149] A trader who made certain advertising claims was expected to be able to substantiate these claims (principle of verifiability). In legal doctrine this principle was endorsed as reflecting fairly the information asymmetry between traders and consumers and placing the burden on the party who could more easily (less costly) provide the necessary information.[1150] One effect of the emphasis on truthfulness and verifiability of the advertising claims was that exaggerations and superlatives were treated strictly. In line with the *travaux préparatoires* even sweeping

---

[1145] Prop. 1970:59, 63 f.

[1146] Prop. 1970:57, 63.

[1147] MD 1984:22 ("Goodyear II"). In this case the KO sought to enjoin a producer from carrying out a promotional competition among retailers on the basis of number of articles sold. The KO sought to enjoin this promotional campaign arguing that consumers expected neutral and objective expert advise by retailers, which would not be the case when retailers were affected by the prospect of subjective benefits.

[1148] See MD 1976:20 ("Radiohjälpen"). An advertising claim that certain goods were sold for charity purposes was objectively true, but only for 5 percent of the sums obtained from the sales. The advert was therefore enjoined as contrary to good marketing practice. See also MD 1973:18 "Reader's Digest" about unclear presentation of an offer. See Bernitz (1991), 113; cf. Bernitz/Draper (1986), 134.

[1149] See prop. 1970:57, 101.

[1150] Bernitz (1991), 112 with further references to decisions of the Market Court.

claims about being 'best', 'largest', 'unique' were interpreted as verifiable statements of fact, requiring substantiation.[1151]

In ascertaining whether an advert is misleading the perceptions of the targeted consumer group were considered decisive. For advertisements addressing the general public the benchmark was the presumed average consumer with 'normal' comprehension, experience and expertise.[1152] This consumer was presumed to read adverts casually. Therefore it was the aggregate overall impression by casual contact that was important.[1153] The average consumer was for instance not expected to carefully read small print[1154] or to pay attention to quotation marks and question marks used to reverse or place a statement in a larger context.[1155] In case of doubt, the Market Court tended to follow a strict line of reasoning proceeding from the general consumer protection objective of the MFL.[1156] A professional audience would be associated with relaxing the standard of deception. Conversely, advertising targeting consumer groups less capable of critical and informed judgment (for instance children, elderly, and sick) would be subject to stricter scrutiny.[1157]

The assessment whether an advert is deceptive was as a rule purely hypothetical.[1158] The Market Court as well as the KO tended to ascertain the effect of the commercial message on the addressees on the basis of common sense and own experience and rarely invoked opinion polls. According to Bernitz one explanation for this pragmatic approach lies in limited economic resources.[1159] Another reason may be that most of the proceedings were instituted by the KO and usually concerned advertising claims that were misleading to the majority of consumers. Questionable borderline situations would be normally sifted out in the KO's office and would simply not be brought before the Court. Thus a sort of preliminary sorting out on the basis of the public interest in eliminating deception presumably takes place before approaching the Court. Finally, the limited possibilities to claim reimbursement of litigation costs may be one reason for private parties to abstain from expensive market surveys.

Unlike the special criminal provision on misleading advertising, the general clause on good marketing practice did not contain any requirement of relevance of the message for consumer behaviour. In legal doctrine such requirement was, however, considered to exist and to serve as a basis for sifting out trifle and insignificant cases to reduce the backlog of cases in the Market Court.[1160]

[1151] See e.g. MD 1981:9 ("Svebe-Fasad"). A claim that a product (facing plaster) "needs no maintenance" is interpreted literally that no maintenance measures should be taken throughout the lifetime of the product.
[1152] Bernitz (1991), 117.
[1153] Bernitz (1991), 116; Svensson/Stenlund/Brink/Ström, *Praktisk marknadsrätt*, 7th ed. (Stockholm: Norstedts Juridik, 1996), 68.
[1154] MD 1975:20 ("Philips") about discrepancy between the impression from a casual reading of an ad and the text in the small print.
[1155] MD 1992:30 ("Odinsplatsens Guld och Optik").
[1156] See Svensson/Stenlund/Brink/Ström (1996), 68.
[1157] See Bernitz/Draper (1986), 136.
[1158] See Bernitz (1991), 116 on some exceptions to this rule.
[1159] Bernitz (1991), 116.
[1160] See Bernitz (1991), 111.

The Government Bill to the 1970 MFL paid particular attention to price advertising. A more aggressive low price marketing was in the Bill generally considered positive for invigorating competition and ultimately for consumer interests. Therefore the Minister underlined the importance of certain tolerance to such arguments. Price advertising was thus to be partly exempted from the stringent criteria for assessing exaggerations and superlatives.[1161] Indeed, the Market Court followed these instructions.

It may be interesting to note that the information approach to advertising and arguably also macro-economic considerations occasionally prompted the Market Court to dismiss KO's claims for sweeping prohibitions of certain forms of marketing, and to indicate to the possibility of protecting consumers through adequate information. The case "Brio" concerned the marketing of Barbie accessories in packages depicting toys, which were not enclosed in the package (notably the Barbie-doll). The KO sought to obtain a broad-worded injunction enjoining the defendant from marketing toys by depicting on the packaging articles that were not part of the package content. The Market Court took seriously the arguments of the defendant that such prohibition would amount to trade barrier and pointed that deceptive impression could be prevented by adequate information. Eventually the injunction was formulated in more narrow terms.[1162]

Comparative advertising was explicitly mentioned in the Government Bill of 1970 as one area where the consumer interest required particular consideration.[1163] Comparisons could intensify competition and communicate effectively useful consumer information and were therefore to be allowed in principle. This was no novelty, but an already accepted approach in the practice of the NOp, following in this respect the change in attitudes announce in the ICC Codes.[1164] At the same time it was acknowledged that comparative advertising carried a particular aura of objectivity and had therefore to be carefully scrutinized for its truthfulness, relevance and representativity. Comparisons were thus subject to the general requirement of truthfulness.[1165] In the practice of the Market Court comparisons only rarely passed this test.[1166] Most comparative advertisements failed to fulfil all or some of the requirements above.[1167]

The positive effects of comparative advertising were expected to be most palpable in the case of price comparisons. The general difficulties applied, however also within this category. To compare prices implied either a comparison between truly homogeneous goods or required unequivocal and clear information about quality differences between the products. Few comparative advertising campaigns could claim to conform to these demands. Nevertheless, the Market Court in a number of instances

---

[1161] Prop. 1970:57, 57, 69.
[1162] MD 1988:16 ("Brio"). See Treis (1991), 114.
[1163] *Ibid.*, 70.
[1164] See Ch. 4.4.2.3 above.
[1165] See also the presentation in Svensson/Stenlund/Brink/Ström (1996), 148.
[1166] See, however, MD 1974:16 ("Linnéa") where an advert on the advantages of margarine with low calories was upheld.
[1167] MD 1977:8 ("Expressen"); MD 1983:5 ("Comvik"): test of the criteria of comparable, representative and objective comparison). See more recently MD 1994:5 ("Länstidningen"): misleading graphic presentation of comparison); MD 1994:17 ("Procter &Gamble").

displayed a generous approach, acknowledging that too stringent requirements on truthfulness and representativity would render any price comparison impossible.[1168]

5.5.2.2 Information disclosure

One of the clearest embodiments of the consumerist spirit of the 1975 MFL was the provision on information disclosure in 3 § MFL. Following this clause traders were under a duty to provide information of particular significance to consumers and could be enjoined to provide such information. Certainly, an implied duty to provide truthful information could be derived from the prohibition of misleading advertising forming part of the general standards of good marketing. It was, however not possible on the sole basis of the general clause to require information disclosure. The new rule thus sought to enhance the positive flow of important consumer information. The main difficulty before the Market Court when implementing the information clause lay, predictably, in the elaboration of coherent criteria as to which information was of particular significance to consumers. This difficulty was observed already in the preparatory work and it was here that the KOV's guidelines were expected to play a crucial role. The Government Bill suggested a rather bold approach. Information could in the Government's view be required as soon as there was a "not wholly insignificant" consumer need for it.[1169]

Indeed, part of the cases tried under the information disclosure clause involved enforcement of information duties laid down in KOV guidelines against non-complying traders. Litigation was relatively infrequent and in most instances the Market Court endorsed the guidelines as an authoritative source regarding the issue of what information ought to be considered of particular significance for consumers. Thus, in three similar cases the Court imposed a duty upon car-sellers to inform consumers about the average fuel consumption of new cars, following closely the standards laid down in the relevant KOV's guidelines.[1170] The paternalistic attitude toward consumers transpiring from the practices of KOV especially in the 1970s is pertinently illustrated by a case concerning marketing of skateboards as a free gift upon purchase of jeans.[1171] The advert depicted a boy on a skateboard with a helmet but bearing no other protective equipment (for elbows, knees, etc.) as required by KOV's guidelines.[1172] The Market Court prohibited the combined offer as well as the use in advertising of the depiction of the boy, thus endorsing the prescriptions in the guidelines.[1173]

5.5.2.3 The information approach to sales promotions

The 1970 and 1975 MFL opted for the introduction of special criminal law restrictions on certain sale promotions and combined offers (7-8 §§ 1975 MFL). Both provisions built on a requirement that the promotional offers should not render rational consumer choice difficult. In order to be prohibited a combined offer had furthermore to

---

[1168] See MD 1977:13 ("BP"); MD 1982:14 ("Lasses Färg").
[1169] Prop. 1975/76:34, 136; cf. Bernitz/Draper (1986), 177.
[1170] See MD 1981:20 ("SAAB"), MD 1981:21 ("Ford Company"), MD 1981:22 ("Svenska Renault AB") concerning KOVFS 1979:11. See SOU 1983:40, 108 ff.
[1171] MD 1979:24 („DonGeorge AB"). See the discenting opinions of Harling, Körner and Wennerholm.
[1172] KOVFS 1977:3.
[1173] It further obliged the seller to provide information on the existing statutory prohibition on skateboard-riding for children below 12 years of age.

manifestly lack natural connection with the product.[1174] Sale promotions that did not fall under the strict terms of the criminal provisions could nevertheless be prohibited under the general clause of good commercial practice.

The case law of the Market Court hardly revealed any coherent pattern of application of the said provisions. In a number of decisions the criteria were treated rather expansively, prohibiting what appeared to be fully legitimate promotions, carrying ample benefits for consumers.[1175] In other cases the provisions were more narrowly construed and the Court even underlined that the promotion was useful for consumers.[1176] In the legal literature this lack of consistence was subject to harsh criticism. Most importantly, commentators saw some of the decisions of the Market Court prohibiting sales promotions clearly advantageous for consumers as being in marked conflict with the consumer protection philosophy behind the 1975 MFL.[1177]

5.5.2.4 Lagstridighetsprincip: a short-cut to enforcement of paternalist legislation

Like in Germany also in Sweden compliance with legal obligations laid down in statutes other than the MFL was considered an integral part of the standard of good marketing practice (the so called 'lagstridighetsprincipen'). An injunction could consequently be obtained from the Market Court enjoining infringements of such statutory duties on the basis of the general clause of good commercial practice. The pattern of cases decided under the doctrine of breach of statutory duty is, however, very different from that under the German Rechtsbruch doctrine. Apart from advertising in violation of legislation on foodstuffs, which is common for both legal systems,[1178] in Sweden the 'lagstridighetsprincipen' has most intensely been applied to enforce prohibitions of advertising on alcohol and tobacco and consumer protection legislation in general. It should be noted that such cases have been considered the reserved domain of the KO. Competitors have not been successful in invoking the doctrine in their interest (for instance on the basis of arguments about undue competitive advantage).

The elaborate regime of restricting alcohol and tobacco advertising was presented above. Much of these restrictions did not flow from straightforward statutory prohibitions but from guidelines drawn up by the KOV in cooperation with the affected industry sector. The Market Court confirmed the validity of the guidelines as dictating the standard of good commercial practices for advertising of such products.[1179] In particular the Court had to give interpretation of the criteria of 'special moderation' in the marketing of alcoholic beverages[1180] and of tobacco.[1181] Some decisions of the Market Court were in the legal literature criticised as far-fetched,

---

[1174] Bernitz (1991), 138.
[1175] See MD 1980:19, 232 ("Verdexa").
[1176] See MD 1973:26 ("NK") about marketing of Clinique cosmetics.
[1177] Pehrson, 'EG-samarbetet och den svenska rättskälleläran' (1991-92) *JT*, 635 ff., 660 ff.; Bernitz (1993), 261 ff. with reference to the cases MD 1985:234, 263 ("Marabou"); 1988:2 („Önskebutikerna"); MD 1989:12 („Statoil"); MD 1990:4 ("SL").
[1178] See one of the early cases of the Market Court MD 1972:9 ("Astra Home Products") about deceptive advertising when marketing a drink based on synthetic taste additives as a raspberry drink.
[1179] KOVFS 1979:5-6 and 1986:2.
[1180] MD 1986:3 ("Pripps I")and 1989:11, ("Pripps II") about moderation in advertising of beer.
[1181] MD1980:23 ("Philip Morris II"); see also MD 1980:4 ("Philip Morris I") and MD 1991:16 ("Reynolds") about free distribution of cigarettes.

notably the decision to prohibit an advertisement for bar accessories, with a bottle of whisky in the background.[1182]

The information clause in 3 § MFL served as a main instrument for introducing an obligation for price disclosure and a duty to indicate comparative prices for foodstuffs in Swedish retail stores. Such obligation was initially based on KOV's guideline from 1982. With a decision of 1985 the Market Court raised the voluntary obligation to indicate comparative prices on foodstuffs into a binding standard.[1183] These obligations were more firmly anchored in statutory provisions with the Act on Price Information.[1184] The possibility to enforce norms on indication of prices (either in guidelines or in legislation) with the help of the general clause has never been questioned.

5.5.2.5 Protection of particularly 'exposed' consumer groups – socially responsible marketing

The protection of particularly weak and 'exposed' consumer groups emerged as a clear theme in the jurisprudence of the Market Court in all categories of cases. This approach was in line with the general principle of socially responsible advertising advanced in the ICC Code on Advertising Practices and stressed in the Government Bill to the 1970 MFL. Advertisers were required to apply particular care when addressing children, elderly, sick, or people with health problems or otherwise shaken self-confidence.[1185] Not only was the standard of deception stricter in these cases, but also advertising was generally subject to more careful scrutiny.

In a number of cases the Court elaborated a set of rigorous criteria as to marketing to children. Also in this respect the KO and the Court found firm support in the ICC Code on Advertising Practices. Art. 13 of the Code instructed advertisers not to abuse children's natural gullibility and lack of experience.[1186] In a decisive step the Market Court prohibited direct marketing to children below 16 years of age as contrary to good marketing practice.[1187] To induce adolescents to dangerous conduct was clearly pronounced as unacceptable.[1188]

Similar ideology can be discerned in the abundant number of cases concerning health-related products (such as nature-cure medicines, weight-loss preparations and method)[1189] as well as foodstuffs.[1190] With the advancement of environmental

---

[1182] MD 1980:18 ("Tegnér") about bar items Scotch whisky; MD 1983:6 ("Nordvästra Skånes tidningar"), announcements of Danish Wine-producers should not be accepted in Swedish newspapers;
[1183] MD 1985:24 ("AG Favör"); cf. Treis (1991), 117 ff.
[1184] Prisinformationslagen (SFS 1991:601). See Bernitz (1991), 120, 151 ff.
[1185] See MD 1973:25 ("Positiv Fritid"). Cf. Bernitz (1991), 118.
[1186] See MD 1972:13 ("Williams förlag") concerning advertising for a series of pictures on the theme "Wild West".
[1187] MD 1983:16 ("Skadinavisk Press").
[1188] See MD 1973:32 (" Monark Crescent") concerning invitation to children below 15 years of age to test-ride a moped. See also MD 1979:24 („DonGeorge AB") above.
[1189] See e.g. MD 1988: 9 ("Magnetic therapy"); MD 1988:26 ("Sou Tsian-te"): about the weight-loss effects of a certain tea; MD 1991:15 ("Svenska Defence"): weight-loss pills; 1991:15 ("Chromager"); MD:1991:22 ("Ipren"): about the superior quaoities of a pain-killer; MD 1992:6 ("Laser center"): about the effects of laser therapy; MD 1994:28 ("Seredrin"): balsam against "restless legs".
[1190] See MD 1972:9 ("Astra Home Products").

protection also ecological arguments in advertising were scrutinized through the test of 'socially responsible advertising'. Generally, the Court has treated utterly restrictively the use of 'green claims' for products, which are in principle detrimental for the environment.[1191]

5.6 Comparative comments

In both Germany and Sweden, the reforms in fair trading law in the 1960s and 1970s were about bringing diffuse consumer interests to the fore and ensuring adequate consideration of these interests in the decision-making process. In this section the multifaceted developments in fair trading law during this period will be interpreted in institutional terms, in an attempt to shed light on the importance of institutional choice and design. Rather than looking at the substance of legal rules, changes in statutory law and in judicial case law will be conceived as choices between institutional processes associated with the market, the political process, or the administrative process and courts. These institutional choices will then be analysed with a focus on differential participation costs and benefits for the actors involved. Finally, institutional choice will be set in a broader context in order to gain a deeper understanding about the constraints of the past on present institutional choices.

5.6.1 Institutional choice

The issue of integrating consumer interests into the texture of fair trading law became topical in the political debate of the 1960s and 1970s in both Germany and Sweden. However, one and the same debate stimulated different institutional response in the two countries. In terms of institutional choice, Germany opted for full reliance on the courts for adapting the standards of fairness with regard to the broad consumer interest.[1192] The general clauses on good morals and misleading advertising in the UWG were considered flexible enough to allow for novel interpretation, accommodating a plurality of interests. The design of the judicial process was amended to provide access of consumer organisations to the courts. Generally, the private incentives of competitors and of their associations to enforce the standards of fairness were seen to indirectly serve the consumer interest. Through the participation of consumer organisations in the process of enforcement, a missing link was added to a comprehensive decentralised system of 'help to self-help'. The legislature thus intervened only in a minimalist, procedural manner. Importantly, few changes in the legislative standards of fairness were introduced with the purpose of enhancing consumer interests. The structure, the language and the competitor-oriented 'ideology' of the UWG were preserved.

In Sweden, by contrast, the political process actively intervened and set forth some important guidelines for future individual decision-making, leaving no doubts about the priority position awarded to consumer interests. Certainly, also in this country fair trading law was built around broad general clauses, in turn requiring further concretisation. Yet, by introducing a portal paragraph in the 1975 MFL and through numerous elaborations in the *travaux préparatoires*, the lawmaker acknowledged the

---

[1191] MD 1990:20 ("Hydro"): eco-friendly petrol; MD 1991:11 ("Opel Omega"): eco-friendly car; MD 1992:23 ("Lever") and MD1994:10 ("Ariel"): eco-friendly washing powder.

[1192] „Rechtsvergleichend bedeutsam ist dabei die grundsätzliche Entscheidung des deutschen Gesetzgebers, *den Verbraucherschutz in das Wettbewerbsrecht* und sein zivilrechtliches, das Eigeninteresse der Betroffenen nutzende Sanktionssystem *zu integrieren*." (italics as in the original), Beier (1984), 67.

consumer protection 'ideology' of the new statute and imposed constraints on interpretations by the law-enforcing bodies. More importantly, whereas Germany remained faithful to the private law model of enforcement in preserving the central role of ordinary civil courts, in Sweden a mixed system of administrative intervention and controlled adjudication was introduced. Especially in the late 1970s, decision-making capability in fair trading law was simply transferred to the administrative process through the elaboration of ambitious guidelines by the KOV in cooperation with industry. Adjudication was shifted from the domain of ordinary courts to a single specialised court with interest representation. Through the central place of public bodies in the process of enforcement, the political process preserved the possibility to exercise, if mainly indirectly, control over the shaping of the standard of fairness.

5.6.2 Interests in the political process

The consumer interest which emerged in the limelight of legislative discussions during this period was in reality weakly represented in both Germany and Sweden. There were no powerful and active 'grassroots' consumer organisations that could rely on stable financing and constant personal membership. The only associations with a consumer-orientation were women guilds and unions working on the practical aspects of household management rather than on ambitious consumerist projects. Skilful and charismatic consumer advocates of the calibre of legendary American Ralph Nader were likewise absent from the political stage. This vacuum in representation and organisation was gradually filled in, although in different ways in the two countries.

5.6.2.1 Germany: preserved dominance of the Mittelstand *and minoritarian bias*

In Germany the consumerist debate of the 1970s engaged all political parties and major corporate actors. Yet none of these organisations identified itself fully with the consumer interest, or saw a need for radical changes in the existing institutional framework. Many amendments with a consumerist tinge were certainly advanced by the Social Democratic Party. The trade unions were also among the vocal proponents of an active consumer policy. But even these actors argued that consumer policy should be pursued in small steps, with respect for inherited legal and institutional arrangements.

The problem of political representation of the consumer interest was addressed by promoting and sometimes creating networks of non-profit consumer associations. These associations were expected to act on the same terms as other participants in the political process. The newly formed consumer organizations, however, faced all the classical limitations associated with the 'logic of collective action' in the case of diffuse, fragmented, small stake interests. For a long period they remained economically feeble, understaffed and poorly coordinated. Hence they could not credibly portray themselves as the voice of collective consumer interests, or achieve a mobilisation of consumers in German society. Dependence on public funding presumably also reduced the likelihood that these organisations would press for radical and unorthodox solutions.

On issues of fair trading law the political process in Germany thus remained dominated by organized commercial interests, mainly the *Mittelstand* and its political representation. Industry and trade associations, but most of all organisations 'specialised' in unfair competition law such as the *Wettbewerbszentrale*, were among

the influential opinion-makers in the legislative debate. With their expertise, resources and broad industry membership, these organisations were in a powerful position to erode undesired legislative initiatives and to promote amendments expanding their own opportunities to influence the new institutional framework. The disproportionate influence of the *Mittelstand* and of professional competition associations has arguably resulted in a minoritarian bias in the political process. Evidence of such bias can be found, not least, in the ease with which the demands of the *Mittelstand* were met in the 1969 and 1986 UWG reforms.[1193] Another example is evident in the spectacular fiasco of the consumerist reforms of the 1970s.[1194] Supposedly under the influence of group interests, the political process in the first case intervened in areas that would have been more efficiently tackled by the market. In the second case, the political process rejected intervention in situations where the market and the judicial process may not always provide adequate and efficient solutions.

The issues pressed by the *Mittelstand* were those characterised as 'preferential', where a skewed distribution of stakes involves differential industry interests as well as the interests of a diffused consumer majority. Abstract prohibitions of price comparisons and certain marketing methods, which on the surface appear neutral, were often veiled instruments of structural economic policy. The ban on price comparisons accorded competitive advantages to small and medium-size enterprises, and presumably sometimes at the expense of the broad consumer majority.

5.6.2.2 Sweden: catalytic sub-groups and a majoritarian bias

In Sweden, consumerism found its ardent political entrepreneurs. The country's powerful trade union confederation (LO) and the closely related Social Democratic Party in consumer policy identified a simple but commanding political issue which could attract broad popular support, fitting into their overall political agenda. In the context of the consumerist debate of the 1970s, LO and the Social Democratic Party in alliance with the KF acted to mobilize (and radicalise) the large and dispersed consumer majority. Both LO and KF are broad-based organisations that correspond to the 'by product' model described by Mancur Olson.[1195] Their memberships are stable, partly because of the individual incentives reserved for members. Due to the long-standing influential position enjoyed by these organisations on the Swedish political stage, their consumer programme could be sweeping and far-reaching.[1196]

The connection between trade unions and the consumer movement has in many countries been seen as intrinsically problematic. The interests of organised labour not always run parallel to those of consumers taken as a whole. One of the essential tasks of trade unions, namely bargaining for higher wages and better labour conditions, inevitably contribute to higher prices of consumer goods and services. In the process of competition between undertakings, the loyalties of employees are understandably with their employer in that the success of the employer is essential for the well-being

---

[1193] See Kisseler (1987), 131 ff.

[1194] It could be objected that the *Mittelstand* covers a high number of small- and medium-stake interests (namely those of small and middle-size entrepreneurs), and in this sense is not a concentrated minority. I nevertheless call the bias in favour of the *Mittelstand* 'minoritarian' since I look at the relationship between the interests of the *Mittelstand* to those of individual consumers.

[1195] Olson (1965), 132 ff.

[1196] On the Saltsjöbad Agreement see Ch. 4.1.1 and 5.1.2 above.

of the employee. Seen from this perspective, employees may be interested in limitations of competition if this would be favourable for their employer even if such measures might be detrimental to the majority of consumers. Given these conflicts of interests, many grass-root consumer organisations have insisted on keeping trade unions outside their membership structure.[1197] Likewise, a recognised international consumer organisation such as the Consumer International has consistently refused to accept trade unions as genuine consumer organisations. In the Swedish context, it appears that the crucial role played by LO in the formation and enforcement of Swedish consumer policy never prompted significant objections in the political or doctrinal debate.

Under the influence of these political entrepreneurs, the solution to the problem of representation of diffuse consumer interests was rapidly identified in the setting up of special public bodies devoted to consumer policy. With this measure the dispersed low-stake consumer interests were converted into a concentrated high-stake interest shouldered by the state. The initially skewed distribution of stakes between consumers and producers was transformed into uniform high distribution of stakes.

The dominance of broad-based organisations in the consumerist debate, at least at the dawn of legislative activism in the consumer area in Sweden, has apparently produced a situation of majoritarian bias in the political process. A level of protection and of control was advanced that were arguably higher than society's optimum. In the consumer policy debate the majoritarian bias is evident in elements such as conceptualising consumer protection as a primary concern of the state, the proclamation of 'normative criteria' for defining the consumer interest and in setting the objective of "influencing the producers in their production and marketing decision". The implementation of any of these policy objectives would require societal resources that would far outweigh the expected positive returns.

In the specific debate on fair trading law, the majoritarian bias is evident in the complete control of the litigation process by the KO, and in the strong element of interest representation introduced in administrative and the adjudication processes. Substantively, the 1970 and the 1975 MFL left out whole areas of legislation that could effectively enhance the protection of traders from unfair competition, thus showing open neglect for legitimate commercial interests. The enforcement design accorded a privileged position to the public consumer advocate, symptomatically defining the legal standing of entrepreneurs as subsidiary. Restrictions in possibilities to claim litigation costs and to challenge administrative measures may have reduced the incentives to seek protection of legal rights. The interest of the broad majority has thus been advanced at the expense of curtailing individual economic freedoms, but also through unnecessary compromising principles of due process and equality of arms. Whereas the common interests of trader and consumers in fair marketing was underlined throughout the legislative debate, many of these institutional arrangements fail to conceal a perception of consumer and producer interests as antagonistic (a conceptualisation possibly borrowed from industrial relations). Many of these

[1197] On the divided loyalties of trade unions, see Brinkmann (1976), 50 f. From this position he is critical of the participation of the two big German trade unions in AGV and in the Consumer Associations at the *Länder* level. *Ibid.*, 24.

measures, undertaken in the zeal of achieving more comprehensive consumer protection, may have in fact reduced the level of such protection.

Although industry was hostile to the sweeping changes proposed in the early 1970s, it eventually accepted these changes. One reason lies in the close interweaving of consumer policy with industrial relations by way of participation of the same stakeholders. In addition, industry was ushered into a system of soft enforcement, and was offered generous opportunities to participate in shaping the standards of fair trading. Such opportunities have tended to favour well-endowed local industries, and have held the promise of strengthening their economic as well as political positions.

At the same time, the legislative evolution of fair trading law demonstrates that instances of majoritarian bias are rarely stable and persistent. The threat of consumer mobilisation can be credibly upheld only under a limited period of time. In the long run the regulated industry and trade tend to restore the balance of power in the legislative debate. Thus the initial underrepresentation of industry on the Management Board of the KOV was rapidly corrected. Furthermore, the excessive rule-making and standard-setting activity of the KOV in the late 1970s was effectively blocked by massive political action by organised industry. The subsidiary right of action, although not repealed, was mitigated by assurances of equal standing and by speeding up the reaction of the KO.

5.6.3 Participation opportunities in the process of enforcement

5.6.3.1 Germany: the decentralised private model of enforcement

Costs and benefits of consumer participation

The representation of collective consumer interests in German unfair competition law has been channelled into the process of private law enforcement. Consumer organisations were entrusted with the right to take legal action in the name of adversely affected consumers. Certainly consumer organisations were financed and supported by the state, which represents a form of assisting the formation of a catalytic sub-group that would act on behalf of the broad majority in the process of enforcement. The procedural rules applied to these organisations in their capacity of litigants, however, have basically remained those of general civil procedure. In the context of civil procedure they have been treated as ordinary litigants, and difficulties associated with collective action have not been (and probably could not be) taken into account by the courts. Despite partial modifications, no serious alleviations specifically tailored to the problems of consumer organisations were introduced.

Under these conditions litigation has not been easy for consumer organisations. The system of determination of the value of controversy and of distribution of costs under German law of procedure has generated gross uncertainties as to the financial risks connected with litigation. In terms of costs of participation in the judicial process, this has implied significant barriers to the efficient representation of consumer interests before the courts. The risk of high litigation costs and an uncertain outcome have presumably reduced the incentives of consumer organisations to institute proceedings against big enterprises. [1198] Other risks of litigation associated with possible insolvency

[1198] See v. Falckenstein (1977), 65.

of the loosing party (*Zweitschuldnerhaftung*) and possible counteraction on the basis of negative *Feststellungsklage* or damages have also exerted a deterring effect.

The costs of litigation are also influenced by rules on evidence and burden of proof. The information asymmetries at the heart of most instances of unfair marketing and advertising are transferred to the judicial process. Consumers are at a clear disadvantage to furnish evidence of, for instance, deceptive advertising. In their capacity of private entities, consumer organisations are not in a position to require information making the summoning of evidence a precarious and costly activity. Despite several proposals for introducing a reversed burden of proof in German unfair competition law, the general rules continued to apply and exceptions from these rules were left for the courts to define.

As for the stakes, it is generally agreed that injunction as a remedy with prospective effect only has limited impact on business conduct and on the situation of negatively affected consumers and competitors. A marketing campaign has often played out its role when an injunction is issued, and a different form of unfair practice can be initiated without risk of increasing the losses to the trader (engaged in such conduct). More efficient remedies were not granted to consumer organisations. They were not accorded the right to claim damage compensation or to seek imposition of pecuniary sanctions. It can also be noted that consumer organisations do not have the possible additional incentives that may be present in the case of individual competitors and business associations, namely obstructing a potential or real competitor through litigation.

On a more general level, a serious limitation of consumer representation through the *Verbandsklage* has been the infrequent recourse to litigation "on policy grounds".[1199] The reasons for this are probably partly to be sought in the uncertain financial situation of consumer associations, and partly in limited membership and associated problems of legitimacy. One of the important findings of the v. Falckenstein study in 1976 was that consumer associations tended to select their cases primarily on the basis of received consumer complaints. The majority of complaints understandably had to do with personally suffered damages or disappointment from purchase or service contract, and belonged to the domain of classical civil law. Complaints involving unfair competition subject matter (and thus collective consumer interests) formed only 20-25 percent of the total amount of complaints.[1200]

In summing up this section, it could be noted that litigation by consumer associations has had a sporadic and accidental character. In the v. Falckenstein study the division of labour between the relevant constituencies looked as follows: individual competitors (54.7 percent), competition unions (36.1 percent), industry unions (8.4 percent) and consumer associations (0.8 percent).[1201] Moreover, litigation often follows the whims of chance and rarely a coherent strategy for identifying pervasive consumer problems. Given the identified need by economic theory of carefully selecting the instances of intervention, the importance of precedent-setting litigation and generally of

[1199] In this sense see also Koch, H., Verbraucherprozessrecht verfahrensrechtliche Gewährleistung des Verbraucherschutzes (Heidelberg: Müller Verlag, 1990), 41.
[1200] See v. Falckenstein (1977), 41.
[1201] See v. Falckenstein (1978), 27.

anticipating legal developments, the described traits of litigation by consumer associations can be regarded as serious deficiencies.

Costs and benefits of participation for business associations and individual competitors

Whereas the balance of costs and benefits defined by the German system of judicial enforcement deterred litigation by consumer associations, the conditions for individual competitors and trade associations were different. For these litigants litigation costs had not been a serious factor in dissuading them from litigation. Moreover, high litigation costs had the secondary function of being a more effective and palpable sanction for unfair competition than the injunction. Especially in cases of clear-cut infringements, high litigation costs tended to raise the stakes and the attractiveness of litigation for the plaintiff. For competition associations (*Wettbewerbsverbände*) litigation was indirectly or directly sponsored by individual members adversely affected by a given marketing conduct. While for interest unions this type of concealed sponsoring is seen, at least by some German authors as inherent in the collective action by trade associations and corresponding to the original legislative intent with the *Verbandsklage*, for competition associations the possibilities for abuse are more tangible.[1202] Generally, the *Wettbewerbsverbände* have had the advantage of being repeat players with accumulated information and expertise.

Rather than suffering from underrepresentation, the system of enforcement under the UWG preserved the powerful incentives to engage in litigation for this category of litigants. There was visibly overrepresentation of their interests before the courts. This is evident from statistics on the caseload of the courts and the litigation record of major litigants.[1203] The crux probably lay in the disrupted connection between material and procedural interest and the associated principal-agent problem. In the usual case of civil proceedings, procedural interests and rights are a function of material (substantive) interests and rights. In the case of *Verbandsklage* litigation is purportedly carried out in the name of the general public.[1204] Rules on litigation costs in civil lawsuits normally rest on the sound principle of internalizing the costs of one's own procedural activity. Whoever wants to have his/her right defended in a court of law is disciplined by the risk of bearing the costs if losing the case. When it comes to unions acting on behalf of loosely defined general or collective interest, there is a clear risk of slippage of control of those supposedly represented by the union (the agent). Other interests may interfere, such as the interest to collect procedural fees.[1205]

The doctrine of compensation of the pre-trial costs of notification deserves particular attention in this regard. This doctrine probably evolved as an attempt by courts to

---

[1202] Pastor, 'Der Gesetzesentwurf zr Einführung eines „Wettbewerbsarmenrecht"' (1964) *WRP*, 182 ff., at 186.

[1203] In this respect it may be interesting to mention the misgivings expressed at the Congress of the British Institute of International and Comparative Law towards the German system of private enforcement of fair trading law. According to Schricker, common law representatives were surprised at the fact that established firms could be involved in years-long proceedings over the nuances of their advertising campagnes. From a macroeconomic perspective such resource-wasting strategies can hardly be desirable. Schricker (1970a), 36.

[1204] For a comprehensive and critical analysis of the understanding about the *Verbandsklage* as a right of private entities to sue in the public interest, see Pause (1984), 190 ff. Pause insists that the *Verbandsklage* should be regarded as an instrument for enforcement of group (private) interests and not of the general public interest. *Ibid.*, 210.

[1205] See Schäfer (1999), 67. Similar Pause (1984), 196.

decrease the volume of litigation and to encourage voluntary out-of-court settlement. The result, however, may have been the reverse. The *Abmahngebühren* have created a general incentive for the existence and increased activism of specialized competition associations, arguably leading to new waves of litigation.

One of the main flaws in the design of the *Verbandsklage* has been the undifferentiated approach to all categories of organisations and the ensuing lack of sensitive adjustment of the legal regime to meet the specific needs of each type of organisation. Consumer unions might need special incentives in terms of decreased risks of litigation costs and increased benefits. Genuine interest unions would tend to carefully balance the costs and benefits from litigation, and therefore hardly need to be tempered through rules against abuse. Finally, more loosely conceived 'unions for the combat of unfair competition' can obviously be a source of excessive enforcement, which is why their litigation activity might require additional thresholds. Such considerations have nevertheless been absent from the legislative debate during the period discussed.

As a common feature, both consumer associations and business associations have tended to direct complaints and judicial proceedings predominantly at small and medium-sized enterprises. In fact, the interests of large business corporations were rarely challenged by consumer associations. But also business unions were oriented at the *Mittelstand* firm. In cases where the most serious deception and unfair practices are expected, e.g. in monopolistic or oligopolistic markets with competitors sharing the same (negative) product characteristic, the *Verbandsklage* never offered the expected relief.[1206]

The institutional capacity of the judiciary
In his analysis of the courts as an institution, Komesar emphasizes three structural elements of courts that distinguish them from alternative institutions, notably from the political and the market process. These are: the formal requirements for participation (higher threshold access costs), the limited size of the adjudicative process in terms of physical resources and personnel, and finally, the independence of judges. In the view of Komesar, these basic characteristics: "interact with each other and with the conditions of participation that are the subject matter of the participation-centred approach; together they produce the comparative advantages and disadvantages of the adjudicative process versus the market and political processes."[1207]

In Germany the courts were identified as the decision-making process best suited to cope with the flexible and ever changing forms of unfair competition. The judiciary was seen as able, on the basis of broad general clauses, to adapt the standards of fairness to shifting moral values and economic realities.[1208] The courts were, furthermore, perceived to be an appropriate institution for balancing the panoply of interests involved in a typical act of unfair competition. Schricker praises the civil law approach reflected in the UWG in the following way:

[1206] See Kur (1981), 558 ff., at 560. On the importance of market structure for the frequency and pervasiveness of information failures, see Ch. 3.2.3
[1207] Komesar (1994), 123.
[1208] Schricker (1975), 218.

> Die richterlichen Weiterentwicklung der privatrechtlichen Normen führte zu komplexen, fein differenzierten Tatbestanden, bei denen das Unwerturteil sich erst aus dem Zusammenwirken der verschiedensten Gesichtspunkten, rechtlicher und ausserrechtlicher Standards ergibt.[1209]

In this 'procedural' approach the affected actors will shape the standards through participation and in communication with judiciary and doctrine.[1210] Such confidence proceeds from the tacit assumption that all relevant interests are adequately represented in the decision-making process.[1211] There are, however, several features of courts that account for their disadvantages, in particular from the point of view of representation of diffuse interests. The first feature is the already addressed issue of high threshold access costs. Normally courts work according to strictly formalized procedures, which require highly remunerated expertise and assistance (lawyers). The rules of access to courts are strictly formalized with regard to the limited size of this institution and its limited capacity to serve as a mechanism for conflict resolution of last resort.

A major limitation to the capacity of courts as an institution, in the case of diffuse interests, is the arbitrary and fragmented approach they offer in terms of the unpredictability of litigation. Courts do not control the cases that are brought before them and can only decide on a minor portion of society's grievances. Legal scholars speak of 'institutional tunnel vision'.[1212] The question of who visits the courts and how often this occurs thus acquires central importance. Even if many of the decisions in the UWG area are common-sense decisions, judges are inevitably affected by the information that is presented to them in the cases, and the interpretation of the facts offered by the parties. If a certain category of interests rarely has access to the courts there may be a tendency for the court to neglect those interests, in part due to simple lack of information.

Another feature of civil courts engaged in private law adjudication is that they have little room for discretionary judgement in the sense of weighing the seriousness of the violation, along with its economic or societal relevance. In the framework of a private law dispute, the courts are not expected to evaluate whether the violation is serious and if severe macroeconomic consequences follow from their decisions. All they can assess is whether there is an 'unfair advertising' or 'misleading advertising' in the meaning of the legislative provision. Naturally, courts are in a position to develop certain tests of 'appreciable effect' and to sift the trifle cases through the net of adjudication. Such efforts, however, require an active judicial policy and may be difficult to uphold in a decentralised system of enforcement.

Developments in German unfair competition law demonstrate the difficulties of maintaining predictability and uniformity of law when broad general clauses are intensely applied by the courts. The tendency of different courts developing their special biases and strings of interpretation have been critically discussed in the

---

[1209] Schricker (1975), 218.
[1210] See Teubner (1971), 99 ff., 106 ff.
[1211] See Tonner (1987), 1917 ff.
[1212] Stewart/Sunstein, 'Public Programs and Private Rights' (1982) 95 *Harvard Law Review*, 1193 ff., at 1240.

German legal policy debate.[1213] Likewise, multiple law suits constitute an annoying side-effect of decentralised decision-making.

Fifteen years after his overwhelmingly positive assessment of the German system of private enforcement, Schricker passes a much more critical judgement:

> Die beteiligten Kreise sind prozessfreudig; schon die Verbandsklage sorgt fur ein erhebliches Aufkommen an Verfahren. Die Gerichte werden in die Situation des Turnierpferdes gebracht, das stets aufs neue an die Hindernisse herangeführt wird: Ob es will oder nicht, mit der Zeit springt es immer hoher. Oder anders ausgedrückt: Fur die Gerichte ist naturlich auch von Bedeutung, wie die Gewerbetreibenden selbst die fraglichen Wettbewerbspraktiken bewerten. Wird eine Praktik wiederholt und massiv angegeriffen, muss sich schliesslich die Uberzeugung festigen, dass sie dem „Anstandsgefühl des verstandigen Durchschnitts-gewerbetreiben den" in der Tat zuwiderlauft und zu veurteilen ist. [1214]

This analysis reveals ample awareness of the importance of institutional factors. There is recognition of the fact that the overrepresentation of certain interests before the courts would inevitably lead to better consideration of these interests in the decision-making process. The role of the plaintiffs as sources of information and basis for shaping the jurisprudence of the courts is underlined. The tendency to decide in interim proceedings without the participation of the defendants is another factor strengthening this trend.[1215]

5.6.3.2 The mixed administrative- adjudicative model

Costs and benefits of participation in the administrative process

In contrast to Germany, the Swedish system of fair trading law and the way it evolved in the 1970s implied a manifest reliance on the administrative process for shaping and enforcing the standards of fairness through rule-making, negotiations and consent injunctive orders. The KOV was in this system expected to embody the collective consumer interest and to represent this interest in all its activities. In laying down the standard of fairness the agency was - like all institutions - facing the problem of diffuse interests. Its efficiency thus depended on the costs of participation of the affected interests and the distribution of stakes.

For individual consumers one substantial improvement of possibilities for interest representation through a KOV is that there is one identifiable public institution charged with consumer issues. Arguably, by virtue of its very existence the Agency raises the awareness for consumer-related problems and sensitises active consumers to such problems.[1216] Given the low costs of submitting a complaint or announcing a perceived unfairness through a telephone call, or by sending a letter, the Agency easily gathers information about consumer concerns. In the presence of good administrative

---

[1213] See Pastor (1978), 245, 253 ff., cf. above 5.3.3.4.

[1214] Schricker (1990), 112 ff., at 116.

[1215] „Schliesslich darf nicht vergessen werden, dass die einstweilige Verfügung einen hohen Anteil an der Zahl der Verfahren hat. Sie ergeht nicht selten ohne mündliche Verhandlung und z.T. bleibt es beim Verbot. Gewiss, in wichtigen Fallen kommt es zum kontradiktorischen Verfahren; aber ein strengeres Wettbewerbsrecht mag doch allein unter dem Eindruck der Argumente des Antragstellers getan werden." Schricker (1990), 116.

[1216] Wilhelmsson (1996a), 128.

routines for collecting and processing complaints, this can constitute a substantial information advantage.

Among the negative aspects, the Agency model does not present possibilities of controlling Agency action on the basis of consumer complaints. Essentially, the Agency possesses the prerogative to pursue or drop a complaint depending on its own assessment of the extent of public interest involved.[1217] Under conditions of budgetary constraints, this discretion might move the KOV to prioritise concerns of consumer majorities and neglect the interests of smaller consumer groups. Similarly, individual consumers have played no part in the shaping of Agency guidelines.

The participation of interest representatives on the Agency's Advisory Board was generally intended as an additional channel for information and representation of consumer interests. During the first decades of the existence of the Agency, representation of consumer interests was chiefly entrusted to the trade unions and the KF. Whereas these broad-based organisations certainly came into contact with the needs of their members in their capacity of consumers, both organisations have different priorities and agendas that occasionally may interfere with their consumer engagement. Above I have discussed the possible conflict of interests both organisations may experience. In the case of trade unions this conflict may lead to a tendency to side with industry and compromise the consumer interest, if a measure is burdensome for the industry and ultimately may affect the labour market. Alternatively, trade unions may use consumer policy as one more arena (and one more bargaining chip) in their negotiations with industry. For KF there is an inbuilt conflict of loyalties in its dual capacity of association of consumers and a powerful producer and distributor.

More importantly, both organisations formed the backbone of the corporatist model of political decision-making, which has been influential in Sweden for several decades. Their key role in political decision-making on a broad spectrum of issues may produce interlocking effects, complicating the management of consumer policy. Interest representation on Advisory Boards of public agencies was subject to intense political and legal debate throughout the years. Supporters of stricter constitutional notions of democracy have expressed scepticism as to this input of laymen in the process of administration. Concerns were voiced that there is an open channel of group interest influence, not subjected to the principles of representative democracy. On the other hand, advocates of pluralist democracy and deliberative processes at all levels of government assert that this mechanism provides a forum for open influence by interest groups instead of behind-the-scenes lobbying. In addition, lay representatives are said to contribute with expertise and real life concerns.[1218] From a participation-centred perspective, the concerns arising from substituting the interests of the represented diffuse majority for the interests of the catalytic subgroup are real.

Interestingly, the Guidelines Committee established that trade unions and KF were not active participants in the elaboration of guidelines. At lower levels of implementation these interest groups did not exercise substantive control, and relied on the Agency to

[1217] See 11 § Standing Instructions of KOV.
[1218] SOU 1983:40, 97.

represent the consumer interest. In the absence of consultation procedures on planned guidelines with the broad consumer community, the needs and the 'best interest' of consumers were necessarily defined by the Agency.

On a more general level of reasoning, vesting the representation of consumer interests in the hands of the KOV and the Consumer Ombudsman has possibly suppressed the spontaneous establishment of consumer-related organisations. Given the high density of non-profit organisations in Sweden, it is indeed remarkable that no such organisations ever appeared in the field of consumer protection.[1219]

Costs and benefits for participation for industry
For industry the administrative model set up in the 1970s implied both drawbacks and advantages. The intensified supervision and control associated with a public KOV and detailed guidelines for marketing and production inevitably implied higher costs for industry. At the same time, the model opened up opportunities for participation and for influencing Agency decision-making. Well-organised industries participated on a permanent basis in the Advisory Board of the KOV, and had their say in setting the long-term agenda of the Agency. The initial prevalence of labour and cooperative organisations was effectively counteracted, ensuring a balance.

In the important work of drawing up guidelines for marketing and production, the representation of industry has been crucial. It can be argued that in each instance of negotiating specific guidelines for a particular sector, industry representatives hold an information advantage over the KOV. While the Agency has limited resources to cover a broad range of consumer-related issues (products and services), the industry is specialised per definition and has profound knowledge of production and marketing processes in the particular sector at issue. The Agency is certainly in a better position than the individual consumer to evaluate the technical complexities of the market process. Yet, even an expert agency will in many details be referred to the industry and may thus be a suboptimal decision-maker.

The unequal possibilities for participation in bureaucratic rule-making procedures on the part of different businesses constituted a different distortion in the decision-making process and also a main concern of the Guidelines Committee. Small-sized businesses, unrepresented in big-scale industry unions, have typically been poorly featured in guidelines negotiations. Although the Guidelines Committee did not make a conclusive assessment of the distributive effects of such 'representational malfunction', one might conjecture that the guidelines followed standards established by organised industries. The guidelines many times standardised requirements already being practiced by the big market actors. As a result, small enterprises had to adjust. About this effect of the guidelines, the Commission concludes that the supply has become more even (*"utbudet har blivit jämnare"*).[1220] But in fact all outsiders may have been adversely affected by being less adapted to these standards, thus

[1219] In a similar sense, see Fukuyama: "Spontaneous socialbility, moreover, refers to that wide range if intermediate communities distinct from the family or those deliberately established by governments. Governments often have to step in to promote community when there is a deficit of spontaneous sociability. But state intervention poses distinct risks, since it can all too easily undermine the spontaneous communities established by civil society." Fukuyama (1995), 27.
[1220] SOU 1983:40, 171.

contributing to concentration of the respective market. [1221] The NO assessed that: "the result could be expensive overprotection of consumers combined with reduced competition pressure, rendering it more difficult for small businesses to assert themselves in the market."[1222]

Eventually, the most cost-efficient way for well-organised industry to influence Agency action may have been through lobbying within the political process. This is pertinently demonstrated by the Swedish Guidelines debate.

Characteristics of the administrative process
The major advantage of the administrative process is that it can generate substantial resources and expertise for high-quality decision-making on complex societal problems. The Agency has been given the power to demand information from affected enterprises thus to compensate for some of the information asymmetries at the heart of poor enforcement of fair trading standards on the part of consumers. A decision to set up a public agency is, moreover, generally considered as a long-lasting and stable commitment to a certain policy. It cuts through some of the severe problems of uncertainty and under-financing characteristic of voluntary consumer organisations.

One of the major risks of economic regulation through public agency has been identified in the economic literature as that of 'capture'. Officials of an agency regulating a sector of industry may develop professional ties and a degree of empathy with the regulated industry instead of with the large consumer community. Another form of capture is that of corruptive practices between industry and the agency. But even a benevolent agency is dependent on information for its decision-making. If repeatedly exposed to biased information originating with the regulated industry, the agency may be swayed to alter the parameters of regulation in its favour.

The risk for 'capture' in the case of broad-based Consumer Agencies is assumed to be less severe compared to agencies performing control over discrete industry branches, such as banking or financing.[1223] Yet in the practice of drawing up industry-specific guidelines, the KOV has demonstrated that it is not immune to the views of some of the most vocal representatives of industry. The dangers associated with skewed regulation standards in terms of failing to meet the interest of consumers or of small businesses are well understood. Criticism in this sense has been raised for instance in respect to the guidelines on car-repair services.[1224]

Another risk is linked to the alleged propensity of bureaucratic bodies to seek to maximize their budgets. A model predicting such budget-maximizing behaviour is advanced by Niskanen based, more generally, on the familiar principal-agency

---

[1221] Such analysis is advanced by Skogh, 'KOV – en ulv i fårs kläder?' in: *Måste konsumenten gå till Verket?* (Stockholm: Industriförbundets Förlag, 1978), 33. On possible anticompetitive effects, see SOU 1983:40, 254, where the Commission speaks of standardised information requirements as a sort of "advertising cartel, which may conserve existing competitive structures."
[1222] Prop. 1984/85:213, 109.
[1223] Wilhelmsson, 'Administrative Procedures for the Control of Marketing Practices – Theoretical Rationale and Perspectives' in: Wilhelmsson, *Twelve Essays on Consumer Protection* (1996b), 142 ff., at 156 f.
[1224] Skogh (1978), 33 ff.

problem.[1225] According to Niskanen agencies have a monopoly over the information about the true costs of supply [of regulation], and bureaucrats may therefore use that power to secure budget and outcome levels that are higher than society's optimal.[1226] Indeed, one concern of the Guidelines Committee was that the KOV tended to select clear-cut 'certain cases' of infringement for individual consent orders. It may well be that the Agency was trying to cut back expenses and resources, while hoping to retain the same, high rate of enforcement. In this category of 'certain cases' belong violations by perpetrators known for their willingness to comply, or simply clear-cut offences that do not involve high costs of investigation and evidence gathering. As Komesar has noted, however, there is no reason to believe that such tendencies necessarily are long-standing and widespread. Parliament has various instruments by which to control Agency action (and inaction), and the regulated industry has its own avenues to reach political decision-makers (as the Guidelines Committee demonstrates).

In his comparative institutional analysis, Komesar advances a 'two-force model' of the political process, demonstrating the combined effects of majoritarian and minoritarian influence (and bias) in the political process. This model explains the frequent instances of delegation of decision-making power from parliament to administrative agencies, in cases where a policy has widespread (diffused) benefits and concentrated costs. Assuming that parliamentary action is better known to constituents than the action of administrative agencies or bureaucracies, Komesar suggests that parliaments are more likely to act under majoritarian influence than an agency. In this line of reasoning, it is sensible for a Parliament "to pass legislation that presents the appearance of a diffused benefit/concentrated cost (majoritarian victory while at the same time allocating the details and implementation to the less observable and more complex administrative process."[1227] Under this model, the concentrated interests in the administrative process will be able to compensate and at least in part 'neutralise' the adverse effects of majoritarian legislation. In a similar vein, Trubek and Trubek speak of high and low visibility political arenas, criticising the system of representation of diffuse interest by administrative government in the US context.[1228]

The Swedish consumer policy of the 1970s seems to fit this theoretical model rather well. The high profile given to consumer protection issues in the programme of the government was well tailored to gain popular support. The message of active consumer protection policy was simple and easily attracted attention. The benefits of such policy in terms of higher marketing standards and better products promised to be widely spread across the consumer community. Conversely, the costs appeared concentrated within industry. This effect may have been enhanced by the high rate of concentration of Swedish industry and the relatively small share of small and medium-size businesses.[1229]

[1225] Komesar (1994), 92, quoting Niskanen, *Bureaucracy and Representative Government* (1971).
[1226] Komesar (1994), 92.
[1227] Komesar (1994), 95.
[1228] Trubek, 'Environmental Defense' in: Weisbrod/Handler/Komesar, *Public interest Law: an Economic Analysis of Institutional Innovation* (Berkley, CA: University of California Press, 1978); Trubek, 'Public Advocacy: Administrative Government and the Representation of Diffuse Interests' in: Cappelletti/Garth, Access to Justice. Emerging Issues and Perspectives. Vol. III (Alphen aan den Rijn, Sijthoff and Noordhoff, 1979), 447 ff., at 457.
[1229] See the analysis of the Government Inquiry Commission "Competition for Increased Welfare", SOU 1991:59, part I, 101 ff.

The implementation of the policy and the elaboration of the details of regulation were delegated to the KOV. The KOV and the KO were clearly conceived as organisational bodies responding to majoritarian concerns. Whereas the Agency was entrusted with a wide variety of tasks, its formal powers to impose sanctions and to demand compliance remained limited, however. The institutional design of KOV/KO was pervaded by a strong desire to avoid formal procedures. There are no clear rules as to the procedure to be followed when drafting the guidelines or when negotiating an individual consent order. The activity of the Agency was based on negotiations, voluntary settlement and rule-making in cooperation with the affected industry. Enforcement depended on the acceptance and consent of the regulated industry or the individual trader, respectively.[1230] At all stages of the procedures there were effective guarantees for industry that its voice will be heard and that no radical turns in policy would be undertaken before consulting industry representatives. Crucial in this respect was the representation of industry on the Management Board of KOV.

The limitations of the administrative process are well illustrated with the fate of the guidelines as an instrument of consumer policy. The massive reliance on the KOV's guidelines as a method of setting the standards of fair trading in the mid-1970s shifted the weight of decision-making from the Market Court, as originally intended, to the KOV.[1231] At the same time, the elaboration of marketing (and production) standards proved an elusive and precarious enterprise. The drafting process in some cases took several years and required dozens of meetings and lengthy negotiations and compromises. This clearly strained the limited resources of the Agency. More importantly, there was no clear theory or method for setting the priorities in the work of the Agency. Given the divergence of consumer preferences and needs, as well as lack of representation of the alleged beneficiaries of envisaged guidelines, the Agency was left with considerable freedom to choose a specific area in which to impose new regulations.[1232] The difficulties of setting priorities while defining areas for information disclosure requirements were stressed by the Advertising Commission and repeated by the Guidelines Committee.[1233] A related problem was that of following up on actual compliance with guidelines. It proved hard especially for enterprises in the retail trade to keep their staff up to date with the content of particular guidelines. If the subject matter of the guidelines did not fall strictly into the field of application of the MFL, there was few means with which to combat non-compliance. At best, the guidelines proved effective the year after they had been adopted.[1234]

[1230] See Wilhelmsson (1996b), 142.

[1231] See Kur, 'Neuere Entwicklungen im Verbraucherschutzrecht der skandinavischen Länder' (1979) GRUR Int., 510 ff., 517. "Die Aufgabe der Rechtsausfüllung und –fortbildung verlagert sich unübersehbar von dem durch den Gesetzgeber hierfür vorgesehenen Organ, dem Marktsgericht auf die eigentlich nur der Überwachung der Einhaltung des geltenden Rechts dienenden Institutionen, die, da ihre Tätigkeit nicht unmittelbar überwacht und kontrolliert wird, praktisch autonom handeln."

[1232] The guidelines on marketing of potatos are probably an extreme example (and were soon repealed), but demonstrate the difficulty of trying to guide the market process through administrative means.

[1233] The Committee pointed at the situation in the comparison with the *Arbetarskyddsstyrelse* – where there were organised interests. It proved easier to set the priorities because the benficiaries of regulation are well represented. SU 1983:40, 452.

[1234] See SOU 1983:40, 85.

All these difficulties faced by the KOV provoked massive criticism and eventually prompted a drastic reduction in the ambitions linked to the guidelines. The sheer limitation in size, resources and competence of the administrative process makes it impossible to cope with the daunting task of shaping the conditions of marketing and production. An Agency, even on a generous budget, can hardly match the market with its almost unlimited size in terms of participants, transactions and potential to coordinate individual decisions.[1235] On the other hand, an Agency may have advantages in situations where the market cannot be expected to perform efficiently and where Agency action can be lean and well-directed. Arguably, information economic theory suggests valuable criteria for selecting and fine-tuning administrative action.[1236] The KOV, however, has not been particularly successful in building a coherent and convincing strategy for intervention.

Costs and benefits of participation in the judicial process

The judicial process in the early model of Swedish fair trading law was in many respects designed along the lines of administrative procedure. Also the rule on litigation costs, namely that each party bears its own costs and expenses, stemmed from administrative practice. The main rationale behind this approach was to adapt adjudication to the position of the KO as main litigant in the procedure before the Market Court. The expenses of the Ombudsman were covered by the annual budget of this institution. At the same time, the costs incurred by defendants were not to burden the public purse.

From the point of view of consumer representation, the setting up of the KO was conceived as a fundamental and radical way to eliminate the problem of litigation costs and low incentives that normally plague litigation in the consumer interest. The Ombudsman was thus a direct response to perceptions of underrepresentation of consumer interests in the judicial process. As a result of majoritarian politics, the state intervened and shouldered the consumer interests by investing public resources in representation of these interests before the courts. The diffuse low-stake consumer interests were transformed into a concentrated interest, thus converting the skewed distribution of stakes into a uniform, even distribution of stakes.[1237] This concentration of diffuse interests into the figure of the KO is accentuated by the subsidiary standing of all other litigants. One effect of this arrangement may have been that, once the Ombudsman gets notified of an alleged infringement and decides against litigation, it is more difficult for alternative litigants to build their case on consumer-interest arguments. On the negative side, potential litigation in the interest of consumers is inhibited. As a positive aspect, the KO may restrain abusive litigation in the name of consumers.

[1235] See Komesar (1994), 98 ff.

[1236] See Ch. 3; cf. also the experience of the US Federal Trade Commission where information economics forms the basis of the consumer protection programme. See Ippolito (1986), 1 ff.

[1237] See Komesar (1994), 136. "Where a dispersed majority prevails in the political process at the expense of a concentrated minority, the state is confronted with concentrated interests; as a result, there are well-represented positions on both sides of the legislation. In effect, political victory converts the dispersed majority into a single concentrated entity – the government that passed the legislation – and., in turn, converts a skewed distribution into a uniform high distribution."

The effect of the rule on litigation costs on the access to the court by other litigants, namely individual competitors and business and consumer associations, cannot be unequivocally assessed. The outcome would generally depend on the interests involved, and on the overall complexity of the case. For high stakes interests and high complexity of the case, the prospective of having to bear one's own costs even when winning the case can certainly dissuade from litigation parties from going to court.[1238] The rule is unlikely to hamper litigation of clear-cut cases of infringement, which do not require costly legal advice and expertise. But this uneven distribution of costs creates no incentives to sue for strategic purposes.

The subsidiary standing of all litigants in relation to the KO has arguably been an additional source of litigation costs. At first glance, a simple filing of a petition with the KO should not deter genuine and serious prosecution of violations against the MFL. Yet from the perspective of the ideology of the model, a refusal of the Ombudsman to prosecute amounted to a rather realistic prognosis for a negative outcome from litigation. The KO, much against common sense cost-efficiency presumptions, was indeed considered to be responsible for the enforcement of marketing practices standards in the interests of all market participants. Therefore it was not rare that the KO would prosecute clear cases of individual competitor interests.

One effect of the Ombudsman institution has been the virtual vanishing of alternative representatives of the consumer interests from the judicial process. Obviously, the availability of the easy and costless way of complaint to the KO reduces the added value of a separate claim. In addition, the legal standing of consumer organisations, as that of all other litigants, was made subsidiary to that of the KO. This arguably raised the costs and the risks of litigation, in particular given the greater expertise of the Ombudsman and the expected overlap of the concerns of this institution with those of alternative consumer organisations.[1239]

If litigation costs may raise barriers to litigation, remedies can influence the stakes of litigating parties and the incentives for litigation. Common to all litigants under the 1975 MFL were the relatively modest remedies at their disposal, namely prohibitions and injunctions. Damages could only be awarded on violation of an injunctive order, thus preserving the traditional low levels of compensation for pure economic loss in Swedish law.[1240] More generally, the public law character of proceedings along with modest remedies (with limited possibilities for reimbursement of litigation costs), may

[1238] In this sense, see Treis (1991), 81.

[1239] Against this background, the decision of the Market Court in the above discussed case 'Säker Lek' (setting requirements that the group represents consumer interests on a more permanent basis and is not formed *ad hoc*) is truly surprising. It seems to indirectly endorse an unbroken monopoly of the KO in consumer related litgation.

[1240] "Den marknadsrättsliga metoden förväntas kanske tillgodose samhällsbehovet av effektiva företag genom tillskapandet av tillsynsmyndigheter i högre utsträckning än ett system där domstolarna med hjälp av skadeståndssanktionen gör en avgränsning mellan tillåtet och otillåtet och härigenom drar upp gränserna för affärsdrivande verksamhet. Visserligen väljer man då att bortse från skadeeffekterna i det enskilda fallet, vilket kan förefalla obarmhärtigt, men kan väl sammanfogas med den under detta århundrade dominerande rättsteoretiska skolans programförklaringar. Det är rättsreglernas allmänna inverkan på medborgarnas beteende och inte den enskilde skadelidande som ställs i centrum." Kleineman (1987), 279.

have reduced the attraction of market law among professional business lawyers, contributing to the whole discipline retaining a marginal position.[1241]

Characteristics of the judicial process with a special court
The Market Court, as a specialised and central adjudicative body for fair trading disputes, has been tailored to overcome some of the disadvantages of ordinary courts in interpreting broad general clauses and of diffuse interest litigation. The dispersed and decentralised decision-making by ordinary courts, and the ensuing risks of contradictory decisions and of multiple litigation in the same matter, can thus be avoided. In addition, the participation of experts and interest representatives arguably puts the Market Court in a better position to tackle economic issues than courts with a generalist orientation. Access to the court is facilitated by simple rules, informal procedure and frequent reliance on process in writing. Speedy procedure and the position of the Court as a court of first and ultimate instance help solve problems associated with time. And finally, the involvement of the KO as a main litigant has been designed to overcome the capricious twists and turns of private litigation interests.

Other features of design and procedure also distinguish the Market Court from classical judiciary, for good or bad. One of the major advantages of the courts, namely insulation from political influence, has been traded in for other benefits. The court was deliberately conceived as a body of interest representatives. Although the Market Court has a remarkable record of keeping objective standards, it possessed the unmistakable hallmarks of a corporatist body where decisions are taken in negotiation and compromise with major corporate players, such as organised industry, trade unions and cooperative union. In a different vein, the continuous exposure of the Market Court to litigation by the KO may have produced a bias in that cases argued by the Ombudsman are less critically evaluated than those by other litigants.[1242]

5.6.4 The standard of fairness revisited

The standards of fairness evolving from these different institutional frameworks may occasionally display similarities. Indeed, some of the doctrines that evolved under German unfair competition law have inspired Swedish lawyers and have found close counterparts in Swedish marketing practices law. On a more aggregate level, though, the differences in ideology, in institutional choice and design have resulted in a palpable difference in substantive standards.

In Germany the idea of consumer protection entered the courtrooms and the value systems of judges only hesitantly and incompletely. Despite assurances of a

[1241] On the somewhat marginal position of consumer law research in Sweden, cf. the reflections of Olsen (2000-2001), 330.

[1242] For a discussion on advantages and disadvantages of specialised courts in the US American context, see Sunstein, 'Participation, Public Law and Venue Reform' (1982) 49 *U Chi. L. Rev.*, 976 ff., at 998: "Specialisation carries with it a risk of partisanship, and it is naïve to believe that experts or technocrats can impartially discern the 'public interest'. Prolonged exposure to a particular agency tends to produce bias in one direction or another and perhaps an illusion of competence in handing complex regulatory issues. To be sure there are potential advantages to specialization as well; familiarity with a subject may aid in the resolution of cases. Moreover centralization of cases in one forum tends to promote predictability and uniformity in the law. Nonetheless, specialization would be an undeniable departure from the convenional understanding of the proper role of federal courts."

Schutzzweckwandel, the integration of the consumer interest into an all-sided appreciation of competitive conduct was rarely visible in judicial decisions. Thus, the potential for change of engrained habits and values associated with infusing new perspectives and interests in the decision-making process was not exploited.[1243] Beater rightly notes the contradiction in the assessment given by Schricker of one hundred years of evolution of the UWG. On the one hand Schricker praises the integration of consumer protection among the objects of protection under the UWG as one the most significant achievements of judge-made private law in the 20th century. On the other hand, the same author observes the striking inertia and resistance to change of judge-made unfair competition law.[1244] In the light of the participation-centred approach it appears more probable that the poor representation of consumer organisations before the courts and the absence of alternative 'speakers' for the consumer interest has contributed to the persistence of engrained habits. Industry organisations and professional litigants continued to be the dominant players in the institutional framework of fair trading law. As a result the judiciary has remained encapsulated in traditional values and routines and the 'signals' of changed preferences have only slowly reached the courts.[1245]

Particularly clear is the connection between institutional and procedural arrangements and substantive outcome in the category of breach of statutory duty (*Rechtsbruch, lagstridighet*). Since German unfair competition law ensures a high density of enforcement by competitors and their associations and many cases are being brought before the courts, there is a risk for overrepresentation of business interests. Whereas administrative enforcement ultimately depends on discretion and proportionality, UWG opens almost unlimited opportunities for 'total' enforcement by private action. Among the objections against this doctrine has been the one about the unity of the legal order (coordination between the decisions of the competition courts and the respective specialised authority.

As in the early period of fair trading law, to explore the absence of certain categories of cases in one or the other country may be more interesting than to analyse the available case law. An impression provoked by an even cursory look at doctrines and case law under German unfair competition law is that those connected to antitrust considerations (e.g. obstructive competition) are entirely absent in Swedish marketing practices law. The perceptive remark by Bernitz about the 'forgotten legal area' of unfair competition in Sweden is based on observations about whole areas of potential grievances of individual competitors or of economic groups that are not addressed by Swedish law (and market law in particular). Apparently, such conflicts have been left to the market. Conversely, certain categories of cases that frequently end up in the Market Court are equally absent from the German UWG. Different forms of children advertising, advertising of alcohol and tobacco, are examples in point.

If we turn to some of the classical categories of fair trading law that have been litigated in both countries, the picture is more nuanced. Certainly, the standards of protection

[1243] Similar arguments in Beater (2000a), 15: "Der Verbraucherschutz erfasst damit im Gegensatz zum Allgemeinheits- und Institutionsschutz einen Grossteil wettbewerbsrechtlicher Streitfälle und kann in Form veränderter Bewertungen nahezu das gesamte Wettbewerbsrecht erfassen."
[1244] Beater (2000a), 7 with reference to Schricker (1996a), 473 ff., at 476.
[1245] Similar Beater (2000a), 28 f.; Sosnitza (1995), 212 ff.

from deceptive advertising have been high in both Sweden and Germany. Nevertheless there are differences in the frequency of litigation, in the relevance of deceptive information and in the methods used to ascertain deception. For both German and Swedish courts and legal doctrine the main challenges in the field of misleading advertising has been to find a stable, predictable and balanced standard of deception. Given the infinite variety of communication means and products on the market and the differential capacity of consumers to perceive and process information, this has not been an easy task. The higher the level of generalisation of the standard, the greater the risk that it will remain detached from reality. Conversely, an attempt to take full account of the circumstances of the individual case implies a greater degree of uncertainty for economic actors. An important role in setting the standard of deception in Germany is assigned to the so-called *Verbraucherleitbild.* The exact content and meaning of the concept are controversial. In a narrow sense the *Verbraucherleitbild* refers to an empirically verified or verifiable notion of a typical consumer, as he or she acts and chooses in a specific market situation. At the same time the *Verbraucherleitbild* per definition implies an approximation, an ideal type.

Whereas in German law there has been an attempt to set the standard of deception on empirical grounds, in Sweden a normative approach has been preferred. Correspondingly, courts in Germany would often make recourse to opinion surveys trying to ascertain the actual perceptions of consumers about the advert at issue. In Sweden, the decision is in most cases taken on the basis of an extrapolation of the judges as to the presumed expectations and perceptions of consumers. Under the German general clause on misleading advertising, the question of relevance of the advertising message to the consumer has only been treated casually and not as an element of the actual assessment. While the question has not attracted much attention in Swedish doctrine, the sifting of cases by the KO has generally contributed to litigation of cases with more distinct bearing on the consumer interest. According to Beater, the issue of relevance is a good example of the pro-competitive effects that the idea of consumer protection can generate when integrated into unfair competition law.[1246]

More recently, an attempt has been made in the German literature to advance economic theories and in particular economics of information as an instrument for fine-tuning the level of protection from misleading advertising. Beater refers to Nelson's theory on information and consumer behaviour and the distinction between search, experience and credence goods.[1247] As regulative guidelines the distinction between high-value/low-value and often purchased/rarely purchased goods are recommended. Similar suggestions have already been made in the German debate by Lehmann/van den Bergh.[1248] The main problem with the application of these theories in the German context is their normative character and the implied assumption of possibility to exercise discretion. This is only natural for administrative agencies or

[1246] „Die Materie [die wettbewerbsrechtliche Beurteilung von der Wichtigkeit der in Frage stehenden Werbeinformation] ist ein Paradebeispiel dafür, dass der Verbraucherschutzgedanke zu anderen Ergebnissen als der Konkurrentenschutz führen kann und aufgrund seiner wettbewerbsöffnenden Wirkungen zum Überdenken und Korrigieren von Lösungen führt, die in Zeiten vor Ausbildung des Verbraucherschutzgedankens für richtig gehalten wurden." Beater (2000a), 140.

[1247] Beater (2000a), 150 f.

[1248] Van den Bergh/Lehmann (1992).

other governmental decision-makers who apply a selective approach in enforcement. Their enforcement competencies are per definition based on sufficient public interest in enforcement, and economic theories contribute by providing criteria for the exercise of this discretion.[1249]

Still, in German law decision making is left entirely in the hands of a decentralised judiciary. The main power and disadvantage of the courts is that they do not control the flow of case law which reaches them. Likewise, once a case is filed, a civil court cannot dismiss the case simply because it considers the protected interest not to be worth protecting. Laws are formulated in a neutral manner and courts are bound to apply these laws objectively, having only limited possibilities of imposing a threshold of social importance. The court is bound to pronounce an affirmative decision, provided evidence of deception is presented.

Similarly, the dominance of individual competitors and of competition associations in litigation has been a major factor for preserving the low threshold of deception in German law. Under the influence of these litigants, the courts have often detected deception even when insignificant consumer minorities (might) have been misled by a commercial message. In legal doctrine one often talks of the high standard of consumer protection in German unfair competition law, simplistically equating a low threshold of deception with a high level of protection. More recently it has been rightly argued that the low threshold of deception implies protection for consumer minorities but may equally mean loss of opportunities for consumer majorities.[1250] One explanation for this tendency in the courts' jurisprudence may be that the interest of consumer majorities is underrepresented in German unfair competition law.

The minoritarian tilt of German unfair competition law probably also accounts for the frequent litigation (or indeed *Prozessfreude*) of issues associated with consumer privacy and unconstrained consumer choice. Competitors have also here acted as entrepreneurs for the interests of those who do not wish to be harassed by advertising. The same *topos* has been actively pursued by consumer associations. Looking at Sweden, it is surprising to see that Swedish marketing practices law has generated so few lawsuits led by similar concerns. Without straining the argument, it may again be surmised that priority is given to broad-based majority (welfare) interests than the interests of privacy in the calculus of the KOV. Moreover, the interest of the advertising industry to reach consumers is presumably taken into consideration.[1251]

Finally, on such issues as comparative advertising and special offers, German law has revealed a restrictive approach, whereas Swedish marketing practice law has applied a

---

[1249] Beater suggests that by frequently purchased experience goods the consumer is sufficiently protected through the market, and legal intervention could be denied. He gives examples of cases where the dispute has concerned the quantity of a box of shoe-shine or of a chocolate bar. Yet his examples demonstrate the difficulty of applying normative advice from micro-economics within the German system of private ordering. The courts can hardly deny protection simply because consumers will learn by experience. See Beater (2000a), 150 f. Generally, the categories used by Beater (search, experience and credence goods) are somewhat confusing and do not strictly follow the distinctions introduced in information economics.

[1250] Keβler, 'Wettbewerbstheoretische Aspekte des Irreführungsverbotes - eine ökonomische und dogmentheoretische Analyse' (1990) *WRP*, 73 ff., 73 ff. Drexl (1998), 203 ff.

[1251] On the voluntary agreement between the Consumer Agency and the Swedish Marketing Association on the possibility for opt out from receiving advertising materials per post, see Ch. 7.1.4. below.

rather strict standard proceeding from the premise of consumer information. Again, although some substantive decisions may be very similar, the way in which the goal is reached is quite different, and the same applies to the frequency of litigation.

5.6.5 The influence of the institutional context

Comparative institutional analysis provides a model for studying the choice between alternative decision-making processes also in a cross-border setting. However, it offers only partial explanation of the reasons for differential institutional choice and says little on the prospects for institutional change. Needless to say, an institutional framework of fair trading does not arise in a vacuum. In many respects it is a microcosm of more general, persistent and long-standing characteristics of the overall institutional environment. Prevailing outlooks on the balance between private, group and public interests in the economy, constitutional arrangements of the division of power and institutional distribution of functions, and the balance between private and public law, have all impacted on specific choices in fair trading law. The long-term logic and constraints of institutional choice can thus only be captured when analysing the institutional framework of fair trading in its broader institutional context. Revisiting some of the macro-institutional factors discussed at the opening of this chapter may therefore provide a more robust basis for explanation and evaluation of divergent choices of decision-making institutions, enforcement mechanisms and the outcomes they produce.

The fundamental institutional choices in the 1970s in German and in Swedish fair trading law were thus strongly influenced by constitutional tradition and outlook, permeating economic reasoning as well as private law doctrines. Thus, the choice of continued reliance on private enforcement and on the judiciary as a decentralised decision-making process in Germany relates to deeper constitutional concerns about private autonomy, and the virtues of restrained, law-bound intervention by the state. The *Eigenvalue* of private law as a guarantee of personal and economic freedom has had a deterring effect on experiments in the direction of expansive and pro-active public commitments to consumer policy.

In Sweden the consumer ideology fitted nicely with the continued success of the welfare project, with bold programmes of changing and reforming society and with a prevailing concern for the aggregate welfare interest. A welfarist, rational-elitist outlook on the role of government in the economy nurtured a trust in political and legislative solutions to perceived economic problems. A majoritarian rule with strong government provided a solid basis for the realization of bold economic policy perceptions and for turning them into concrete political programmes. Finally, a pragmatic legal corps, for the most part sharing a view of law as an instrument of practical implementation of democratically taken political decisions, completes the picture of a society to be characterised by 'joy at changes'. [1252]

A similar understanding of the importance of a fundamental compatibility of constitutional notions and the economic policy outlook for the evolution of fair trading law is reflected in Beier:

[1252] For a similar observation about the connection between the market law approach and majoritarian ideology, see Kleineman (1987), 279.

> My belief is that this contrast can be traced back to the existence of different fundamental views as to the relationship between the state and its economically active citizens. These views also influence a country's attitude toward the law of unfair competition and distinctive signs.[1253]

Comparing these fundamental views in Germany and in France, Beier defines two ideal type approaches to the relationship between individual and the state. The one that he regards as characteristic for Germany is „a liberal concept ... oriented toward free competition and the consumer, keeping legal prohibitions in most general terms and trying to avoid interference by the State or its authorities with the market place by means of regulations".[1254] Characteristic of the other view, allegedly distinctive for France, is that "the state displays a more protectionist attitude with greater emphasis on planning and regulating."[1255] This analysis is certainly perceptive in that it captures a major factor for historically conditioned institutional choice. At the same time, the representation of the German outlook finds only partial corroboration in the developments of German unfair competition law described above. The most characteristic and persistent feature of German UWG is certainly its civil law nature and the limited involvement of the State in law enforcement, as well as in direct control of business conduct. Yet, it is hard to view the UWG as a pure embodiment of liberal and neoliberal economic and political philosophy. In the strictness of its standards and in the broad powers it gives to organized industry and trade to shape the standards of fair competition, the UWG may in fact be depicted as closer to the mercantilist heritage than the French approach.

5.6.6 Path dependence and institutional symbiosis

Apart from macro-institutional factors, a historical perspective reveals the constraining effects of already exercised choices in many areas of social life. In particular, the long and continuous history of German unfair competition law has created strong path dependence, raking up the costs of possible new choices. It is not so surprising that Germany and Sweden in the 1970s reversed positions, compared to the original developments in the area of unfair competition. The legislative activism characteristic of Germany at the turn of the last century and resulting in the present UWG, transformed into legislative paralysis when it came to incorporating consumer interests in the same legislation. By contrast, in Sweden a protracted, cumbersome and fruitless legislative process to enact a full-fledged unfair competition law took more than half a century, until it was suddenly replaced by unseen expediency and a series of proposals creating an innovatory consumer protection statute.

Clearly the long-standing legacy of the German system of unfair competition law has impeded changes in the representation of alternative interests. The system created incentives for intense enforcement through the courts and produced a wide network of

---

[1253] Beier (1985), 148.

[1254] „...but rather relying on the economy's self-monitoring forces and the initiative of all market participants including the consuming public." *Ibid.*

[1255] "...enforced with the aid of a superior civil service system which regulates, in detail and with countless decrees, the conduct of its enterprises and all other market participants towards the goal of national welfare; it tells its subjects how to behave, how to produce, mark and market their products and also spells out what is beneficial and what is injurious to consumers." *Ibid.* For the original German version see Beier (1984), 64.

organisations and actors dependent on this framework, such as repeat litigants (such as *Wettbewerbsverbände*), industry associations and lawyers specialised in unfair competition law. The views brought before the courts by these 'users' of the framework have largely shaped the value system and beliefs of judges. The symbiotic relationship between institutional framework and organisations makes changes expensive and difficult.[1256] As a whole the framework has shown a low degree of adaptive efficiency (despite frequent claims of flexibility).[1257] The difficulty of restructuring the framework so that to achieve viable representation of consumer interests through private ordering can serve to illustrate this point.[1258]

In Sweden, institutional change during the 1970s proved much easier. Reshuffles of public boards and institutions, shifts from a private to a public law orientation, creation and demise of self-regulative institutional mechanisms have all been undertaken without serious resistance. One important factor is certainly the absence of a well-developed and institutionally embedded system of unfair competition law at the dawn of consumerism in the 1960s. This institutional vacuum, together with a general openness to social change in the Swedish Government, made the innovations of the 1970s possible.[1259]

In a different context, the contrast in expediency of the legislative decision-making process between Germany and Sweden has been noted by political scientists and regarded as an important institutional factor explaining the differential potential for change.[1260] According to Immergut "the ability of an executive government to introduce a policy depends on its capacity for unilateral action". This capacity is in turn dependent on the design of the parliamentary process (e.g. the availability of stability of parliamentary majority and party discipline) and the control by the electorate (for instance in the form of referenda).[1261] Depending on the logic of the decision process, different political strategies are available to interest groups, and different groups are privileged by the political institutions in each country.[1262]

The potential for change thus emerges as a feature influenced by a mix of historical and institutional factors. Interest constellations play a clear and powerful role.

[1256] North (1990).

[1257] Nonetheless, see Schricker's reflections on the conservatism of German unfair competition law and the example of comparative advertising: "Am Beispiel der vergleichenden Werbung wird ein Charakterzug des Richterrechts im UWG deutlich: Es zeichnet sich, einmal verfestigt, durch ausserordentliches Beharrungsvermögen aus. Man sollte auf den ersten Blick meinen, Richterrecht sei elastisch und im Wandel der Wertungsgrundlagen leichter wandelbar als gesetztes Recht; die Praxis zum UWG lehrt aber das Gegenteil." Schricker (1996a), 473.

[1258] Similar Tonner (1987), 1917: "Die zähe Überlebensfähigkeit des UWG erklärt sich daraus, dass es an wesentlichen Stellen mit Generalklauseln arbeitet, d.h. gesellschaftlicher Wandel kann durch die Rechtsprechung bewältigt werden, ohne dass der Gesetzgeber eingreifen muss."

[1259] The easiness of legislative change is in a different context noted by Strömholm, when he discusses parallels to the English legal institute of 'equity'. Apart fom general clauses that allow for an element of correction of legal provisions in view of unfair outcomes, Strömholm names the speed of legislative reform in Sweden as one mechanism of achieving 'equitable' results. Given the dynamic and relatively uncomplicated legislative process in Sweden, perceived injustices can be corrected by intervention of the lawmaker. Strömholm (1994), 5 ff.

[1260] Immergut (1992), 57 ff., at 65.

[1261] Immergut (1992), 65.

[1262] Immergut (1992), 67.

Whereas both minoritarian and majoritarian biases are possible, regulation resulting from minoritarian bias is less susceptible to subsequent change than regulation resulting from a majoritarian bias.[1263] On the other hand, historical and macro institutional factors complicate the picture. Arguably, an institutional design relying on a decentralised system of courts and on intense enforcement by repeat players is more difficult to change than a centralised institutional model.

[1263] Komesar (1994), 137: "The same conversion does not occur, however, where the political process suffers from minoritaran bias because the losers are the dispersed majority. In effect, the distribution has not shifted. When the concentrated interest wins in the political process, the resulting distribution of stakes facing the adjudicative process is still skewed rather than uniform high. It is less likely to be litigated because we have a dispersed interest on one side."

III EUROPEANISATION

In the previous part of the study I traced the evolution of fair trading law in two distinct national legal systems, German and Swedish, in an attempt to pin down the 'internal' logic of this evolution. At the inevitable cost of simplification, I described the predominant approach to fair trading regulation in Germany as decentralized, private law-oriented and with a touch of protectionism. The German model is seen as the product of a minoritarian bias in the legislative process, a bias that efficient organizational entrepreneurs have successfully carried further into a decentralized process of enforcement and that was eventually diffused in the value-systems of competent courts and repeat litigants. The Swedish approach, in contrast, is roughly characterized as centralized, public law-oriented and with a touch of paternalism. The latter model bears the imprint of a majoritarian bias in the legislative process, made possible by the engagement of politically powerful catalytic sub-groups and leading to emphasis of collective consumer and welfare concerns at the expense of individual business interests. The ideology of majoritarianism has been embraced by the main enforcement agent in the model, the KO. It has coloured the decisions of the Market Court, a specialized court with corporatist features. Despite the fact that each of the models theoretically acknowledges a plurality of interests, the institutional dependence on distinctive ideological preferences and enforcement design was found to have had important repercussions on the evolving standards of fairness.[1]

In the present part I change the focus from the internal to the external logic of institutional evolution. As members of the EU, both Germany and Sweden have been exposed to a 'creeping Europeanisation' of rules, standards and procedures in all spheres of law and public policy, including fair trading. Given the different institutional modalities of the legal systems underpinning the EU, it becomes clear that the process of harmonisation at the Community level should be conceptualized not simply as approximation of 'texts' (rules and procedures) but mostly as a coordination of diverging regulatory 'contexts'. Only by gaining a better understanding of differing ideologies and biases, underlying national regulatory patterns, can one make a realistic assessment of the prospects and limits to European legal integration.

The analysis in this part proceeds by three steps. In a first step (Chapter 6) I approach European Community law as a separate system of law and policy. A rather mundane task here is to present the record of Community interventions in the area of fair trading law to date. I speak deliberately of 'interventions' in order to underline the selective and patchwork character of the existing legislative acts and judicial decisions. At the same time I seek to fit these interventions into the overall texture and architecture of European Community law. Despite being a conglomerate of member states, the Community (now Union) has from the very beginning revealed autonomous

[1] The dichotomy between these two models corresponds, *mutatis mutandi*, to the observation made by Dine in the area of company law. Dine points out that company law may be seen either, in a private perspective, as an 'enabling framework' or, in a public one, as a 'tool of social engineering'. I submit that the attitude to marketing practices law in Germany and in Sweden can be ordered under these two categories – the 'enabling' private perspective of German unfair competition law and the 'social engineering' public perspective – of Swedish market law. See Bernard, 'The Future of European Economic Law in the Light of the Principle of Subsidiarity' (1996) 33 *CMLRev.*, 633 ff., (649 quoting Dine, 'The Harmonisation of Company law in the European Community' (1989) 9 *YEL*, 93).

institutional features in terms of both political economy and constitution, which in this context need to be considered.

The task of presenting the elements of Community fair trading law is, however, subordinate to the more general goal of exploring the influence of European integration on the national institutional frameworks of fair trading. Therefore, in a second step (Chapter 7) I take a close-up picture of the changes in national institutional frameworks as a direct or indirect result from European integration. The Community intervenes by commanding changes in the formal rules of fair trading, by modifying enforcement design and, more generally, by shifting the weight of decision-making to new institutional arenas. The questions are: how deep and lasting are the changes in national institutional framework resulting from European integration? Are European rules and norms smoothly accommodated in the national framework or do they threaten normative coherence? Do they reaffirm or challenge longstanding national arrangements in interest representation? Finally, are these interventions bringing different institutional traditions and cultures closer together in a process of convergence or, are they, conversely, doomed to failure in view of the embeddedness of national institutions in a unique institutional context?

The chapters on national patterns in Germany and Sweden have demonstrated a tension between the long term 'conserving' effects of macro institutional characteristics of the legal and political system, on the one hand, and the dynamic of changing interests and preferences of individual and group actors, on the other. At the same time the comparative analysis suggests that a model responding to majoritarian ideology seems more amenable to change than a model of private and decentralized enforcement, actively used by well-organised business interests and internalized by a broad network of courts, private lawyers and legal doctrine. In the centralized model of enforcement the persistence of majoritarian ideology depends on an elite bureaucracy, and is scantily diffused among the plurality of institutional actors and organizations. The diffuse majority that was the intended beneficiary of the regulation can only poorly identify its interests and supervise the transformation of legislative intentions into concrete every-day decision-making. These differences in the potential and conditions for institutional change may offer an explanation for the different modes and varying degrees of success in the implementation of Community measures at national level.

The analysis inevitably faces what others have called the problem of the dual logic of private law and of European integration.[2] The 'internal' logic of fair trading law as a legal discipline requires that any Community intervention, either in the form of harmonized rules on fair trading, or in the form of suspended national regulation, be scrutinized through the endogenously produced criteria of systemic coherence and "good" substantive outcome. At the same time the 'external' logic of European integration gives priority to the accomplishment of the Common Market. The success

[2] Joerges/Brüggemeier, 'Europäisierung des Vertrags- und Haftungsrechts' in: Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1993), 238: "Wer deshalb dem Integrationsprozess eine eigene Bedeutung zuweist behauptet damit zugleich, dass die Logik der Privatrechtsentwicklung und die Logik der Integration zu unterscheiden seien, dass man es mit einem Spannungsverhältnis zu tun habe und weder von einem harmonischen Gleichlauf noch von einem natürlich oder normative vorgegebenen Rangverhältnis ausgehen dürfe."

of European interventions is consequently measured by their potential to abolish obstacles to free trade and to achieve a genuinely integrated market with sufficiently uniform, or at least coordinated, policy. These two logics (or legitimations) often come into conflict. Interestingly, there is an almost irresistible attraction in ascribing precedence to the logic of the Common Market. The principles underlying economic integration are fascinatingly simple and straightforward. What is more important, they build upon the uniform theoretical fundament of economic efficiency. In contrast, national legal and institutional traditions have produced an array of differing perceptions about how best to achieve optimal and normatively coherent regulative solution, and even about the importance of systemic coherence as such. Despite the seemingly 'given' superiority of integration logic, however, I shall argue that the conflict cannot be resolved through simple principles of precedence. A more realistic approach is to acknowledge the tension and to search for compatibility through continuous communication between the two.[3]

In a third chapter, concluding the analysis of Europeansation, I turn to the recently revived work on comprehensive harmonisation of fair trading law. I look at the proposals discussed so far and at the reactions of Swedish and German governments and other stake-holders. Using the insights gained from the previous two chapters I venture an assessment of alternative approaches and on the prospects of successful harmonisation.

[3] „Konflikte zwischen der Logik der Integration und der Logik der Privatrechtsentwicklung können weder durch eine Vorrangregel zugunsten der Integration noch durch Vorbehaltsansprüche des nationalen Rechts gelöst werden. ... Es geht bei der Vermittlung von Privatrechtsentwicklung und Integration um ein Kollisionsverhältnis, für das praktische Kompatibilitätsprinzipien und –regeln gefunden werden müssen. Weil beide Prozesse, die Privatrechtsentwicklung und die Integration offen sind, weil man weder den einen noch den anderen auf präskriptive Endmodelle festlegen kann, ist die Europäisierung des Privatrechts nur als kontinuierlicher Prozess der Vermittlung zwischen der Autonomie der Privatrechtssysteme und der integrationspolitischen Intervention vorstellbar." *Ibid.*, 239 f.

6 FAIR TRADING IN THE TEXTURE AND ARCHITECTURE OF COMMUNITY LAW

In this chapter the most important achievements of European integration in the area of fair trading law will be mapped out, in an effort to fit the disparate European rules, regulations and court rulings into a more or less coherent picture. The aim is by no means to give an exhaustive account of the relevant legal material, but rather to select those legal acts that have had the most vibrant repercussions on the national law of the Member States. The presentation of what at first sight appears to be an emerging body of European fair trading law[4] follows the familiar dichotomy between positive and negative integration. I first identify the elements of positive harmonisation of fair trading law. The most important secondary Community acts – the Misleading Advertising Directive, the Comparative Advertising Directive, the Television Directive and the E-Commerce Directive - are discussed with an eye to harmonized substantive rules. Separate attention is devoted to the somewhat scattered elements of coordination (and harmonisation) of enforcement design, tracing a tendency toward increased Community intervention in this field (initially considered to be a domain reserved for the Member States). Examples are found in all the directives listed above and notably in the Injunctions Directive, which is entirely devoted to questions of remedies and enforcement. In a second step the impact of 'negative integration' is traced, i.e. the process of control of national fair trading rules for their compatibility with the fundamental Community freedoms.

Parallel to this classical dogmatic account I offer an alternative, institutional, account on the evolution of European fair trading law. From an institutional perspective what is important is not so much the substance of the legislative and judicial measures, but rather the choice between alternative modes of integration conceived as a choice between different institutional decision-making arenas. European integration substantially complicates decision-making processes in fair trading law. The Community political process and the Community judiciary bypass the legislatures and courts of Member States, claiming equal and sometimes preferential rights to define and to interpret the rules of fair trading. Each technique of integration entails an open or disguised distribution of decision-making competences between alternative institutional processes on a horizontal and on a vertical level. Thus, whereas positive integration requires the involvement of the Community legislative process under active participation of national governments, negative integration relies more directly on judicial intervention (ultimately on the European Court of Justice). Likewise, the choice between minimum and full harmonisation, between country of origin and country of destination principles, between limited and full-swing mutual recognition, all involve intricate forms of reallocation of decision-making competencies. Furthermore, with the maturing of the Common Market more regulative issues are left to the market process. It should be underlined that decision-making is rarely concentrated exclusively in one single institution and is never static. There is, on the contrary, an ongoing process of shifting and balancing decision-making competencies between the different national and Community institutions and a constant interplay between these processes.

[4] Micklitz speaks of European fair trading law *praeter legem*, in Micklitz et al. (2000), 337 ff.

It can of course be objected that a separate analysis of European law is in poor harmony with conceptualizations of European law as part of national law and does not reflect a reality of intricately intertwined national and Community laws and institutions. At the same time, my purpose is to identify strands of influence of Europeanisation on national law and this requires me to keep the two components of the analysis apart. Admittedly, European law and policy most often result from political and legislative action taken by the Member States or by national agents and organizations. They present an exciting amalgamation of national legal and political traditions and cultures. Studying how different national laws and policies have shaped European developments is in itself a deserving and promising research agenda and will partly be considered even in this analysis.[5] As argued in the introduction, however, at the present, mature stage of European integration it appears a timely task to gain a more profound understanding about the ways in which European influences construct, in turn, reforms and redefines national practices, attitudes and institutions.

The original Treaties on the European Communities signed in the mid-1950s did not contain any rules on fair trading as the concept is defined in this thesis. The few references to fair and undistorted competition to be found in the Treaty of Rome (e.g. Art. 3(f)) referred to the common competition (antitrust) law and policy of the Community and did not cover the German concept of unfair competition law. Nor did the Treaties show any recognition of consumer interests or the need to protect consumers against misleading and unfair commercial practices. References to consumers were only sporadic and appeared mainly in connection with Community's other policies, notably competition policy (see Art. 82, ex 86 EC Treaty,). The main concern of the founders of the European Economic Community was to ensure the creation of a Common Market where goods, services, persons and capital would move freely throughout the territories of the Member States and free competition would promote efficient allocation of economic resources. Certainly the results of this thrust towards free trade and competition were expected at the end of the day to provide benefits for European consumers. But it was obviously not found necessary to incorporate into the Treaty active consumer protection policy in terms of correcting market failures. Insofar as such policies were considered by the founders, they must have been seen as falling within the domain of competence of the Community Member States.

Yet it was not long before the first discussions on a harmonized Community legislation in the area of fair trading were launched. As early as in the mid-1960s the Competition Service of the European Commission commissioned a deeper study on the prospects of harmonisation in the area of unfair competition law from the Max-Planck Institute in Munich. Parallel to discussions of harmonisation, the case law of the European Court of Justice gradually came to abound in decisions where national fair trading rules perceived as disproportionately burdensome by economic operators were scrutinized for their compatibility with the fundamental principles of free movement of goods.

Curiously, however, despite several decades of scholarly and political debates the controversies over the basis and scope of Community intervention in the area of fair

[5] See Koopmans (1991).

trading and the need for such intervention are far from settled. Likewise, the precise impact of European Community law on national law in this area remains a bone of contention. In view of the recently renewed efforts to achieve more comprehensive harmonisation at the Community level, fair trading law in Europe can appropriately be described as being in a state of flux.

6.1 Institutional background

Before probing deeper into the reasons for these controversies, we should a look at the institutional background against which the integration project is unfolding. At Community level just as in the Member States, decisive elements forming this background have been the choice between interventionism and free markets and the constitutional architecture of the Community. In contrast, when it comes to distinctions between private and public, the Community cannot claim an autonomous historically evolved institutional tradition but instead must rely on the mixed and ambiguous institutional heritage of the Member States.

6.1.1 Between market-building and market-correction policies

The process of Europeanisation of fair trading law cannot be seen as a straight line led by a single and coherent conception of political economy. Through the years it has shifted in pace with changing perceptions of the role and function of the Community in the drafting of the welfare and social policy agenda.

6.1.1.1 Unfair competition law as part of the European Economic Constitution

The ingenuity of the so-called founding fathers of the European project lay in the close coupling of political and legal cooperation with the logic of economic integration and free markets. In the wake of the Second World War *dirigisme* was grossly discredited in most West European countries, and free and undistorted competition was viewed by many not only as a guarantee of economic prosperity but also as a safeguard against concentration of political power. Perhaps more importantly, it was seen as the sole path towards true democracy and peaceful coexistence. These ideas were clearly congruent with German ordo-liberal theory. Indeed, ordo-liberals came to occupy key positions in the European Commission, and their ideas provided theoretical underpinnings for an important part of the institutional structure and substance of the European Economic Community, notably competition law.[6]

Whereas free markets in the national context were seriously constrained by ambitious welfare programmes, the European project was by definition market-oriented and, due to fundamental constitutional constraints, consciously detached from social policy agendas. It is therefore easy to understand why many, especially in Germany, were inclined to see in the Treaty of Rome the kind of economic constitution that was not fully realized in Germany. In an ordo-liberal reading the Treaty with its emphasis on free trade and undistorted competition proclaimed individual autonomy as a supreme constitutional principle, ostensibly ranking higher than welfare goals. According to this view the European Economic Constitution view required, moreover, that the

[6] See Gerber (1994), 71 ff.

legitimacy of social policies pursued at the national level be measured by the yardstick of least possible intervention with a general constitutional principle of free trade.[7]

The initial interest in rules of unfair competition at the Community level was arguably inspired by such ordo-liberal visions of European integration. One should not forget that a view of unfair competition law as integral part of the broad area of competition law, including both freedom and fairness of competition, was well established – at least in Germany – since the early 1930s.[8] Therefore it is not surprising that references in the Treaty of Rome to fair and undistorted competition were interpreted by many German scholars as an embodiment of this integrated view.[9] Müller-Graff speaks openly of fairness of competition as an element of the [economic] constitution of the European Community:

> [D]ie wettbewerbliche Lauterkeit ein gemeinschaftsrechtliches Verfassungselement darstellt, allerdings als normenfragmentierter Begriff in unterschiedlichen Kontexten und damit mit potentiell unterschiedlichen Inhalten. Wird daraus ein generalklauselartiges Verbot unlauteren Wettbewerbs abgeleitet (so Fikentscher) so lässt sich dieses richtigerweise nicht weiter verdichten als mit der Bezeichnung eines „ausfüllungsbedürftigen Rechtsgrundsatzes des Gemeinschaftsrechts".[10]

Specific importance is attached to the Preamble of the original Treaty, stating:

> RECOGNIZING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and *fair competition* (emphasis added).[11]

Art. 3(1)(f) of the Treaty of Rome envisaging "the institution of a system ensuring that competition in the common market is not distorted" supported such a view.[12] Finally, practices which under German law would be subsumed under the general clause of § 1 UWG as obstructive competition (*Behinderungswettbewerb*) were in Community law addressed by Arts. 81 (ex Art. 85) and 82 (ex Art. 86) of the EC Treaty. Having in mind the detailed and ambitious provisions securing competition freedom to be found in the original Treaties a systemic gap was perceived to exist, requiring corresponding rules for the sphere of fairness of competition.[13]

An implied reference to unfair competition law was for some time also seen in Art. 30 (ex Art. 36) EC Treaty.[14] As is well known this article mentions protection of

---

[7] See Joerges (1997), 382 ff.; Joerges, 'European Economic Law, the Nation-State and the Maastricht Treaty' in: Dehousse, R., *Europe After Maasstricht. An Ever Closer Union?* (München: Law Books in Europe, 1994), 29 ff.
[8] Ulmer (1932); Fikentscher (1958).
[9] See Müller-Graff (1984), 209 ff.; Fikentscher, 'Das Verhältnis von Kartellrecht und Recht des unlauteren Wettbewerbs im deutschen und europäischen Recht' in: *Festschrift Hallstein* (Frankfurt am Main: Vittorio Klostermann, 1966), 127 ff., 158 ff.
[10] Müller-Graff (1984), 222 with reference to Fikentscher, *Wirtschaftsrecht*, Bd. 1 (München: Beck, 1983), 667.
[11] See Beier (1984), 71; Müller-Graff (1984), 219. Müller-Graff refers to one sectoral provision which he considers as a specific reference to fair competition, namely Art. 60(1) ECSC Treaty referring to "unfair competitive practices" and "discriminatory practices".
[12] Now Art. 3(1) (g) with slightly amended wording.
[13] Dethloff (2001), 8 ff.
[14] On the jurisprudence of the ECJ rejecting such interpretation see below, Ch. 6.3

industrial and commercial property as one reason to exempt national measures from the principle of non-discrimination in free movement of goods. That unfair competition law should be viewed as part of the system for protection of industrial property was certainly taken by many as a basic and undisputed assumption. Repression of unfair competition was a recognized protected matter under the Paris Convention on Industrial Property (cf. Arts. 10 *bis* and 10 *ter* of the Convention) and all six original Member States of the EEC were parties to this Convention. Following this understanding two interrelated conclusions could be drawn in regard to the division of competencies between Member States and the Community in the area of unfair competition. On the one hand, the exemption seemed to leave the decision-making control in the hands of the Member States. Divergent national laws appeared to be immune to tests of compliance with Community free movement requirements. On the other hand, since no one doubted that the protection of industrial property was of high relevance for the creation of the Internal Community Market, there appeared to be a need of harmonization. Approximation of the law of unfair competition was thus perceived as an integral part of the overall Community strategy to harmonize intellectual property law within the Community.[15]

A common denominator for the competition and the intellectual-property approaches was that they both conceptualized harmonisation of unfair competition rules as a necessary 'market-building' measure.[16] Common rules on fair trading would enhance fair competition and would strengthen intellectual property rights, which could in turn have a stimulating effect on intra-Community trade. Admittedly, in contrast to the situation in other areas of intellectual property law, the need for harmonisation in the case of unfair competition law was somewhat theoretical and speculative. There was limited evidence to support the existence of specific and noticeable obstacles, flowing directly from different regulative regimes of marketing and fair competition. In their answers to questionnaires sent by the Commission, the representatives of industry and trade took a generally positive stand on harmonisation, but could not point to many specific examples where the absence of common provisions was creating palpable difficulties.[17] This weaker connection with the Internal Market project was a factor that was also to influence the relatively hesitant course of the legislative process later on.

6.1.1.2 From the neoliberal to the regulatory state

A new turn in ideological paradigms and policy priorities could already be seen in the 1960s. Strengthened after a period of post-war reconstruction of their economies, European governments increasingly engaged in ambitious projects of income

[15] See the comments by the representative of the Commission Hans von der Groeben, in Ulmer (1965), VI.

[16] On the dichotomy between 'market-building' and 'market-correcting' policies in the European Community, see Scharpf, 'European Governance: Common Concerns vs. the Challenge of Diversity' (2001), retrievable at: http://www.jeanmonnetprogram.org/papers/01/010701.html (8-05-2003), 4. Scharpf uses the notions of market-building and market-correcting measures, classifying in the first group measures directed at creating a free market (negative integration and competition rules) and in the second one social policies purpoting to correct market failures such as environmental and consumer protection initiatives.

[17] See Schricker, 'Die Arbeiten zur Angleichung des Rechts des unlauterne Wettbwerbs inden Ländern der Europäischen Wirtschaftsgemeinschaft' (1973) *GRUR Int.*, 141 ff., at 144; Schricker, 'Einleitung: Teil F' in: Jakobs/Lindacher/Teplitzky, *Handbuch des Wettbewerbs* (Berlin, New York: Walter de Gruyter, 1994b), 454 ff., at 459.

redistribution involving substantial public expenditures.[18] The neo-liberal project was gradually replaced by the Keynesian model of macroeconomic management. In most European countries a centralized welfare state was set in motion. Admittedly, this bold interventionist approach did not last long. As early as in the 1970s under conditions of severe economic crisis, failures of extensive governmental intervention and of public sector management started coming to the fore. Contrary to some expectations, however, the welfare state was not dismantled but was, instead, substituted by a leaner regulatory state.[19] The much discussed process of deregulation was paradoxically accompanied by an intensive process of re-regulation, modifying and streamlining but not abandoning, governmental regulation.[20]

This shift in priorities had repercussions, even if somewhat delayed, at the Community level as well. The delay could be explained by the original constitutional model of the Community leaving social policy issues within the ambit of Member States sovereignty. For the European Community to engage in projects of regulatory nature a major re-conceptualization of this model was needed. A turning point in this regard was marked by the Paris Summit of Heads of State or Government in October 1972, where by using Art. 308 (ex Art. 234) EC Treaty a number of social policy issues, for instance environmental protection, were declared to be of central importance for the Community.

For the present project the most important consequence of this paradigm-shift was the hesitant entry and subsequent slow but steady expansion of consumer policy on the Community stage. At the Paris Summit the Heads of State or Government emphasized that they attach as much importance to vigorous actions in the social field as to the achievement of economic and monetary union. They invited the Community institutions draw up a programme of action aiming, "in particular at strengthening and coordinating measures of consumer protection."[21]

As already indicated above, the Treaty of Rome in its original version did not contain even the slightest trace of independent Community consumer law and policy.[22] At the Paris Summit consumerism was thus 'discovered' and elevated to the Community level. The political statements of the Summit were soon followed by more specific steps that, however, did not take the form of formally binding legal acts. In 1975 the first Preliminary Programme for a Consumer Protection and Information Policies was adopted.[23] This Community soft law document is remarkable for the level of ambition and comprehensiveness of the measures envisaged. In spirit as well as in substance, it clearly echoes President Kennedy's Consumer Message and submits a long catalogue of measures already taken or to be taken by the Community. In 1981 the Preliminary Programme was followed by a Second EEC Programme for a Consumer Protection

[18] Majone, *Regulating Europe* (London: Routledge, 1996), 1 ff.
[19] *Ibid.*, 54 ff.
[20] Majone (1996), 2.
[21] Commission of the Communities, 6th General report of the activities of the European Communities, 1972, Brussels – Luxembourg, 1973, p. 12, point 6, quoted after Bourgoignie (1987), 98.
[22] Bourgoignie (1987), 99 ff.
[23] Council Resolution, OJ 1975 C 92/1.

and Information Policies, purporting to demonstrate the determination of the Member States to turn consumer policy into a constant element of Community law and policy.[24]

The reasons for the successful launch of Community consumer policy are multiple. Apart from a generally conducive social and economic environment at the beginning of the 1970s, a number of pragmatic political and institutional factors have arguably been of particular importance. The 1960s and the beginning of the 1970s were a time of stagnation for the process of integration in many respects. Having been heavily pressed as an economic project, the Community was more and more perceived as a construct serving big business, losing its legitimacy among the citizens of Europe. There was an increasing feeling of alienation between a European-friendly business and a population that could not identify itself with the advantages of a Common Market. Against this backdrop, commitment to a positive consumer policy, with its clear economic relevance for the individual consumer and its popular appeal, held a promise of convincing ordinary citizens in the attractiveness of the European idea. What was needed was a Community with a 'human face', and a proactive consumerist policy could be an important ingredient of such imagery.[25]

In substance, the Community consumer policy seems to be inspired by classical theories on regulation directed at correcting market and information failure. At the same time, when comparing the first and second programme on consumer information and education policy, a certain evolution in the main conceptions can be traced. Whereas in the first Preliminary Programme, the emphasis was laid on direct regulatory measures in the sphere of health and safety protection and on consumers' economic interests (harmonisation of national provisions through Community directives, introduction of uniform Community safety, technical or quality standards), in the Second Programme a preference is shown for informational measures for compensation of market information deficiency. In the chapters on protection of the economic interests of consumers, strong emphasis is placed on the different forms of distortion of the quality of consumer information (misleading advertising, incorrect labelling, misleading presentation or promotion of goods and services).[26]

As to the mode of regulation, a trend toward replacement of direct intervention (be it on State or Community level) with extra-legal means of tackling the problem can be identified. The interaction of activist groups representing the conflicting interests is promoted, in an attempt to achieve a better balance of market forces. Comparative tests of independent state or private institutions are proposed as a most market-conformable means of providing better quality and quantity consumer information. The idea behind this approach to informational failures is that governmental efforts

[24] Council Resolution, OJ 1981 C 133/1.

[25] In the words of Bourgoignie: "Consumer policy, thus, could serve as a useful but somewhat deceptive illustration of the self-proclaimed willingness of the Community to go further than unification of Europe's economies and markets. This is likely to be a popular option. In addition, the promotion of consumer interests throughout the common market is obviously 'good politics' for the European integration process, since... it has immediate popular appeal and, thus, can be used for promoting or reviving the European ideal by giving the Community order a more 'human face', fostering the image of a less bureaucratic Community, one not simply focusing on complex international business affairs, but also dealing with the daily problems faced by common citizens." Bourgoignie (1987), 115.

[26] Chapter B. Protection of the Economic Interests of Consumers, Principles, in Preliminary Programme, OJ 1975 C92/6, 18 and Chapter B., Principles, in the Second Programme, OJ C 1981 133/7, 28.

should be concentrated on giving the producers enough stimuli for intensive supply of consumer information and thereafter to rely on the ability of consumers to orient in this dense informational environment so as to help increase the allocative efficiency of competition.[27]

To be sure, the ambitious consumer rights agenda set out by the Programmes was only imperfectly matched by specific initiatives. Nevertheless, these Community 'soft law' instruments exerted a structuring effect on the consumerist debate on the Community level and gave impetus to new initiatives or to rethinking of old ones. Despite not having any binding force on the Member States (such force being assigned only to regulations, directives and decisions), the two consumer programmes have had a significant impact on the decision-making process in the Community and have influenced the interpretation of Community law by the European Court of Justice.[28]

The advent of consumerism in Community law and policy fundamentally affected the direction of European initiatives in the field of fair trading law. From an area of market-building measures, fair trading regulation was redefined into an area of market-correcting measures. A not insignificant factor proved to be the institutional redistribution of competences in the European Commission.[29] After the accession of three new Member States in 1973 (right after the Paris Summit), a special Commission Department on Consumer Protection was formed which gradually replaced the Internal Market Directorate in the work on fair trading. Since the 1970s this department was actively involved in the legislative work and since 1977 was fully in charge of this work.[30] This inevitably influenced the general spirit and direction of harmonisation.

One should be aware, however, that at the Community level consumer protection policy experienced important modifications due to the very nature of the integration process. It is therefore difficult to view the consumer protection discussion at the European level as a full counterpart to the respective national debates. As Dehousse has noticed, studies that shift from national to Community level and aim at comparing the substance of legislative initiatives suffer often from a 'homogenization' bias. The analyst transfers analytical categories and normative expectations from the national to the supranational level, without taking into consideration the different type of objectives forming the *raison d'être* of international cooperation.[31]

In the case of consumer protection, one apparent distinctive feature of Community policy is the interest in the situation not of the consumer *in abstracto*, but of the "European consumer". At the centre of attention is the consumer who is willing and able to make use of the advantages of the Common Market, who is curious to try new products and new services originating from a foreign geographical, cultural and economic environment, and who travels and shops abroad. Many of the policy priorities of the Community and a large part of the jurisprudence of the European

---

[27] See Second Programme of the EEC for a consumer protection and education policy, OJ 1981 C 133/1, para 42: "It is important that as far as possible the market itself should be so structured as to facilitate the adjustment of demand to price changes, primarily through increased transparency."
[28] See Case C-362/88 *GB-INNO-BM* [1990] ECR I-667.
[29] See Henning-Bodewig (1999), 385.
[30] Beier (1984), 70.
[31] Dehousse (1994) *AJCL*, 761 ff.

Court of Justice (ECJ) can be best understood as providing support to this dynamic, open and trans-border creature as an important actor in the amalgamation of markets. The focus is thus on the obstacles that may undermine this consumer's confidence in the Common market project and enhance national prejudice and isolation. Of course the original notion of the consumer as weak and vulnerable was not fully erased and was put into the basis of some Community acts. More room, however, was cleared for the conceptualizations of active and rational consumers, moving and shopping across borders and ready to exercise an informed choice.

6.1.2 Fair trading in the Community constitutional design

In order to understand the logic of Community interventions in the field of fair trading law, it is not sufficient to look at the underlying economic policies and objectives. Given the nature of the Community as a 'hybrid' legal order with a mixture of federalist and intergovernmental features, or as a multi-level system of governance as recently advanced in various political science accounts, it is essential to see how fair trading fits into the decision-making architecture of the Community.[32] Arguably, much of the fluctuation between Community activism and restraint, at the legislative as well as at the judicial level, could be more productively explored when seen in a constitutional rather than a substantive-policy perspective. More specifically, it appears important to gain deeper understanding of how the shifting division and balance of competencies within the Community affect decision-making in fair trading law. One can speak of a division of competences both on a vertical plane, i.e. between Member States and Community and on a horizontal plane, i.e. between the main Community decision-making bodies, like the Community political and judicial process. The different forms for achieving integration, namely positive or negative integration, soft law or binding law, minimum or full harmonisation, are also explored. These are all factors potentially affecting the adaptive pressure exerted upon national decision-making processes. The place of fair trading within the Community decision-making architecture will be looked for against this general background.

6.1.2.1 Community vs. Member State competences

The division of norm-making powers between the European Community (Union) and its Member States is among the fundamental constitutional issues of European integration. It is a recurrent point of schism between advocates of a federal Europe and inter-governmentalists arguing for retained powers of national governments within the limits of a classical concept of sovereignty. As is well known, the founding fathers of the European Communities did not provide clear and unambiguous answers to this or to other fundamental questions. The Treaty of Rome, with its bearing principles and unique institutional architecture, was certainly not a conventional international construct. However, it left questions like the nature of the new formation, the limits it sets on the competences of its Member States and the crucial question of '*Kompetenz-kompetenz*' (i.e. who has the final say on division of competences) unanswered or open to different interpretations.

Given the silence or ambiguity of the basic treaties, the answers to several of these questions had to be provided by the European Court of Justice. The story of the

[32] On the concept 'multi-level governance' see Scharpf, 'Regieren im europäischen Mehrebenensystem – Ansätze zu einer Theorie' (2002) *Leviathan*, 65 ff.

Court's activist pro-integration approach is familiar. In the seminal judgment *Van Gend and Loos* the ECJ defined the Community as "a new legal order of international law for the benefit of which Member States have limited their sovereign rights, albeit within limited fields." The principles of direct applicability and the subtler one of direct effect thus found their first recognition.[33] Only a year later, in *Costa v. ENEL* the Court confirmed and elaborated further these fundamental principles.[34] In addition this decision dispelled any doubt as to the hierarchical relationship between the separate legal orders. In those areas where Member States have transferred competence to the Community, Community law takes precedence over any conflicting Member States law, present as well as future.[35] The reasoning of the ECJ in the above decisions has been founded on an innovatory conception of "divisible sovereignty" fitting in smoothly with the specific hybrid nature of the Community.[36] In these path-breaking judgments, the European Court of Justice consciously assumed the role of a vehicle of European integration in a time of political stagnation and decision-making crisis during the formative years of the Communities.

The doctrine of *enumerated powers* has originally been and still remains of central importance for understanding the limits of Community vis-à-vis Member States competence.[37] The gist of the doctrine is that the Community has the right to intervene only within those limited spheres of competence specifically outlined in the Treaties. The doctrine is familiar from American federal law and has in Community law been regarded as just one manifestation of the more general principle of legality, enshrined in Arts. 7(1) (ex 4) and 220 (ex 164) of the EC Treaty, and in Arts. 5(1) (ex 3b(1)) EC Treaty introduced with the Treaty of Maastricht. According to Art. 7(1) the institutions of the Community "shall act within the limits of powers conferred upon them by this Treaty." Apart from delineating the powers of the different institutions in relation to each other, this provision has been considered to equally address the limitation of the powers of the Community institutions vis-à-vis the Member States. The doctrine of enumerated powers received ample expression in Art. 5 (ex E) of the Maastricht Treaty.

An important part of the doctrine of enumerated powers is that the Community legislator is required to always state the positive legal basis for any legislative measure it undertakes. The failure to base a legislative initiative on a correct legal ground may eventually lead to a legal act being declared partially or wholly void by the ECJ. Proceedings can be instituted by any Member State or by any of the Community institutions (Art. 230, ex Art. 173 EC Treaty). A corollary to the obligation to state the specific ground of intervention is the duty of Community institutions to state the reasons on which legal acts are based (Art. 253, ex Art. 190 EC Treaty).

Admittedly, the Community legislator has not been particularly eloquent in drawing clear boundaries for these specific powers. Arts. 2 and 3 of the Treaty of Rome provide a loose list of goals and objectives to be achieved by the Community through

---

[33] Case C-26/62 *Van Gend and Loos* [1963] ECR 1, 12.
[34] Case C-6/64 *Costa v. Enel* [1964] ECR 585.
[35] *Ibid.*, 594 f.; cf. Case C-106/77 ECR *Simmenthal* [1978] 640, paras 17 and 24.
[36] Hartley (1998), 9. For a review of the debate on 'divisible sovereignty' see Maier, L., EU, arbetsrätten och normgivningsmakten (Stockholm: Stockholms Universitet, 2000), 93 ff. with further references.
[37] The doctrine is alternatively known as the doctrine of attributed powers.

the Treaty. They are nonetheless inapt for the purpose of justifying and clarifying the limits of legislative action. The exact scope of the Community powers and the various grounds for norm-making at the Community level have therefore often been an object of controversy and have frequently occupied the Court's attention. Despite the lack of clear wording in the Treaty, the original understanding of the founding Member States was certainly that the principle should be interpreted strictly. With the passing of time, and especially during the 1970s and 1980s, the Court swung towards a more flexible and bold interpretation. Commentators note a process of erosion of the principle of enumeration.[38]

The most remarkable expansion of Community powers has taken place by using the elastic provision of Art. 308 (ex Art. 235) in the Treaty of Rome.[39] Initially Art. 308 was seen as a provision of last resort, to be used very restrictively by the Community decision-maker. A rather dramatic turn in this attitude was arguably marked by the Paris Summit of 1972. Art. 308 was then used in a concerted attempt to vitalize the Community after a period of political stagnation. It was this same dynamic that brought consumer protection within the ambit of Community policy. Weiler seeks the explanation in the inability of the Community at the time to advance in important but sensitive areas of integration.[40] There is, in other words, a sort of activism by association (side-tracking).

> The momentum was directed to a range of ancillary issues, such as environmental policy, consumer protection, energy, and research, all important of course, but a side game at the time. Yet, although these were not taken very seriously in substance (and maybe because of that), each required extensive and expansive usage of article 235 and represented part of the brick-by-brick demolition of the wall circumscribing Community competences.[41]

The main actors supporting the consumer policy project were the European institutions. In a succinct analysis Bourgoignie explains the commitment of the European Commission to a proactive consumer policy in terms of a desire to expand its relative position among the European and national institutions. The 1970s were allegedly a time when the first early signs of retreat from a period of 'decisional supranationalism' were beginning to show up.[42] Among the indications of such a development students of Community law and policy order include the setting up of the Committee of Permanent Representatives (COREPER), as well as the emergence of legislative committees composed of representatives of the Member States and Community officials. The Commission was therefore regarding consumer policy as a

---

[38] In the words of Weiler (1999): "In the 1970s and early 1980s, the principle of enumerated powers as a constraint on Community material jurisdiction (absent Treaty revision) was substantially eroded and in practice virtually disappeared." *Ibid.*, 42 f.

[39] Art. 308 reads: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

[40] Elsewhere the same author states: "My point is that the relevant interpretative communities, by choosing to opt for the wide and flexible reading of the Treaty, have transformed strict enumeration into a very flexible notion, practically emptied of material content in the Community." *Ibid*, 45, fn. 8345, fn. 83

[41] Weiler (1999), 58.

[42] Weiler (1999), 39 ff.; Bourgoignie (1987), 117.

potentially new and welcome competence area. Last, but probably not least, the Commission was in need of new policies in order to secure portfolios for new Commissioners from the three recent Members of the Community, Denmark, Ireland and the United Kingdom. Consumer policy could provide occupation for new administrative services and units to be filled by civil servants from the said countries.[43]

From a somewhat weaker position, the European Parliament was also trying to find its appropriate place in the Community political process. Consumer policy could serve to bolster the public image of the Parliament and thereby suited its aspirations to represent the peoples of Europe. The Parliament was aligned with the Commission in its quest to keep the pace of 'decisional supranationalism' and to counteract trends towards increasing the decision-making competencies of institutions with strong intergovernmental characteristics, notably the Council. Bourgoignie quotes an opinion of the European Parliament on the Preliminary Programme for a Consumer Protection and Information Policy, containing "several clearly consumer oriented statements, such as a call for alignment of Community legislation with the most advanced national rules.[44]

Among the agents promoting the expansion of Community competencies in the consumer protection sphere, Bourgoignie eventually mentions Member States who early acquired a high profile in this sphere of activity. Those states may initially have been motivated by fears of losing their high level of protection by entering a common market of differential standards. Likewise, lending credence to institutional theories of regulatory competition, it appears to be in these states' interest to ensure that Community regulatory policies are shaped in a manner not widely divergent from the respective domestic model, in this way diminishing the costs of adaptation and change. Incidentally, in the case of consumer policy it was the new Member States, Denmark and the United Kingdom, which brought a fresh administrative and mediating experience in consumer protection matters that they infused at the European level. In fact, English and Danish officials occupied key positions in the first consumer administrative units at the Commission.[45]

Also at the Community level, consumers were not among the most active bearers of the new ideals. At the time of the initiation of the Community in the area of consumer policy, the representation of consumers at the national level was very weak and even non-existent. The first initiatives towards organization and representation of consumers at the European level were reportedly undertaken already in 1950s and 1960s. This nevertheless mainly occurred under the auspices of organizations with different agendas and priorities, such as the cooperative movement, the trade unions and Christian organisations in their family-oriented policies.[46] In 1962 the

[43] According to Bourgoignie "there were no budgetary nor administrative constraints limiting the addition of new services to the Commission machinery but, quite the contrary, incentives and even obligations to do so." Bourgoignie (1987), 117.
[44] Bourgoignie (1987), 119.
[45] Bourgoignie (1987), 119.
[46] Bourgoignie mentions the following organizations: Community of National Consumer Cooperative Organizations in the Common Market (1957); European Organization of the International Confederation of Free Trade Unions (1958); European Organization of the International Confederation of Christian Trade Unions (1959). Only one organization reportedly had consumer policy as its exclusive objective, namely the European Union of Consumer Unions (1962). Bourgoignie (1987), 122, fn. 84.

Commission regrouped the five organizations into one Committee qualified to represent consumers' interests in the Common Market and influence the Community decision-making process. However, this first experiment in consumer participation did not last long. In 1972 the Committee announced its own dissolution. Admittedly, behind most of the initiatives to organize consumers one could identify the hand of the European Commission. Bourgoignie gives two explanation of this attitude:

> First, it [the Commission] recognized the imbalance between industry and consumers in Commission processes and wished to provide a stronger consumer voice; and secondly, it needed consumer allies to support its own efforts to expand in this field. (footnotes omitted)[47]

So in a sense the creation of strong and viable consumer unions at the national level and the institutionalization of their cooperation at the Community level could be interpreted as one brick of the strategy of the Community towards expanding the scope of its legislative powers. The existence of national organizations joined in a consumer movement provided a partner and legitimation of Community involvement in this area.[48]

6.1.2.2 Legal basis for Community intervention

From the principle of enumerated powers it follows that any intervention on a Community level has to invoke one or more Treaty provisions assigning power to the Community to deal with the issue concerned. The question about the legal basis of Community law and policy in the area of fair trading is not an easy one, since the answer very much depends on the objectives of specific regulatory measures. Given its elusiveness in terms of interests and policy priorities, the area of fair trading has been difficult to fit into the neat categorizations of the Treaty. As we already discussed above marketing regulation is characterized by a broad diversity of objectives. Regulation of commercial communications can be provoked by concerns about consumers' economic interests, about protection of health or the environment, fairness of competition, protection of minors, or a combination of these. Some of these objectives are easily compatible with the mandate of the Community, whereas others appear more problematic. Ensuring fairness of competition, for instance, is clearly a market-related objective. It is not difficult to demonstrate that differing national regimes of regulation affect economic operators differently and may thus distort competition and create obstacles to intra-Community trade even if the constraining effect may not be as immediate as with differing national standards for goods and services. Harmonisation measures can thus be justified to be within the ambit of Community policy. Other objectives like consumer protection, environmental protection, protection of minors, etc. are of a more social policy character and were - originally at least - not among the objectives of the Treaty.

---

[47] Bourgoignie (1987), 123.

[48] For a similar general explanation of the role of organized interests in the Community see Maduro, *We, The Court. The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998a), 120. "Furthermore, to enhance its powers as a European government the Commission must find support beyond the Member States. Thus it makes alliances with other forces: either Community institutions such as the European Parliament and the European Court or supra-national groups and elite technocrats who support its policies and its image of independence of from national interests."

It is therefore not surprising that the first attempts at Community initiatives in the field of commercial communications proceeded from the concern about fairness of competition within the clear ambit of Common Market policy (see below on the history of the Misleading Advertising Directive). Promotion of fair competition and harmonisation of disparate national measures could be firmly based on Art. 100 (now Art. 94) EC Treaty as "directly affecting the establishment and the functioning of the common market."

With the Single European Act the Community for the first time entered a more explicit commitment to consumer protection as an autonomous policy aim. This commitment, however, was seen as an integral part of the internal market programme. Despite the bold language of the 1975 and 1981 Consumer Programmes, no separate consumer policy title was introduced in the Treaty. Art. 95(3) (ex Art. 100a) referring to measures for approximation of national provisions which have as their objective the establishing and functioning of the internal market provided:

> [t]he Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.[49]

Commentators have noted that the obligation in this provision was only addressed to the Commission and had the flavour of a political declaration rather than a legally enforceable commitment. The Single European Act introduced a qualified majority voting for harmonisation measures under this heading and Member States could no longer veto Community legislation. Theoretically, the Commission could advance initiatives limiting national consumer protection laws in the dissenting minority of Member States if this was necessary for the completion of the internal market.[50]

With the evolution of European integration closer economic union presupposed much closer co-operation and harmonisation in respect of major social policy issues as well. This led to further enhancement of the position of consumer protection among the Community competences. The Treaty of Maastricht inserted an express reference to consumer protection in the list of activities of the Community.[51] A new title XI on Consumer Protection was introduced in the EC Treaty. Art. 129a (now after amendment and renumbering Art. 153) was entirely devoted to Community measures in the area of consumer protection. According to Art. 129a(1):

> The Community shall contribute to the attainment of a high level of consumer protection, through:

---

[49] See Stuyck, 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?' (2000) 37 *CML Rev.*, 367 ff., 378 with further references to the Community Directives adopted under this provision. Cf. Weatherill, 'The Evolution of European Consumer Law and Policy: From Well-Informed Consumer to Confident Consumer' in: Micklitz (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa?* (Baden-Baden: Nomos, 1996a), 423 ff.

[50] Nonetheless, see Art. 100a (4) allowing for exceptions in case a Member State can demonstrate 'major needs' for retaining more stringent regulation. Cf. Weatherill/ Micklitz, 'Consumer Policy in the European Community: Before and After Maastricht' (1993) *JCP*, 285 ff., 295.

[51] See Art. 3 (t) (ex. (s)): "a contribution to the strengthening of consumer protection".

> (i) measures adopted pursuant to Article 95 (ex 100a) n the context of the completion of the internal market;
> (ii) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

It is noteworthy that the addressee of this provision was now the Community as a whole, and no longer just the Commission. Thus, the provision arguably established for the first time competence for the Community to act in the field of consumer protection which is formally independent of the process of legislating to complete the internal market.[52]

Despite academic discussions about the strengthened position of consumer policy in the new architecture of the Community, the practical importance of this amendment has proved limited.[53] The only directive adopted on the sole basis of Art. 129a has been Directive 98/6/EC on consumer protection with regard to the indication of prices of products.[54] The Court has likewise refused to attach an exaggerated importance to the new policy.[55]

The final touch in the constitutional status of consumer protection in the EC Treaty was added with the Amsterdam Treaty. Beyond sheer renumbering of provisions (from Arts. 129a into 153), the goals of consumer protection are now stated with greater clarity and determinacy.

> In order to promote the interests of consumer and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

For the first time the rhetoric of 'consumer rights' (ushered in by the 1975 Consumer Programme) has been integrated in the text of the Treaty. Furthermore, an explicit obligation of the Community is stipulated "to take consumer protection requirements into account in defining and implementing other Community policy and activities" (Art. 153(2) EC Treaty). Apart from supporting and supplementing national consumer policies the Community is now authorized to monitor Member States policy.[56] Importantly, the amendment makes clear that the intervention of the Community can take the form of legislative measures. After the amendments in Amsterdam, there can hardly be any doubt that measures undertaken in the context of the completion of the internal market can pursue the protection of consumer interests and rights. The

---

[52] See Weatherill/Micklitz (1993), 285, 295 ff.
[53] See Bourgoignie, 'European Community Consumer Law and Policy: from Rome to Amsterdam' (1998) *CLJ*, 443 ff., at 447 arguing for expanded Community powers in the field of consumer protection after Maastricht. The author also notes the confusion surrounding the issue of distinguishing between measures with common market relevance and measures with no such relevance. On the limited practical implication of the amendment, see Stuyck (2000), 380.
[54] OJ 1998, L80/27.
[55] Case C-192/93 *El Corte Ingles* [1996]ECR I-1281, para 20; cf. Comment by Stuyck (1996) 33 *CMLRev.*, 1261.
[56] Art. 153 (3)(b). See Stuyck (2000), 383 ff.

Community is also empowered to act in areas not connected with the internal market, but only by supplementing, supporting and monitoring Member States policies.[57]

Given the absence of consumer policy from the original Treaties, the evolution culminating culminating in Art. 153 EC Treaty is indeed impressive. At the same time, parallel to the widening of Community competences in the field, a process of regaining of regulative powers by the Member States can be observed. Thus, new provisions on consumer protection in the Treaty are accompanied by reassurances that the competences of Member States will not be unnecessarily encroached upon. The Maastricht Treaty codified a principle of 'minimum harmonisation' for all action by the Community specifically directed at consumer protection. According to Art. 129a(3) "specific action adopted within the meaning of Art. 129a(1)(b) shall not prevent any Member State from maintaining or introducing more stringent protective measures." Such measures must be compatible with the Treaty and the Commission must be notified of them.[58] This provision was reproduced in Art. 153(5) EC Treaty, as amended in Amsterdam, and is a concrete application of the general principle of subsidiarity in Community law (Art. 5(2), ex Art. 3b(2)).[59] It inconspicuously defines consumer policy as an area of shared competence between the Community and its Member States. Somewhat paradoxically, this constitutionalized principle of minimum harmonisation makes Art. 153 an unattractive legal basis for ambitious integration projects. Given the relevance of consumer protection rules for the market, commentators predict that legislation will continue to be based preferentially on Art. 95 (ex Art. 100a) EC Treaty.

The ECJ also seems less inclined to pursue an aggressive line of interpretation of the Community competences vis-à-vis the Member States. A recent case confirms the trend of moving backwards in direction to the original understanding of enumerated powers.[60] At the centre of the case was a Directive seeking to harmonize the advertising and sponsorship of tobacco products.[61] The Commission argued that harmonisation was necessary for improving the internal market, yet the Court found the measure to be primarily directed at health protection, an area not exclusively under the Community's competence. The ECJ thus endorsed the view of the dissenting states (as well as of stakeholders, notably the tobacco industry), that the initiative was going too far. The Court here takes a position radically opposite to its previous position of 'agent provocateur'. Whereas at previous stages of stagnation of the integration process the Court has been acting (controversially) as the driving force behind expanding Community powers, now it is the sobering influence calling for moderation and self-restraint in exercising new powers. It may be that the risk of institutional and representational malfunctioning are nowadays perceived to lie elsewhere. Under the majority vote procedure a majority of Member States may push a controversial decision through the legislative agenda despite the objections of a strong minority of Member States. In the particular case Germany and Austria had voted against the

[57] For a fully-fledged analysis, see Stuyck (2000), 384 ff.
[58] Art. 129a(3) (new Art. 153(6)).
[59] Stuyck speaks of constitutionalization of the minimum harmonisation approach. Stuyck (2000), 367 ff.
[60] Case C-376/98 Germany v. European Parliament and Council (tobacco advertising)[2000] ECR I-8419.
[61] Directive 98/43/EC on the advertising and sponsorship of tobacco products, OJ L213, 9 ff.

Directive, whereas Spain and Denmark abstained.[62] Probably the Court again tries to balance and correct a possible majoritarian bias and at least invites Member States to reach more stable and viable majorities.[63]

6.2 The evolution of positive European fair trading law

It is established taxonomy within European integration studies to divide Community law and policy into two categories of positive and negative integration. The term 'positive integration' stands for the process of harmonisation of divergent national laws and regulations in matters of relevance to the completion of the Common Market (Art. 95, ex Art. 100a EEC Treaty).[64] Harmonisation is effectuated through the Community legislative process via the adoption of regulations or directives, depending on the essence of the issues at hand and the level of uniformity aimed at.

The alternative mode of action is usually termed 'negative integration' and implies the abolition of obstacles to trade. This concept is usually associated with the jurisdiction of the European Court of Justice on the basis of the Community free movement provisions, and notably Arts. 28 and 30 (ex Arts. 30 and 36) EEC Treaty. Art. 28 prohibit all quantitative restrictions on imports and all measures "having equivalent effect" to quantitative restrictions. Hence, national legal provisions can be declared inapplicable to import or export products whenever they conflict with the principle of free circulation of goods and services in the Common Market and cannot be justified by the exemptions provided for in Art. 30. This alternative has given strong evidence for its efficiency throughout the last decades. It was highly esteemed in the Commission White Paper and in the Cecchini Report preparing the Single European Act.[65] Consequently, after 1988, broader space was cleared for negative integration based on the principles of proportionality and mutual recognition.

One should, however, not loose sight of the constant interplay between the two integration techniques. Although the Single European Act emphasised the process of negative integration as a non-bureaucratic and efficient way of elimination of barriers to trade, the very same attitude called for a more intensive process of harmonisation. Faced with the potential invalidation of national legislation through the activity of the Court, especially in the sphere of social policy, national governments were urged to insist on expanding the scope of harmonisation of diverging legal regulations. Thus, they trigger a new round of bargaining for safeguarding their national protection standards and for their introduction on Community level.[66]

---

[62] See Usher, 'Comments on the Case C-376/98' (2001) *CMLRev.*, 1519 ff.; Byström, 'Precisering av EGs kompetens: formulering av problem utan lösning i sikte?' (2001) *ERT*, 92 ff.

[63] In this sense, see Weatherill, 'The Commission's Option for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis' (2002) *EBLR*, 497 ff., at 505. See Directive 2003/33/EC, OJ 2003 L 152/16.

[64] On the economic concepts see Molle (1990), 11.

[65] Completing the Internal Market, White Paper from the Commisson, COM (85) 310 final, 18 ff

[66] See Weiler (1999), 17.

6.2.1 Between unfair competition and consumer protection (market building and market correction)

6.2.1.1 Unfair competition approach: the Ulmer project (market building approach)

Judging from various preparatory materials for what finally became the Misleading Advertising Directive, the initiatives for harmonisation were pressed by the German government. Having a well-elaborated and vigorous body of law in the area of unfair competition, the German government was apparently eager to transform its own national conceptions into Community standard.[67] On the request of the Commission, the Max Planck Institute in Munich under the leadership of its Director Prof. Eugen Ulmer carried out a comprehensive study of the law of unfair competition in each of the then six Member State. The term 'unfair competition' was considered as sufficiently uncontroversial, considering its presence in the Paris Convention for Protection of Industrial Property to which all Community Member States are parties. The study resulted in eight volumes of reports on national law complemented by an extensive comparative analysis and proposals for future action.[68]

Harmonisation was suggested to take the form, not of a Directive on the basis of Art. 100 as it could be expected, but, ambitiously, that of a Convention. The authors of the report considered a directive insufficient since according to the express wording of Art. 189(3) EC Treaty, it was to be binding only upon the Member States and then exclusively as to the results to be achieved. National authorities would thus be granted too large a margin of discretion to decide on the form and methods of implementation. It was the firm belief of the MPI experts that in the area of unfair competition law means and methods of implementation were of crucial importance. A divergence in implementation instruments would largely make harmonisation hollow and devoid of any meaning. Therefore a legal instrument was sought that would allow to pursue more ambitious harmonisation objectives. [69] This line of reasoning is understandable and legally stringent, in the sense that the ECJ at the time of legislative deliberations had not yet developed its doctrine of direct and indirect effect of Directives. Nor had it demonstrated the potential of enhancing the binding force of directives through creative interpretations of the Treaty.[70]

The path of an international convention was regarded as the more appropriate one not only in the area of unfair competition law but also for the whole area of intellectual property law. The Treaties did not expressly mention the possibility of Member States of entering into multilateral conventions, but this followed from general principles of international law. Problems of transformation of conventions into national law were not seen to exist, since all the original Member States belonged rather to the monist tradition.[71]

---

[67] If one subscribes to theories of regulatory competition, Germany has here exerted visible pressure to have its own regulative model recognized as a standard. See Héritier/Mingers/Knill/Becka (1994); Reich, 'Competition Between Legal Orders: A New Paradigm of European Law' (1992a) *CMLRev.*, 861 ff.

[68] Ulmer (1965), 15 ff.; Schricker (1973) GRUR Int. 1973, 141 ff.,

[69] Ulmer (1965), 232 ff.

[70] See Steiner, *Textbook on EC Law*, 4th ed (London: Blackstone, 1994), 26 ff.; Weatherill/Beaumont, *EU Law*, 3rd ed. (London: Penguin Books, 1999), 392 ff., see Case C-14/83 *Von Colson v. Land Nrthrein-Westfalen* [1984] ECR 1891.

[71] Ulmer (1965), 245.

Despite its broad comparative character the outcome of the study was, perhaps not surprisingly, strongly influenced by the German way of legal thinking in this field. The analytical grid applied in the comparative study followed closely the categorizations traditionally used in analyses of the German UWG. Likewise the interests put at the centre of the draft were those of competitors, and only in a reflexive manner, the interests of the consumers and the general public. The triad introduced by Ulmer in German law was thus set out to find its way into European Community law.

In terms of legislative technique the Ulmer study built upon a general clause on unfair competition. A number of more specific factual situations were then suggested to complement and flesh out the abstract general clause. The selection of instances to be included in the catalogue was in some respects again a recap of the law as it stood in Germany. Some of the factual situations proposed to enter the catalogue were known as integral parts of the German UWG, others constituted a codification of the precedents developed by the German judiciary. Likewise, the Paris Convention has obviously served as a common ground for the proposed solution. The suggested rules included: causing risk for confusion, disparagement (*Anschwärzung*), including personal and comparative advertising, misleading advertising and finally the protection of trade secrets (*Geschäfts- und Betriebsgeheimnisse*).[72]

In the procedural part of the proposal, private enforcement through injunction and standing to sue for individual competitors and for business associations were envisaged as common standard. In addition, the importance of speedy procedure, like preliminary injunction, was underlined. The enforcement model familiar from German unfair competition law was thus advanced as the most appropriate option at the Community level as well.[73] Ulmer spoke passionately in defence of this model with broad procedural rights of business unions for enforcement of collective interests. He emphasized in particular that it would be wrong to establish a strict requirement of connection between standing to sue and affected interests of union members. In this, he referred expressly to the example with the *Wettbewerbszentrale*:

> Die besondere Bedeutung der Verbandsklage liegt darin, dass sie das geeignete Mittel zur Geltendmachung kollektiver Interessen ist. Sie wird dabei aber, wie wir glauben, in zu weitgehendem Masse eingeschränkt, wenn sie von der Voraussetzungen abhängig gemacht wird, dass durch die Wettbewerbshandlung das Gesamtinteresse der Mitglieder des Verbandes betroffen wird. In der Praxis hat sich die Erstreckung der Klagebefugnis auch auf solche Verbände bewährt, denen Mitglieder aus verschiedenen Geschäftszweigen angehören, wie es beispielsweise bei der in Deutschland bestehenden Zentrale zur Bekämpfung des unlauteren Wettbewerbs.[74]

In the awareness that the generous German enforcement model would hardly gain the support of the other Member States a compromise solution was proposed, namely making the right of action conditional either on interests actually affected being represented by the association, or on the chartered objectives of the association.[75]

---

[72] Ulmer (1965), 250-256.
[73] Ulmer (1965), 256 ff. Positive to this proposal, Beier (1984), 69.
[74] Ulmer (1965), 258.
[75] Ulmer (1965), 258.

It is worth noting that despite the generally positive assessment in the comparative report as to the feasibility of harmonisation, the tone changed to a more pessimistic one when it came to the prospects of arriving at a common understanding on the issue of collective interests and the extent of their integration into the Draft. The possibilities for enforcement and protection of such interests varied largely even in the laws of the original six Member States belonging to a common Roman /canonical law continental tradition. In a concluding chapter of the summary report on the comparative study Ulmer laments:

> Die rechtsvergleichende Untersuchung hat das verschiedene Maß gezeigt, in dem sich in den Mitgliedstaaten der EWG der Gedanke durchgesetzt hat, dass das Wettbewerbsrecht nicht nur dem Schutz der einzelnen Mittbewerber, sondern auch demjenigen der Gesamtheit der Mitbewerber dient. Die praktischen Folgen der Verschiedenheit sind erheblich. Sie zeigen sich insbesondere bei der Beurteilung der täuschenden Werbung.[76]

The extent of integration of consumer protection ideas in the system of unfair competition law was also fraught with differences.

> In Belgien, Deutschland und Luxemburg geht man von der Vorstellung, dass das Wettbewerbsrecht, jedenfalls mittelbar, auch dem Schutz der Verbraucher und der Allgemeinheit dient. In Fortführung dieses Gedankens wird in Deutschland erwogen, bei irreführender Werbung die Legitimation zur Erhebung der Unterlassungsklage auch auf die Verbraucherverbände auszudehnen. Eine solche Regelung würde aber, wie wir glauben in anderen Ländern des Gemeinsamen Marktes als eine zu starke Abweichung von der Tradition der Wettbewerbsklage empfunden werden.[77]

Finally, the experts openly acknowledged the different legal policy standpoints in the different Member States. More specifically, some Member States openly regarded the law of unfair competition as an effective instrument for ensuring protection of the interests of the *Mittelstand.* Ulmer pointed at Belgian and French legislation on sales under production cost as examples, but similar examples could be easily found also in German law.[78] In contrast, in countries like Great Britain the very idea of granting privileges to certain economic group through private law was perceived as fundamentally wrong and foreign to the English legal and political system.[79]

6.2.1.2 The consumerist approach (market correcting approach)

The Ulmer project envisaged a Convention that would transfer the comprehensive and broad categories of German unfair competition law to the Community level. However, in the course of the preparatory work, and especially after the Community acquired three new members in 1973 – the UK, Ireland and Denmark – it became clear that it would be very difficult to find a basis for a compromise. Whereas in Germany the UWG was a well-developed and intensively applied body of law, in the UK and Ireland a general concept of 'unfair competition' was almost unknown and

[76] Ulmer (1965), 241.
[77] Ulmer (1965), 241.
[78] Ulmer, 'Die Bekämpfung des unlauteren Wettbewerbs im gemeinsamen Markt' (1973) *GRUR Int.*, 135 ff., at 137.
[79] See Ohly (1998-99), 69 ff., at 77.

unacceptable for a number of dogmatic and legal policy reasons.[80] Control over unfair trade practices was there largely exercised via voluntary codes of conduct on the principle of self-regulation.[81]

More importantly still, while the Max Planck institute was preparing its impressive study, consumerism was gaining ground in the Member States and in the Community at large. Growing rapidly into an independent sphere of public concern, consumer protection had also to be considered in the process of harmonisation of fair trading, particularly when tackling issues of misleading advertising. In this respect too, German unfair competition law approach clashed with higher British and Danish preoccupation with consumer interests.

The institutional redistribution of competences in the European Commission also proved to be a not insignificant factor.[82] After the accession of the three new Member States in 1973 an independent Commission service for environment and consumer protection was set up, which in 1981 was transformed into a Directorate.[83] These consumer protection entities gradually replaced the Directorate on internal market in the work on fair trading. From the beginning of the 1970s the Consumer Protection Service was actively involved in the legislative work and after 1977 became fully in charge of this work.[84] This inevitably influenced the general spirit and direction of harmonisation.

In 1978 a compromise proposal was submitted by the Commission.[85] It targeted only advertising leaving aside the broader unfair competition approach followed by the MPI study. The objective of consumer protection was particularly highlighted. At the same time the proposal aimed at taking into account all relevant interests, namely those of consumers, traders and the general public. Many of the most important hypotheses of unfair competition outlined in the Max-Planck study were covered. Ambitiously, apart from misleading advertising and comparative advertising, the proposal purported to define the concept of unfair advertising. The definition was deemed to cover a comprehensive catalogue of situations in stating that:

> 'unfair advertising' means any advertising which:
>
> (a) casts discredit on another person by improper reference to his nationality, origin, private life or good name, or
> (b) injures or is likely to injure the commercial reputation of another person by false statements or defamatory comments concerning his firm, goods or services, or
> (c) appeals to sentiments of fear, or promotes social or religious discrimination, or
> (d) clearly infringes the principle of the social, economic and cultural equality of the sexes, or

[80] For a detailed analysis of English law, see Ohly (1997), 73 ff. See also Schricker (1990), 118 ff.
[81] See Krämer, *EEC Consumer Law* (Brussels: Story Scientia, 1986).
[82] See Henning-Bodewig (1999), 385.
[83] Krämer (1986), 26.
[84] Beier (1984), 70.
[85] OJ 1978 C 70/4 ff. An even earlier draft was submitted in 1975, Doc. XO/C/94/75.

> (e) exploits the trust, credulity or lack of experience of a consumer, or influences or is likely to influence a consumer or the public in general in any other improper manner...[86]

Whereas some of these hypotheses were taken from the Ulmer proposal, others reflected a different, public interest, understanding of unfair advertising foreign to German unfair competition law. To prohibit as unfair any advertising building on sexual, social or religious discrimination was plainly avant-garde. Likewise a general requirement that advertising does not exploit trust, credulity and lack of experience was taking a decisive step towards a consumer-oriented view on advertising.

This proposal was met with criticism from all quarters. Interestingly, in Germany it was seen to be influenced by English legal thinking and in England was accused of German bias.[87] Gradually, it became clear that Germany was not going to accept a harmonisation act that would so radically differ from its established concepts of unfair competition. On the British side, in contrast, any attempt to introduce a general clause on unfair competition was doomed to failure.[88] Moreover, steps towards more extended public regulation of advertising were met with distrust by the British advertising industry. The solution to these multiple dilemmas was found in limiting the scope of harmonisation to misleading advertising only and underscoring the need to pay due regard to the interests of consumers. Thus, the main rationales for regulating fair trading underwent a perceptible shift from ensuring fair competition throughout the Community to protecting consumers from the harmful effects of incorrect and misleading marketing practices. Unfair advertising and comparative advertising were left to further legislative efforts. In effect, this new approach implied abandoning the plans for comprehensive harmonisation on the basis of an unfair competition law approach and embarking on the road of piecemeal harmonisation of specific regulatory issues.

6.2.2 Substance and form of harmonisation of fair trading law (piecemeal harmonisation)

After abandoning the comprehensive Ulmer project, harmonisation of fair trading law proceeded in a piecemeal fashion. Most sluggish has been the development in the area of acts of general application. Starting with the Directive on Misleading Advertising in 1984, the list was complemented only in 1997 by the Directive on Comparative Advertising. Recently, however, the Commission has resumed the initiative to harmonize the law of fair trading on a more comprehensive basis by drafting a framework directive on fair business practices. Legislative work in areas of special application, addressing specific marketing methods or marketing in certain media or for certain products and services, has been much more intensive. The Doorsteps Selling Directive of 1987 was the first one to treat separately a particular method of selling. In 1997 this Directive was followed by the Distance Selling Directive, thus covering two marketing methods deviating from the classical situation of purchase in a store of the consumer's choice. The doorstep selling directive tackles the situation of

[86] Draft Art. 2, third indent, *ibid.*, 5.
[87] See Krämer (1986).
[88] On the reasons for the failure of these harmonization attempts, see Ohly (1998-99), 69 ff. For an in-depth analysis of the differences between the common law and the German approaches to a general clause on unfair competition, see Ohly (1997), 73 ff.

consumers who are taken aback by sellers in their home and are thus unprepared to make a reasoned consumer decision. The distance selling directive, conversely, deals with the situation of consumers approached by sellers or service providers from a distance, and thus being unable to ascertain the quality of the products on offer.

Another group of directives provides a special regime for advertising in particular media, e.g. as the Television without Frontiers Directive and the Directive on Electronic Commerce. The TV Directive provides ambitious coverage of a number of specific advertising and marketing situations. It regulates surreptitious TV advertising, TV advertising of alcohol, tobacco, drugs, children advertising, etc. Yet another part of the patchwork of Community provisions constitutes of Directives and Regulations governing marketing of particular consumer products such as drugs, cosmetics, foodstuffs, etc. In the following the emphasis will be on the acts of general application. Harmonisation of rules that relate to specific marketing methods as well as media-specific directives will likewise be examined, since these form important pieces of the jigsaw of European fair trading law. Product specific rules and regulations, by contrast, will only be invoked selectively, by virtue of their relationship to the acts of general application.

6.2.2.1 Misleading Advertising

The most important Community legal act of general (horizontal) nature concerning fair trading is the Directive on Misleading Advertising.[89] As mentioned above, the negotiations on the Directive were protracted and sluggish. While initially the Commission set out to comprehensively regulate unfair competition law, gradually the ambitions changed scope and direction. In the face of resistance from many quarters, eventually the scope of harmonisation was reduced until finally it only included misleading advertising. Interestingly, in England the Directive was initially seen as a result of German legal philosophy ("German bias").[90] At the end of the negotiations, the exclusion of unfair advertising was celebrated as an "almost total victory for the long campaign waged by the United Kingdom".[91]

Substance

The Directive requires the Member States to ensure adequate and effective protection against misleading advertising. It seeks to establish minimum and objective criteria as a basis for determining whether advertising is misleading.[92] Despite an emphasis on consumer interests the Directive takes an integrated approach and declares explicitly that its purpose is to protect three groups of interests: those of consumers, of competitors and of the general public.[93] In this, the Directive bears the imprint of German unfair competition law doctrine codifying the conceptualizations elaborated by Ulmer in the 1930s. In contrast to German law, however, consumer interests are mentioned expressly and have pride of place in the triad of interests, thus indicating the consumerist thrust of the Community approach in the field.

---

[89] Council Directive 84/450/EEC concerning misleading advertising, recently amended by Directive 97/55/EC concerning comparative advertising.

[90] See Select Committee, Misleading advertising, House of Lords, London (1978) quoted after Krämer (1986), 153.

[91] Consumer Law Today, Vol. 7, Issue Nr. 10, 1, quoted after Ohly (1998/99), 74.

[92] See Rec. 7 Directive 84/450. See Case C-373/90, *Criminal proceedings against X* [1992] ECR 131, para 9.

[93] See Art. 1 Directive 84/450.

The Directive proceeds from a broad understanding of advertising. It qualifies as advertising "the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations."[94] From this broad definition of advertising it follows that commercial information in any medium, including oral information in the course of purchasing, falls within the scope of the definition.

More important is the definition of 'misleading advertising'. Art. 2(2) defines as misleading "any advertising which in any way, including its presentation, is likely to deceive the persons to whom it is addressed or whom it reaches and which by reasons of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor." Three elements deserve closer attention in this definition. Firstly, the Directive does not require actual deception. Likelihood of deception is sufficient. Secondly, decisive for determining whether an advert is misleading is its effect not only on the targeted audience but also on those who are effectively reached by the advertising. Finally, the advertising should, due to its deceptive nature, be likely to influence consumers' purchasing decisions. The deceptive element should, in other words, be of some relevance for the customers. Arguably, claims concerning product qualities which are of no significance for the choice of consumers would not qualify as misleading advertising under the definition, even if deceptive (for instance, and unless specific circumstances suggest otherwise, the weight of a book, the colour of a videocassette, the taste of ink). It is less certain is whether claims on product qualities that are relevant for consumer choice but that can easily be ascertained by consumers upon purchase also disqualify from the definition.

Art. 3 of Directive 84/450 requires a complex and all-sided appraisal of an advertisement that is alleged to be misleading. This evaluation should take into account all features of the advert, and in particular any information it contains concerning product and service characteristics such as availability, nature, composition, price, along with industrial, commercial and intellectual property rights of the advertiser. The long list of product features is only indicative and therefore its normative value is limited. The Directive further provides that, in order for an advertising to be prohibited as misleading, it should not be necessary to prove actual loss or damage, or intention or negligence on the part of the advertiser.[95]

In the initial Commission proposal the definition of misleading advertising was complemented by a provision (draft Art. 3(2)), specifically addressing the situation of deception by omission. Advertising omitting material information was to be considered misleading when, by reason of that omission, it would give a false impression or arouse expectations, which the advertiser could not satisfy.[96] In the same paragraph the European Parliament wanted to include a general requirement on recognisability of advertising. According to this proposal, advertising was to be regarded as misleading when it was not readily recognizable as such.[97] This paragraph, however, was dropped in the final version of the Directive.

[94] See Art. 2 Directive 84/450.
[95] See Art. 4 (2) Directive 84/450.
[96] See OJ 1978 C 70/4, 6.
[97] OJ 1979 C 140/23, 26.

Many commentators have expressed disappointment over the fact that the Directive did not provide clear answers to some of the most pertinent questions of interpretation and enforcement when regulating misleading advertising. Thus it left open the question of the standard of deception and the threshold for intervention. How was the expression "likelihood to mislead" to be interpreted in specific situations? Was it sufficient to establish a likelihood of an advertising message to mislead a small portion of the targeted audience in order to prohibit the advertising, or should all of the addressed consumers be misled? Case law and doctrine in the different Member States revealed substantial variations on this particular point. Especially in view of the minimum harmonisation approach preferred in the Directive, the fact that Member States remained free to apply their national doctrine implied continued discrepancies of protection standards.[98] Another controversial issue was the interpretation of the requirement that advertising could qualify as misleading when it was likely to affect the economic behaviour of the recipients. As we shall see in the next chapter, put in a specific institutional context, such open questions have produced an intensified debate.

Form of harmonisation

The choice of a directive as the legal act of harmonisation is to some extent indicative of the relatively soft approach and modest results characteristic of this document. Discretion in regard to the form and methods of implementation is an inherent characteristic of directives as a special category of Community legal acts.[99] Nevertheless, experience has demonstrated that there is a broad variety of means to limit this discretion and to set quite specific requirements for national legislatures and governments as to enforcement and implementation. Given strong political will and consensus, a Directive may be formulated in terms that come very close to those of a Regulation. The Court has consistently refused to attach exaggerated importance to the denomination of legal acts and in assessing the binding force and character of the act has tended to proceed from the lawmaker's intentions. Commentators therefore speak of blurring the distinction between regulations and directives.[100]

In the light of these developments it should be noted that the Misleading Advertising Directive corresponds to the original nature of this type of legal acts. While laying down certain minimum standards for protection, the Directive leaves to the Member States with a broad choice of means of reaching this objective. The Community legislator has not used the full potential for narrowing down the options for implementation open to the Member States and for setting precise harmonized standards.

The Misleading Advertising Directive is, moreover, a typical example of a minimum harmonisation directive.[101] The minimum character of the Directive follows from the wording of Art. 7. According to this provision the Directive "shall not preclude Member States from retaining or adopting provisions with a view to ensuring more

[98] Schricker (1991a), 788 ff., at 791; Gamerith, 'Neue Herausforderungen für ein europäisches Lauterkeitsrecht' (2003) *WRP*, 143 ff., at 146 ff.

[99] See Prechal, *Directives in European Community Law* (Oxford: Clarendon Press, 1995), 44.

[100] See Weatherill/Beaumont (1999), Hartley (1998).

[101] Schricker, 'Einführung in das Recht der Werbung. Internationales und EWG Recht' in: Schricker (ed.), *Recht der Werbung in Europa*, Band 1: (Baden-Baden: Nomos, 1996b), 85; Schricker (1994b), 456.

extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public." This article appears to authorize Member States to apply a large variety of measures that go beyond the standards established by the Directive.

As indicated above, the meaning of "minimum harmonisation" in European Community law is far from clear. By stipulating the principle in a specific provision of the Directive the drafters have apparently desired to reduce the uncertainty and to give more clear substance to the concept. In this, however, they have only partially succeeded and the provision does not give unambiguous answer to all queries. One controversial issue concerns the character of more protective measures that could be undertaken or maintained by the Member States. The Directive actually speaks of "provisions", suggesting only legislative or administrative rule-making. It is not certain whether the concept also encompasses judicial interpretation of definitions set forth in the Directive, for instance a stricter standard of deception established through case law.[102]

Another particularly obscure aspect of the Misleading Advertising Directive, which has been less observed in legal doctrine and which seems decisive for determining its binding force, appears to concern the term 'more extensive protection'. The term suggests clarity and exactness both in respect to the categories of interests to be protected and concerning the substance of the measures associated with extensive protection. This, however, is a highly misleading impression. The Directive is certainly *explicit* about the interest groups whose protection can justify a more intensive level of protection: these are consumers, competitors and the general public. Yet, given the plurality of interests and the fragmentation within collective interests like those of competitors and of consumers, the expression 'more extensive protection' (or 'higher level of protection') is in need of further clarification.

It is indisputable that these interests are not always in harmony with each other. Measures that favour one category of interests, say those of competitors, may therefore harm the interests of consumers, or vice versa. Likewise, measures that on the surface seem to promote one category may end up damaging the same group, while willingly or unwillingly benefiting another. Thus, setting an excessively high threshold of deception may create the impression of a measure prompted by concern about consumer interests. In reality, however, an excessive standard may prevent innovative marketing techniques, may stifle competition and thus be ultimately detrimental to consumers. Finally, it is not completely clear whether a measure should more extensively protect all of the three categories or whether protection of one of the categories will suffice. A strict reading of Art. 7 suggests that a national measure will be accepted if it protects more extensively any of the groups of interests mentioned, thus leaving open the question of possible conflict and balance of objectives and effects. It is also apparent that the measure has to aim at higher level of protection "against misleading advertising and the unfair consequences thereof".[103]

[102] Sosnitza (1995), 208.
[103] Art. 1 Directive 84/450/EEC.

Not surprisingly, many commentators were sceptical of the Directive's harmonisation potential. A generous reading of Art. 7 suggests that Member States have been given a blank cheque to introduce or retain almost any kind of national measure that is more extensively regulative than the Directive. It is exactly the minimum character, in combination with the few and rather vague substantive standards introduced, that prompted Schricker to name the Directive "a modest flower of European harmonisation".[104]

The minimum harmonisation approach is generally defended by proponents of high level of protection who fear that insistence on common standards usually implies hard negotiating and compromising and inevitably results in higher level of protection being sacrificed "on the altar of uniformity".[105] Seen from a constitutional and institutional perspective it is the preferred method of integration for those who favour a centralized constitutional model with the least possible transfer of sovereignty from the national to the Community level. From the perspective of the existing national institutional framework this approach is, at least *prima facie*, hardly in a position to pose a serious challenge and produce change.

In a more optimistic view, however, it may be possible to see minimum directives as first steps in a discourse between divergent polities and institutional traditions in a multi-level system of governance. Considering the sluggishness of the legislative process, the wide disparity of national regulations and the unanimity rule which was then the prevailing form of decision-making at Community level Krämer wrote in 1986 that the minimum Directive was "the only way to legislate consumer protection issues at the Community level."[106] Thus minimum directives may have played the role of a Trojan horse that by seemingly unassuming standards and assurances of preserved sovereignty lulls the vigilance of Member States and enables the treading of new paths of European integration.

From the point of view of vertical division of competencies the minimum harmonisation approach implies that the centre of decision-making gravity remains within the ambit of the Member States. But Community institutions are not totally deprived of prerogatives. In particular the Court of Justice has felt competent to interpret minimum Directives and to require national courts to follow these interpretations even concerning minimally harmonized provisions. The technique used has been to stress the obligation of Member States to interpret national law as much as possible in a spirit of loyalty to the purpose of the act (the doctrine of sympathetic interpretation).[107] It is nevertheless true that in their quality of "weak" normative acts these directives do not seem to encourage national actors and national courts to seek guidance from the European institutions.

The added value of the Directive as far as harmonisation of substantive standards is concerned is rightly questioned in doctrine. It is often lamented that the Directive has

---

[104] See Krämer (1986), 161 with reference to Schricker, 'Ein bescheidenes Pflänzchen europäischer Harmonisierung' ZAW-Service, No. 123, 335 ff.
[105] Bourgoignie (1997), 174 ff.
[106] Krämer (1986), 50.
[107] See Ward, Judicial Review and the Rights of Private Parties in EC Law (Oxford University Press, 2000), 158 ff.

applied the principle of the lowest common denominator. It is said that the Directive did not mark any substantial progress in the harmonisation of the rules of marketing because it has left open such controversial questions like the reversed burden of proof, compensation for damages, the prohibition of unfair advertising and the policy towards comparative advertising open. Yet not all the Member States found it unproblematic to comply with the conditions of the Directive. The Commission has had to initiate proceedings under Art. 169 against Belgium and Greece.[108] As a result of the Directive, new legislative acts were introduced in the UK, Spain, Italy, Belgium, France.[109]

Some aspects remain obscure, though. In the case of minimum directives, what is still unclear is how such directives relate to the continued application of the principle of free movement of goods. The famous 'Cassis de Dijon' begins with the recognition that 'in the absence of common rules Member States may keep their standards." What is meant here by common rules? Is it sufficient for a certain area to be addressed at the Community level although not exhaustively harmonized, in order to say that there are common rules, and thus to deprive Member states from the wider policy leeway provided for by Cassis de Dijon? Or is the assessment specific for each and every question that reaches the court? Put somewhat differently the question is: what is the freedom of Member States to legislate in areas harmonized through minimum Directives? Does *Cassis de Dijon* apply in full with all possible justifications (fairness of commercial transactions, consumer protection, etc. or is it only the protection grounds specifically laid down in the Directive that take precedence?

In addition, the Directive does not include any provisions on conflict of laws. Hence, the general principles of private international law continue to apply, meaning that national provisions on advertising could also freely be applied to the advertising of imported products (following a quite well-established *lex loci competitionis* rule), provided that the rules are in harmony with primary Community Law, namely the general provisions of the Treaty on free movement of resources.

Is a minimum harmonisation Directive then totally deprived of harmonisation potential? Although such Directives are not clear and unconditional enough to allow for direct effect, the Court has found other ways of strengthening their effect. It has on multiple occasions underlined that national courts should apply national laws on misleading advertising in harmony with the wording of the Directive (indirect effect).[110]

6.2.2.2 Conditional Liberalisation of Comparative Advertising

A draft rule on comparative advertising was already included in Commission's 1975 proposal for a Directive on Misleading and Unfair Advertising. It stipulated that comparative advertising was to be prohibited when misleading or based on unfairly

---

[108] Case C-329/88 *Commission v Hellenic Republic* [1989] ECR 4159; Case C-360/88 *Commission v Kingdom of Belgium* [1989] ECR 3803.

[109] Schricker (1990), 118 ff.

[110] Case C-14/83 *Von Colson* [1984] ECR 1891, para 26; Case C-106/89 *Marleasing* [1990] ECR I- 4135, para 8. On the minimum harmonization character of Directive 84/450/EEC see Case C-373/90 *Criminal proceedings against X (Nissan)* [1992] ECR I-131, para 7, below Ch. 7.1.1.1.

selected facts.[111] In line with the consumerist stance taken in the mid-1970s, a new draft was submitted in 1978, emphasizing the need to proceed with liberalisation of comparative advertising. Provided that the comparison was objective, representative and not misleading it was considered that comparative advertising could be a source of valuable information for consumers, increasing market transparency.[112] The draft rule was consequently revised from prohibition into permission. The text submitted by the Commission was a laconic provision, formulated in a simple, general-clause-like language. It read:

> Comparative advertising shall be allowed, as long as it compares material and verifiable details and is neither misleading nor unfair.[113]

This definition, however, left too much leeway for interpretation and was criticized as leading to circular reasoning.[114] Since the standard of fairness in advertising was not harmonized and the standard of deception was harmonized only at a minimum level, there was a substantial risk that Member States would interpret this definition in divergent ways and would continue to apply their divergent domestic standards. The objectives of harmonisation and liberalisation would thus be seriously compromised. Importantly, the proposal was firmly opposed by Germany, which refused to proceed with harmonisation in a piecemeal fashion and to treat the problem of comparative advertising outside the general context of unfair competition law. Under the unanimity decision-making procedure valid at the time of voting (before the entry into force of the Single European Act) a single country could effectively block harmonisation attempts.[115] The Misleading Advertising Directive was consequently adopted without the provision on comparative advertising, the harmonisation of which was postponed for a second stage.[116] It took, however, more than a decade for this pledge to materialize.

It was not until 1991 that the Commission returned to the issue of comparative advertising, submitting a revised proposal for harmonisation. The draft took a markedly liberal and consumerist stance. It met, however, with strong opposition on the part of the European Parliament, the Economic and Social Committee and some Member States, notably Germany. The controversy is obvious when comparing the opening recital proposed by the Commission and its revised version by the European Parliament. In the language of the Commission the recital declared that 'the use of comparative advertising must be authorized in all the Member States since this will help demonstrate the merits of the various products within the relevant range; whereas comparative advertising can also stimulate competition between suppliers of goods and services to the consumers' advantage.' The Parliament insisted that such

---

[111] Doc. N. XI/C94/75-E and Memorandum No. XI/C/93/75-E, Nov. 1975, quoted by Spink/Petty (1998), 855.

[112] This position has been criticized in legal doctrine as conflating information with advertising, the latter being a commercial, and hence biased, marketing instrument. See Bourgoignie, 'Comparative Advertising and the Protection of Consumer Interests in Europe: Reconcile the Irreconcilable?' (1992) *European CLJ*, 3 ff., at 4 ff. Cf. Howells/Wilhelmsson, *EC Consumer Law* (Aldershot: Ashgate, 1997), 145.

[113] Draft Art. 4, OJ 1978, No. C 70, 4 ff. On the history of the Directive, see Krämer (1986) 152 ff. Cf. Rijkens/Miracle, *European Regulation of Advertising* (Amsterdam: North-Holland, 1986), 101 ff.

[114] Henning-Bodewig (1999), 385. Similar Ohly (1998/99), 73.

[115] See Gamerith (2003), 143 ff., 146.

[116] Rec. 6 Directive 84/450 includes an explicit commitment to continue with harmonisation of unfair advertising and "as far as necessary" of comparative advertising.

authorisation should be *'subject to stringent restrictions'* and continued "since **only** this will help demonstrate *objectively* the merits of various products within the relevant range."[117]

Similar changes in a restrictive spirit were suggested to almost every paragraph and article of the proposed directive. In the opinion of the European Parliament the main rule was to be amended as follows:

> Comparative advertising shall be allowed *only* if it *objectively* compares material, relevant, *at all times* verifiable, *objectively determinable, fairly chosen* and *representative* features of competing goods and services (emphasis added).[118]

All these additional restrictions set out to tone down the liberalisation tenor of the directive.[119] The Social and Economic Committee underlined that comparative advertising can be a useful source of consumer information, provided however, that it is strictly regulated. It insisted that "the main aim of the proposal should extend beyond consumer protection" and that "the rights of the manufacturer whose product is being compared must be respected on equal terms with those of the consumer."[120] The Commission Draft was basically blocked.

A renewed effort to advance on the issue of comparative advertising was undertaken under the British presidency in 1994. A revised and much more restrictive proposal was submitted by the Commission apparently in an attempt to win the support of the opponents to the excessively liberal approach.[121] This proposal, however, provoked the indignation of those who saw in a Europe-wide regulation of comparative advertising a chance for intensifying competition and improving consumer choice. As Spink and Petty remark in regard to the revised Commission proposal:

> Predictably, this concession alienated those with a permissive agenda, and in fact it did little to win over restrictive member States. In particular, the influential German camp remained implacably opposed to the measure.[122]

During the following years each of the conditions was rigorously negotiated before achieving the compromise of the present Directive. It should be noted that not even the final version attracted unanimous support. Germany and Finland voted against the Directive. Several Member States were induced to make express reservations concerning the interpretation of some of the Directive's provisions. Germany insisted on writing in the Council minutes that in its opinion the prohibition of comparative advertising should not be interpreted so as to include comparisons made at a customer's request in the course of purchase counselling.[123] Under the new Art. 189b decision-making procedure majority did, however, suffice and the Directive was adopted in October 1997.

---

[117] OJ 1992 C 337/136, 137.
[118] OJ 1992 C 337/136, 139.
[119] Spink/Petty (1998), 857.
[120] See para 2.2 , Opinion of the ECOSOC, OJ 1992 C 49/35.
[121] COM (94) 151 final, OJ 1994 C 136/4.
[122] Spink/Petty (1998), 857.
[123] *Ibid.*; cf. Henning-Bodewig (1999), 394, fn. 67.

It would of course be too simplistic to equate a liberal approach to comparative advertising with a pro-consumer attitude and conversely to treat all restrictions on comparative advertising as being against the consumer interest. Experience has shown that it is extremely difficult to design a comparative advertising which is mostly informative and which does not contain any element of deception, partiality or parasitism. It may not be easy to strike a balance between (reconcile) the need to protect consumers from deception and undue pressure, on the one hand, and the interest of consumers in increased market transparency and information, on the other.[124] At the same time it is equally undisputed that the severe limitations on comparative advertising have their origin from the times of regulated corporatist economy and have as their objective the protection of existing competitive positions. Whereas it is clear that the effects of the liberalisation of comparative advertising should not be overrated, the massive resistance to liberalisation provides a nice illustration of the difficulties of breaking with ingrained habits.

The definition

Recital 6 of directive 97/55/EC makes clear that the desire of the European lawmaker has been "to provide a broad concept of comparative advertising to cover all modes of comparative advertising." In line with this intention, Art. 2(2a) defines comparative advertising as "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor." This provision is decisive for determining the scope of the Directive, but is unfortunately susceptible to conflicting interpretations. The strangest aspect of the definition is the absence of any requirement of true comparison. On literal interpretation, this provision suggests that a mere mention of the name or identification of a competitor in one's own marketing suffices to subsume an advertisement under the scope of the Directive. Yet it is unclear how this very broad definition relates to other provisions of the Directive, notably the conditions for admissibility. Recital 11 of Directive 97/55/EC provides that the conditions of comparative advertising should be cumulative and respected in their entirety. Are these conditions then applicable to all hypotheses of comparative advertising or do they apply only where relevant?[125]

The conditions

The final catalogue of conditions that have to be observed for a comparison to be admissible is indeed impressive. Art. 3a(1) contains more than ten different criteria for comparative advertising has to comply with. As with any other advertising comparative advertising must not be misleading (lit a). It has to compare goods meeting the same needs or intended for the same purposes (lit b). The core requirements are laid down in lit. (c), which stipulates that comparative advertising shall compare objectively "one or more material, relevant, verifiable and representative features of those food and services, which may include price." Despite the appearance of clarity, few of these criteria are easy to construe. For instance, what is the meaning of verifiability? Does it imply that comparisons should only involve

[124] See Kur (1993), 436 ff, 447-48; Bourgoignie (1992), 3 ff.

[125] For instance Art. 3a(1)(b) and (c) require that such advertising 'compares goods or services'; (b): "it compares *goods or services* meeting the same needs or intended for the same purpose"; (c): "it objectively compares one or more material, relevant, verifiable and representative features of those *goods and services*, which include price" (my italics)

factual claims and not subjective valuations? Such an interpretation would practically entail the prohibition of any comparison based on subjective, emotionally-coloured traits such as taste, value, conformity with fashion trends, etc.[126] Who should be in a position to verify the truthfulness of the comparative claim and at what moment?[127] The consumer addressed at the moment of purchase? Or would it suffice if the advertiser can substantiate his claim upon request by the court at the time of legal dispute? When are certain features to be regarded as representative? Is price always a representative feature?

More importantly, the criteria in Art. 3a(1)(c) do not seem to allow for exceptions. Recital 11 of Directive 97/55/EC provides that the conditions of comparative advertising should be cumulative and respected in their entirety. Taken literally, this provision threatens to prohibit quite innocent forms of comparison, such as comparison at a customer's request, for instance because the features compared are irrelevant and non-representative. The same applies to the hypothesis of comparison as a form of defence (*Abwehrvergleich*). Many commentators therefore express misgivings as to the potential of the Directive to effectively liberalise comparative advertising. In some respects the new conditions may lead to a more restrictive regime even in countries like Germany, where liberalisation was most needed.[128] We shall return to this point when exploring the effects of European law on the national institutional framework of fair trading in Germany and Sweden.

Several requirements are specifically intended to prevent any possible encroachment on recognised intellectual property rights. Thus comparative advertising must not cause confusion between the advertiser and a competitor or between the advertiser's trade-marks, trade names, other distinguishing marks, goods or services and those of a competitor (Art. 3a(1)(d)).[129] It must not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products (g).[130] It must not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name (h). Finally under the notorious pressure of French commercial interests, a special safeguard was included for products with designation of origin. Comparison with such products is only permitted if it relates in each case to products with the same designation (lit f).

Earlier drafts of the Directive and in particular the 1991 Commission proposal went even further in this regard. This proposal required that comparative advertising should not 'aim principally to capitalize on the reputation of a trade mark or trade name of a competitor'.[131] In the literature criticism was voiced that the Draft Directive was going further than the Trade Mark Directive in ensuring extra protection beyond the scope of exclusive intellectual property rights.[132] It was pointed out that a comparison by definition involved taking advantage of a competitor's reputation. In this the interests

[126] See Henning-Bodewig (1999), 391; Spence/Ohly (1999), 693.
[127] BGH GRUR 1996, 983 ff., at 984 („Preisvergleich").
[128] Henning-Bodewig (1999), 385; Ohly/Spence (1999), 693; cf. Bernitz (2002a), 11 ff., 21 and 24.
[129] The text of the draft of 1991 was even stricter prohibiting comparative advertising *likely* to create confusion.
[130] On distinguishing marks and unfair advantage, see Case C-112/99 *Toshiba* [2001] ECR I-7945.
[131] COM (91) 147 final, Draft Art. 3a(1)(c).
[132] Kur (1993), 449 ff.

of owners of strong marks may ultimately have gained the upper hand of the original concern for the consumer interest.[133]

Summing up, the Comparative Advertising Directive is a typical example of accommodation of diverse and often contradictory national regulatory traditions and ideologies under a seemingly coherent umbrella concept. The starting position with this Community measure has been a thrust towards liberalisation of comparative advertising. In the melting pot of the Community legislative process, however, this initial ambition has been watered down and even risks being turned into its opposite. The concepts are numerous and amenable to different interpretations. In countries with high litigiousness these concepts open the door to endless disputes and may thus exert a deterrent rather than encouraging effect on the incentives to use comparative advertising.

Full harmonisation

One can say that harmonisation in the field of comparative advertising proceeded in a way opposite to that of general unfair competition law. In the case of unfair competition law developments went from a full-fledged harmonisation proposal with a number of specific provisions to a rather scaled-down version focusing on misleading advertising only. In the case of comparative advertising, on the contrary, negotiations moved from a vague general clause towards an ever-increasing catalogue of detailed and elaborate conditions for admissibility.

This result can arguably be attributed to the form of harmonisation chosen. In contrast to its counterpart on misleading advertising, the Directive on Comparative Advertising was conceived from the very outset as an act of full harmonisation. The main thrust of the Directive, namely to liberalise comparative advertising throughout the Community, could be significantly undermined if Member States were free to persist with their divergent national approaches, even if under commendable objectives like ensuring higher level of protection. Art. 7 was consequently amended as follows:

> 1. This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection with regard to misleading advertising, for consumers, persons carrying on a trade, business, craft or profession, and the general public.
> 2. Paragraph 1 shall not apply to comparative advertising as far as the comparison is concerned.

The minimum harmonisation approach taken in regard to misleading advertising is expressly abandoned in the field of comparative advertising.

However, by raising the intended level of harmonisation, the act has unleashed a process of legislative bargaining and normative competition. Instead of purging the regulative jungle of obsolete and antiquated national restrictions, that process eventually appears to have resulted in denser net of regulations than prior to harmonisation. The various national rules do not merge into a single, straight-forward and, ideally, improved standard, but instead are superposed in multiple layers of

[133] Kur (1993), 457.

regulation whose validity now extends beyond national boundaries. It is tempting to assume that the political process of reassuring powerful vertical as well as horizontal interests has provoked not a race to the bottom, but rather a "race to the top", in many respects completely at variance with the original legislative intentions.

In a different context, Joerges and Brüggemeier find a similar dependency between more direct intervention in national regulatory autonomy via broad application of the mutual recognition principle and increased pressure toward regulation at the Community level.[134] This process of re-regulation tends to result in more stringent regulation.

> ...the implementation of mutual recognition encountered many practical difficulties. Even in those fields where it has been carried out, the ensuing framework contains re-regulatory elements at both the Community and the Member State level. In other areas, notably in all the more recent directives concerning the harmonisation of private law, the Community tends to promote relatively strict mandatory provisions which usually raise pre-existing levels of protection. If mutual recognition was a strategy to enhance consumer choice – by exerting pressure on regulated economies, at the same time by improving the chances of less developed and less strictly regulated economies – it has been only partially successful.[135]

Although national regulative concerns should be taken seriously, the detail of regulation suggests a fierce struggle to preserve existing national restrictions, even at the expense of reducing the efficiency of the overall regime. We can arguably observe an instance of the more general phenomenon described by Weiler as the relationship between "hard law" and "hard law-making". The relationship is formulated in the following way:

> The "harder" the law in terms of its binding effect both on and within states, the less willing states are to give up their prerogative to control the emergence of such law or the law's "opposability" to them. When international law is "real", when it is "hard' in the sense of being binding not only on but also in states, and when there are effective legal remedies to enforce it, decision-making suddenly becomes important, indeed crucial.[136]

The clumsy and heavy text of the Directive demonstrates convincingly that 'hard law'-making does not necessarily mean 'good law'-making. It appears that attempts to satisfy all regulatory concerns and, arguably, to encroach as little as possible on national political arrangements, tend to produce legal acts that are difficult to interpret and implement.[137]

---

[134] Joerges/Brüggemeier (1993), 233 ff. See in particular at 253 concerning the Package Tour Directive: „Das Ergebnis ist ... ein Reisevertragsrecht, das die in den Mitgliedstaaten verfolgten Schutztechniken kombiniert und dadurch überbietet." Similar regulative drift is discussed at 254 concerning the Doorstep Selling Directive.

[135] Joerges (1994), 29 ff., at 42 f.

[136] Weiler (1999), at 34.

[137] Similar Ohly/Spence: „Die Richtlinie ist in vielerlei Hinsicht ein schwieriges Regelwerk, unklar in ihrem Anwendungsbereich, häufig allzu deutlich das Ergebnis politischer Kompromisse und problematisch hinsichtlich ihrer mögichen Auswirkungen. Obwohl sie vielfach als Massnahme der Liberalisierung begrüsst wurde, beschränkt die Richtlinie den Bereich erlaubter vergleichende Werbung in Grossbritannien und geht hinsichtlich der Liberalisierung des deutshen Rechts nicht so weit, wie teliweise erhofft." *Ibid.*, (1999), 682.

Apart from the questionable coherence of the catalogue of conditions in Art. 3a(1)(a)-(g), uncertainty as to the success of the original liberalising intentions flows from conflicting interpretations of Art. 7. In the original Commission proposal the second paragraph of Art. 7 simply reads: "Paragraph 1 shall not apply to comparative advertising." The Commission's commentary to this text was:

> Article 7 of the Directive 84/450/EEC allows Member States to retain or adopt provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession and the general public. This rule will not apply to comparative advertising, given that the objective of the proposal is to allow such advertising in all Member States under the same conditions. [138]

The second paragraph was thus clearly intended as a derogation from the minimum harmonisation approach in the Misleading Advertising Directive. Such unconditional application of the full harmonisation principle, however, unleashed fresh concerns among Member States about a possible weakening of regulative autonomy. The Nordic countries in particular, Sweden not least, feared that by limiting their competence to regulate comparative advertising Member States might be indirectly and unduly prevented from regulating other aspects of advertising as well. For instance, an advertising containing comparison can be designed in a way which is particularly intrusive on consumers' privacy or be unfair on other grounds that do not relate to the comparison as such. It can concern products or services the advertising of which is restricted on public interest grounds such as protection of children or of public health. The feeling was that liberalisation of comparative advertising should not have 'spill over' effects on other aspects of advertising regulation. On Sweden's initiative, therefore, the second paragraph of Art. 7 was amended to include the phrase "as far as the comparison is concerned" *in fine*. This waiver was given a counterpart in the text of the new Art. 3a(1) reading "Comparative advertising shall, *as far as the comparison is concerned*, be permitted when the following conditions are met..." This editorial intervention was intended to reassure the Nordic countries that the full harmonisation approach taken in the Directive would not lead to decreased level of consumer protection.[139]

The question of whether the standards established in the Directive preclude only stricter national regulation, or likewise preclude a more liberal regime of comparative advertising, has proved to be particularly controversial. The first paragraph of the amended Art. 7 addresses only more stringent national provisions, allowing such provisions in the area of misleading advertising. The second paragraph states that the above approach does not apply to comparative advertising. A literal interpretation of the two sections read in conjunction leaves the impression that Member States remain free to apply laxer rules to comparative advertising. This interpretation is arguably more in line with the liberalisation purpose and spirit of harmonisation.[140] If Member States could guarantee that comparative advertising would be allowed when the

---

[138] COM (91)147 final – SYN 343, 21 June 1991.

[139] For details on the Swedish position in the course of harmonisation negotiations, see Dölling, 'Jämförande Reklam – Sverige och EU' (Stockholm: IFIM Series Nr. 84, 1996), 60.

[140] In this sense Sack (1998a), 263, 270.

conditions listed in Art. 3a of the Directive are met, this would secure the required liberalisation of comparative advertising in Europe.

Yet a number of recitals and express provisions in the Directive prompt an opposite conclusion. Thus Rec. 14 refers expressly to control of comparative advertising, and to 'unpermitted comparative advertising', stating:

> (14) Whereas provisions should be made for the legal and/or administrative means of redress mentioned in Articles 4 and 5 of Directive 84/450/EEC to be available *to control* comparative advertising, which fails to meet the conditions laid down by this Directive; whereas according to the 16th recital of the Directive, voluntary control by self-regulatory bodies to eliminate misleading advertising may avoid recourse to administrative or judicial action and ought therefore to be encouraged; whereas Article 6 applies to *unpermitted* comparative advertising.

This recital corresponds to the text of the amended Art. 4(1)-(2), reading:

> (1) Member States shall ensure that adequate and effective means exist to combat misleading advertising and for the compliance with the provisions on comparative advertising in the interests of consumers, as well as competitors and the general public.

The Directive further provides that the remedies available in the case of misleading advertising, namely ordering its cessation or prohibiting its imminent publication, shall equally be at hand for combating the "unpermitted comparative advertising".[141] The same interested parties can invoke these remedies in both cases.

The language of these provisions can only be understood if the new Directive is binding in its entirety and if it sets a comprehensive standard for comparative advertising. It leaves the compelling impression that comparative advertising which does not correspond to the detailed requirements laid down in Art. 3a should be prohibited and that Member States are obliged to provide adequate and effective means for the cessation of such unpermitted comparative advertising in much the same way as misleading advertising. Many authors are consequently inclined to think that the standards of the Directive set a double threshold, limiting Member States' competencies both upwards, in direction to establishing more stringent regulation, as well as downwards in the direction of more permissive rules.[142] This is indeed an interpretation creating the most favourable conditions for common cross-border marketing campaign, guaranteeing uniform conditions of competition in the Common Market and sustaining the *'effet utile'* of Community Law. At the same time it places a

---

[141] See Art. 4(2), first and second indent: "to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of the misleading advertising or *unpermitted comparative advertising*, or if the misleading advertising or *unpermitted comparative advertising* has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of, such publication" (my italics).

[142] Cf. Henning-Bodewig: "Vor dem Hintergrund von Sinn und Zweck der Richtlinie lässt sich hieraus m. E. kein anderer Schluss ziehen lassen, als dass die Richtlinie einen nach oben und unten verbindlichen Standard setzt.", Henning-Bodewig (1999), 386 with further references; cf. Tilmann (1999), 551.

heavy burden on the European legislator to have provided an ultimate and exhaustive regime and for the further implementation and interpretation of the specific rules.

The question about the scope of harmonisation achieved with the Directive is even more puzzling if an attempt is made to clarify the relation between the provisions on comparative advertising with those on misleading advertising. According to the Art. 3a(1)(a), comparative advertising shall be permitted when "it is not misleading according to Arts. 2(2), 3 and 7(1)". Art. 7(1) of the Directive in its turn embodies the minimum harmonisation principle with regard to misleading advertising. It provides that Member States should be free to adopt or retain provisions with a view to ensuring more extensive protection with regard to misleading advertising for consumers, competitors and the general public. The explicit reference to Art. 7(1) prompts the conclusion that, in respect of the assessment of deception, the minimum harmonisation principle continues to apply even for comparative advertising. Full harmonisation thus obtains only in respect to the comparison narrowly construed, but not as to determining whether it is misleading.

When in the next chapter we explore the different ways of 'appropriating' EC law in national law, we will return to this issue and will notice that this is not the only possible reading of this complex provision. An alternative interpretation has been advanced, especially in the German scholarly literature. It takes as its starting point Art. 7(2) of the Directive and emphasizes the phrase "as far as the comparison is concerned".[143] From this limitation commentators conclude that misleading advertising is subject to a double standard. Within the context of a comparison, deception should be assessed by the minimum objective criteria laid down in the Directive. Outside the narrow context of the comparison Member States are free to apply a deviant and stricter standard of deception.[144]

6.2.2.3 Fair trading in the TV-Directive

The Television Broadcasting Directive[145] was adopted in 1989 and has been recently amended through Directive 97/36/EC of the European Parliament and of the Council.[146] The main objective of the Directive is not the harmonisation of marketing practices, but to achieve free movement of television broadcasts and to facilitate the establishment of television operators throughout the Community. The legal basis of harmonisation is therefore found in Arts. 57(2) and 66 of the EEC Treaty. Harmonisation of rules and regulations on television advertising fulfils only a subordinate function. Yet, divergent national rules on television advertising proved to be one of the main obstacles to the free circulation of television broadcasts. Therefore in a thrust to achieve a veritable Common Market of broadcasting services, the Community embarked on an ambitious programme of harmonisation of advertising regimes (Chapter IV). Admittedly, not all of the rules on advertising addressed in the Directive belong to the domain of fair trading law narrowly defined. Ethical aspects, protection of public interests like health and morals, protection of minors are among the main reasons for regulation in this area. Indirectly, however, through the

[143] See Art. 7(2) as amended by Directive 97/55/EC.
[144] See Henning-Bodewig (1999), 386; Sack (1998a), 271; Tilmann, 'Anwendungsbereich und Bindungswirkung der Richtlinie Vergleichende Werbung' (1999) *GRUR*, 546 ff., 550.
[145] Directive 89/552/EEC, OJ 1989 L 298/23.
[146] Directive 97/36/EC amending Directive 89/552/EEC, OJ 1997 L 202/60.

requirement of lawfulness of any marketing and advertising as an essential part of the concept of fair commercial practice, these requirements become relevant for harmonisation of fair trading law as well.

Harmonised rules on advertising
The Television Directive introduces a definition of television advertising comes close to but is not identical with that in the Misleading Advertising Directive. According to Art. 1(c) television advertising is:

> ... any form of announcement broadcast in return for payment or for similar consideration by a public or a private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations.

In its Chapter IV the Directive lays down a number of substantive standards concerning television advertising and sponsorship. Advertising should be easily recognisable (Art. 10(1)), neither subliminal nor surreptitious (Arts.10(3) and 10(4)). It shall not prejudice respect for human dignity, include any discrimination on grounds of race, sex, or nationality, be offensive to religious or political beliefs, encourage behaviour prejudicial to health or to safety, encourage behaviour prejudicial to the protection of the environment (Art. 12). These are all rather stringent ethical standards that go far beyond the conventional concerns about consumer and competitor interests. In addition it has been considered necessary to provide special protection to particularly vulnerable groups such as minors. Advertising to children under Art. 16 is subject to strict requirements of moderation and self-restraint.[147]

Obviously, considering the powerful effect of television as a medium and in particular the intrusiveness of television advertising in the private sphere of the individual viewer, Member States have been much more inclined to accept more tangible restrictions in the freedom of advertisers and broadcasters. Similar 'special treatment' of television advertising is noticeable in respect to advertising of particular products, such as cigarettes and tobacco, drugs and alcohol. Television advertising of cigarettes and tobacco is absolutely prohibited under Art. 13 of the Directive. The same goes for the advertising for medicinal products available only on prescription in the Member States within whose jurisdiction the broadcast falls (Art. 14). The advertising of alcoholic beverages is submitted to detailed restrictions (Art. 15).

Form of integration: selective minimum harmonisation with home country control in the harmonized area
The Television Directive paved the way to a different harmonisation approach in the fair trading area. It relies on a mix of two familiar techniques, namely that of

---

[147] The full provision reads:
Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection:
(a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
(b) it shall not directly encourage minors to persuade their parents or others to purchase the foods or services being advertised;
(c) it shall not exploit the special trust minors placie in parents, reachers or other persons;
(d) it shall not unreasonably show minors in dangerous situations.

(selective) minimum harmonisation and that of mutual recognition. The Directive does not offer a comprehensive legal framework for television broadcasting but harmonizes only some of the most important areas of regulation.[148] In these regulated areas, called 'the coordinated field', deviation by Member States from the common standard is allowed in the direction of more stringent requirements but only in respect of domestic service-providers. Art. 3(1) of the Directive as revised in 1997, lays down:

> Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by the Directive.[149]

Thus a sort of one-sided minimum harmonisation is introduced, where stricter regulation binds only economic operators on the territory of the regulating Member States, but has no effect on broadcasting services originating from other Member States. In the scope of the coordinated field the principle of minimum harmonisation, in other words, is severely curtailed.

In respect of broadcasts from other Member States the Directive codifies the principle of mutual recognition. Member States are not allowed to limit or obstruct the reception or retransmission of broadcasts from other Member States on grounds that come within the coordinated field, provided the broadcasts comply with the minimum standards of the Directive. Derogation from this principle is allowed only in certain areas of paramount public interest defined in Arts. 22a and 22b and following a specific consultation procedure mediated by the Commission (cf. Art. 2a(2)). As a consequence of this approach in the coordinated areas the mechanism of regulatory competition is consciously set off in order to complement the effective integration achieved by way of substantive standards.[150]

The gist of the described integration approach is that in the areas 'harmonised by the Directive', only one country, 'the one that has jurisdiction over the broadcaster', shall exert control over the broadcasts. This distribution of jurisdiction between the Member States is usually referred to as the 'home country control' principle.[151] Recital 14 of the Preamble to the 1989 Directive reads:

---

[148] For the areas pertaining to fair trading, the relevant rules are listed above.

[149] Cf. also Rec. 26, Preamble Directive 89/552/EEC "Whereas in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction".

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

[151] A number of alternative concepts have been in vogue, such as 'transmission state principle' ('sändarlandsprincipen'), or the more classical term 'country-of-origin principle' familiar from the *Cassis de Dijon* jurisprudence. Given the Court's interpretation of the notion of jurisdiction in close connection with the broadcaster's place of establishment, the principle would most strictly be denominated 'the country-of-establishment principle'. See Lans, *Jurisdiktion över TV sändningar i EU* (Stockholm: Juristförlaget, 1996), 43.

> Whereas it is necessary in the common market that all broadcasts emanating from and intended for reception within the Community and in particular those intended for reception in another Member State, should respect the law of the originating Member State applicable to broadcasts intended for reception by the public in that Member State.

The 'home country control' principle displays a passive and an active aspect. The passive aspect consists in the obligation of Member States to guarantee unhindered reception and retransmission of broadcasts originating from other Member States of the Community. According to Art. 2a(1) of the TV Directive as revised in 1997:

> Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.[152]

The passive aspect largely corresponds to and incorporates the principle of mutual recognition familiar from the *Cassis de Dijon* jurisprudence of the ECJ and from the Single European Act.

Something often disregarded in the discussion about the harmonisation approach in this Directive is that the 'home country control' principle contains not only a passive but also an active obligation for Member States laid down in Arts. 2(1), 3(2) and 3(3) of the Directive as revised in 1997.[153] According to Art. 2(1):

> Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.

This obligation obviously seeks to avoid one much-feared risk, namely that Member States might lack the necessary incentive and resources to monitor compliance with their domestic legislation of broadcasts intended solely for reception abroad.[154] Such failure may not necessarily be a manifestation of negligence or discrimination towards viewers and consumers from other Member States. Underenforcement may have a simple practical explanation in existing language barriers. Broadcasts transmitted exclusively in the language of the recipient country, which is different from that of the regulating country, may yield to effective monitoring only at the cost of substantial expenditure in the country of establishment. Such suboptimal monitoring could create a state of *de facto* legal vacuum (safe haven) for broadcasters willing to avoid restrictive regulations in the country of destination. By obliging Member States to ensure compliance with their domestic law on the part of all broadcasters under their jurisdiction, the competent enforcement agencies are required to pay particular attention to such broadcasters and to devote special resources to monitoring.

In addition, a responsibility is imposed on Member States to ensure that broadcasters under their jurisdiction comply with the provisions of the Directive itself. Art. 3(2)

---

[152] Equivalent to Art. 2(2) of Directive 89/552/EEC, OJ 1989 L 298/23.
[153] Cf. Arts. 2(1) and 3(2) of Directive 89/552/EEC, OJ 1989 L 298/23.
[154] See Bernitz, 'TV-reklam och räckvidden av svensk marknadsrätt' (1997-98) *JT*, 479 ff., 480.

Directive 97/36/EC seeks to guarantee that Member States, including those who have failed to transpose the Directive into their national legislation, could be forced to abide by the standards established in the Directive. The objective is to provide fair conditions of competition throughout the Community.[155]

The correlation between active and passive obligations under the Directive is designed to create a climate of mutual confidence and undisturbed flow of television broadcasting services throughout the Community. In practice, however, many Member States, especially those priding themselves on high protective standards, have on multiple occasions expressed serious concerns about the deficiencies of the present mechanism. Despite the mandatory language of the above provisions experience has shown that enforcement of these obligations has been cumbersome and unsatisfactory.[156] Both active obligations have been considered of little worth unless combined with effective mechanisms for those immediately affected, including individuals and public institutions in the receiving countries, to institute proceedings for effective compliance or at least to trigger the attention of a competent local administrative authority. This has been acknowledged in the new amended version of the Directive.[157]

Finally, it should not be forgotten that the home country control obtains only in areas which are covered by the Directive. In non-coordinated areas Member States retain their full regulative powers provided they do not violate other obligations flowing from primary Community law, notably the provisions on free movement of goods and services.

The efficiency of the harmonisation approach advanced in the TV Directive depends essentially on the clear and unambiguous interpretation of several bearing principles and concepts. Since the main thrust of the Directive has been to subject broadcasters to only one set of rules and regulations, clear identifiability of the country exercising jurisdiction over the individual broadcaster has been of major importance. In the original version of the Directive, the term 'jurisdiction' was not clearly defined, leaving much room for possibly conflicting interpretations.[158] At the same time, the jurisdiction issue is of particular importance when it comes to the application of the 'home country control' principle, which is at the core of the Directive. Arriving at an authoritative and clear interpretation of the concept was therefore quite crucial. In a series of judgements the ECJ was faced with this issue in the case of *Commission v. UK*.[159] After a complex and multifaceted linguistic, teleological and historical analysis of both the Directive and the preparatory documents to it, the Court concluded that the notion 'jurisdiction' should be equated with the place of establishment of the broadcaster. With multinational companies or where the broadcaster had its

[155] Cf. Rec. 16 Directive 97/36/EEC: "Whereas it is necessary to ensure the effective application of the provisions of Directive 89/552/EEC as amended by this Directive throughout the Community in order to preserve free and fair competition between firms in the same industry."
[156] See the discussion in connection with the *De Agostini* case, Ch. 7.1.1.3 below.
[157] See below on enforcement. Cf. Henning-Bodewig, 'Die EG Fernsehrichtlinie von 1989' in: Schricker/Henning-Bodewig, *Neuordnung des Wettbewerbsrecht* (Baden-Baden: Nomos, 1998/1999), 81 ff., at 84.
[158] On the developments before the amendment see Lans (1996).
[159] Case C-222/94 *Commission v. United Kingdom* [1996] ECR I-4025.

establishment in several places, the place of establishment was regarded to be the place where the broadcaster has the centre of his activities. The subsequent amendment of the Directive codified the principles developed in the ECJ case law.[160]

A broadcaster can benefit from the 'one country control' principle of the Directive as long as their establishment in a foreign country is not made with the primary objective of circumventing the legislation of the recipient state. This specific application of the general principle that no one can profit from their unlawful conduct has been explicitly recognized in Community law in the decision *van Binsbergen* (wherefrom the "*van Binsbergen* principle").[161] The decision concerned interpretation of the Treaty provisions on freedom to provide services (Arts. 49 and 50, ex Arts. 59 and 60). Mr Van Binsbergen, of Dutch nationality, was entitled to act for parties before Dutch courts and tribunals where representation by an 'advocaat' was not obligatory. In the course of legal proceedings before a Dutch Court Mr. Van Binsbergen transferred his residence to Belgium. This prompted the court to contest his capacity to act as legal representative, since under Dutch law this right was only reserved for persons established in the Netherlands.

In the Van Binsbergen case the ECJ confirmed the direct applicability of the provisions on free movement of services. At the same time, the Court acknowledged that:

> ... a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state.[162]

The principle was found applicable to the field of television broadcasting, in the cases *Veronica*[163] and *TV 10*.[164] The first case concerned restrictions under Dutch Media Law for Dutch broadcasting organizations to help set up commercial radio and television companies abroad for the purpose of providing services directed towards the Netherlands. The Court reiterated the van Binsbergen principle and upheld the Dutch legislation.

The van Binsbergen principle is not codified in the text of the Television Directive, but it was included in the form of a recital in the Preamble of the amendment Directive 97/36/EC:

> (14) Whereas the Court of Justice has constantly held that a Member State retains the right to take measures against a television broadcasting organization that is established in another Member State but directs all or most of its activity to the territory of the first Member State if the choice of establishment was made with a

[160] See now Art. 2(2) of Directive 97/36/EC.
[161] Case C-33/74 *Van Binsbergen* [1974] ECR 1299.
[162] *Ibid.*, para 13.
[163] Case C-141/91 *Veronica* [1993] ECR 487.
[164] Case C-23/93 *TV 10* [1994] ECR I-4795.

> view to evading the legislation that would have applied to the organization had it been established on the territory of the first Member State;

Another fundamental issue for the effective implementation of the Directive is defining the objective scope of harmonisation (coordinated field). The distinction between rules and areas harmonised by the Directive and areas outside the scope of the Directive becomes crucial for determining its effect.[165]

6.2.2.4 Distance Selling Directive

The Distance Selling Directive added new pieces to the patchwork of harmonized fair trading rules.[166] The interest of the Community in this type of contracts is explained by the dual logic of consumer protection and market integration. From a consumer point of view contracts concluded at a distance involve increased risk, since they exacerbate the information asymmetry in seller-buyer relations. Consumers are, first, not in a position to inspect the goods offered prior to purchase and, second, occasionally exposed to psychological pressure to buy which additionally reduced their ability to exercise free choice. From an integration perspective, however, contracts concluded at a distance reveal a special attraction with their promise to overcome physical barriers to trade and to harness the existing new communication technologies (fax, telephone, tele-shopping, internet) in the interest of the internal market.[167]

The Directive deals predominantly with contract law issues, its aim being to enhance consumer protection in the particular context of contracts concluded at a distance, such as requirements concerning prior information, right of withdrawal, performance, payment, etc.[168] There are, however, a number of provisions with clear implications for fair trade practices. Thus, the provisions on pre-contractual information in Arts. 4 and 5 are partly concerned with commercial communication and pertain to fair trading law.[169] It is noteworthy that Art. 4(2) when stipulating the information that has to be provided by the supplier prior to conclusion of any distance contract, makes reference to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable to give their consent, such as minors. Art. 9 obliges Member States to take measures to effectively prohibit inertia selling, i.e. the supply of unsolicited goods against payment.

Most importantly, for the purpose of protecting consumers from high-pressure selling methods Art. 10 requires that restrictions are introduced on the use of certain means of communication. For automated calling machines and facsimile machines a so-called 'opt-in' regime is introduced meaning that consumers can be solicited by advertising via these technical means of communication only when they have given their express consent beforehand (Art. 10(1)). For all other means of distance communications

---

[165] On this issue see the *De Agostini* ruling of the ECJ discussed below, Ch. 7.1.1.3.

[166] Directive 97/7/EC, OJ 1997 L 144, 4.6.1997, 19 ff.

[167] Rec. 3 Directive 97/7/EC seeks to unite the consumer-related and the internal market logic: "Whereas, for consumer, cross-border distance selling could be one of the main tangible results of the completion of the internal market ..."

[168] See Art.4-8 Directive 97/7/EC.

[169] These provisions are mentioned as setting out rules for advertising and commercial communication in Annex 2 to the Proposal for a Directive concerning business-to-consumer commercial practices in the Internal Market, COM (2003) 356 final.

Member States are required to ensure that suppliers shall use these means only where there is no clear objection from the consumer (Art.10(2)). The question of how this second regime should be implemented in practice is left to the Member States. One possibility is to set up so called 'opt-out' registers where consumers could notify their unwillingness to receive commercial communication via the respective medium. Another possibility is to treat aggressive use of means of distance communication as unfair commercial practice under general *bonos mores* clause or under a special provision. Art. 10 derives its philosophy from the right to privacy as laid down in Arts. 8 and 10 of the European Convention for the Protection of Human Rights.[170] It thus demonstrates the intimate link between consumer rights and individual constitutional rights and fundamental freedoms.

Form of harmonisation
The Distance Selling Directive is a classical minimum harmonisation directive. It proceeds from the premise of freedom of Member States to introduce more stringent provisions ensuring higher level of consumer protection in the areas covered by the Directive (Art. 14 Directive 97/7/EC). These provisions, however, remain subject to a compatibility test with the Treaty, notably with the basic Community freedoms.

6.2.2.5 Fair trading in the E-commerce Directive
The E-commerce Directive was conceived as a normative Community instrument promoting business on the Internet. Its main thrust is to simplify the legal environment for electronic commerce, to settle regulative controversies and thus increase predictability and promote business transactions. In the words of the Explanatory memorandum the Directive aims at setting forth a "light, evolutionary and flexible" regulative framework of electronic commerce. Obviously 'light' implies a minimalist and lean attitude towards harmonisation in the spirit of subsidiarity. 'Evolutionary' indicates a gradual approach with recurrent reassessment and readiness to modify inefficient solutions. Finally, 'flexible' presupposes keeping in tact with the rapidly changing technology and 'sociology' of electronic communications and avoiding petrified regulative solutions. Meanwhile, by looking at the abundant literature that has emerged to interpret the few provisions of the Directive, in particular in the German debate, one cannot help querying the successful realization of these intentions.

At the centre of the Directive and decisive for defining its scope of application is the concept of *information society service (ISS)*. The Directive does not provide any independent definition of this term, but refers to the definition given in Directive 98/4/EC.[171] Art. 1(2) of that Directive describes as ISS "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services." Of practical significance for the clarification of the concept is the indicative list of services not covered by the definition, to be found as Annex V of the Directive.[172]

---

[170] See Rec. 17, Directive 97/7/EC.
[171] Directive 98/34/EC, OJ 1998 L 204/37 as amended by Directive 98/48/EC, OJ 1998 L 217/18.
[172] Thus consulting an electronic catalogue in a shop is not an ISS since the parties are present (Annex V, 1 b); telephone and telefax services, direct marketing or consultation are not ISS, because not provided by electronic means (Annex V, 2) and television and radio broadcasting are excluded because involving point to multipoint transmission and no provision upon individual request (Annex V, 3).

In the Explanatory memorandum to its proposal the Commission makes clear that the concept is intended to be broad. It covers both business-to-business and business-to-consumer transactions. It encompasses not only sales of goods and services, but also services provided free of charge (typically, financed by advertising). In this the Directive follows the established case law of the ECJ on free movement of services.[173] The positive examples of ISS include a wide range of activities such as electronic newspapers, educational services, on-line encyclopaedias, sale services for certain products (motor vehicles), tourism services, professional services, virtual supermarkets, classified advertisement services, BBS, job-search services, search engines, entertainment services, video-game services, services providing access to the WWW and even discussion forums. Clearly, some of the examples given go beyond the traditional ideas of commerce and tend to stretch to the area of leisure and hobby. Notably, advertising by e-mail is considered a service to the consumer, and as such fall under the concept of ISS.

Substantive provisions related to fair trading

The substantive rules of the E-commerce Directive cover a wide range of issues, including a ban on prior authorization, identification of providers of information society services (ISP), and general information to be provided, regulation of commercial communication, including promotional offers and unsolicited e-mail advertising, contract issues and liability of ISS providers. These rules only apply to ISS. In the area of fair trading most controversial and debated have been the rules on promotional offers and on unsolicited e-mail advertising.

Art. 6(c) of the Directive provides that promotional offers, where permitted in the Member State of establishment, shall comply with certain information requirements. Such offers shall be clearly identifiable as such. The conditions which are to be met to qualify for the offers shall be easily accessible and presented clearly and unambiguously. The same requirements apply to promotional competitions and games.[174]

In respect of unsolicited commercial communication in the form of e-mails the initial Directive proposal relied exclusively on an information approach, but leaving it to the Member States to subject such communications to stricter rules.[175] This liberal approach was met with criticism on the part of representatives of legal doctrine and consumer groups. Many insisted on the prohibition of such communications throughout the Community.[176] Others were generally satisfied that unsolicited e-mails were exempted from the scope of the Internal Market principle.[177] Eventually, the Directive preserved the permissive information approach. In addition, however, Art. 7(2) requires Member States to take measures to ensure that service providers consult

[173] The Court has held that although under Art. 60 of the Treaty a service was normally provided for remuneration, the Treaty did not specify the means of financing a particular services, Case C-352/85 *Bond van Adverteerders* [1988] ECR 2085, para 16.

[174] Art. 6(d), Directive 2000/31/EC.

[175] See COM (1998) 586 final, 98/0325 (COD).

[176] For a critical view see Lehmann (1999), 180.

[177] See Hoeren, 'Vorschlag für eine Richtlinie über E-commerce' (1999) *MMR*, 192 ff., at 198; Maennel, 'Elektronischer Geschäftsverkehr ohne Grenzen – die Richtlinienvorschlag der Europäischen Kommission' (1999) *MMR*, 187 ff., at 190. On the Internal Market principle, see the sub-section below.

regularly and respect so-called 'opt-out' registers (also known as 'Robinson lists'). Natural persons not wishing to receive unsolicited electronic mail should be able to register themselves in such lists. The exact organizational form for handling of opt-out registers is not dealt with in the Directive, leaving the matter to the Member States.[178] Member States where this marketing method is prohibited by way of express law or by way of judge-made law, are expressly free to maintain their stricter standards. The scope of required changes in respect to both promotional offers and unsolicited commercial communications becomes clear only when seen in the light of the harmonisation approach adopted.

Harmonisation approach
To achieve its complex regulative objectives the Directive relies on the well-established Community principle of country of origin in its two components: 'home country control' and mutual recognition. In the Directive the combination of these two components is dubbed 'Internal Market.' This harmonisation approach is expected to provide an efficient short cut around the long and winding road of difficult intergovernmental negotiations and of detailed adjustment of divergent national regulative agendas. In the spirit of Community solidarity, pronounced already in the seminal *Cassis de Dijon* judgement of the ECJ, the Directive purports to rely on trust and acceptance of alternative regulative approaches, instead of resorting to classical techniques of centralised legislative harmonisation. The harmonisation approach in the E-commerce Directive has much in common with that in the Television Directive, but the country-of-origin principle is applied on a much more comprehensive scale. The extension is achieved by a far wider definition of the coordinated field in the Directive (Art. 2(h) Directive 2000/31/EC).

In its second part (Art. 3(2)), the internal market rule reiterates fundamental principles of Community law. Although forming the second 'limb' of the internal market rule, the principle of 'mutual recognition' has historically been the one to first gain recognition in the history of the Internal Market building. Each country is obliged to assure the free receipt of information society services originating from an ISP established in another country of the EU. Mutual recognition and mutual trust are once again imposed as supreme values of European integration.

As with the Television Directive, the first pillar of the internal market principle, the rule on 'home country control' laid down in Art. 3(1) of the E-Commerce Directive has remained less observed in scholarly discussions. Following this principle, Member States are obliged to take responsibility not only for enforcement of the national rules and standards on situations having purely domestic effect, but also on the activity of national operators exclusively targeting foreign consumers. Whereas this approach may be justified by the personal connection between the service provider and the controlling countries, there has traditionally been uneasiness in international criminal and administrative law about interpreting the concept of national sovereignty so extensively.

[178] See COM (1998) 586 final, 98/0325 (COD).

Scope of the Internal Market principle
Comparison with the TV Directive is also warranted in another respect, namely as to the scope of the internal market principle. Under the TV Directive Member States were allowed to require television broadcasters under their jurisdiction to comply with more detailed or stricter national rules, but only in the areas harmonised by the Directive. This strongly curtailed minimum harmonisation clause in effect implied recognition of regulative regimes existing in other Member States for operators established on their territories. The logic of this rule is clear. Since the Directive had successfully harmonized certain areas of regulation, there was a sufficient degree of uniformity that would also justify a higher degree of trust in different regulative approaches, provided that the minimum provisions of the Directive are observed.

The E-commerce Directive represents a different understanding of the concept "coordinated field". In Art. 2(h) "coordinated field" is defined as requirements laid down in Member States' legal systems "applicable to information society service providers or information society services regardless of whether they are of a general nature or specifically designed for them." Importantly, the definition does not mean rules harmonized at a minimum level by the directive. Instead it refers to rules laid down by the Member States and, moreover, regarding all aspects of regulating the service or the service provider. The phrase 'coordinated field' consequently does not refer to an actually achieved harmonisation, but is rather used as a *fictio*. It is assumed that all national measures concerning information society services are coordinated by the Directive. In the initial proposal of 1998[179] the Commission commented the (then much more cryptic) definition of the term 'coordinated field' as follows:

> This definition makes it possible to determine the national provisions in respect of which the Member States are to ensure compliance under Article 3. It therefore covers all requirements which may apply to a person acting as a provider of Information Society services or to Information Society services.[180]

The term 'requirements' is crucial to an understanding of the scope of the Directive. *Prima facie* the term seems to cover only rules of public law, such as administrative and criminal law rules and regulations, through which the state controls the activity of commercial actors, and enforced by way of administrative or criminal procedure with the decisive intervention of public authorities. However, this would be a very narrow interpretation, that would be in poor harmony with the rather undogmatic approach of the ECJ in its case law on free movement of goods and services. The court has rarely asked whether a certain national rule (or measure) formally pertains to public or to private law. The main question has always been whether the rule in question is likely to negatively influence intra-Community trade. In this test mandatory rules treated in many countries as belonging to private law (such as unfair competition law rules or mandatory rules on consumer protection) have also been scrutinized for their compliance with the fundamental Community freedoms.[181]

---

[179] COM (1998) 586 final.
[180] *Ibid.*, 21.
[181] See rules on free gifts (Case C-268/81 *Oosthoek's* [1982] ECR 4575); on misleading advertising (Case C-238/89 *Pall* [1990] ECR I-4827); mandatory consumer protection rules on cancellation of contract (Case C-91/92 *Faccini Dori* [1994] ECR I-3325; Case C-45/96 *Dietzinger* [1998] ECR I-1199. On the ECJ's jurisprudence on free movement of goods see below Ch. 6.3.

Internal Market Principle and National Pivate International Law
One of the most controversial aspects of the E-Commerce Directive is the relation between the internal market principle and private international law. According to Art. 1(4) the Directive does not aim at establishing additional rules of private international law or on jurisdiction. A legitimate question, then, is whether the Directive affects questions of jurisdiction and applicable law in cross-border disputes concerning infringements of national fair trading rules on the Internet. The answer appears to be depend essentially on the doctrinal classification of fair trading law in different legal systems. If fair trading law is interpreted as relating to public law, then they would not invoke questions of private international law. The Brussels convention and the Brussels regulation would not be applicable to proceedings on the basis of such rules.[182] Rather than looking at choice-of-law rules, one should be concerned with defining the scope of application of national public law rules.[183]

Conversely, if fair trading rules are conceived as pertaining to private law, then Art. 1(4) Directive 2000/31/EC acquires utmost relevance. National rules on jurisdiction and applicable law would in many instances lead to solutions incompatible with the country-of-origin principle and the question of determining the precise relations between the two sets of rules and the order of precedence is crucial. As we are going to see in the following chapter these apparent paradoxes of the E-Commerce Directive have produced an array of different reactions and contradictory interpretations that are far from settled.[184]

The Directive and existing consumer protection and fair trading standards
Another aspect of the E-Commerce Directive that is far from clear concerns the relation between the Directive and previous Community Directives and national legislation. It has been noted by commentators that here again the Directive uses novel language.[185] In previous Directives and notably in the 'Television Without Frontiers Directive', whenever the Community lawmaker intended to signal that a new piece of legislation should not affect already achieved harmonisation, the language has been "this Directive is without prejudice to previous Community Directives concerning... ". In the E-Commerce Directive this issue is addressed in Recital 11. Yet in contrast to previous documents, the Directive speaks of "without prejudice to the *level of protection* as laid down in existing Community Directives and national legislation implementing these Directives" (my italics).

Two elements need elaboration in this formula. First, it is not clear what is the meaning of "the level of protection". The Community Directives in the field of consumer protection referred in this recital are so-called 'minimum' Directives. As

[182] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1978 L304/36; Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L12/1.
[183] On the autonomous interpretation of the term civil and commercial matters under the Brussels Convention and on the problems of cross-border enforcement ensuing from different institutional approaches to fair trading see Reich, 'Rechtsprobleme grenzüberschreitender irreführender Werbung im Binnenmarkt' (1992b) 56 *RabelsZ*, 444 ff., 445 ff.
[184] See Ch. 7.1.2.3 below.
[185] Bodewig, 'Elektronischer Geschäftsverkehr und Unlauterer Wettbewerb' (2000) *GRUR Int.*, 475 ff.

such they not only leave Member States a large margin of freedom as to methods of implementation, but also give them freedom to retain or introduce more protective legislation, naturally, always within the limits of primary Community laws.[186] It is consequently a reasonable interpretation that the expression "without prejudice to previous Directives" in the TV Directive refers to previous directives in their entirety, including the minimum harmonisation principle allowing for more stringent national regulation. By contrast, the language used in the E-commerce Directive rather might be interpreted in a sense that only the harmonized minimum standards of previous Directives remain untouched. It thus appears that the 'internal market' principle in the Directive cannot be set aside by a receiving country in favour of national legislation, that goes beyond the minimum standard of previous consumer protection Directives.[187]

The second element that poses interpretation difficulties concerns identifying the national legislation that is envisaged by the Recital. One can see here at least three situations: national legislation that is specifically introduced to implement a Community Directive; existing national legislation that is explicitly identified by the Member State in question to ensure compliance of national law with the Community Directive, and finally national legislation that actually is within the scope of a Community Directive. Logically, the impact of the Directive would differ quite substantially, depending on which of these categories of national legislation are held in mind.[188]

6.2.3 Enforcement

Until recently, the process of European integration was regarded as not affecting or as having only a very limited effect on national rules on remedies and procedure. The principle of procedural autonomy has been a hallmark of much Community decision-making. Member States have been considered sovereign to decide on matters of procedure and remedies for implementation of harmonized Community law, probably because of the closeness of such subject-matter to core elements of the political identity of states.[189] As a result of this approach the actual application and the effectiveness of enforcement of European Community law is largely dependent on the national laws of the Member States. On the positive side, reliance on national courts, national procedures and national remedies increases the integration of Community law within the national legal system. To the plaintiffs it offers the advantage of familiar avenues for instituting proceedings and claiming judicial protection. From the point of view of Member States this approach ensures maximum respect for 'national procedural autonomy'.[190] On the negative side, the wide divergence in Member States' procedural laws clearly tends to produce inequality in the level of protection and in the actual enforcement of individual rights arising under Community law. Differing provisions on access to courts, remedies, sanctions, burden of proof, to mention but a

[186] On the different versions of the minimum harmonisation approach, see Dougan, 'Minimum Harmonizaion and the Internal Market' (2000) 37 *CML.Rev.*, 853 ff.
[187] Critical of such interpretation, mainly on normative grounds, Henning-Bodewig (2001), 775.
[188] In this regard see Bogdan, 'EU Direktivet om förbudsföreläggande för att skydda konsumenternas intressen' (1998a) *SvJT*, 532 ff.; Bogdan, 'Some Reflections regarding the new EU Directive on Injunctions for the Protection of Consumers' Interests' (1998b) *CLJ*, 369 ff.
[189] It has been rightly pointed out in the literature that in the European context the term 'procedural' should not be construed narrowly. See Prechal (1995), 149, fn. 17.
[190] Prechal (1995), 149.

few relevant issues, vastly influence the chances of private and public interest litigants to enforce substantive Community law effectively. In the words of the Court, the "...regrettable absence of Community provisions harmonizing procedure... entails differences in treatment on a Community scale."[191]

In this section I shall consider to what extent the principles of procedural and institutional autonomy and of Community non-intervention on issues of remedies, choice of appropriate courts and procedure have been upheld in the harmionization of fair trading. I shall also explore the importance of procedural harmonisation and/or coordination for the realization of effective harmonisation. As the national chapters have demonstrated, in this area implementation and enforcement techniques play a formative role for the very substance of the legal standards in force. I have argued that there is a close interaction between rules on access to courts and on remedies, on the one hand, and the evolving perceptions of fair trading, on the other. The question is whether harmonisation limited to substantive provisions in the area of fair trading can lead to anything more than "harmonisation in the books".

6.2.3.1 Provisions on enforcement in fair trading directives

The importance of harmonised remedies and enforcement for the effective approximation of fair trading law was recognized already in the Ulmer study. As mentioned above, part of this early harmonisation proposal concerned questions of remedies and standing to sue. In its final comparative analysis the Ulmer report stressed the importance of no-fault injunction based only on objectively unlawful conduct, irrespective of proof of intention or negligence.[192] He further insisted on introducing the possibility for preliminary injunction under a speedy and efficient procedure in all Member States.[193] Ensuring access of competition unions to the courts, albeit under more restrictive conditions than in German law, was likewise envisaged as a key to ensuring uniform and effective implementation of the harmonised substantive rules.

Some of the proposals of the Ulmer study were incorporated in the Misleading Advertising Directive. Art. 4(1) of the Directive opens with the conventional requirement that Member States shall ensure adequate and effective means for achieving the purpose of the Directive, namely combating misleading advertising. It then goes on to specify the institutional and procedural measures that would satisfy this general requirement. In a manner quite unusual for European law, the Directive devotes considerable space to issues of enforcement and procedure. Arts. 4, 5 and 6 deal extensively with competent courts, remedies to be offered, access to justice and burden of proof. In this the Directive occupies a prominent place among Community harmonisation acts, which as a matter of general attitude have been sparing on aspects of enforcement and procedure.[194] That these provisions have not provoked significant commentaries and reactions in legal doctrine and in judicial practice is perhaps mainly

---

[191] Case C-130/79 *Express Dairy Foods* [1980] ECR 1887, para 12.
[192] Ulmer (1965), 257.
[193] Ulmer (1965), 258.
[194] The prominent position of enforcement in the Misleading Advertising Directive has been noticed by Steiner, *Enforcing EC Law* (London: Blackstone, 1995), 58.

due to the wide margin of discretion left to the Member States and crucially because of the very modest substantive rights, if any, that can be derived from the Directive.[195]

The dual enforcement model
From an institutional perspective, the Directive outlines two main avenues of enforcement: taking legal action in the form of court proceedings (Art. 4(2)(a)) and/or bringing the advertising before an administrative authority (Art. 4(2)(b)). It is interesting that these enforcement models correspond broadly to the techniques familiar from the review of German and of Swedish law. The first one involves private law action by the immediately affected, not unlike the action of unfair competition in German law. The second is characterized by the active intervention of a public agency either as a decision-making body or as a mediator and a public interest litigant.

Both techniques are expressly declared compatible with the Directive and the choice between the two is left to the Member States.[196] This dual solution is not surprising. It reflects the dichotomy between the continental civilistic approach to fair trading under unfair competition laws, on the one hand, and the public law approach with consumerist connotations characteristic of British law and of the Scandinavian countries, on the other. The fact that the Directive was adopted after the accession of UK, Ireland and Denmark accounts for the broad spectrum of enforcement schemes accommodated by the Directive. Indirectly, through Denmark's membership in the Community and via the preceding harmonisation of marketing law within the framework of Nordic legal cooperation, Sweden's approach to marketing practices found a way into Community law.[197]

Art. 4(1) a does not say anything about the courts competent to try the legal claims under the Directive. *Ex silentio* we may conclude that these could be civil, criminal or specialized courts. The decisive requirement is that these courts act upon the (direct) action of interested persons and organizations. Thus a civil action before criminal courts as part of criminal proceedings (the approach typical of France) would satisfy the requirement. In contrast, an action by the public prosecutor alone would arguably be insufficent.[198]

The Directive is equally taciturn with regard to the character of the administrative agency envisaged in Art. 4(1)(b) It is clear that such authority can either be designed as a quasi-judicial body and be granted competence to decide on complaints. Or, alternatively, it may act as a sort of clearing house for complaints and an advocate of the public interest, initiating appropriate legal proceedings. The specific form of the agency and its place in the system of government is, however, ultimately a matter for the Member States. Any sort of board, directorate, ombudsman, commission or the like can function as an administrative authority as far as it is invested with the powers envisaged in the Directive.

---

[195] A similar view concerning Directive 92/28 on the advertising of medicinal products, which contains the same procedural provisions as the Misleading Advertising Directive, is expressed by Prechal (1995), 150, fn. 25.
[196] Cf. Art. 4(1), third subparagraph: "It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 5."
[197] On Nordic legal cooperation, see Ch. 5.4.1.
[198] Schricker (1994b), 454.

Yet, despite the reticent acceptance of different modes of enforcement, the freedom of the Member States to define the powers and the modes of action of the administrative authority does not seem unconstrained. Art. 4(3) of the Directive provides, surprisingly, an impressive list of institutional requirements regarding the structure and the procedural principles to be employed by the administrative authority under Art. 4(1)(b) The requirements can be classified in two categories. The first consists of general requirements applicable in all cases. The second concerns only administrative authorities exercising the powers under Art. 4(2) exclusively, i.e. where the administrative authority acts as a sole decision-making body and does not just complement additional avenue of private enforcement.

Central among the general requirements is that of impartiality. Under Art. 4(3)(a) the administrative authorities must "be composed so as not to cast doubt on their impartiality." From this provision it is impossible to say conclusively in what situations the impartiality of the authority may be questioned. Should the authority be free from corporate influence or should it be independent of government? A look at the history of the Directive suggests that the provision has been drafted to ensure that decision-making will not be unduly influenced by industry. In the initial proposal it was expressly stated that the administrative authority should not be controlled by advertising interests.[199] In addition, administrative authorities must "have adequate powers, where they decide on complaints, to monitor and enforce the observance of their decisions effectively" (Art. 4(3)(b)). Finally, these authorities must "normally give reasons for their decision". Taken together, these requirements make up a pretty comprehensive catalogue of good administrative practice.

Where the administrative authority has exclusive competences to order the cessation or the prohibition of the misleading or comparative advertising, it shall be put under an unconditional obligation to give reasons for its decisions.[200] Moreover, Member States are in these cases obliged to provide for judicial review of agency action. This obligation applies not only to instances of improper or unreasonable exercise of powers by the administrative authority but also to instances of improper or unreasonable *failure* of the authority to exercise the said powers.[201] The language for both category of requirements is imperative. The administrative authorities *must* correspond in structure and procedural principles to the standards set forth in the Directive.

Institutes such as impartiality of administrative authorities and judicial review belong to the cherished fundamentals of each state's constitutional order. How are we then to explain this bold entry into the forbidden province of Member States' procedural autonomy? And more curiously, why have Member States accepted this intervention? Or is the principle of procedural autonomy to be confined to court proceedings? Any explanation ventured here is bound to be speculative. Probably, the answer is to seek partly in the need to convince the sceptics that administrative proceedings are as effective as conventional court proceedings. As mentioned above, viewed through the

[199] See the Opinion of the European Parliament on the initial Commission's proposal, OJ C 1979 140/23, 27. The Commission's amended proposal OJ 1979 C 194/3, at 5. Cf. Krämer (1986), 160.
[200] Art. 4(3), second subparagraph.
[201] Art. 4(3), second subparagraph, in fine.

prism of continental legal tradition, private law enforcement in civil or criminal proceedings was the self-evident approach to the area of fair trading. The practice of independent administrative agencies has not been as common on the Continent as in the Anglo-Saxon and the Scandinavian world. Prejudice as to the potential of public authorities to act in an independent quasi-judicial manner must have been widespread, which may explain the resistance to reliance on such enforcement structures. Therefore it probably required particular negotiating skills (and respective concessions) to gain recognition for this approach in the Directive.

Furthermore, those few Member States at the time who relied on administrative authorities for the enforcement of fair trading laws, most probably had no difficulty meeting the Directive's requirements. For the remaining majority the principles regarding administrative action were irrelevant and could apply only in the unlikely eventuality of a radical change of approach. Finally, paradoxically, the fact that the Directive recognized practically no clear individual rights, made recourse to the provisions of the Directive in their entirety most improbable. Therefore the procedural provisions of the Directive were most probably perceived as being of purely symbolic value.

The provisions on enforcement in the Misleading Advertising Directive have subsequently served as a model for a number of Community directives not only in the consumer protection field. They were restated in Directive 97/7/EC on distance selling, though with some important modification.[202] Art. 11 of this Directive sustains the bifurcated approach to enforcement, recognizing the equal validity of administrative measures and of private law action before the courts. Paragraph 1 of this article again requires that Member States to provide 'adequate and effective means' for ensuring compliance with the Directive in the interests of consumers. Somewhat different is the language in the Electronic Commerce Directive. Art. 18 of this Directive insists on the availability of court action allowing for rapid measures to be adopted for termination of any alleged infringement. It appears that administrative procedure would not suffice to comply with this requirement.

Standing and the role of consumer organizations
Regarding the circle of those authorized to institute court proceedings the Misleading Advertising Directive is not fully unambiguous. Yet Art. 4(1), second paragraph seems to refer the issue to national law. It states:

> Such means shall include legal provisions under which persons and organizations regarded *under national law* as having legitimate interest in prohibiting misleading advertising or regulating comparative advertising may ..." (my italics)

It is, in other words, the respective national laws that have to determine who are the persons having legitimate interests to be granted legal standing. The Directive does not seem to lay down any unconditional right of access to justice that could be invoked before national courts. Clearly by 'persons and organizations' the Directive means private parties and alludes to the possibility to grant standing to business and consumer associations. Contrary to Ulmer's pleads, however, the Directive, stops short of

[202] Directive 97/7/EC on the protection of consumers in respect of distance contracts, OJ 1979 L 144/19.

introducing such an obligation for Member States. Interestingly, in an earlier Draft of 1979 the Directive was more assertive in regard to the *locus standi* of business and consumer associations. Art. 5(2) of this Draft read:

> Such laws shall provide persons affected by misleading or unfair advertising, as well as associations with a legitimate interest in the matter, with quick, effective and inexpensive facilities for initiating appropriate legal proceedings against misleading and unfair advertising.[203]

In final event the Directive left it to the national lawmakers to decide whether to give these organizations access to the courts or not. Given this permissive formula it is not surprising that countries like Britain that have traditionally shown reluctance vis-à-vis private enforcement of collective rights, have felt free to retain their restrictive rules in this regard.

In legal doctrine Steiner has submitted a different view. She points to the White Paper on Access to Justice in Consumer Affairs and the emphasis there on representative action as a particularly appropriate way to compensate damages suffered in individual cases, but too small to justify the cost of litigation.[204] In this light she suggests that the Misleading Advertising Directive (and the Directive on Unfair Terms in Consumer Contracts[205] which follows a similar approach) could be interpreted as requiring Member States to give standing to '*bona fide*' interest groups that protect collective consumer interests. According to Steiner "[s]tates which fail to give effect to these provisions, or which adopt a restrictive view as to the bodies 'regarded as having a legitimate interest' will clearly breach EC law."[206]

It should be noted that the formula used in Art. 7(2) Directive 93/13/EEC differs slightly from that in the Misleading Advertising Directive. This provision reads:

> The means referred to in paragraph 1 *shall include* provisions whereby persons or organization, *having a legitimate interest under national law* in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

The difference in wording has also prompted other commentators to interpret the Directive as obliging Member States to introduce legal standing for consumer organization. It was argued that if an organization was recognised under national law as protecting the interests of consumers, then the Directive made it mandatory on the respective Member State to ensure legal standing to this organization.[207]

---

[203] See amendment of the proposal for a Council Directive concerning misleading and unfair advertising, OJ 1979 C 194/3. Cf. Reich (1992b), 444 ff., at 449; see also Krämer (1986), 159 ff.
[204] COM (93) 576.
[205] Directive 93/13/EEC, OJ 1993 L 95/29.
[206] Steiner (1995), 112.
[207] See Micklitz, 'Verbandsklage und die EG-Richtlinie über missbräuchliche Klausulen' (1998a) 19 *Zeitschrift für Wirtschaftsrecht*, 937 ff.; Dean, 'Unfair Contract Terms: the European Approach' (1993) 56 *MLR*, 581 ff; see

Interestingly, Art. 7(2) of Directive 93/13/EEC was indeed – at least politically – recognized as obliging Member States to provide legal standing to consumer organization for seeking injunction of unfair contract terms.[208] In 1996 the question was referred to the ECJ in an Art. 234 EC Treaty (ex Art. 177) preliminary ruling procedure. The case concerned one of the most influential consumer associations in the United Kingdom, CA/Which, which was denied standing under British unfair contract terms law.[209] Before the Court had come with its judgment, however, the new British Labour government announced it was going to introduce legal standing for consumer associations in the particular case of supervision of unfair contract terms. CA/Which withdrew its claim and the ECJ proceedings were cancelled.[210]

The right of action of consumer associations was again an object of debate following the entry into force of Directive 97/7/EC on distance selling. Art. 11(2) of this Directive reads:

> The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:
> (a) public bodies or their representatives;
> (b) consumer organizations having a legitimate interest in protecting consumers;
> (c) professional organizations having legitimate interest in acting.

This Article quite clearly leaves the choice between public or private bodies to represent the consumer interest to national law. The original Commission proposal was more ambitious and specifically tackled the role of consumer organizations in the enforcement process.[211] In this respect the Directive may be seen to make a step back from the position arguably achieved with the Unfair Contract Terms Directive.[212] At the same time, it should not be forgotten that the Distance Selling Directive was discussed in the legislative process parallel to the Injunctions Directive. Given the more comprehensive scope of the latter directive specifically addressing the right of action by consumer organizations, it may have appeared less important to include clear and unconditional provisions on representative action in the Distance Selling Directive. Even this quite unambiguous provision was interpreted by consumer advocates as a mandatory requirement of granting standing to consumer associations.[213] It is noteworthy that the Distance Selling Directive for the first time expressly mentions professional organizations among those to be accorded legal standing.

Rott, 'The Protection of Consumers' Interests After the Implementation of the EC Injunctions Directive Into German and English Law' (2001) 24 *JCP*, 401 ff., 403.

[208] Micklitz (1998a), 937.

[209] Case C-82/96 R. v. Secretary for Trade and Industry, ex parte CA/Which, OJ 1996 C145, 3.

[210] Rott (2001), 401 ff.

[211] COM (92) 11 final, Annex 1, Table 3, See Dickie, 'Consumer Confidence and the EC Directive on Distance Contracts' (1998) 21 *JCP*, 217 ff., 226.

[212] See Dickie (1998), 225-26.

[213] Micklitz, 'Richtlinie 97/7/EG des Europäischen Parlaments und des Rats über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz (Fernabsatzlinie)' in: Grabitz/Hilf (eds.), *Das Recht der Europäischen Union*, Vol.4 A.3 (München: Beck, 2000). See Rott (2001), 403 with fruther references.

More generally, it can be argued that in the absence of a specific Community provision for standing by representative bodies such an obligation for Member States could anyway be inferred from the general duty of loyal fulfilment of Community obligations under Art. 10 (ex Art. 5) of the EC Treaty.[214] Likewise situations may arise where the overall requirement in Art. 4(1) Directive 84/450 of ensuring "adequate and effective means for the control of misleading advertising" could only be fulfilled by providing such collective rights of action.

Remedies

When it comes to remedies the Misleading Advertising Directive, much in the tracks of the Ulmer study, emphasizes the no-fault injunction. Art. 4(2) instructs Member States to confer upon the courts the powers to order the cessation of misleading advertising even without proof of actual loss or damage or of intention or negligence on the part of the advertiser. Alternatively such powers can be vested in administrative authorities, which should either be competent to order the cessation of the advertising themselves or to institute appropriate proceedings. In addition, in cases where the advertising has not yet been published but publication is imminent, the same courts and authorities should be granted powers to order the prohibition of such publication, or to institute legal proceedings for that purpose (Art. 4(2), second indent). Following the amendment of the Misleading Advertising Directive by Directive 97/55/EC the remedies outlined above are extended to unpermitted comparative advertising.

The Misleading Advertising Directive also follows another of Ulmer's recommendations, namely his insistence on the importance of rapid preliminary injunction procedure. In its final version the Directive requires Member States to ensure that the remedies prescribed (i.e. injunction) can be claimed under an accelerated procedure.[215] It is, however, made clear that this requirement could be equally satisfied by an interim injunction as well as by a measure with definitive effect, leaving it open to Member States to decide which of the two options to select. This is only one of multiple evidences of Community Acts being result-oriented, while seeking to accommodate disparate procedural traditions of the Member States. In the particular case in point the result pursued is speedy access to remedies. The way to this end is relatively open.

The Misleading Advertising Directive expressly seeks to encourage remedies that would allow the elimination of any continuing effects of misleading advertising.[216] Whereas publication of court decision has been a well-known remedy in German unfair competition law and in other continental systems, the obligation to publish a corrective statement was a relatively unconventional remedy at the time of the Directive being adopted. It had gained international attention via the discussions within the auspices of the American Federal Trade Commission.

---

[214] Art. 10(1) EC Treaty reads: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

[215] Art. 4(2), subparagraph 2.

[216] Rec. 14 Whereas it may be desirable to order the publication of decisions made by courts or administrative authorities or of corrective statements in order to eliminate any continuing effects of misleading advertising;

Most authors regard the provisions on remedies in Directive 84/450/EEC as binding.[217] And indeed, the language employed appears imperative. Member States "shall confer" certain powers on the courts and authorities and "shall make provision" for an accelerated procedure. At the same time there are several disclaimers, somewhat inconspicuously inserted, that significantly mitigate, or at least put into question, the binding effect of the Directive upon the Member States. The Directive requires the courts and administrative authorities to be empowerd to take the measures envisaged, but only "where they deem such measures to be necessary taking into consideration all the interests involved and in particular the public interest." It thus appears difficult to speak of an unconditional right to injunction of those adversely affected by objectively misleading advertising. The administrative authorities and the courts shall always retain discretion to weigh the interests involved and to decide that an injunction is not the appropriate remedy even when the advertising is misleading. Perhaps this disclaimer, which was not present in the original Commission proposal, bears the imprint of the administrative approach that has been injected into the Directive in the course of its drafting. Administrative agencies entrusted with quasi-adjudicative or mediating missions are typically endowed with the discretion to prosecute and/or intervene only in those cases that more seriously infringe on the public interest. This discretion is left untouched by the Directive.

In the specific case of prohibiting the imminent publication of misleading advertising, Recital 13 of the Preamble of the Misleading Advertising Directive bluntly contradicts the mandatory tone of Art. 4(2). Instead of the familiar idiom of command coded in verbs like "must" or "shall" the Recital employs soft language in the style of recommendation:

> Whereas in certain cases it *may be desirable* to prohibit misleading advertising even before it is published; whereas, however, this in *no way implies* that Member States are under an obligation to introduce rules requiring the systematic prior vetting of advertising (my italics);[218]

It is no wonder that, when discussing the need of adapting Swedish marketing practices legislation to the Directive, the expert opinion was that the Directive in no way obliged Sweden to introduce a possibility for prohibiting advertising prior to publication. A reverse interpretation would have brought the requirements of the Directive into conflict with Sweden's cherished constitutional principle of freedom of the press.[219] The injunction has been subsequently repeatedly invoked as a main remedy in other Community directives with reference to fair trading and has been eventually systematically tackled in the Injunctions Directive.[220]

Can one, despite the vague and modest substantive standards on enforcement in fair trading directives, nevertheless project situations where the directives may confer procedural rights on private parties and thus intervene in Member States' procedural

---

[217] Schricker (1994), 454: „Als hauptsächliche Sanktionsmassnahmen schriebt die Richtlinien *zwingend* die Möglichkeit der Anordnung einer Einstellung der irreführenden Werbung und einer Unterlassung einer bevorstehenden irreführenden Werbung vor..." (my italics)

[218] Rec. 12, Directive 84/450/EEC.

[219] See below Ch. 7.1.1.1.

[220] See Ch. 6.2.3.2 below.

law? For instance, can an individual with reference to the Misleading Advertising Directive object to the partiality of an administrative agency, the lack of adequate powers to monitor and enforce the observance of decisions or failure to give reasons? And if an administrative authority exclusively exercises the powers under this Directive can an individual claim the right of judicial review of agency action directly on the basis of the Directive's provisions? To my knowledge, none of these issues has so far been addressed by Community or Member State institutions. Probably no such opportunity will ever arise.

To be able to take a stand on these question, a look at other areas of Community law may be instructive. In the area of social equality in particular, the ECJ has tended to interpret seemingly vague provisions on enforcement in Community Directives as requiring specific procedural remedies, notably judicial review of administrative action. The Court has even elicited a general principle of judicial review based on the relevant Directive as well as on Arts. 6 and 13 of the European Convention on Human Rights.[221] The doctrine of *effet utile* of Community Directives has likewise been taken to require the provision of effective procedural means of achieving optimal implementation of Community law. The Court has in different rulings developed the doctrine of 'effective, proportionate and dissuasive' sanctions that have to be ensured by Member States in order to achieve adequate implemention of Community obligations.[222] Bringing together insights from different sectors of Community law, legal experts speak of a 'creeping harmonisation' of procedural law, and in particular of administrative law.[223]

One should, however, not be too hasty in assuming that reasoning developed by the Court in one particular policy field would automatically apply across the board to Community law subject-matter. It has been noted on multiple occasions that the approach of the Court tends to be consciously functional and goal-oriented (teleological). Thus reasoning developed in the field of social equality may not be found convincing for advertising law and policy. Seeking to identify a commonality approach to the development of EC remedies may therefore be a misleading and futile venture. Instead scholars have argued for putting the Court's case law on remedies and procedure in the context of specific sectors of regulation.[224]

Recently, however, the jurisprudence of the ECJ in the sphere of remedies and sanctions has begun to surface in Community legislative acts. Thus the E-Commerce Directive includes a provision on sanctions (Art. 20 Directive 2001/31/EC) obliging Member States to ensure effective, proportionate and dissuasive sanctions against

---

[221] Case C- 222/84 *Johnston* [1986] ECR 1651, para 18. See Ward (2000), 71 ff. with analysis of subsequent case law. Most cases concerned Art. 6 Equal Treatment Directive and Art. 6 ECHR.

[222] See Ward (2000), 30 ff.

[223] "The general opinion is that there is indeed a growing influence of EC law on Dutch administrative law. This influence is of a 'creeping' character, brought to bear through, in particular, the case law of the Court of Justice." Jans/de Jong 'Between Direct Effect and Rewe/Comet: 'Remarks on Dutch Administrative Law, Procedural Defects and the EIA Directive' in: Ladeur (ed.), *The Europeanisation of Administrative Law* (Dartmouth: Ashgate, 2002).

[224] See Weatherill (2000), 14. Cf. De Búrca/Ryall, 'The ECJ and Judicial Review of National Administrative Procedure in the Field of EIA' in: Ladeur (ed.), *Europeanisation of Administrative Law* (Aldershot: Ashgate, 2002), 145 ff., 159.

infringements. Thus, rules conceived in the 'incubator' of the Community judicial process are gradually accepted and passed onto the legislative level.

In sum, the impressive volume of text devoted to enforcement in the Misleading Advertising Directive seemed originally to be in inverse proportion to the extent of procedural harmonisation achieved with these provisions. The initial ambition to ensure a reasonably uniform and adequate enforcement by ironing out the most ample differences in national procedural approaches have failed. Even the minimalist intentions of guaranteeing an injunction claim to competitor and consumer organizations did not materialize. Instead, the main function of the provisions on enforcement appeared to be to demonstrate that the Community legislator is taking the institutional and procedural sensitivities of Member States seriously.

This is gradually changing though. The importance of the provisions on enforcement should thus be measured with the help of more sophisticated criteria than the straightforward demand of increased harmonisation. Following the Misleading Advertising Directive several Member States undertook legislative changes in order to comply with the procedural rules of the Directive. In the United Kingdom the Misleading Advertising Regulation was adopted, authorising the Director of the Office of Fair Trading to claim injunction of misleading advertising if all other avenues of private enforcement, including self-regulation, had been exhausted. [225] In Italy the Directive triggered a legislative change, introducing a brand new procedure of seeking injunctive relief before the Italian Competition Agency (*Autorita Garante*) open to individual competitors, consumer and trade associations.[226] These new avenues of redress may have not revolutionized fair trading standards in these two countries, but changes have been registered, especially in Italy.[227]

More important than these direct effects are the indirect effects of the procedural provisions. Through codifying alternative procedural approaches, the Directive may have the role of diffusing procedural values and principles of good governance throughout its Member States. This 'codification' may have the effect of 'model law' in future Community legislation. Due to a certain legislative inertia and reluctance to embark on new and untested normative adventures agreed legislative formulas tend to have an advantage compared to negotiations starting from 'scratch'. Each round of negotiations on a given regulative issue involves not insignificant administrative and other 'sunk costs'. This may account for the willingness of Member State governments to extend already agreed formulaes to new regulative areas, rather than reinventing the wheel. Finally, more on a note of principle, these provisions may gradually come to be seen as part of a minimum catalogue of 'good' procedural and institutional practice in the EU. Such 'codes of good governance' may have an unexpected potential significance for the spread of broader European values, for instance in the process of eastward enlargment of the Union.

---

[225] On the Misleading Advertising Regulation in the UK and, in particular, on the mechanism of enforcement see Schricker (1990), 118 ff.

[226] Bastian, 'Sanktionensysteme im Recht des unlauteren Wettbewerbs' in: Schricker/Henning-Bodewig (eds.), *Neuordnung des Wettbewerbsrecht* (Baden-Baden: Nomos, 1998-99), 199 ff.

[227] See Bastian (1998-99); Bastian, 'Recht der Werbung in Italien' in: Schricker (ed.), *Recht der Werbung in Europa* (Baden-Baden: Nomos, 1996c).

6.2.3.2 Special provisions on cross-border enforcement

A new approach to the probem of enforcement is taken by some directives in the area of the new media, revealing frequent cross-border element. The Television Directive in its original version of 1989 took a much more relaxed approach to enforcement. It is remarkable that even the well-established formula of "adequate and effective" means of enforcement was not repeated. In Art. 21 the Directive gave substantial leeway to Member States in choosing the measures for ensuring compliance with the substantive standards on advertising and sponsorship:

> Member States shall, within the framework of their laws, ensure that in the case of television broadcasts that do not comply with the provisions of this chapter, appropriate measures are applied to secure compliance with these provisions.

It is evident from this provision that national laws of enforcement and procedure continued to hold sway. One could even wonder whether the principle of effective enforcement of Community law would apply, given that the Directive used the term "appropriate" instead of "adequate and effective" measures. Moreover Member States were not required to do anything that was not "in the framework of their laws".

The gap in enforcement was soon identified as one of the main sources of controversy over the implementation of the Directive by the Member States. Recital 16 of Directive 97/36/EC, revising the original Television Directive, therefore expressly stipulated that it was "necessary to ensure the effective application of the provisions of Directive 89/552/EEC as amended throughout the Community in order to preserve free and fair competition between firms in the same industry." One of the main reasons for poor application was the uncertainty surrounding the territorial and personal scope of jurisdiction to be exercised by Member States over broadcasters under the Directive. The revision Directive made substantial steps to plug this gap by codifying the rather extensive case law of the Court of Justice that had accumulated in the meantime.

A more pervasive deficiency of the chosen mutual recognition approach, however, proved to be the asymmetric implementation of the Directive by national authorities in respect to individual, collective and public interests placed abroad. Ensuring the transfrontier reach of radio waves proved to be much less problematic than ensuring the transfrontier reach of administrative authorities. There were no efficient mechanisms under which the grievances of audiences reached in the state of reception could be communicated back to the broadcaster in the state of establishment. Even more importantly, the avenues for such interests to reach the competent authorities and courts with their complaints were limited.

To remedy this shortcoming Directive 97/36/EC resorts to a rather original solution, namely that of requiring Member States to provide procedural avenues for facilitated cross-border complaint and enforcement mechanisms. Art. 3(3) in the new version reads:

> The measures shall include the appropriate procedures for third parties directly affected, including nationals of other Member States, to apply to the competent judicial and other authorities to seek effective compliance according to national provisions.

Art. 3(3) is interesting in that for the first time it advances cross-border litigation as a remedy to the much-lamented gap in enforcement associated with the country of origin principle. It is probably only logical that a Directive which builds upon the principle of 'home country control' in coordinated areas of substantive law, must rely more heavily on the enforcement procedures and remedies of the controlling country also in respect to interests situated in other EU countries. Under the 'home country control' principle the possibilities of judicial and other authorities in the country of destination to react in order to protect legitimate interests of its nationals are seriously curtailed. At the same time under traditional law of administrative procedure, judicial and administrative authorities in the country of control can normally exercise jurisdiction only in respect to interests located on their territory. To plug this gap the expanded material competence of supervision has been matched by an expanded jurisdiction of national courts and other authorities. The system of enforcement would, however, remain deeply asymmetrical and incomplete if those affected in the receiving country were left without procedural avenues to claim their rights before the competent authorities and courts in the country of control. Art. 3(3) seeks to find a solution to this problem.

The approach chosen is not only prompted by pragmatic considerations. In the context of an integrated market it acquires a deeper symbolic importance. At least theoretically, the invitation to affected third parties to claim their interests before the courts and authorities in the country of broadcasting (or of establisment) encourages the continuing interpenetration of national legal and procedural orders. It proceeds from a much contested assumption of a common procedural space in Europe, where the difficulties of individuals and organizations in coping with different concepts and traditions as to access to justice, formality of procedure, defence, evidence and remedies are deliberately played down.

With its emphasis on 'parties directly affected' the Directive, however, most probably excludes a recourse to courts and other authorities by organizations for protection of collective interests (such as business associations or consumer organizations). As we shall see in the following this approach has been carried further by the Injunctions Directive, which extends it to all disputes arising from Community law affecting collective consumer interests. To what degree this new provision is in a position to compensate for the loss of decision-making competence by the national authorities is not clear. Many have expressed scepticism in this regard.[228] Even though the amended Directive makes explicit reference to procedural avenues for nationals of third countries, many are sceptical about the implementation of this provision in reality.

6.2.3.3 Informal enforcement-facilitating techniques: information, cooperation, self-regulation

Intergovernmental cooperation

The Television Directive is the first act of secondary Community law in connection with advertising regulation that sets out to use alternative, informal techniques for securing compliance. An informal *ad hoc* Group for consultations between the Commission and the national governments was already set up after the entry into force of the Directive in 1989. The results from this group's work were favourably assessed

[228] See Henning-Bodewig (1998/99), 84.

in the first and second reports on the application of the Directive.[229] Directive 1997/36/EC therefore made the bold step of formalizing this cooperation. The new Art. 23a provides for the setting up of a Contact Committee under the auspices of the Commission. The Committee shall be composed of representatives of the competent authorities of the Member States. It is chaired by a representative of the Commission and meets either at his invitation or at the request of the delegation of a Member State. The Committee is entrusted among other things with the tasks of facilitating the effective implementation of the Directive through regular consultation (a); acting as a forum for an exchange of views (c); discussing the outcome of regular consultations which the Commission holds with representatives of broadcasting organizations, producers, consumers, manufacturers, service providers and trade union and the creative community (d); facilitating the exchange of information between the Member States and the Commission on the situation and the development of regulatory activities regarding television broadcasting services (e).

The approach has three important elements: the first one refers to co-operation and exchange of information between Member State governments and regulatory authorities and the Commission. The second refers to the direct (or mediated) co-operation between supervising authorities of the Member States. Thirdly, a particularly important function of the Committee in the Community context is its involvement in the direct dialogue between the Commission and the stake-holders in the area of media policy, namely producers, consumers, manufacturers, service providers and trade unions and the creative community.

The last described approach enjoys growing popularity with the Commission. It has the advantage of sidestepping national governments and provides the actions of the Commission with a much wanted 'direct legitimacy'.[230] As mentioned earlier in the context of the expansion of consumer policy in the Community, the Commission reveals an inbuilt institutional bias in favour of federalisation and is in continuous need of ensuring its emancipation from national governments and from the Council. In this endeavour non-governmental organizations and organized industry are natural allies of the Commission, strengthening its independent position as the "European government".[231]

Finally, we should mention provisions that give receiving Member States, as a 'last resort', the opportunity to intervene directly in cases of poor implementation by the state of establishment. Whereas in the original version of the Television Directive such opportunity existed only in the very narrow hypothesis of television broadcasting detrimental to minors, Directive 97/36/EC included similar (conditional) rights of intervention for other cases of public interest. According to Art. 22a the same procedure applies in the case of television broadcasts containing incitement to hatred on grounds of race, sex, religion or nationality.[232] The expansion of such provisions

[229] The first report concluded with proposal to revise the Directive, COM (95) 86 final.
[230] Most recently, see the Commission's White Paper on European Governance COM (2001) 428 final. For a critical comment see Joerges, 'Guest Editorial: The Commission's White Paper on governance in the EU – A Symtom of Crisis?' (2002) 39 *CMLRev.*, 441 ff.
[231] See Maduro (1998a), 120.
[232] Cf. Art. 22 and 22a in connection with Art. 2a Television Directive.

clearly signals the fears of Member States with a high level of protection from sinking standards resulting from the 'home country control' principle.

The careful steps toward informal enforcement, co-ordination and communication between enforcement authorities taken in the Television Directive were followed more openly and with greater determination in the E-commerce Directive.[233] That Directive is much less specific as to the remedial and procedural measures to be taken by Member States. Instead, it focuses attention on unconventional methods of enforcement such as on-line dispute resolution, informal networks of information and control, identification of responsible authorities in Member States and commitment to further exchange of information. The change in tactics is to a great extent self-explanatory. The ubiquitous character of electronic commerce has put the problem of enforcement into the limelight not only of the Community decision-making stage, but also on a global plane. Here the Community sees itself in a unique position to contribute towards finding a more efficient solution that cannot be achieved at the national level.

An increasing role for self-regulation

Self-regulation was already envisaged as one (but not a sufficient) form of enforcement in the Misleading Advertising Directive. This was mainly done to appease Britain's fears that the Directive could undermine its established system of industrial self-regulation.[234] Art. 5 of Directive 84/450 therefore expressly gives assurances that any existing or future self-regulatory schemes shall be left unaffected.[235] At the same time self-regulation alone cannot satisfy the Directive's requirement of adequate and effective means of implementation. It can only come "in addition" to the court and administrative proceedings outlined in Art. 4. Generally, one can observe a process of superimposing different layers and variants of enforcement without one of them taking precedence over the others. Instead of harmonising the Directive is more concerned with giving assurances that established national patterns of enforcement should be duly respected.[236]

Self-regulation, however, is attracting increased attention on the part of the Community. Especially in the sphere of regulating the new media, where conventional forms of enforcement are evasive and inefficient encouraging market-conform mechanisms of self-regulation appears an attractive strategy. Voluntary codes of conduct occupy a central place in the strategy at both Community and national level. These codes of conduct are seen ideally to emerge from cooperation between trade, professional and consumer associations and organizations. The second pillar of the strategy of self-regulation is the promotion of out-of-court dispute-settlement procedures (Art. 17 E-commerce Directive). This kind of procedures reveal particular

[233] Art. 19 Directive 2000/31/EC.

[234] Reportedly, British industry had credibly threatened to withdraw its financial support from the self-regulatory bodies in case their independence and authority would be jeopardized by increased public intervention in the field. See Krämer (1986), 160.

[235] Art. 5: "This Directive does not exclude the voluntary control, which Member States may encourage, of misleading or comparative advertising by self-regulatory bodies and recourse to such bodies by the persons or organizations referred to in Art. 4, if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that article."

[236] As mentioned above, a similar outcome may be observed in some areas of harmonisation of substantive rules, especially under the rule of full harmonisation. See the example of comparative advertising above.

attraction in the case of e-commerce, since the advantages of electronic communication such as speed, paperless procedure and simultaneity (if required) can be used for the purposes of smoother dispute-settlement. At the same time the disadvantages of electronic commerce also apply in this context. They include for instance anonymity, ubiquity, and difficulty in tracing a certain electronic action to a concrete physical person and relying on compliance.

Consumer organizations are again singled out as particularly important actors in this regulatory model. Art. 16(2) reads:

> Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

Moreover, the possibility for cross-border injunction procedure for protection of collective consumer interests as provided by the Injunctions Directive is expressly extended to the collective consumer interests under the Electronic Commerce Directive.[237]

6.2.3.4 Targeting Enforcement

A decisive step away from the presumption of national procedural autonomy was taken with Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests.[238] That Directive seeks to achieve some degree of approximation of national provisions relating to actions for an injuntion aimed at protecting collective consumer interests. This is an open step of the Community into the domain of remedies and procedure. A Community intervention is seen to be warranted by the problems associated with cross-border enforcement of consumer-related legislation and the ensuing distortions of competition. The approach chosen is cautious and realistic. The Directive does not directly target Member States' procedural rules and institutions. Instead it resorts to the principle of mutual recognition, requiring Member States to grant national treatment to a limited number of specifically listed consumer organizations and public law entities.

The Commission was particularly strengthened in its initiative to tackle cross-border enforcement of consumer law by a series of test-cases pursued in a concerted action by German and French consumer associations. In the *Home-Vertrieb* case the associations sought to enjoin the activity of a trader established in Germany who sent misleading advertisements targeting French consumers.[239] For this purpose two avenues were probed, namely (*i*) to sue the allegedly rogue trader in Germany by the German consumer association, and (*ii*) to file a lawsuit before a French court by the French consumer association under French criminal law. The experience from this double-track cross-border litigation demonstrated serious deficiencies. The German court ruled that there was no violation of the German UWG because the German market was

---

[237] Art. 18(2) Directive 2000/31/EC.
[238] OJ 1998 L 166/51.
[239] Micklitz, 'Cross-border Consumer Conflicts - A French-German Experience' (1993) 16 *JCP*, 411 ff.

not affected. The German consumer association was refused legal standing since from the association's by-laws it could be inferred that it only aimed to protect German consumers.[240] Conversely, the French court convicted the trader but the verdict of the French criminal court could not be enforced in Germany.[241]

Similar conundrums could arise in countries which traditionally relied on administrative models of enforcement. Due to the public-law character of the relevant substantive law rules, public authorities entrusted with the protection of collective consumer interests would as a rule intervene only where the interests of domestic consumers were encroached on.[242] Such authorities were, moreover, powerless in respect to rogue traders established abroad, since they could not enforce administrative law decisions and judgments in foreign jurisdictions.[243] The Brussels convention on jurisdiction and enforcement of judgements applied solely in the field of private law ('civil and commercial matters').[244]

This vacuum in the enforcement of collective consumer rights was perceived as truly unsatisfactory. A trader willing to employ an unlawful marketing practice had only to move to a different jurisdiction within the Common Market in order to be immune from prosecution by interested organizations and public authorities in the state of infringement.[245] Seen from the point of view of Community law, such a situation could seriously prejudice the effectiveness of national measures taken for implementation of consumer-related Community legislation and could thus constitute a distortion of competition.[246] Different measures to remedy this situation were conceivable. Clearly, agreeing on common procedural rules on standing and remedies would have been the most radical and efficient strategy. However, this would have gone beyond the limits of Community legislative competences and was therefore not a realistic option. As a second best, creating a common regime on recognition and enforcement of foreign judgments in consumer-related proceedings has been suggested.[247] Yet, even this strategy would not have solved the problems of *locus standi* of consumer organizations described above.

Given the complexities associated with any attempt to harmonise national procedural laws,[248] the Injunctions Directive takes a more modest but realistic stance. The Directive focuses on facilitating cross-border litigation in the interest of consumers. Instead of changing national rules on standing, the Directive builds on the well-tried approach of mutual recognition. Consumer organizations and public bodies properly constituted according to the law of a Member State and recognized there to genuinely represent consumer interests, are to be granted the right to bring an injunction before

---

[240] See LG Achen, *Verbraucher und Recht* 1994, 36 with a comment by Micklitz; OLG Köln, *Verbraucher und Recht* 1995, 292 with a comment by Koch. Cf. Franck/Goyens, 'L'action en cessation des organisations de consommateurs à l'épreuve du Marché Unique' (1995) *REDC*, 27 ff.

[241] Micklitz (1993), 411 ff. Cf. Rott (2001), 401 ff.,

[242] See Bogdan (1998), 532 ff., at 533.

[243] On the complexities of cross-border litigation of collective consumer interests with the associated problems of jurisdiction and applicable law, see Reich (1992b), 444 ff.

[244] See now Art. 1 Brussels Regulation. See Reich (1992b), 455 ff.

[245] Preamble of Directive 98/27/EC, Rec. 3. See Rott (2001), 403.

[246] Preamble of Directive 98/27/EC, Rec. 4.

[247] Bogdan (1998), 542.

[248] See Commission Working Paper on Enforcement of European Consumer Legislation, 26 May 1998.

the competent courts of all other Member States. The Directive defines such organizations and bodies as 'qualified entities'. For reasons of legal certainty and transparency the Directive directs the Commission to draw up and maintain a list of qualified entities to be updated every six months.[249] Member States are in their turn obliged to communicate to the Commission any new 'qualified entities' that are qualified to bring an action under Art. 2.[250] The importance of this list can hardly be overstated. It is only entities figuring on the list which enjoy the rights under the Directive. Courts and administrative authorities cannot question the entries into the list and have to accept the entry as a proof of the legal capacity of the 'qualified entity' in point.

In respect of internal situations Member States are, thus, free to choose the model of enforcement (relying solely on public enforcement or alternatively, on action by consumer associations). It is also up to the Member States to lay down stricter or more relaxed criteria for granting national consumer associations the status of 'qualified entities' in the sense of the Directive. The Directive does not formally oblige Member States to grant a right of action for an injunction to domestic consumer associations. They are, however, obliged to grant such a right to foreign consumer associations provided that the latter are listed as qualified entities. The scope and power of the mutual recognition principle are indeed remarkable. If properly implemented the Directive requires, for instance, that German courts grant legal standing to the Swedish KO in cases of misleading advertising. Conversely, the competent Swedish courts should recognize the legal standing of German consumer associations to bring an action for infringement of relevant interests of German consumers.[251] As always with the technique of mutual recognition it tends to exert considerable pressure on national governments to compare their domestic requirements with those in other Member States and to make changes so that not to put domestic operators at a disadvantage.[252]

Substantively, the scope of the Directive is restricted in a threefold manner. Firstly, it applies only to infringements of *collective* consumer interests. Recital 2 clarifies that collective interests do not include cumulation of interests of individuals who have been harmed by infringement. Class action is thus excluded from the scope of the Directive. Secondly, the Directive aims at the protection only of collective consumer interests included in *specific* Community directives and in national legislation transposing such directives (Art. 1). The relevant directives, many of them pertaining to the area of fair trading, are listed in an Annex to the Injunctions Directive.[253] It has been argued that national legislation which transposes minimum harmonisation Directives by providing a higher level of consumer protection should be regarded as covered by the scope of the Injunctions Directive.[254] All of the Community Directives in the area of fair trading

[249] Changes to the list of national qualified entities within these six-month periods shall be published without delay. See Art. 4(3). For the most recent communication updating the list, see OJ 2003 C159/2.
[250] Art. 4(2) Directive 98/27/EC.
[251] See Baetge (1999), 344.
[252] See Rott (2001), 401 ff.
[253] Directive 84/450 (Misleading Advertising Directive); Directive 89/552/EEC (Television Directive); Directive 92/28/EEC (Directive on Advertising of Medicinal Products for Human Use); Directive 85/577/EC (Doorstep Selling Directive); Directive 2000/31/EC (Electronic Commerce Directive); 97/7/EC (Distance Selling Directive). The Commission has issued a document, clarifying which of the provisions in these Directives the Commission considers as directed at collective consumer interests. Rott (2001), 406.
[254] See Rott (2001), 405.

law have been listed in the Annex. Thirdly, the Injunctions Directive applies only to *cross-border* infringements and does not affect purely internal situations (Art. 4).

As far as remedies are concerned, the focus of attention, as the title of the Directive suggests, is on injunctions (Art. 2). This remedy is known to the legal systems of all Member States, but is differently designed. As a rule it does not apply universally to infringements of all consumer protection legislation. A proper implementation of the Directive will consequently, at least for some Member States, imply changes in national legislation and granting new procedural rights.[255] Other remedies are only cautiously addressed by the Directive. Member States are encouraged to provide for summary procedures (preliminary injunctions) and for publication of decisions, but only "where appropriate" (cf. Art. 2(1)(a) and (b)). Likewise, the question of possible sanctions for failure to comply with an injunctive order (in the form of payments to the public purse or to other beneficiary), is left to national law.[256]

Finally, it is worth drawing attention to Art. 5 Directive 98/27/EC. This provision refers somewhat enigmatically to 'prior consultation' and leaves it open for Member States to introduce and maintain requirements that a party seeking injunction can only start this procedure after having tried to achieve a cessation by consultation with the defendant or the 'qualified entity'. The mystery can, as so often with Community legal texts, be deciphered by looking at the different traditions and misgivings that the provisions was designed to satisfy. Baetge argues that Art. 5 was drafted to cover the German procedure of pretrial notification '*Abmahning*'.[257] This, however, does not explain the reference to consultation with the 'qualified entity'. In this part, the provision is better understood as allowance for the centralised model of enforcement and for requirements for private litigants to consult public consumer protection bodies prior to instituting proceedings.[258]

The Injunctions Directive is conceived as an act of minimum harmonisation. Member States are not prevented from "adopting or maintaining in force provisions designed to grant qualified entities and any other person concerned more extensive rights to bring action at national law."[259] The Directive consequently leaves existing or future procedural rights of business associations and individual consumers under national law unaffected. As to the nature of the 'more extensive rights', the provision apparently refers to rights of action for damage compensation, as well as rights to claim penalties to be paid into the public purse. In the literature it has been argued that once such broader rights are provided in national law, they should extend to foreign 'qualified entities' as well.[260]

---

[255] Member States are of course only obliged to grant such rights to foreign 'qualified entities.' However, the political unpopularity of situations of 'reverse discrimination' in most cases prompts national lawmakers to extend the new rules to domestic entities as well. See Rott (2001).
[256] See Art. 2(1)(c) Directive 98/27/EC.
[257] See Baetge (1999), 346 ff.
[258] On the subsidiarity of the right of action of business and consumer associations in Swedish marketing practices law, see above. This requirement has been annulled by the 1995 MFL, but remains in force for actions under 4 § Act on Contract Terms in Consumer Relations (SFS 1994:1512).
[259] Art. 7 Directive 98/27/EC 'Provisions for wider action'.
[260] Rott (2001).

The Injunctions Directive once again confirms the special attention consumer associations receive in the Community legal and political system. Although Member States are theoretically free to deny standing to domestic consumer associations, 'regulatory competition' and the political sensitivity of 'reverse discrimination' produce a pressure on national legislators to expand the rights of such associations in the domestic legal order.[261] It should be noted that in an earlier version of the same Directive, business associations have been included under the category 'qualified entities'.[262] This alternative has been rejected in the final version which is positively assessed in legal doctrine.[263]

It should be noted that with the Injunctions Directive the double function of coordinated enforcement becomes clearly evident. On the one hand harmonisation is seen as part of the process of reducing regulative differences and levelling of competitive conditions which is vitally important for the Internal Market. On the other hand, improved enforcement is being increasingly seen as an asset *per se*. It is a matter of securing the efficient implementation of substantive Community law as such. Thus the substantive law consumer protection directives are not only viewed as promoting 'negative integration', but also as having a 'positive' and substantive value of their own. Improved instruments of enforcement are consequently considered necessary for the materialization of these new substantive Community values.[264]

6.3 Integration through the judicial process

The process of harmonisation of fair trading law through secondary Community acts involves legal integration through the centralized Community political process. In this process national governments step in as the key actors in shaping harmonised rules under the decisive mediation of Community bodies, and with the participation of affected stake-holders. Solutions are sought on a comprehensive basis and from an *ex ante* perspective. A different kind of harmonisation, or rather coordination of fair trading laws takes place through the Community judiciary when the ECJ faces questions about the compatibility of national fair trading laws with the basic Community freedoms. The interventions are made on a case-by-case basis and from an *ex post* perspective. The ECJ is asked to take a stand on a specific national measure and in a concrete case of perceived violation.

The following section briefly traces the evolution of the ECJ's jurisprudence concerning the interface between national fair trading law and the fundamental Community provisions on free movement of goods and services. The ambition is by no means to provide an exhaustive account of the voluminous case law.[265] Instead, only

---

[261] On the notions of 'purely internal situation' and 'reverse discrimination', cf. Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in: Kilpatrick, C./Novik, T./Skidmore, P., The Future of Remedies in Europe (Oxford: Hart Publishing, 2000), 117 ff., 120 ff. See also Nicolaysen, 'Inländerdiskriminierung im Warenverkehr' (1991) *Europarecht*, 95 ff.

[262] See Baetge (1999), 336 with reference to OJ 1996 C 107/5.

[263] See Beatge (1999), 336.

[264] See the Commission statement in respect to access to justice: "Any failure or difficulty in guaranteeing access to justice to individual consumers automatically leads to failures in the enforcement of European law at national level." Commission's Working Paper on Enforcement of European Consumer Legislation, 26 May 1998.

[265] The literature on the subject is abundant. See among others Hauschka, 'Lauterkeitsrecht und Verbraucherschutz zwischen nationalem Regelungsanspruch und der Rechtsprechung des EuGH' (1990) *ZVergl.RW*, 166; Steindorff, 'Unlauterer Wettbewerb im System des EG-Rechts' (1993) *WRP*, 214 ff.; Joliet,

the leading judgments are reported in order to get a general picture of the shifting limits between Community and national laws and the role of the ECJ in delimiting law-making competences in the area. The focus will be on cases involving marketing measures and not those concerning individual competitors' interests.[266] More cases will be analysed when exploring the impact of Community law on the national institutional framework in Germany and in Sweden.

6.3.1 Fair trading law and the free movement of goods

At the outset of European integration the connection between national fair trading law and Community provisions on free movement of goods was far from obvious. Art. 28 (ex Art. 30) EC Treaty was regarded to address mainly technical requirements related to products and imports. Furthermore, the rationale behind this provision was that of preventing discrimination and state protectionism. Rules on fair trading were generally perceived as setting forth neutral standards of business conduct with universal application, and could therefore not be readily seen as obstacles to intra-Community trade. Finally, the list of exemptions from the principle of free trade in Art. 30 (ex Art. 36) EC Treaty excplicitly mentioned protection of industrial and commercial property, which for many unquestionably included protection against unfair competition.[267]

This impression was confirmed by Commission Directive 70/50.[268] The Directive introduced the by now classical twofold categorisation of distinctly applicable and indistinctly applicable measures (with equivalent effect to quantitative restrictions). The concept "measures having equivalent effect to quantitative restrictions" seemed to catch the two most widely spread forms of discrimination, which in the literature are labelled formal and material discrimination.[269] Among the examples of distinctly applicable measures the Directive expressly mentioned prohibitions or limitations on publicity in respect of imported products only, or measures totally or partially confining publicity to domestic products. By contrast, the category of indistinctly applicable measures seemed narrower. The latter chiefly covered measures dealing with shape, size, weight, composition, presentation, identification or putting up. Measures regarding pricing or publicity were notably not among the examples provided.[270]

'Das Recht des unlauteren Wettbewerbs und der freie Warenverkehr' (1994) *GRUR Int.*, 1 ff.; Sack 'Auswirkungen der Art. 30, 36 und 59 ff. EG-Vertrag auf das Recht gegen den unlauteren Wettbewerb' in: Schricker/Bodewig (1998/99), 139 ff.; Greaves, 'Advertising Restrictions and the Free Movement of Goods and Services' (1998) *ELRev.*, 305 ff. Generally on free movement of goods in the Community see Oliver, *Free Movement of Goods in the EEC*, 3rd ed. (London: Sweet and Maxwell, 1996).

[266] See Case C-6/81 *Beele* [1982] ECR 707 ff.; Case C-58/80 *Dansk Supermarked* [1981] ECR 181, ff. See Beier, 'Industrial Property and the Free Movement of Goods in the Internal European Market', (1990) *IIC*, 131 ff.; Rose, 'Passing-off, Unfair Competition and Community Law' (1990) *EIPR*, 123 ff.

[267] Beier (1990) *IIC*, 131 ff., 145.

[268] Commission Directive 70/50/EEC, OJ L 13, 29-31. With this Directive the Commission sought to provide guidance as to the measures to be abolished until the end of the transitional period.

[269] Cf. Marenco, 'Pour une interprétation traditionelle de la notion de mesure d'effet équivalent à une restriction quantitative' (1984) *CDE*, 291 ff., at 325 ff.

[270] Furthermore, to fall under the scope of Art. 30 EC Treaty, the enforcement organs had to make sure that "the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trading rules." This was the case in particular where: "the restrictive effects on the free movement of goods are out of proportion to their purpose or where the same objective can be achieved by other means which are less of a hindrance to trade." See Art. 3 (1) and (2) Directive 70/50/EEC. See further Weatherill/Beaumont (1999), 565 ff.

The situation changed, however, after the Court pronounced its sweeping *Dassonville* formula subsuming under Art. 28 (ex Art. 30) EC Treaty 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.'[271] The *Dassonville* ruling shifted the emphasis from discrimination to hindrance arising from simple disparity between national legal systems and regulatory traditions. In subsequent interpretations the formula was additionally enhanced so that the 'intra-Community' element was diluted. Arguably, by adopting such an extensive interpretation the ECJ assumed the power to control the compatibility of any measure of state regulation not only against intra-Community trade, but against commercial freedom in general. It opened the flood-gates for contesting all kinds of national regulatory measures against the benchmark of free trade.[272]

The approach of the ECJ was even more unorthodox in the *Cassis de Dijon* judgment of 1978.[273] The political context of the decision was one of stagnation in the progress of political integration. The constitutional balance was fragile, plagued by the blocking effect of unanimity voting. There was a lack of will within national governments to advance decisive measures necessary for the building of the Internal Market.[274] As we know, it was precisely at this moment in time that the ECJ announced its ingenious principle of 'mutual recognition'. In the view of the Court, goods legally produced in one Member States ought to circulate freely throughout the Community. With respect to the blackcurrent liquor at the center of the case the ECJ stated:

> There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced to another Member State.[275]

In the legal literature *Cassis de Dijon* is interpreted as coming close to a presumption in favour of free trade.[276] To soften the impact of this radical reading, which substantially intervened in the regulatory autonomy of the Member States, the Court allowed for a broader range of exemptions than those in Art. 30 (ex 36) EC Treaty to apply for indistinctly applicable measures. Consumer protection and the fairness of commercial transactions were expressly proclaimed as 'mandatory requirements' that justified deviation from the expanded principle of free trade in the absence of harmonisation, and provided that they were proportionate to their purpose. The potential inherent in the *Cassis de Dijon* ruling was promptly recognized by the Commission. The principle of 'mutual recognition' was gradually put at the heart of

---

[271] Case C-8/74 *Dassonville* [1974] ECR 837. On the Dassonville judgment and its consequences see Gormley, 'Actually or Potentially, Directly or Indirectly? Obstacles to the Free Movement of Goods' (1989) *Yearbook of European Law*, 196 ff.

[272] In the literature and especially in ordo-liberal accounts, this approach has been conceptualised as constitionalising economic freedom. Economic freedom was arguably recognized as a higher-order constitutional value in the Community legal order, taking precedence over national regulatory policies. For a presentation of these interpretations and critical anlaysis, see Joerges (1994), 37 ff.; Maduro (1998a), 35 ff.

[273] Case C-120/78 Rewe-Zentrale Ac. V. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) [1979] ECR 649.

[274] See Weiler (1999), 39 ff.; Pinder, 'The Single Market: A Step Towards European Union' in: Lodge, *The European Community and the Challenge of the Future* (London: Pinter Publishers, 1989), 94 ff., 97.

[275] Case C-120/78 [1979] ECR 649, para 14.

[276] See Weatherill/Beaumont (1999), 569.

the 'New Approach' to technical harmonisation and generally of closer European integration.[277] Instead of the slow and cumbersome process of negotiations and detailed harmonisation of national trading rules in the wake of the ECJ ruling an alternative approach of selective harmonisation and reliance on mutual trust in residual areas was advanced. In one blow the Court managed to end the illusion of the strictly controlled hierarchical model of European integration and submitted a vision of a dynamic and decentralized process of multilevel coordination.

6.3.1.1 Discriminatory rules on fair trading

The first time the ECJ was asked to take a stand on possible conflict between national advertising regulation and the principle of free movement of goods was arguably in *Commission v. the French Republic.*[278] The Court had to assess the compatibility of a French regulation on the advertising of alcoholic beverages. The regulation introduced a very sophisticated scheme of advertising restrictions, classyfing alcoholic beverages into five groups and applying different degree of restriction to each group. On the surface the classification was not based on the origin of the products, but it was difficult to discern any objective criterion which had been consistently applied throughout the scheme. In any case the alcohol content was not decisive. The argument of the French government that beverages consumed with or after meals (as *aperitif*) were treated more favourably because less detrimental to consumer health was easily unveiled as disguised preferential treatment for national products.[279]

It is interesting to note that in this case the ECJ for the first time recognised the importance of advertising as a communication tool and its role for the penetration of a new national market. The Court declared:

> There is no dispute between the parties on whether a restriction on the freedom of advertising for certain products may constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 EC Treaty. Although such a restriction does not directly affect imports, it is however capable of restricting their volume owing to the fact that it affects marketing prospects for the imported products.[280]

The paragraph quoted above refers to restrictions of advertising in general and not only to discriminatory measures.

The question of whether classical fair trading rules (a prohibition of misleading advertising under the German UWG) could be qualified as discriminatory measures under Art. 28 (ex Art. 30) EC Treaty was addressed in *Kohl v Ringelhan & Rennett.*[281] In this case it was not the national rule itself but its application in a specific factual

---

[277] Completing the Internal Market, White Paper from the Commisson, COM (85) 310 final, 18 ff. See Pinder (1989), 97; Pelkmans, The New Approach to Technical Harmonization and Standardization (1987) 25 *JCMS*, 249 ff. According to Maduro the programmatic importance attached to the *Cassis de Dijon* judgement was not intended or foreseen by the Court. See Maduro (1998a), 33.

[278] Case C-152/78 *Commission v French Republic* [1980] ECR 2299 ff.

[279] It suffices to note that following the scheme advertising of cognac was allowed whereas that of whisky - prohibited.

[280] *Ibid.*, para 11.

[281] Case C-177/83 *Kohl v Ringelhan & Rennett (r+r)* [1984] ECR 3651, para 15.

situation that was found to be discriminatory. A German court considered a trade symbol of a company *"r+r"* to be misleading chiefly because of possible confusion as to the domestic or foreign origin of the goods. Such an interpretation of the German UWG was held incompatible with the Treaty rules on free movement of goods.[282]

The case demonstrated the readiness of the Court to embark on situation-specific analysis, not in view of the abstract rules of unfair competition but of the results from their specific application. This hands-on approach paved the way to more direct dialogue between the ECJ and national courts bypassing national legislatures. The judiciaries in the Member States were held responsible to take the consequences of their judgments for the integration process into account.[283]

6.3.1.2 Non-discriminatory rules on fair trading before Keck

Whereas the potential of discriminatory rules on fair trading to fall foul of Art. 28 (ex Art. 30) EC Treaty was firmly established in the ECJ's jurisprudence, the attitudes to non-discriminatory advertising and marketing measures have experienced much fluctuation during the last decades. A dividing line between the old, expansive jurisprudence and a more restrictive one is drawn by the *Keck* judgement of the EC, although the meaning and reach of this ruling are far from settled.

The first judgement where the ECJ explicitly addressed a purely marketing measure applying without distinction to foreign and domestic products alike was *Oosthoek*.[284] The case concerned the compatibility of a Dutch prohibition of free gifts with Community law on the free movement of goods. The plaintiff, a company having its business in both Netherlands and Belgium, claimed that the ban on free gifts prevented it from using a successful marketing technique and forced it to organize its marketing strategies along different principles for the two countries.[285] The ECJ held that restrictions on certain forms of advertising and marketing affected intra-Community trade, even if indirectly. Nevertheless, in the case in point the measure was found justified on grounds of protection of consumers and fairness of commercial transactions. The Court eloquently sustained the intimate relation between marketing restrictions and the free movement of goods:

> Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. The possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may

---

[282] "Even though a provision of national legislation on unfair competition applies without distinction to the marketing of domestic and imported goods it cannot fulfil the condition [of non-discrimination against imported goods] if it is interpreted in such a way that it becomes possible to prohibit the use of a distinctive symbol for the sole reason that the public may be mislead as to the domestic of foreign origin of the goods." *Ibid.* See the critical comments of Rose (1990), 123 ff., at 125, who points that the case rather concerned possible confusion as to the connection with a particular manufacturer.

[283] On discriminatory rules related to fair trading see further C-113/80 *Commission v. Ireland (Irish Souvenirs Case)* [1981] ECR 1625, concerning mandatory rules on indication of country of origin.

[284] Case C-268/81 *Oosthoek* [1982] ECR 4575. See Greaves (1998), 305 ff., 309.

[285] For instance by printing two different sets of advertising materials, see Case C-268/81 *Oosthoek* [1982] ECR 4575 ff., at 4577.

> constitute an obstacle to imports even if the legislation in question applies to domestic and imported products without distinction.[286]

This recital has subsequently been repeated in several cases where marketing measures were involved. In *Buet* the Court referred to *Oosthoek* and held that a measure preventing a seller from using his chief method of marketing (canvassing purchasers at their homes) could clearly be an obstacle to intra-Community trade. The national legislation at issue was again exempted as justifiable on grounds of consumer protection.[287]

A different aspect of the problem with divergent fair trading laws and regulations was invoked in the *GB-INNO* judgment.[288] At the centre of the case was an advertising campaign by a Belgian supermarket situated in the border area with Luxembourg. The supermarket distributed leaflets to Luxembourg consumers announcing temporary special-price offers with indication of the duration of the offer and the prices charged previously. This type of promotion was lawful in Belgium, but prohibited in Luxembourg and was enjoined by a Luxembourg court upon a petition by a local trade association. Unlike classical free trade cases the advertising restriction was here seen to prevent the flow of goods indirectly, by limiting consumers' information about purchasing opportunities across the border. It was a question of a potential import to be executed by private customers. Advocate General Lenz stated:

> The continued existence of such a frontier for advertising is thus incompatible with the establishment of a common market... in addition such an interpretation would restrict the significance of the objective of Title I part two of the Treaty Free movement of goods, because in a market economy the provision of information to market participants on market conditions is an essential pre-condition for its functioning.[289]

The ECJ likewise underlined the importance of free movement rules not only to traders but also to consumers. Interestingly, to justify this sudden consumerist perspective the Court referred to the First and Second Community programmes for a consumer protection and information policy.[290] Endorsing its *Oosthoek* ruling the Court added:

> Free movement of goods concerns not only traders but also individuals. It requires, particularly in frontier areas, that consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population. That freedom for consumers is compromised if they are deprived of access to advertising available in the country where purchases are made. Consequently a prohibition against distributing such advertising must be examined in the light of Articles 30, 31 and 36 of the Treaty.[291]

---

[286] *Ibid.*, para 15.
[287] Case C-382/87 *Buet v. Ministere public* [1989] ECR 1235.
[288] Case C-362/88 GB-INNO-BM v Confederation du commerce luxembourgeois ASBL [1990] ECR I-667.
[289] *Ibid.*, para 14 of the AG's Opinion.
[290] OJ 1975 C 92/1; OJ 1986 C 167/1. See Case C-362/88 *GB-INNO* [1990] ECR I-667, para 14-16 of the judgment.
[291] Case C-362/88 *GB-INNO* [1990] ECR I-667, para 8.

The Court refused to accept that a restriction on truthful information could be a genuinely intended measure to protect consumers.[292] The decision can thus be said to support both a market-oriented and a consumerist interpretation.

It is important in these cases to note the presence of a very immediate and real cross-border element. In *Oosthoek* a linguistically homogeneous area of the Community was partitioned only by the existence of different regulations on sales promotions. In *GB-INNO* consumers were prevented from making use of the natural advantages of living in a border region. Advertising could not play the role of a medium inducing cross-border trade and the dissolution of national borders. This immediate cross-boder relevance distinguishes *GB-INNO* from subsequent cases, where national legislation and domestic economic and social policy were challenged solely for their effect on commercial freedom without any palpable impact on cross-border trade.[293] It should rather be seen in its specific context of marketing in an "integrated region and an integrating Community." In the analysis of Joerges:

> This, then seems to be the message of GB-INNO-BM: the ECJ is not prepared simply to impose a Community-wide regime in an area not covered by Community legislation; it is, however, ready to remind both governmental and non-governmental actors of what it means to live in a 'legal' Community.[294]

Despite the difference in circumstances, *Yves Rocher* presented a case similar in philosophy and in relevance to *GB-INNO*.[295] The ECJ was here concerned with § 6e UWG prohibiting eye-catching comparisons with prices previously charged. A trade association had lodged a petition for an injunction under this section of the UWG, seeking to enjoin *Yves Rocher* from marketing cosmetic products through a catalogue where the previous prices were conspicuously stricken and replaced by reduced ones. The ECJ found the German prohibition to affect intra-Community trade and not to be justified under requirements of consumer protection and fariness of commercial transactions. As in *GB-INNO* the ECJ had difficulty to accept that depriving consumers from truthful information could be advanced as beneficial for consumers.[296]

Less obvious was the cross-border element in *Aragonesa de Publicidad*, where the issue of the impact of advertising restrictions on intra-Community trade was revisited.[297] The case concerned an outright ban on the advertising of beverages with an acoholic content of more than 23 degrees in the media and on different public places in Catalonia. The ECJ repeated that national legislation which restricts or prohibits certain forms of advertising "may constitute a hindrance to imports" and should therefore in principle be regarded as a measure having equivalent effect to

---

[292] *Ibid.*, para 18.

[293] See, for instance, Case C-155/80 *Oebel* [1981] 1993 on legislation on night-work in bakeries and Case C-145/88 *Torfaen Borogh Council* [1989] ECR 3851 and Case C-169/91 *Stoke-on-Trent* [1992] ECR I-2361 on Sunday trading. See the emphasis on the cross-frontier element in AG Lenz, Case C-362/88 *GB-INNO* [1990] ECR I-667, para 15.

[294] Joerges (1997), 402.

[295] Case C-126/91 *Yves Rocher* [1993] ECR I-2361.

[296] Other cases of relevance for fair trading law are: Case C-241/89 *SARPP* [1990] ECR I 4695; Case C-238/89 *Pall* [1990] ECR I-4827, para 13.

[297] Joint Cases C-1/90 and 176/90 *Aragonesa de Publicidad Exterior* [1991] ECR I-4151, para 11.

quantitative restriction. At the same time, in contrast to the French restriction scheme discussed above[298] the Court found the prohibition at issue to be justified under Art. 30 (ex Art. 36) EC Treaty as aiming at public health protection and being not "manifestly unreasonable as a part of campaign against alcoholism."[299] The ECJ particularly stressed that the prohibition affected only some marketing channels, whereas other means for advertising remained open.

6.3.1.3 Keck and beyond

A spectacular and much debated turn in the ECJ jurisprudence on free movement of goods followed with the seminal judgment *Keck and Mithouard.*[300] The joint cases concerned a French prohibition of sale at a loss. Explicitly overruling previous precedent the Court stated:

> [C]ontrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly actually or potentially trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[301]

With this statement the Court clearly announced a substantial revision and narrowing down of the *Dassonville* formula. In particular, selling arrangements were excluded from the scope of Art. 28 (ex Art. 30) EC Treaty in principle. *Dassonville and Cassis* continued to apply in full swing only to product requirements relating specifically to "designation, form, weight, composition, presentation, labelling, packaging."[302] The category 'selling arrangements' covered circumstances connected with the selling transaction such as price, opening hours, advertising and marketing (who, when, where, how). Measures in this group could be overturned only if they affected national and import products differently 'in law and in fact' This delimitation had much in common with the Directive 70/50 and at least at first blush seemed to carry Art. 28 (ex Art. 30) back to its anti-protectionist roots.

Two main and mutually related explanations are generally offered to the *Keck* judgment. The first one is associated with the clearly stated desire of the Court to reduce the flow of cases under the broadly defined *Dassonville* formula. Encouraged by the sweeping scope of the basic Community freedoms as interpreted by the ECJ, economic operators were increasingly challenging burdensome national rules and

---

[298] Case C-152/78 *Commission v French Republic* [1980] ECR 2299 ff.

[299] Joint Cases C-1/90 and 176/90 *Aragonesa de Publicidad Exterior* [1991] ECR I-4151, para 17.

[300] Joined Cases C-267 & 268/91 *Keck and Mithouard* [1993] ECR I-6097. The commentaries on *Keck* in legal doctrine are legion. See, among others, Reich, 'The 'November Revolution' of the European Court of Justice: Keck, Meng and Audi Revisited' (1993) 31 *CMLRev.*, 459 ff.; Maduro, 'Keck: The End? The Beginning of the End? Or Just the End of the Beginning?' (1994) 1 *Irish Journal of European Law*, 30 ff.; Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification' (1996) *CMLRev.*, 885 ff.; Heermann, P., 'Artikel 30 EGV im Lichte der „Keck"-Rechtsprechung: Anerkennung sonstiger Verkaufsmodalitäten und Einführung eines einheitlichen Rechtfertigungstatbestands?' (1999) *GRUR Int.*, 578 ff.

[301] Joined Cases C-267 & 268/91 *Keck and Mithouard* [1993] ECR I-6097, para 16.

[302] *Ibid.*, para 15.

regulations, and not obstacles to intra-Community trade.[303] Such use of Community law was creating severe backlog problems for the Court. More importantly, and here comes the second explanation, litigants were increasingly pushing the ECJ into the precarious role of arbiter over national regulatory choices. Since nearly all trading rules could be argued to have at least potential impact on intra-Community trade the role of the Court shifted to weighing the justifications for, and the proportionality of, national measures and policies. The constitutional misgivings associated with this self-assigned role intensified after the Maastricht Treaty, and with the advance of the principle of subsidiarity.[304]

Whereas the concerns of the ECJ were widely shared by policy-makers and legal commentators, the choice of method to achieve the goal was disputed. By basing its new approach on the distinction between selling arrangements and product-related requirements, the Court had opted for a "formalist solution".[305] The virtue of the formalist approach were probably seen to lie in the promise of certainty and predictability. According to some commentators the ECJ sought to "empower national courts to dismiss far-fetched attempts to deploy internal market law which were clogging up the Community judicial system with the minutae of purely local affairs"[306] A simple and well-defined rule was certainly in a better position to ensure the intended reallocation of decision-making powers.

At the same time, the potential of the *Keck* formula to fix the limits of Art. 28 (ex Art. 30) EC Treaty in a clear-cut manner were seriously questioned.[307] Indeed, the very definition of the concept 'selling arrangements' appeared problematic. As Reich pointed out, by introducing the rigid and artificial distinction between product and marketing rules the ECJ disregarded the reality of modern marketing, building on "a uniform concept of product presentation, advertising and sales promotion."[308] A much more nuanced approach to marketing rules was suggested by the AG Tesauro in his opinion in the *Hünermund* case, a case in which the Court delivered judgment soon after after *Keck*.[309] While employing the same distinction between measures related to product characteristics and those relating to commercial activity (who, where, when and how), he added a number of other 'material' criteria such as the degree of negative impact on imports (i.e. the intra-Community element) and the disparity between national rules as a cause for such impact.[310] In the view of the AG measures relating to sales promotion, e.g. those in *Oosthoek*, in *Buet* and in *GB-INNO* obliging traders to modify their 'commercial grab' could still be analysed within the framework of the classical mutual recognition approach.[311]

---

[303] *Ibid.*, para 14.
[304] See Reich (1994).
[305] Reich (1994), 465 ff. The test followed by the Court had been elaborated and advocated earlier by a member of its legal service. See White, 'In Search of the Limits to Article 30 of the EEC Treaty' (1989) 26 *CMLRev.*, 235 ff.
[306] Weatherill (1996b), 885.
[307] See Reich (1994), 470 ff.; Weatherill (1996b) 885 ff.; Maduro (1998a), 83 ff.
[308] Reich (1994), 471.
[309] Case C-292/92 *Hünermund* [1993] I-6787, Opinion of AG Tesauro.
[310] *Ibid.*, para 11.
[311] *Ibid.*, para 22.

In the legal literature a number of alternative tests have been advanced since *Keck*. Weatherill advanced a less formal 'market access' test for compliance of national measures with Community free movement rules. The tests requires assessment of two elements (i) equality in application of the measure in law or in fact, and (ii) direct or substantial hindrance to the access of imported products to the market.[312] As the author himself admits, the flexibility of such a test is at the expense of certainty in its application, since the notions of 'direct and substantial hindrance' are far from clear. With respect to measures concerning selling arrangements Reich proposed a more subtle distinction between dynamic and static elements of marketing. With AG Tesauro Reich argued that measures concerning the dynamic element of marketing should still be subject to a mutual recognition approach. Generally, he suggested that *Cassis* was not overruled, but that the burden of proof had shifted in respect of marketing rules.[313]

Subsequent case law indeed demonstrated that the seemingly clear-cut and rigid formula required more flexible interpretation. Thus in *Clinique* a prohibition on the advertising of a cosmetic product under the designation *Clinique* (on grounds of potential consumer deception) was precluded as falling foul of Art. 28 (ex Art. 30) and disproportionate.[314] Likewise in Mars[315] the application of § 3 UWG to enjoin a short marketing campaign of icecream bars with an indication on the wrapping '+10%' (again for reasons of possible consumer confusion) was considered to have restrictive effects on intra-Community trade and be within the scope of Art. 28 (ex Art. 30) EC Treaty. Both the *Clinique* and *Mars* decisions did not concern pure advertising. The measures at issue impacted equally on product presentation and labelling and revealed a 'dual burden' typical of *Cassis de Dijon* situations. The cases pertinently illustrate the close relationship between product, presentation, packaging and advertising. Where such situations of simultaneous effects are at hand the ECJ obviously does not hesitate to uphold the principles of mutual recognition, even though the national measures might primarily be directed at advertising.

The ruling in *Familia Press* once again demonstrated the difficulties of drawing a sharp distinction between product requirements and selling arrangements.[316] An Austrian prohibition of prize competitions was invoked by a competitor seeking to prevent the distribution in Austria of a German periodical that contained such competitions. Although the Austrian rule at issue clearly governed selling arrangements, it was classified by the Court as a product requirement.[317] The main argument of the Court was that the competitions at issue formed an integral part of the content of the magazine. As a result, a prohibition on a method of sales promotion required traders established in other Member States to alter the content of their products and so impeded market access.[318] The decision in this part came to

[312] Weatherill (1996), 897.
[313] Reich (1994), 487.
[314] Case C-315/92 *Clinique* [1994] ECR I-317 ff. The case involved interpretation of the provisions on deceptive advertising in Directive 76/768/EEC of 27 July 1976 and will be discussed in more detail below, Ch. 7.2.1.
[315] Case C-470/93 *Mars* [1995] I-1923. See also below Ch. 7.2.1.
[316] Case C- 368/85 *Familiapress* [1997] ECR I-3689. See Greaves (1998), 310; see Maduro, 'The Saga of Article 30 EC Treaty: To Be Continued' (1998b) 5 *Maastricht Journal*, 298 ff.
[317] Case C-368/85 *Familiapress* [1997] ECR I-3689, para 11.
[318] *Ibid.*, para 11-12.

corroborate the more subtle approach suggested by AG Tesauro in *Hünnermund*, insisting on the relevance of double burden. Eventually, the court found the rule to be necessary and proportionate for the intended policy objective of press diversity.

With regard to measures exclusively restricting advertising possibilities, the ruling in *Leclerc-Siplec* suggested that the ECJ was prepared to follow the path outlined in *Keck*. The case concerned a French prohibition of television advertising for the distribution sector.[319] Despite the attempts of AG Lenz to attack the applicability of *Keck* to advertising measures at its foundations, the Court qualified the measure as referring to selling arrangement and did not find it to be within the scope of Art. 28 (ex Art. 30) EC Treaty.[320] More recent cases, however, have eroded even this appearance of certainty. The phrase "affecting in the same manner, in law and in fact" increasingly operates as a safety valve, allowing indistinctly applicable marketing measures with a bearing on the internal market to be tested against the free trade requirements of the Treaty. With cases like *De Agostini* and especially *Gourmet* the ECJ made some decisive, albeit well-balanced steps in the direction of relaxing the formalism of *Keck*.[321]

To some extent the interpretation submitted by Reich in 1994 seems corroborated by subsequent developments. The Court is recurrently faced with novel manifestations of the dynamic element of marketing and with the perceptible impact of national marketing rules on intra-Community trade. Sticking rigidly to the *Keck* distinction in such situations would clearly produce unsatisfactory results and the ECJ is constantly involved in new attempts to refine its approach. *Cassis* is not overruled but the burden of proof has shifted to those who allege restrictive effects of national measures concerning selling arrangement. The impact on intra-Community trade in such cases has to be clearly demonstrated. It can be submitted that in cases where the cross-border element is present, immediate and convincing (like it was in *Oosthoek*, *GB-INNO*, *Familia*), the ECJ will not hesitate to subsume a measure under the scope of Art. 28 (ex Art. 30). What can be observed from recent cases, however, is that the Court more often chooses to leave the assessment of equal application 'in law and in fact' to the national courts. Likewise, the importance of a more sophisticated analysis of proportionality increases, a question addressed briefly in the following section.

6.3.1.4 Justifications

Article 30 exemptions

As mentioned above, one might at first glance think that even discriminatory rules on fair trading, with their dual purpose of protection against unfair competition and consumer protection, should be exempted from Art. 28(30) on the basis of Art. 30 (ex Art. 36). The connection between repression of unfair competition and protection of industrial property has been firmly anchored in the Paris Convention of 1883 to which all Member States are parties. Likewise it could reasonably be contended that

---

[319] The rationale behind the restriction was to channel adverts to the press and thus promote this sector.

[320] Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179. What appears specific of *Lecler-Siplec* is that the advertising restriction at issue affected a whole distribution sector and not of a specific product. Therefore its impact on the market access of specific products was not obvious. See Woodridge, 'Article 30 and TV Advertising; the ECJ Judgment in Leclerc-Siplec' (1996) *EBLR*, 3 ff.

[321] Joint Cases C-34/95 & 35/95 *De Agostini & TV Shop* [1997] ECR I-384; Case C-405/98 *Gourmet* [2001] ECR I-1795.

consumer protection is a classical ambit of 'public policy' and should therefore qualify for exemption under Art. 30 (ex Art. 36) EC Treaty. The ECJ has made it clear, however, that the latter provision is to be very narrowly construed. Once the Court has found a measure to be distintly applicable it is very rare that a justification for this discriminatory treatment is found in the provisions of Art. 30 (ex Art. 36).

A serious blow to the basic assumption of unfair competition law as part of industrial property protection was delivered through a number of decisions of the ECJ, where the court advanced a very restrictive interpretation of the term 'industrial property'.[322] In the *Irish Souvenirs* case the European Commission challenged an ordinance issued by local authorities and imposed mandatory marking of foreign origin on souvenirs with Irish themes which were produced abroad and imported to Ireland. The Irish government defended the order with arguments resting on consumer protection and protection of local producers from unfair competition.

The Court first insisted with reference to its seminal *Cassis de Dijon* decision that it was important to differentiate between distinctly applicable and indistinctly applicable measures. While in the *Cassis* judgement the Court had developed a longer list of exemptions from the principle of free movement of goods, including fairness of commercial transactions and consumer protection, this longer list applied only to indistinctly applicable measures. In the case of discriminatory measures, on the other hand, only the exemptions enumerated in Art. 30 (ex Art. 36) of the Treaty could be invoked. These exemptions were to be regarded as *numerus clausus* and were moreover to be narrowly construed. The Ordinance in *Irish souvenirs* was an outright discriminatory one since it affected exclusively imports. Any resort to *Cassis* justifications like consumer protection and fairness of commercial transactions were ill-placed and respectively rejected. The Court thus implicitly refused to treat national unfair competition laws as part of industrial property and consequently as exempted from the principle of free movement of goods on grounds of Art. 30 (ex Art. 36) of the EC Treaty.[323] Likewise, consumer protection was not considered a sub-species of public policy.

This line of reasoning was confirmed with the judgement in *Ringelhan & Rennett*. The case concerned the use of a trade symbol ('r+r') which could allegedly deceive consumers as to the commercial origin of the company. The Court made it clear that consumer protection and fair trading as well as other mandatory requirements under the *Cassis de Dijon* doctrine beyond those listed in Art. 30 (ex Art. 36) can only be invoked where national measures are indistinctly applicable. The plaintiff supported by the German government contended that German law on unfair competition aimed at safeguarding the interests of consumers and was to be regarded as a measure of public policy. This argument was discarded categorically by the Court:

> Whatever interpretation is to be given to the term "public policy" it cannot be extended so as to include considerations of consumer protection. ...[S]uch

[322] On the question of fairness of competition as a principle of primary Community law, see also Beier (1985), 139.

[323] Case C-113/80 *Commission v. Ireland (Irish Souvenirs Case)* [1981] ECR 1625; cf. Case C-12/74 *Commission v. Germany (Sekt/Weinbrand)* [1975]ECR 181. See Oliver (1996), 237-243. For a critical view see Beier (1990), 131 ff., at 145.

> considerations may in certain circumstances be taken into account in establishing whether national measures applicable without distinction to domestic and impoted products are caught by the prohibitions laid down in Article 30; they cannot, however, serve to justify restrictions on imports under Article 36.[324]

Mandatory requirements
Regarding the exemptions in the case of indistinctly applicable rules, the ECJ has been much more relaxed and has accepted a wide range of policy considerations. The concept 'overriding requirements of general public importance' coined by the Court has throughout the years been interpreted generously and has expanded with ever novel grounds for exemptions. The first justifications advanced already with the very *Cassis* doctrine were fairness of commercial transactions and consumer protection. Subsequently in *Beele* the Court, notably with reference to Art. 10 *bis* of the Paris Convention, acknowledged that rules prohibiting precise and confusing imitation of someone else's product may indeed protect consumers and promote fair trading.[325] This jurisprudence was interpreted as giving constitutional rank (in the meaning of the *Europäischen Wirtschaftsverfassung*) to the provisions of fairness of competition.[326]

It is clear from the case law of the ECJ that in respect to indistinctly applicable measures the overriding requirements *'à la Cassis'* come in addition to the classical Art. 30 (ex Art. 36) justifications. Protection of public health is thus a frequent exemption ground also for non-discriminatory measures.[327] Cases like *Familiapress* and *Alpine* (discussed below) opened for new requirements, namely diversity of the press and soundness of fiscal transactions.

The proportionality test
An element in the compatibility evaluation under Art. 28 (ex Art. 30) which has recently been gaining on importance is the test of proportionality. After having established that a measure falls within the scope of Art. 28 (ex Art. 30), but aims at achieving an accepted public interest requirement, a conclusive proportionality assessment is required. The questions asked by the ECJ are whether the measure is necessary to fulfil the intended legitimate objective, and wheather the same effect cannot be achieved by measures less restrictive to intra-Community trade.

As has been noted in the literature on the free movement of goods, in its search of striking the right balance between institutional and integrational concerns, the Court develops ever more sophisticated balancing techniques, where the interpretation of the last criteria, namely that of 'alternative means', has been changing. In its activist years the Court often carried out the test itself, not rarely substantially modifying the objective under the guise of an 'alternative means' assessment. Thus in the field of consumer policy, critics point out that the frequent emphasis of information as an alternative to mandatory product requirements does not always show consideration for the true public interests objectives pursued. Recently this has changed, though. The test of 'alternative means' is first and foremost on a much broader scale left in the hands of the national courts. And when occasionally the ECJ undertakes the test itself,

[324] Case C-177/83 *Kohl v. Ringelhan & Rennett* [1984] ECR 3651, para 19.
[325] See Case C-6/81 *Beele* [1982] ECR 707, para 9.
[326] Müller-Graff (1984), 220.
[327] See in this sense Maduro (1998a), 51.

then the substitution of objectives is less apparent.[328] We will return to these questions when discussing the effects of the ECJ jurisprudence on national law in the next chapter.

Finally, the relations between positive and negative integration have been unclear and changing. Whereas the meaning of exhaustive harmonisation is relatively straight forward, the implications of minimum harmonization have been a matter of controversy and received divergent treatment by the judiciary.[329] There is little doubt that producers and service providers established in a Member State which has opted for more stringent rules than minimum standard in a Community act are bound by these national rules. Community law does not protect from instances of reverse discrimination. Equally clear is that minimum harmonisation does not offer a free ticket for protectionist and openly discriminatory measures. Apart from these relatively clear-cut categories, however, uncertainties abound. For instance, can national measures enacted on the basis of explicit authorization for more stringent national rules be applied equally to foreign as well as to domestic products and services? If such indistinctly applicable national measures constitute a barrier to trade, can they be justified on the basis of the mandatory requirements *a là Cassis* or do the more restrictive conditions of Art. 30 (ex 36) EC Treaty apply?

In doctrine the views vary widely. Proceeding from functional and goal-oriented reasoning some argue that such measures should be applicable to domestic products only, since an interpretation in the opposite sense would undermine the very goal of harmonisation.[330] Others regards more stringent national measures as applicable to national and foreign products alike. However, in case of incidental conflict between such measures and Art. 28 (ex 30) of the Treaty, it is argued that the measures can only be exempted on the basis of the explicit Treaty derogations of Art. 30 and that no place for application of the doctrine of mandatory requirements exists.[331]

In the absence of specific clarifying rules in the respective Community act, the Court of Justice has so far given somewhat contradictory signals. It has in a number of situations acknowledged the full validity of higher national standards in respect of foreign (and domestic) products and services. Moreover, in case of incidental conflict of such measures with free movement principles of primary Community law, derogations have been authorized not only on the basis of Art. 28 (ex 30) EC Treaty but with recourse to the broader range of exemptions developed by the Court under the mandatory-requirements doctrine.[332] This generous attitude has attracted academic support.[333] However, there are also examples where the Court delivers judgments contradicting this line of interpretation.[334] As the ECJ has demonstrated on numerous occasions, attempts at generalization are precarious. Ultimately the circumstances of

[328] See Maduro (1998b), 306 ff.; cf. Case C-405/98 *Gourmet* [2001] ECR I-1795.
[329] See Dougan (2000), at 864 ff.
[330] Bernard (1996), 633 ff, at 646-7.
[331] Slot, 'Harmonisation' (1996) 21 *EL Rev.*, 378 ff., at 385.
[332] Buet, Case 382/87 [1989] ECR 1235; SARPP, Case 241/89 [1990] ECR I-4695. After Keck, Case C-39/96 *Aher-Waggon* [1998] ECR I-4473.
[333] Oliver (1996), 376 ff.; Stuyck (2000), 367; Dougan (2000), 870 ff.
[334] Case C-169/89 Gourmetterie Van den Burg [1990] ECR I-2143; Case C-1/96 R v. Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming (CIWF) [1998] ECR I-1251.

the specific case in point and the degree of impact on the Internal Market will be decisive.

6.3.2 Fair trading law and free movement of services

The fact that advertising and marketing in Community law foremostly are scrutinized under the rules of free movement of goods is only explained by the priority awarded to these rules under the Treaty. In all other respects the more natural place of advertising and marketing is under the category 'services'. This has been recognized by the ECJ, whereby there are two groups of cases to be distinguished. In a first group advertising is itself considered a service and restrictions on advertising are tested against Art. 49 (ex Art. 59). In the second group of cases, much like under Art. 28 (ex Art. 30) advertising is considered in its secondary role of a promotional tool but in relation to services. The severity of advertising restrictions is consequently judged by the impact on the turnover of the promoted service.

6.3.2.1 Advertising as a service

Already in the Sacchi Case the ECJ confirmed that advertising is to be regarded as a service under EC law.[335] The Court held that the transmission of television signals, including those in the nature of advertisements, comes as such within the rules of the Treaty relating to services. This was confirmed in *Bond van Adverteerders*, where the Court stated:

> More specifically, the broadcaster, established in a certain Member State, provides a service to the advertisers established in a particular Member State where the programmes are received, by broadcasting an advertisement which the advertisers have prepared especially for the public in the Member State where the programmes are received.[336]

In the early years of European integration, the principle on free movement of services was defined as being more limited than that of free movement of goods and closely linked to the notion of discrimination. With the maturing of the Common Market and through a creative interpretation on the part of the Court, this anomaly has gradually been rectified. It was in 1980, in *Debauve* that the Court stated that also indistinctly applicable measures are capable of raising an obstacle to intra-Community trade:

> Article 59 and 60 of the EEC Treaty do not preclude national rules prohibiting the broadcasting of advertisements by cable television - as they prohibit the broadcasting of advertisements by television - if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established.[337]

Nowadays there is no doubt that also non-discriminatory (indistinctly applicable rules) relating to services can come in conflict with Community law on services.[338]
This has been confirmed in a series of cases concerning Swedish restrictions on advertising to be discussed in more detail below.[339] The application of the principle of

---

[335] Case C-155/73 *Sacchi* [1974] ECR 409.
[336] Case C-352/85 *Bond van Adverteerders* [1988] ECR 2085.
[337] Case C-52/79 *Procureur du Roi v. Debauve* [1980] ECR 33.
[338] See Hatzopolous, 'Recent Developments of the Case Law of the ECJ in the Field of Services' 37 (2000) 43 ff.

free movement of services, however, requires that the service possesses a cross-border element. This can constitute in that the service provider (advertiser), or the recipient of the service (advertisor), or both, or the service itself move fom one Member State to another.[340] Alternatively the international element can be identified in that the advertising service is used for promoting products that are international.[341] Commentators nevertheless note that in the recent case law of the ECJ the cross-border element is substantially relaxed so that even domestic situations can come within the socpe of the rule.[342]

6.3.2.2 Diverging advertising laws as an obstacle to the free movement of services

Distinct from the hypotheses described in the previous section are situations in which divergent advertising laws may be perceived as an obstacle to the provision of services. Here advertising plays a secondary role of promoting a given service. Similar to the case law on free movement of goods, it is a question of ascertaining whether a restriction on advertising is capable of hindering the provision of the service. The cases in which the issue has reached the ECJ are not numerous. The issue is well illustrated by the judgment *Alpine Investment*.[343] The case concerned the provision of financial services across borders. A Dutch company was selling investment packages through cold calling techniques not only in the Netherlands but allegedly also to potential customers abroad. The Court acknowledged the importance of a method of marketing like cold calling for the provision of cross border services. It confirmed the potentially restrictive effect of a legislation which bans such a marketing techniques. At the same time the Court found the justifications presented by the Dutch Government, namely consumer protection and upholding the reputation of the Dutch operators in this important industry, as acceptable and the measure as proportional.[344]

One of the uncertain issues in the area of advertising for services has been whether the *Keck* test would apply to situations like the one in *Alpine Investment*. Can one argue that cold calling is just a 'selling arrangement' for the promotion of financial services and as such should not fall within the scope of Article 49 (ex 59 EC Treaty)? So far the ECJ has refused such application. As some authors argue one of the main reasons for this double-track approach may lie in the specific 'immaterial' nature of service. While for goods it is possible (even if difficult) to distinguish between the physical product

[339] See Joint Cases C-34/95 & 35/95 *De Agostini & TV Shop* [1997] ECR I-3843; Case C-405/98 *Gourmet* [2001] ECR I-1795.

[340] See Joint Cases C-34/95 & 35/95 *De Agostini & TV Shop* [1997] ECR I-3843.

[341] See Case C-405/98 *Gourmet* [2001] ECR I-1795.

[342] Hatzopoulos (2000), 58.

[343] See Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

[344] See also the ruling in *Schindler & Schindler*, Case C-275/92 [1994] ECR I-1039, where the Court found a prohibition on lotteries to be restrictive for intra-Community trade, but recognized the protection of the freedom of the press as a sufficient public interest. A more peculiar case in this group is the case on abortion publicity C-159/90 *SPUC v. Grogan* [1991] ECR I-4675. A private organisation, brought legal proceeding to prevent student unions in Ireland from publicizing the addresses of British abortion clinics. The students argued that abortion was a service within the terms of Art. 49 (ex 59) and that Community law therefore prohibited Ireland from placing restrictions on the right of Irish residents to have abortions in another Member States. The Court accepted that abortion should be regarded as a service despite objections on the part of SPUC but finally held that the students could not benefit from this right because they were not acting on behalf of the abortion clinics. See Hartley (1998), 136-7. For criticism of this judgment see Phelan, 'Right to Life of the Unborn v. Promotion of Trade in Services: the ECJ and the Normative Shaping of the European Union' (1992) *MLR*, 670 ff., at 674.

and the selling arrangement, for services the promotional measure is often an integral part of the service itself.[345] From a different, comparative institutional perspective, Maduro interprets the reluctance of the ECJ to treat the two fields equally with the underdeveloped internal market for services and the sluggishness of positive integration in the field of services. In this interpretation the ECJ exercises more judicial activism when there is perceived institutional malfunction in alternative decision-making processes (the market and the European political process).[346]

6.4 Institutional implications

It is not the the purpose of this study to conduct detailed analysis of the developments on the Community level. Here only some reflections on the institutional implications of the described evolution in negative and positive integration in the field of fair trading will be proposed.

The survey of the advance of European integration in the field of fair trading in its two branches (an unfair competition and a consumer-oriented approach) shows a constant interplay beween different forms of harmonisation. These fluctuations reflect shifting perceptions about the constitutional balance between the Community and its Member States.[347] In the field of harmonisation the preferences have been oscillating between a more ambitious and flexible approach with a larger margin of discretion left to the Member States. Thus the beginning of European integration was very much a time of full harmonisation, even though in narrower range of policies than nowadays. The attempt to equalize technical standards throughout the Community, however, demonstrated the complexity of the European project and the embeddedness of even technical regulation in an intricate environment of regulatory philosophies and institutional practices, where harmonisation was a daunting and cumbersome task. With the dawn of the 'New Approach' to technical harmonisation in the 1980s, building on minimum standards, self-regulation and on the doctrine of mutual recognition the pendulum appeared to swing in the other direction. Legal harmonisation changed its role from being an indispensable condition for deeper integration into having a complementary, facilitative importance. Given the effective threat of precluding national measures in conflict with Community free movement principles, a spontaneous process of adaptation was expected to take place.

The gradual expansion of European integration to an ever wider range of legal and political areas has required finding supple instruments for reconciling this process with concerns about the regulatory autonomy of the Member States. The method of minimum harmonisation, although criticised as unsatisfactory, has occasionally worked as a 'carrot and stick' approach. Allowing Member States to keep their competencies in sensitive areas of regulation has been the carrot, luring them into new fields of harmonisation. Still, by keeping the threat of applying the free movement principles of primary community law, the Community has kept the 'stick' of continuous control over substance and proportionality of deviating national law.

---

[345] See Hatzopolous (2000), 68.
[346] See Maduro (1998a), 99 ff.
[347] See Maduro (1998a), 3 ff

With the deepening of European integration, the Community seems to be in search for a new equilibrium. Recent Community directives in the field of fair trading are rich in unorthodox solutions mixing elements of harmonisation and mutual recognition. Importantly, the Community more decisively enters the precarious sphere of procedural autonomy and enforcement, no longer satisfied with leaving implementation fully in the hands of the Member States.

The process of negative integration follows similarly cyclic fluctuations in the quest for constitutional balance, although less clearly discernable and rarely openly announced in the ECJ's jurisprudence. Formally speaking, the rulings of the ECJ are not binding upon the national courts and it is the latter's judgment which determines the outcome of each particular case. Yet the ECJ has shifted its position on the degree of cooperation and division of competences between the Community and Member State judiciaries. The ECJ can provide a comprehensive and compelling interpretation of the relevant Community provisions, thus leaving the national court with practically no room for maneuvering except to restate the ECJ's reasoning in its final judgment. Moreover, the Court may proceed to apply the relevant Community norm to the factual situation before it. Such an approach is characteristic of some of the activist rulings of the Court, notably the *Cassis de Dijon* ruling and a number of cases sustaining the *Cassis* line of reasoning.

Conversely, when taking a more reserved approach the Court may leave the true decision-making to the domestic courts and tribunals. The policy turn marked by *Keck* and arguably influenced by developments in the constitutional architecture of the Community (notably the emphasis on subsidiarity in the Maastricht Treaty) has been followed by a number of decisions, where interested litigants have returned from Luxembourg empty-handed. Some of the answers to the queries of national courts have been truly enigmatic, increasing the state of confusion and uncertainty prior to the ruling. Such 'weak' normative judgements can hardly induce national courts to consider changes in national law, and even less so national legislatures.[348]

The case law of the Court of Justice referred to above can also be conceptualised from the perspective of a shifting allocation of competencies between the Community decision-making bodies, notably between the Community legislative process and the Community adjudicative process.[349] The remarkabe judicial activism observed in the foundational years of the Common Market, and in periods of stagnation in the Community political process, can be seen as compensation within one decision-making process for inefficiencies in the alternative fora. With an increasing efficiency of the Community legislative procedure and higher pace of common-market building, the ECJ tends to take a more low-key position in the decision-making process. Thus concessions are made not only to the autonomy of the Member States vis-à-vis the Community, but also to the primacy of the political process as a pivotal law-making institution.

[348] On developments in the Court's case law after Keck see Weatherill, S., 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontier of Market Deregulation' (1999) 36 CMLRev., 51 ff.
[349] Expressly in this sense ith a detailed analysis of the ECJ's jurisprudence, see Maduro (1998a).

At a general level the fluctuations between minimum and maximum harmonisation give ample expression of the changing perceptions of constitutionalism within the Community and the constant tug-of war between trends toward centralisation and decentralisation. The developments described above corroborate the view expressed by some authors that there will hardly be a fixed choice for any of the models. Instead there is ongoing communication and experimentation in a succession of phases predominated by 'exit' or 'voice'.[350] Although regulation of fair trading has not been a core area in the European project, its treatment at the Community level has been tangibly affected by these more abstract considerations of constitutional and institutional nature.

[350] See Maduro (1998a), 3, 150 ff.

7 INSTITUTIONAL ADAPTATION TO EUROPEAN INTEGRATION: GERMANY AND SWEDEN REVISITED

In this chapter I return to Germany and Sweden, exploring key changes in the institutional framework of fair trading law under the influence of European integration. Following a conventional legal approach it is not difficult to identify formal changes in the shape of domestic rules transposing Community legal acts, or in the form of national case law adapting to ECJ jurisprudence. Seen through the lenses of legal analysis, the intensity of impact of European rules depends on the form of integration (positive or negative integration) and on the scope and bindningness of harmonized legal rules and policies.

At the same time, I attempt to combine this traditional legal perspective with an institutional account of European influences. The institutional perspective involves shifting our attention to changes in the overall institutional framework of fair trading law, including enforcement and changes in informal constraints. One of the major transformations induced by European integration is, I submit, that decision-making is shifted to new arenas with different institutional design, such as the European political process and the European judicial process. This in turn ensures access of new actors and organisations to the decision-making process concerning the standards of fair trading.[351] These changes may lead to enhanced opportunities for previously underrepresented groups to influence decision-making processes, or conversely, strengthen the position of traditionally powerful interest groups in the national context.

On the other hand, from a long-term institutional perspective, transformations of national institutional frameworks may not only depend on interests and institutional design. Community rules and regulations may challenge or confirm the national institutional framework in its dominant ideology and practical approach, and therefore be more or less likely to induce national change. European integration may also fit in with broader trends of rethinking national fair trading law, thus supporting internal momentum towards reform. Arguably, the impact of integration will be perceived as less problematic where harmonisation measures (while always requiring some institutional adjustment) remain within the general institutional context of the respective legal system. Conversely, the pressure towards institutional change will be greater where Community interventions are incompatible with deeply embedded institutional habits and demand an overhaul of the institutional framework. The translation of pressure into true institutional change will to a large extent depend on the maturity of internal processes of reform. As historical institutionalism teaches, even where change in formal rules can be registered, one should beware of jumping to conclusions about dramatic institutional transformation.

The preceding chapters on the evolution of fair trading law in Germany and Sweden have demonstrated a tension between the long-term 'conserving' effects of macro-institutional characteristics of the legal and political system, and the dynamic of changing interests and preferences of individual and group actors. The comparative analysis in Chapter 5 submitted that an institutional model responding to majoritarian ideology is more susceptible to change than a model of private and decentralised

[351] Knill speaks of changes in opportunity structure, see Knill (2001), 215.

enforcement, the latter being sustained by legal doctrine and a broad network of courts and private lawyers. In the centralised model of enforcement the persistence of majoritarian ideology depends on an elite bureaucracy, and is scantily diffused among the plurality of institutional actors and organisations. The diffuse majority that was the intended beneficiary of the centralized model can but poorly identify its interests and supervise the transformation of legislative intentions into concrete every-day decision-making. These differences in the potential and conditions for institutional change offer an explanation for the different modes and varying success in implementation of Community measures at the national level.

In the following I shall first analyse the implementation of the most important Community Acts in the area of fair trading in Germany and in Sweden. Then I shall give account of more comprehensive reform processes in the institutional framework of fair trading law in each country, and try to explore to what extent these changes are influenced by European developments. I will look at how these changes affect the opportunities for representation and participation of interest groups and actors. Finally, an analysis of case law and decision-making priorities of enforcement agencies will help capture more inconspicuous changes in value-systems and mentalities of enforcement bodies and organizations.

7.1 Transposing Community directives: exercises in appropriation of European law

A comparison between the European influences on German and on Swedish marketing practices law may at first sight seem problematic, due to an apparent lack of common basis. Germany is among the founding members of the European Communities (now the EU) and has now been exposed to European influences for almost five decades. German institutions and actors have been actively involved in shaping the European construct by influencing the legislative process and taking an active part in enforcement and interpretation of European law. By contrast, Sweden is among the youngest Community Member States, with only limited experience of full membership. At the same time, we should recall that European harmonisation in the area of fair trading got off to a late start and had progressed at a rather hesitant pace. One can therefore say that, in this limited field at least, the real impact of European integration was felt only relatively recently, which gives sufficient ground for comparatively examining the effects in the two countries.

Moreover, it should not be forgotten that adaptation of Swedish legislation to European Community law and policy (*acquis communautaire*) commenced long before Sweden's formal accession to the EU. Sweden was among the founders of EFTA (European Free Trade Association), hosting the signing of the EFTA Convention in 1960.[352] Relations between the European Community and the EFTA states had since 1972 built upon a system of bilateral free trade agreements. While these agreements were limited to abolition of customs and other obstacles to free trade, they nevertheless implied a constant voluntary coordination between regulatory frameworks. In 1990 negotiations were launched between the Community and the seven EFTA states on a new Treaty aiming at even closer cooperation and creating the

[352] This is the so-called Stockholm Convention between Austria, Denmark, Great Britain, Norway, Portugal, Sweden, Switzerland. On EFTA and Sweden's 'long way' to EU membership see Bernitz/Kjellgren, *Europarättens grunder* (Stockholm: Norstedts, 1999), 11 ff.

European Economic Area (EEA).[353] Membership of the EEA was much more demanding than the loose free trade agreements. Sweden was bound to implement a substantive part of the 'acquis communautaires' and had successfully done so already before entry into force of the EEA Treaty.[354] Importantly, through the jurisprudence of the EFTA court a channel was established for direct communication between the national and the (quasi) Community judiciary, albeit used relatively restrictively.[355]

Finally, on 1 July 1991 Sweden applied for full membership of the European Community.[356] The period until 1995, when Sweden acceded to the EU, was marked by a more intense process of approximation of legislation and institutional structures to comply with the requirements of membership. The approximation of Swedish marketing practices law to the standards of Community law was specifically addressed by the Government Committee working on a new MFL, in a report submitted in 1992.[357]

7.1.1 Transposition of substantive fair trading directives

The most visible and purposive form of Community influence on national law is arguably the transposition of secondary Community legal acts into domestic law. In the field of harmonisation of fair trading law the relevant body of secondary Community law has so far exclusively consisted of directives. The most important of these acts were briefly presented and analysed in the previous chapter. I also underlined the differential binding force and harmonisation ambition of the individual directives, and the different degree of pressure exerted on national governments to change existing legal rules and institutions. But, as we shall see in the following, even in the absence of strong pressure on the part of the Community, the need for adaptation of domestic legislation to European law has often been used as a trump card in the legislative debate on the national level.

7.1.1.1 Compliance without change: the Misleading Advertising Directive

The first European act of harmonisation in fair trading law, the Misleading Advertising Directive, was in its substance and spirit predominantly influenced by a consumer protection 'ideology'. However, the Directive explicitly took a minimum harmonisation approach, allowing Member States to keep their stricter rules against misleading advertising or to introduce such rules.[358]

Germany and Sweden: compliance without change

The Misleading Advertising Directive did not provoke significant legislative changes in either Germany or Sweden. Both the German and the Swedish government considered their domestic legislation to go far beyond the minimum requirements of the Directive. Therefore they did not find it necessary to undertake any formal steps

---

[353] The Treaty on the EEA was signed on 2 May 1992 and entered into force at the beginning of 1993, at the same time as the completion of the Internal Market was announced.
[354] On the EEA, see Bernitz/Kjellgren (1999), 164 ff. On the effect of the EEA Agreement on consumer protection in Sweden see Eklund, P. 'The Effect of the EEA Agreement on Consumer Protection Interests in Sweden' (1994) JCP, 123 ff.
[355] *Ibid.*, 166.
[356] See Bernitz/Kjellgren (1999), 21 ff.
[357] SOU 1992:49.
[358] Art. 7(1) Directive 84/450.

for transposition of the Directive into domestic law.[359] Even so, a difference between the two countries can be noticed in the overall attitude to this document.

Reactions in Germany were much more intense and emotional. After the failure of the ambitious Ulmer project mentioned in the preceding chapter, German politicians took an aloof attitude to the relatively modest achievements in terms of European harmonisation. The driving force behind the more ambitious attempts at harmonisation (based on the German UWG-model), the German government did not conceal its disappointment at the abandoning of original plans. By declaring it had no intentions to undertake implementation of the Directive, the German government demonstrated its critical stance over the meagre outcome of long negotiations.[360]

This attitude was largely shared by German legal doctrine and especially by scholars raised in the unfair competition law tradition. Schricker called the directive "a modest flower of European harmonisation" and regretted the failure to arrive at more comprehensive harmonisation.[361] Beier was likewise openly critical of the Misleading Advertising Directive. The directive was in his view hastily prepared and the choice of approach ill founded. He bitterly noted that harmonisation had eventually proceeded not along the lines drawn up by the carefully elaborated draft of the Max-Planck Institute (with which he was associated), but on the basis of the – from the German perspective somewhat exotic – International Code of Advertising Practices of the International Chamber of Commerce (ICC). In the view of both Schricker and Beier the Directive was excessively influenced by Anglo-Saxon legal thinking.[362] The consumerist bias of the Directive was seen as a clear drawback. Even in 1984, the year of adoption of the Misleading Advertising Directive, Beier appealed to Community institutions to base the harmonisation of unfair competition law on the MPI project, and not on the final draft, which had drifted into 'the waterway of consumer protection.'[363] Illustrative of the failed expectations among German lawyers is the following comment by Keilholz:

> Die Bemühungen von deutscher Seite, möglichst viel von dem zu den Generalklauseln der §§ 1 und 3 UWG ergangenen Richterrecht in die Diskussion einzubringen, um auf diese Weise entsprechende Sondertatbestände auf europäischer Ebene zu schaffen und damit die bei uns verherrschenden Vorstellungen über das, was irreführende Werbung sein kann, durchzusetzen, müssen als gescheitert angesehen werden.[364]

Unlike Germany, Sweden had not participated in the drafting of the Directive. Neither politicians nor academics were therefore encumbered with lost battles or dashed hopes. The attitude was much more pragmatic and open. The main conclusion of the

---

[359] On Germany see Schricker (1991a), 788 ff., 790. On Sweden see SOU 1992:49.

[360] A similar attitude was adopted by the governments of Denmark, France and the Netherlands. In contrast, Spain, United Kingdom and Greece passed statutory amendments in close approximation to the Directive, Schricker (1990), 114 ff.; Schricker (1991a), 792.

[361] Schricker (1981), 537 ff.

[362] Schricker (1981), 542; Beier (1985), 161.

[363] „Anknüpfen sollte man dabei nicht an den letzten, fast gänzlich in das Fahrwasser des Verbracuherschutzes abgedrifteten Entwurf, sondern – und hier sehen Sie mich nach, wenn ich pro domo spreche – an die rechtsvergleichend fundierten, zurückhaltenden, sorgfältig abgewogenen Vorschläge Ulmers zur Gesamtharmonizierung des Wettbewerbsrechts der Gemeinschaft." Beier (1984), 71.

[364] Keilholz, K., 'Die misslungene Harmonisierung des Verbots der irreführenden Werbung in der EG und ihre Konsequenzen für die deutsche Rechtsprechung' (1987) GRUR, 390 ff., 392 ff.

Marketing Practices Commission was that there were only a few rules and principles requiring adjustments to the Swedish regulative framework. Basically, Swedish marketing legislation was deemed to fulfil and to go beyond the minimum requirements of Community law, in particular of the Misleading Advertising Directive.[365] While implementation of international agreements, including EC Directives would normally require formal legislation, this was not considered necessary where existing legal rules or principles were sufficient to satisfy the obligations emanating under public international law.[366]

Certainly, there were very concrete factors facilitating the smooth acceptance of the Directive. If the influence of the ICC International Code of Advertising Practice in the German debate was brought out as criticism, in Sweden this influence was regarded as a major advantage.[367] As mentioned earlier, the ICC Codes have traditionally played an important role in setting the standard of fair commercial practice in Sweden, both in the work of the self-regulatory bodies until the late 1960s and in the subsequent case law of the Market Court. Together with the general consumerist stance of the Directive, the link between ICC Codes and Community law enhanced Swedish confidence in the European regulative approach.

Predictably, the only issue that raised some concern in Sweden was the relationship between the Directive and Swedish legislation on freedom of expression and freedom of the press.[368] In particular, the requirement on control and prohibition of misleading advertising prior to its publication [369] was considered to be incompatible with the ban on censorship laid down in the Freedom of the Press Act. However, the problem was easily solved by restrictive interpretation of the Directive's provision. The authors of the report noted a lack of clarity in two respects. It was not clear whether the possibilities for intervention against misleading advertising in the first and second indent of Art. 4(2) (providing for *ex post* and *ex ante* prohibition, respectively) were given as alternatives, or as relating to two different hypotheses. Lacking the basis of literal interpretation (including examination of the text of the provision in other languages than Swedish), the Committee proposed a functional 'common sense' interpretation and concluded that the two hypotheses were independent from each other. In a second step the question was asked whether the provision on prohibition prior to publication was binding. An answer was found in the preamble to the Directive, stating that 'it may be *desirable* to order the prohibition of misleading advertising even before it is published.' The same recital expressly ensured that Member States were 'under no obligation to introduce rules requiring the systematic prior vetting of advertising.' The report concluded: "The directive does not require that a EEA country introduce rules implying that a court can intervene against an advertising already before its publishing."[370]

---

[365] Prop. 1992:49, 39.
[366] SOU 1992:49, 39 with reference to Danelius, *Mänskliga rättigheter, 4th ed.* (Stockholm: Norstedts, 1989), 71.
[367] SOU 1992:49, 17.
[368] SOU 1992:49, 21 ff.
[369] See Art. 4(2), second indent of Directive 84/450.
[370] SOU 1992:49, 44.

A similarly candid and pragmatic approach was applied in respect to the second crux associated with the Freedom of the Press Act, namely the Directive's requirement concerning corrective advertising.[371] If this requirement were to be interpreted as mandatory it would be in conflict with the constitutionally guaranteed freedom of the publisher to determine the content of the publication.[372] Also in this respect (given the loose wording of the Directive[373]), experts relatively quickly came to the conclusion that the Directive was not binding: "The Directive does not require an EEA country to have rules about the obligation of traders to correct a misleading advertising, etc."[374]

Despite the declared full conformity of Swedish legislation with the standards of the Directive, a new MFL (enacted 1995) seized the opportunity to bring Swedish law, also textually, closer to the provisions of the Directive.[375] The Directive has visibly influenced the wording of the prohibition of misleading advertising stipulated in 6 § of the 1995 MFL. This provision closely follows the catalogue of factors, listed as relevant for determining whether advertising is misleading in Art. 3(1)(a)-(c) of the Directive.

The Misleading Advertising Directive left hardly any visible traces in the Swedish doctrinal debate. In his short commentary on the Swedish MFL, Bernitz notes that there are "no real difficulties" for Swedish law to meet the requirements of the Directive.[376] He adds that the Directive applies a minimum harmonisation approach, which gives Member States the freedom to lay down stricter standards than those of the Directive. The Swedish MFL is seen as one example of using this opportunity.[377] A similar assessment is provided by other Swedish commentators on market law.[378]

Germany: the Directive as an argument in the internal debate

In contrast to Sweden, where the Misleading Advertising Directive never provoked much interest after the implementation discussions were over, in Germany the Directive has repeatedly been an object of heated doctrinal controversies. Opinions diverged on the question of whether the Directive had any potential to influence German law, as well as on the normative assessment of such influence or its absence. One cannot escape the impression that the positions on the desirability of European influences over national legislation represented in the legal literature, sometimes by stakeholders in the debate, often colour dogmatic interpretation, so that positive questions related to valid law become entangled with normative issues.

Considering the positive question of the impact of the Directive on German law, initially there was agreement that Art. 7 Directive 84/450 was a typical 'minimum harmonisation' clause and that the Directive could therefore not affect German law in a significant way.[379] Dogmatically, such understanding implied that Member States

[371] See Art.4(3), third indent, Directive 84/450.
[372] TF 7:6 and Freedom of Expression Act (YGL) 7:5.
[373] See "Member States may confer..." Art. 4(2) second indent.
[374] SOU 1992:49, 45.
[375] For analysis of this act see Ch. 7.3.2 below.
[376] Bernitz (1997), 23.
[377] Bernitz (1997), 23.
[378] See Svensson/Stenlund/Brink/Ström (1996), 582.
[379] Keilholz (1987), 391. Schricker (1990), 120 with reference to a statement of the Federal Minister of Justice.

were authorized to go beyond this 'minimum objective standard' in a variety of modes, i.e. by introducing or retaining more protective substantive provisions, by maintaining higher standards of protection established in case law, or through stricter remedies and sanctions.[380]

Despite this consensus as to the minimum and non-binding character of the Directive's provisions, many authors argued that the Directive could nevertheless exert an indirect influence over German law. This could partly occur by way of competitive pressures from countries with lower standards of protection and partly by comparative legal influences. Normatively, such less conspicuous and hypothetical influence of European rules on German law was divergently assessed. The Directive was by some perceived as a threat to the exemplary standards of German unfair competition law, or conversely, as an opportunity for critically reconsidering these standards. Thus, attempts have been made to invoke European law in support of both continuity and change of domestic institutions.[381]

Critics of German unfair competition law urged for more serious consideration of the Directive by the German lawmaker and the courts. The Directive was viewed as a potential source of beneficial influence on German rules and practices, but interestingly in two somewhat different directions. Consumer advocates noted that the Directive took a more openly pro-consumer stand and that in many respects German unfair competition law failed to meet this novel approach. One such aspect was the reversed burden of proof, which the Directive seemed to require.[382] On the other hand, authors arguing for certain deregulation of German unfair competition law perceived in the Directive a welcome chance to review German attitudes. Noting that the Directive has given rise to novel case law in Great Britain, Schricker expressed the hope that "increased comparative law attention might lead to an examination of engrained case law habits" even in German law.[383] As to the direction of change, he argued that in contrast to English law, German unfair competition law needed a shift towards relaxing the standard of deception, "docking certain exaggerations of severe practice pursuant to Sec. 3 of the Act Against Unfair Competition by virtue of which German law manifestly distances itself from the standard otherwise prevailing in the Community."[384] In the words of Schricker:

> The sensibility of the courts to possible risks of deception should not be exploitable by obstructive competition at the cost of individual competitors or groups of competitors. This usually has nothing to do with consumer protection. It is an old claim that combating possible deception must be measured so that it does not unduly interfere

[380] This interpretation was supported by Schricker (1991), 790; Möllering, 'Das Recht des unlauteren Wettbewerbs in Europa: Eine neue Dimension' (1990) *WRP*, 1 ff., 9 ff.; Meyer 'Das Verbraucherleitbild des Europäischen Gerichtshofs – Abkehr vom „fluchtigen Verbraucher"' (1993) *WRP*, 215 ff., at 217; Spätgens, 'Wandel der deutschen Rechtsprechung?' in: ZAW, *Irreführende Werbung in Europa. Masstäbe und Perspektiven* (Bonn: 1990). 71 ff., 77) as quoted in Köhler, 'Irreführungsrichtlinie und deutsches Wettbewerbsrecht' (1994) *GRUR Int.*, 396 ff., 397.

[381] See reference in Keilholz (1987), Tilmann, 'Irreführende Werbung in Europa – Möglichkeiten und Grenzen der Rechtsentwicklung' (1990) *GRUR*, 87 ff.

[382] Tonner (1987), 1987, 1922 ff. The nature of the requirement on reversed burden of proof, however, is uncertain. Tonner seems to interpret it as a mandatory requirement to the implementing Member States.

[383] Schricker (1991a), at 793.

[384] Schricker (1991a), 793.

> with the freedom of competition. The application of the Act Against Unfair Competition and the Act Against Restraints of Competition must be coordinated.[385]

Schricker was not alone in perceiving the Directive as a fresh wind from Europe and consequently an opportunity to rethink engrained habits of litigants and courts.[386] Other authors voiced similar recommendations. Thus Schwanhäuser pointed out that the definition of 'misleading advertising' in the Directive encompassed only advertising that was likely to affect consumers' economic behaviour. Such subjective requirement could in his view have a positive effect on German jurisprudence, helping it "to separate the wheat from the chaff."[387] Although in his view it was early to substitute the well-established German practice (based on the UWG), he argued that European harmonisation offers an opportunity to re-evaluate the accumulated experience.[388]

The above-described attempts to bolster the authority of the Directive can be understood as value-oriented. In Germany the Directive was perceived as reflective of alternative normative values in a diversified European context. Against this background domestic practices were exposed as inadequate. The authors following this line of reasoning did not contest the weak binding force of the Directive. They rather tended to exploit the Directive constructively by deriving support for their own arguments within the field of national fair trading law.

Proceeding from the same dogmatic interpretation of the Directive, others argued that the Directive would bring about gradual harmonisation on the basis of competitive pressures in the Internal Market.[389] An appeal for revision of German attitudes was thus made on economic grounds. Given that the Directive did not force Member States with lower levels of protection to raise their standards, the argument was that German industry might be exposed to competitive disadvantage. German economic actors could be negatively affected not only on their domestic market, but also in their export activity (on the basis of expansive theories on the jurisdictional scope of German UWG lingering in legal doctrine and in judge-made law).[390]

---

[385] Schricker, *ibid.*

[386] See Keilholz (1987), 390 ff.; Schwanhäuser (1988), 180 ff.

[387] „Verstärkte subjective Anforderungen an die Irreführung könnten manche vielleicht mehrdeutige, aber unschädliche Behauptungen durch die Maschen des Gesetzes lassen und würden uns mehr Spielraum geben, um die Spreu vom Weizen zu sondern." Schwanhäuser (1988) 180 ff., 184.

[388] „Es ist bei weitem früh, eine ca 80 Jahre alte, grossenteils bewährte und vor allen Dingen sehr differenzierte Rechtsprechung mit groben Schlägen von den gesicherten Geleisen zu holen. Es wird sich um einen langwierigen Prozess handeln. Die Darlegungen sollten allein dem ewig jungen, alten Ziel dienen, erlebte wettbewerbsrechtliche Erfahrung unter den Herausforderungen der europäischen Harmonisierung zu überdenken." Schwanhäuser (1988), 184.

[389] See Keilholz (1987), 392. „Zunächts einmal muss zur Kenntnis genommen werden, dass auch diese Richtlinie Harmonisierung bewirkt. Auf die Dauer wird auch sie durch das, was sie bestimmt hat und das, was sie offengelassen hat, zu einer EG-einheitlichen Behandlung der irreführenden Werbung führen."

[390] The reference is to the so-called Nussbaum-doctrine requiring application of German unfair competition law to competitive acts between German enterprises, even when the competition takes place on foreign markets. On the origins of the doctrine in the jurisprudence of the RG and its subsequent evolution see Keilholz (1987), 392 ff. On German private international law of unfair competition see Joerges (1972); Schricker (1994b), 371.

A more radical interpretation concerning the formal bindingness of the Directive on the Member States was advanced in 1990 by Everling.[391] He argued that the standard of deception laid down in Art. 2(1)(b) Directive 84/450 ought to be regarded as authoritative and binding. National courts were consequently obliged to accept this standard when interpreting national law implementing the Directive. Concerning the minimum harmonisation clause of Art. 7, the term 'stricter provisions' in Everling's view related to the freedom of Member States to impose stricter *sanctions*, and not to the substantive standards established by the Directive. In a similar vein, Sosnitza suggested that Art. 7 Directive 84/450 could be interpreted as authorising Member States only to introduce and maintain statutory rules and not to refer to the standard of deception established in judge-made law.[392]

More important than the linguistic arguments in Everling's position was his teleological reasoning. A broad understanding of the minimum harmonisation clause ought in his view to be rejected because it deprived the Directive of harmonisation effect. Such a reading is goal-oriented and gives precedence to the integration logic inherent in all Community harmonisation acts over purely textual interpretations, aiming to preserve the coherence of the national legal order. Indeed, recital 4 of the Directive emphasizes that differences between the laws of the Member States might hinder "the execution of advertising campaigns beyond national boundaries and thus affect the free circulation of goods and provision of services." The execution of cross-border advertising campaigns would clearly be impeded if the Directive allowed Member States to apply their stricter standards to marketing measures emanating from other Community States.[393]

Ultimately, the legal policy objective behind this line of argument is evidently to demonstrate that European advertising law is not fully indifferent to national policy choices. According to Everling, the latter exerts stricter control on substantive rules and standards than is usually believed. In particular, the thrust of the argument is that some of the extreme protective standards in German unfair competition law should be invalidated, as they are in conflict with Community law.[394]

The same year as Everling published his monograph, the ECJ returned its first decision where the Misleading Advertising Directive was invoked and commented on, albeit in passing. In the *Pall* case the ECJ was asked to take a stand on the compatibility of § 3 UWG with Art. 28 (ex Art. 30) EC Treaty, though in a very specific situation. The defendant in the main proceedings imported blood filters from Italy. The Italian manufacturer put on the filters and on the packaging the trade name 'Miropore' accompanied by the sign ® commonly understood to stand for 'registered trade mark'. The trade mark was indeed registered but only in the country of origin (Italy) and not in the country of importation (Germany). The plaintiff in the main proceedings applied

---

[391] Everling, 'Zur Bedeutung der Rechtsprechung des Europäischen Gerichtshofes für die Werbung in Europa' in: ZAW (ed.), *Irreführende Werbung in Europa – Maßstäbe und Perspektiven* (Bonn, 1990), 43 ff.; Sympathetically, Köhler (1994), 396, 399 ff.; Schricker (1994a), 586, 592, fn. 69.

[392] Sosnitza (1995), 208. The author is, however, aware of the difficulties to sustain such an interpretation.

[393] At the same time, it is difficult to reconcile Everling's interpretation with the clear language of Art. 7(1) Directive 84/450.

[394] „Die bisherige nationale Rechtsprechung mit ihrem kaum übersehbaren Präzedenzfällen wird dadurch überlargert und muss neu durchdacht werden." Everling (1990), 51 ff.

for an injunction seeking to enjoin the use of the sign ® for a trade name which is not registered in Germany on the basis of the German clause prohibiting misleading advertising (§ 3 UWG). The Court held such interpretation of the general clause on deception to be in conflict with the principles of free movement of goods. In the Court's view it was of little interest to consumers to know where exactly a trademark was registered as long as the /statementof registration was correct. The German government suggested that the situation should be analysed in the light of the Misleading Advertising Directive and not Art. 28 (ex Art. 30) of the EC Treaty. The ECJ rejected this view and held quite unequivocally:

> This Directive is limited to partial harmonisation of national legal provisions on misleading advertising through establishing minimum and objective criteria for determining whether advertising is misleading and minimum requirements in respect of the details of protection against such advertising.[395]

Somewhat surprisingly, the Court applied a reverse order of precedence between secondary legislation and primary Community law compared to the *Cassis de Dijon* judgment. The latter judgment referred to imperative requirements relating to consumer protection or fair trading only 'in the absence of common rules." In the *Pall* ruling the Court stated:

> Finally, having regard to the arguments advanced by the Federal Republic of Germany based on Council Directive 84/450/EEC ..., it must be added that, since the prohibition at issue has been found not to be justified by imperative requirements relating to consumer protection or fair trading, it can also find no basis in the aforementioned directive.[396]

Apparently, what the Court implies is that in view of the minimum harmonisation achieved with the Directive, disparity between national rules persists. These disparate national rules are then still to be analysed in the light of the *Cassis de Dijon* doctrine.

The *Pall* judgment confirmed the prevailing view in German doctrine on Directive 84/450/EEC as laying down only minimum objective standards and leaving Member States free to maintain higher standards of protection, albeit within the limits of primary Community law. Everling's interpretation would have probably received only limited attention, had it not been for the subsequent *Nissan* judgment of the ECJ. The case was filed as a request for preliminary ruling under Art. 234 (Art. 177) EC Treaty.[397] It concerned criminal proceedings against a French motor vehicles dealer on the basis of *Loi Royer* – the French Law implementing the Misleading Advertising Directive.[398] The French salesman advertised vehicles imported from Belgium with the words: "buy your new vehicle cheaper" and "one year manufacturer's guarantee". The imported vehicles were registered for import purposes but had not been driven on the road. They were sold below local dealers' prices, but the basic Belgian model had fewer accessories than the basic French model. The referring French court inquired

---

[395] ECJ C-238/89 *Pall* [1990] ECR I-4827 ff., para 22.
[396] *Ibid.*, para 22.
[397] Case C-373/90 Criminal proceedings against X (Nissan) [1992] ECR I-131.
[398] Loi No. 73-1193 of 27 December 1973 on the Orientation of Business and Crafts. Art. 44 of this law prohibits untruthful and unlawful advertising.

whether the prohibition of such advertising would be in conflict with European Community law, and specifically with the Misleading Advertising Directive.

The approach adopted by the court was both cautious and daring. On the one hand, the Court avoided giving an authoritative interpretation of the Directive in general terms. It left it to the national court to ascertain "in the circumstances of the particular case and bearing in mind the consumers to which the advertising was addressed", whether the latter was misleading. This disappointed those who had expected an unambiguous answer to some controversial questions concerning the Directive. At the same time, the court made some rather categorical statements, relating very specifically to the factual situation in question, the binding nature of which remained uncertain. Thus the Court held that "it is when a car is first driven on the public highway, and not when it is registered, that it loses its character as a new car."[399] Likewise in a concluding paragraph the Court summed up:

> [T]he Council Directive 84/450 of 10 September 1984 does not preclude vehicles from being advertised as new, less expensive and guaranteed by the manufacturer when the vehicles concerned are registered solely for the purpose of importation, have never been on the road, and are sold in a Member State at a price lower than that charged by dealers established in that Member State because they are equipped with fewer accessories.[400]

Interestingly, in the *Nissan* case, the ECJ appeared to treat the definition of 'misleading advertising' as binding upon the Member States and as able to produce what is known as 'indirect effects'.[401] This interpretation was suggested in the opinion of the Advocate General Tesauro. The AG seemed to defend the binding force of the Directive on two grounds. Firstly, the Member States were obliged to interpret national law in maximum conformity with Community law. In the words of the AG:

> The national court must interpret and apply the law in question in the light of the wording and purposes of the directive. The case law of this Court shows that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Art. 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive the national court is? called upon to interpret, it is required to do so as far as possible in the light of the wording and the purpose of the directive, in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.[402]

More importantly, the AG addressed specifically the minimum harmonisation principle stipulated in Art. 7 of the Directive. In his view this principle did not refer to the definition of misleading advertising.

---

[399] Case C-373/90 *Nissan* [1992] ECR I-131, para 14.
[400] Case C-373/90 *Nissan* [1992] ECR I-131, para 19.
[401] See Steiner (1994), 37 ff.
[402] Case C-373/90 *Nissan* [1992] ECR I-131, Opinion of the AG Tesauro, para 2.

> To deal, finally, with the point that Article 7 of the Directive allows Member States to adopt provisions with a view to ensuring more extensive protection for consumers, I will only say that, in the present case, it is not a question of specific measures aimed at ensuring such protection, but of the interpretation of the general definitions given by the directive, and that, in any case, the rule cited cannot have the effect of justifying measures that specifically hinder advertising by parallel importers of motor vehicles when, as in this case, consumer protection can be achieved by measures that are less prejudicial to the marketing of the products in question.[403]

Prima facie the above reasoning seems to suggest that the minimum harmonisation principle applies only in respect to specific national protective measures and that conversely, the general definition should be subject to uniform European and binding interpretation. On closer inspection, however, it becomes evident that the AG hardly takes a categorical stand on any of these issues as a matter of principle. His statements are all qualified and closely connected with the circumstances of the particular case.[404] His main concern is not to give a general and abstract interpretation, facilitating uniform interpretation of the Directive in the future, but rather to deal with a very specific and concrete case of limiting market access for parallel importers.

It should moreover be observed that in its judgement the Court accepted explicitly only the first part of the argument, namely the argument of Community-friendly interpretation. In contrast, the Court did not address the issue of minimum harmonisation. The Court did not consider whether Art. 7 of the Directive, allowing Member States to introduce or retain higher level of protection, was applicable in the particular case. Instead it restated its well-worn doctrine of sympathetic interpretation. Under this doctrine national courts were obliged to interpret domestic law in the light of the wording and purpose of the Directive:

> It should be recalled at the outset that, by a line of authority now well-established by the Court, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts, and that, in applying national law, the national court is therefore required to interpret it in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty (see Case 14/83 Von Colson and Kamann [1984] ECR 1891, paragraph 26, and Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8).[405]

It is not clear, however, how the doctrine of sympathetic interpretation relates to the minimum harmonisation principle. Arguably, under the latter principle, if a Member State finds it to be in the interest of consumers and competitors to prohibit deceptive advertising even when the deception is not likely to influence consumers' purchasing decisions, such a measure would provide a higher level of protection and should thus

---

[403] Case C-373/90 *Nissan* [1992] ECR I-131.
[404] Certify in particular qualifications like: "I will only say", "in the present case", "in any case".
[405] Case C-373/90 *Nissan* [1992] ECR I-131.

be compatible with the minimum harmonisation approach in the Directive. Could the doctrine of sympathetic interpretation curtail an explicitly stipulated minimum harmonisation approach? This problem was not advanced by the French government and the question remained untested.[406]

The *Nissan* judgment concerned a very specific cross-border situation of parallel imports and its importance as a source of interpretation of the Misleading Advertising Directive appears limited.[407] Yet in the German context the decision was heavily debated and used as a platform both for attacking and for praising European influences on German unfair competition law. Those wishing to see in Community law a source of curbing the excessive deception standards in German unfair competition law welcomed the *Nissan* judgement. The ruling was seen as convincing evidence of the existence of an autonomous European concept of misleading advertising, one that should be respected by national courts and enforcement bodies. Everling appeared vindicated in his view on the binding force of the Directive.[408] In respect to the conditions for determining whether advertising is misleading, the decision appeared to set a maximum threshold of protection, not only a minimum one.[409] Others were more careful and based their arguments on the doctrine of sympathetic interpretation of directives by national courts.[410] This doctrine advanced by the ECJ in *Marleasing* and further elaborated in *von Colson* and *Dori* rulings, was explicitly invoked by the Advocate General in his opinion, and then repeated by the Court in the *Nissan* ruling.

The *Nissan* judgment did not only (or even prevalently) provoke support among legal commentators. In the literature it was also heavily criticized from different positions.[411] The Director of the *Wettbewerbszentrale* Marcel Kisseler claimed that by offering a detailed interpretation of a minimum harmonisation directive the Court had grossly overstretched its competencies. This was seen to be incompatible with the principle of subsidiarity, freshly advanced by the Maastricht Treaty.[412] Some commentators expressed concern that the judgement would require a substantial lowering of the level of protection established in German unfair competition law. It was pointed out that the ruling to be in blatant conflict with the minimum standard of the Directive it set out to interpret in the first place.[413]

One of the most prolific commentators on European influences over German unfair competition law, Rolf Sack, advanced in a series of articles a more restrictive view of

---

[406] On the discussion in German legal doctrine.

[407] In a similar sense Beater (2000a), 77 ff.; Beater, 'Zum Verhältnis von europäischem und nationalem Wettbewerbsrecht' (2000b) *GRUR Int.*, 963 ff.

[408] Everling, *Die Einwirkung der Grundfreiheiten des EWG-Vertrages auf das Werberecht der Mitgliedstaaten*, Referat im Rahmen der Tagung 'Werbung in Europa' (Bonn, 1992). Similar view by Sosnitza (1995), 206 and Köhler (1994), 396, 399 ff. The latter, however, introduces corrections to this view in the light of the subsequent *Clinique* ruling of the ECJ.

[409] Köhler (1994), 396, 399 ff.

[410] Art. 5 EC Treaty as interpereted by the ECJ in *Marleasing*, *von Colson* and *Kammann* etc. See Sosnitza (1995), 206.

[411] Deutsch, 'Der Einfluß des europäischen Rechts auf den Irreführungstatbestand des § 3 *UWG*' (1996) *GRUR*, 541 ff.; Heermann, 'Auswirkungen der Europäischen Rechtsentwicklung auf das deutsche Wettbewerbsrecht' (1993) *WRP*, 578 ff. Kisseler, 'Das deutsche Wettbewerbsrecht im Binnenmarkt' (1994) *WRP*, 1 ff., 3 ff.

[412] See in particular Kisseler (1994), 2.

[413] Deutsch (1996), 541 ff., at 544 ff.

the *Nissan* judgement. On the basis of an elaborate dogmatic textual analysis of the decision and the Directive, he emphatically defended the freedom of Member States to maintain stricter standards against misleading advertising as expressly provided in Art. 7(1) In an attempt to solve the controversy between the principle of minimum harmonisation and the normative language used by the ECJ, Sack focussed on the wording of the reference for preliminary ruling. The question before the Court referred, in his opinion, exclusively to the interpretation of the text of the Directive. The referring court had, importantly, not asked whether the standards of French law were in compliance with the Directive but had only required an abstract interpretation of the Directive's own minimum standard. The judgement had consequently not taken a stand on the question whether a national prohibition of such advertising would be in line with the Directive, since such a question would be irrelevant in light of the minimum harmonisation clause of Art. 7.[414]

The above review of the reactions to the *Nissan* judgements in German courts and doctrine demonstrates the difficulty of maintaining systemic coherence in a world of multi-level governance. The Court of Justice, as in previously discussed cases, typically gives an answer to a specific question arising from a very concrete factual context. In its judgement the Court is guided by the overriding purpose of ensuring the efficiency of European law, and of guaranteeing that national doctrinal idiosyncrasies will not compromise a well-functioning Internal Market. This functional orientation is seldom properly understood by national lawyers, be they judges or academics, and is perceived as an 'irritant' to the coherence of domestic law.[415] To cope with the fissions created, scholars try to appropriate European law through the prism of domestic dogmatic debates and reform endeavours.

In flagrant contrast to the attempts by national doctrine and judiciary to find a coherent pattern in the decisions of the court and to join national law and Community law in a conflict-free manner, the jurisprudence of the ECJ stands out as situation-specific and goal-oriented. This becomes evident when looking at decisions pronounced after *Nissan*. The *Clinique* case concerned a specific application of the clause on deceptive advertising in § 3 UWG to the marketing of cosmetic products under the trade name Clinique. The German government pointed out that § 3 UWG ensured the implementation in German law of the Misleading Advertising Directive as well as of Council Directive 76/768/EEC relating to cosmetic products. The Government then argued that the Court ought to base its decision on these directives and not on Art. 28 (ex Art. 30) of the EC Treaty. Advocate General Gulmann discarded this view as oversimplifying the problem. In respect to the Misleading Advertising Directive he stated:

> Thus, the directive on misleading advertising lays down only relatively vague criteria as to what constitutes misleading advertising. Moreover, the directive does not prevent Member States from imposing more stringent provisions. It is also important

[414] A similar reading of the Nissan judgment is suggested by AG Gulmann in his opinion in Case C-315/92 *Clinique* [1994] ECR I-317 ff., fn., 6. Against this understanding one may wonder why a national court would submit a question lacking relevance for the interpetation of domestic law.

[415] On the concept of 'legal irritants' see Teubner (2000).

> that the obligations under the directive should be interpreted in accordance with the requirements, which flow from the Treaty rules on the free movement of goods.[416]

In its judgment in the *Clinique* case the Court repeated the above quoted paragraph from the *Pall* ruling concerning the partial harmonisation achieved with the Misleading Advertising Directive and proceeded to try the case under Art. 28 (ex Art. 30) EC Treaty.[417] In the *Mars* case[418] Advocate General Lenz quoted the same paragraph from *Pall* in his opinion, while the Court did not even consider the possible implications of the Misleading Advertising Directive, even though the case again concerned the application of the German prohibition of misleading advertising (§ 3 UWG).

Summing up, the Misleading Advertising Directive and the relevant ECJ jurisprudence have had a divergent impact on German and Swedish law. Whereas in Swedish law the Directive hardly provoked any significant processes of rethinking of national standards, in German law the Directive, together with the few decisions concerning its application, worked as catalyst of internal debates, enhancing arguments towards the liberalisation of German protective standards. This may serve to confirm the inherent 'ideological' conflict between the liberal/consumer protection stance of the Directive and the lingering competitor-oriented philosophy of the German approach.[419] Despite the assurances of the German government that German law was in full conformity with the Directive, this conflict became visible in case law and in doctrinal debate. Judging by the sheer volume of writings and comments on the Directive in German literature, one can preliminary conclude that there was a widely perceived need of change of German law, and that European rules in this context performed a role hardly predicted at the time of drafting.

7.1.1.2 Comparative advertising

In contrast to the Misleading Advertising Directive, the Comparative Advertising Directive was from the outset intended as an act of exhaustive harmonisation. Presumably, the greater the binding force of the Community legal act, the stronger the pressure towards adaptation of national institutional frameworks. This, however, is a qualified truth. The pressure would ultimately depend on the conformity of national formal and informal institutions with the formal standards and ideology of the Directive.

Germany: challenge of the institutional core?

As mentioned above, Germany used its veto already in 1984 to block the integration of a rule on comparative advertising in the Misleading Advertising Directive. In its resistance against liberalisation of this field, Germany subsequently promoted the elaboration of a number of specific conditions for permitting comparative advertising.

---

[416] Case C-315/92 *Clinique* [1994] ECR I-317, Opinion of AG Gulmann, para 12.

[417] Case C- 315/92 *Clinique* ECR [1994] I-317 ff., para 10, judgment. The Court furthermore held that even a directive providing for exhaustive harmonisation of national rules, such as the Directive on the packaging and labelling of consmetic products, should be interpreted n the light of the Treaty rules on the free movement of goods. *Ibid.*, para 11-12.

[418] Case C-470/93 *Mars* [1995] ECR I-1923, Opinion of AG Leger, para 58.

[419] See Beater (2000a), 88.

In its comments on the 1991 Draft Directive the German Bundesrat gave the following instructions to the Government:

> Der Bundesrat bietet daher die Bundesregierung, darauf hinzuwirken, dass die Anforderungen an die vergleichende Werbung genauer umschrieben und die Grenzen hierfür eng gezogen werden.[420]

The ambition to throw a dense net around the principle of permissibility partly accounts for the prolonged period of negotiations (13 years). Eventually, the 1997 draft approximated a summary of German jurisprudence on the issue. Even this version did not satisfy the Federal Government, and Germany remained (together with Finland) in opposition to the Directive.[421]

Interestingly, in the area of comparative advertising German courts reacted to the legislative change even before the time for incorporation of the Directive into national law had expired. In a remarkable gesture of loyalty to the European lawmaker, the BGH expressly dissociated itself from its previous case law.[422] It accepted comparative advertising as long as it complied with the requirements listed in the new rule of Art. 3a Directive 97/55. The reasons for this move were interpreted in a variety of ways. According to Tillman the Court had hoped to prevent a legislative intervention in a senior normative act such as UWG through detailed regulation or, even worse, a fundamental reform of the law.[423] Indeed, legal commentators had argued that a clear change in the case law on comparative advertising could make legislative reform obsolete.[424] In institutional terms the BGH could be seen to defend its decision-making competences, which would clearly be curtailed by a more precise legislative transposition of the Directive.

Despite the BGH's activism towards self-correction, the view prevailed that the Directive needed to be formally incorporated in the UWG. Certainly, not every provision in a Community directive needs transposition through specific national legislation. Yet the Comparative Advertising Directive aimed at detailed and comprehensive harmonisation, leaving a very narrow margin of discretion to the Member States. The government therefore considered that the Directive required a transposition which closely followed the wording of the original text.[425]

As to the form of transposition, some authors argued that no literal take-over was needed. The legislator should in this view rather try to capture the essence and spirit of the reform, and enshrine these into a legislative text.[426] This minimalist approach did not gain recognition in the legislative process. Instead, preference was given to a faithful, though not literal, transposition of Art. 3a of the Directive into § 2 UWG.[427]

---

[420] BR-Drs. 459/91, Beschluss des Bundesrats, 5.
[421] Spink/Petty (1998), 854 ff.
[422] BGH GRUR Int. 1998, 891 („Testpreis-Angebot"); BGH GRUR Int. 1999, 453 („Vergleichen Sie"); BGH GRUR Int. 1999, 69 („Preisvergleichsliste").
[423] Tilmann (1999), 546.
[424] See Sack, 'Die Berücksichtigung der Richtlinie 97/55/EG über irreführende und vergleichende Werbung bei der Anwendung der §§ 1 und 3 *UWG*' (1998b) *WRP*, 241 ff.
[425] BT-Drs. 14/2959, 6 with reference to *Commission v. Germany* Case C-361/88 [1991] I-2567.
[426] Henning-Bodewig (1999), 394; Ohly/Spence (1999), 696
[427] Cf. BR-Drs. 459/91; BT-Drs. 14/2959 Gesetzesentwurf der Bundesregierung.

Interestingly, the Federal legislator has not followed the language of the Directive in one important respect. Instead of laying down the principle of permissibility of comparative advertising and then listing the exceptions (as in the Directive), § 2 UWG prohibits all comparative advertising, which does not comply with the listed requirements. The new § 2 I and II UWG read:

> (1) Vergleichende Werbung ist jede Werbung, die unmittelbar oder mittelbar einen Mitbewerber oder die von einem Mitbewerber angebotenen Waren oder Dienstleistungen erkennbar macht.
> (2) Vergleichende Werbung *verstößt gegen die guten Sitten* im Sinne von § 1, wenn der Vergleich: ... (my italics)

The change in wording from permission to a prohibition was in the preparatory material explained by a desire to conform to the systemic approach of the UWG, building on prohibitive tort law principles.[428] Generally, systemic coherence has again been a leading concern of lawmakers and legal doctrine.[429] Of course it could be argued that the choice of wording is insignificant (is the glass half-full or half-empty?). Yet considering the ideological legacy of German unfair competition law and its bias towards entrenched interests, it might have been wiser to depart from the prohibitive approach and signal a change in attitude on this issue.[430]

In German doctrine the interpretation of the Comparative Advertising Directive caused serious difficulties. In particular, defining the scope of the Directive proved to be a hard nut to crack. In the legal literature most interpretations tended to expand the effect of the Directive on national law. Thus, it was accepted by scholarly opinion that the Directive was not only binding as to stricter regulation of comparative advertising, but also prevented a more liberal regime of regulation.

In the Government Bill transposing the Comparative Advertising Directive, the Federal Government in this respect follows scholarly opinion in regarding the Directive as an act of exhaustive harmonisation. According to the Bill, the Directive precludes not only more stringent national measures but also more liberal regulation of comparative advertising by individual Member States. As the Government puts it:

> Zweck der Richtlinie ist primär die Harmonisierung des Rechts der vergleichenden Werbung in Europa (Erwägungsgründe 2, 3, 7). Das Anliegen der Liberalisierung ist dagegen im Laufe der Entstehungsgeschichte der Richtlinie in den Hintergrund getreten.[431]

As to the relationship between the regulation of comparative advertising and misleading advertising, most commentators took the view that the Directive contained a double standard in respect to deception. The assessment of whether an advertisement containing a comparison was deceptive had to proceed with the help of the

---

[428] Köhler/Piper (2002), 875.
[429] Thus Henning-Bodewig directs attention at the dissonance between the language of the Directive and the traditional prohibitive approach in UWG and proposes a substantial revision of the UWG beyond a literal transposition of the text of the Directive, Henning-Bodewig (1999), 394.
[430] In this sense Bastian (2000),151 ff., 159.
[431] BT-Drs. 14/2959, 6.

autonomous 'European' criterion, as developed in Art. 2 of the Directive and refined by ECJ judgements such as *Nissan*, *Gut Springenheide* and *Estée Lauder*.[432] In contrast, when evaluating deception outside the comparison, existing higher standards of deception in individual Member States had to be taken in consideration, if relevant.[433]

Dogmatically, this interpretation stems from a narrow reading of the first paragraph of Art. 7, laying down the principle of minimum harmonisation. In an attempt to clarify that this principle is confined to misleading advertising only, Directive 97/55/EC provides:

> This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection *with regard to misleading advertising* ...(my italics)[434]

When in the second paragraph of Art. 7 comparative advertising is exempted from the minimum harmonisation approach, this is made by reference to paragraph 1. Art. 7(2) reads:

> Paragraph 1 shall not apply to comparative advertising as far as the comparison is concerned.

The conclusion drawn by German scholars from the two paragraphs, read in conjunction, is not that the minimum harmonisation principle as such is not applied to comparative advertising, but that the minimum harmonisation principle *with regard to misleading advertising* is not applied in situations of comparative advertising.[435] Tilmann emphasises the qualification 'as far as the comparison is concerned' in Art. 7(2). On this basis he develops the theory of the double standard of deception in the Directive, which was accepted by most legal scholars.[436] Following the double-standard doctrine, misleading advertising in the context of comparison was subject to full harmonisation, thus precluding divergent national standards. Misleading advertising outside the comparison continued to be harmonized only at a minimum level with freedom of Member States to apply stricter standards.

It is not surprising that, proceeding from such an interpretation, German scholars experienced serious difficulties to find a convincing explanation for another of the Directive's provisions. Art. 3a(1)(a) reads:

> Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

---

[432] On Gut Springenheide and Estée Lauder, see below Ch. 7.2.1.

[433] In Tilmann (1997), 790, 796; Tilmann (1999), 550; Henning-Bodewig (1999), 386; Sack (1998b), 242; Sack (1998a), 271; more hesitant Ohly/Spence (1999), 689-90; Bastian (2000),151 ff., 161.

[434] Art. 7(1) as amended by Directive 97/55/EC.

[435] This is debatable. In my view the reference to the first parapraph of Art. 7 is to the principle of minimum harmonisation as such, and not to its specific application to misleading advertising. German commentators preferred the second interpetation, despite that such a reading could not explain the reference to Art. 7(1) in Art. 3a(1)(a).

[436] See Henning-Bodewig (1999), 385 ff.; Ohly/Spence (1999), Sack (1998b), 242.

> (a) it is not misleading according to *Articles* 2(2), 3 and *7(1)*; (emphasis added)[437]
> ...

Contrary to the stand in German doctrine, this provision, by referring to the first paragraph of Art. 7 seemed to suggest that misleading advertising even in the context of comparison, continued to be subject to the minimum harmonisation principle. The puzzle is succinctly captured by Tilmann:

> Die Anweisungen in Art. 3a Abs. 1 a) einerseits und in Art. 7 Abs. 2 andererseits scheinen sich zu widersprechen. Die eine Vorschrift sagt: Absatz 1 ist anzuwenden, die andere Vorschrift sagt, Absazt 1 ist nicht anzuwenden.[438]

Despite the obvious incongruence between the two provisions, most German scholars preferred to interpret the Directive as requiring full harmonisation of misleading advertising in the context of comparisons.[439]

This interpretation seems to be in opposition to the one advanced in Sweden.[440] As mentioned above, when presenting the history of the Directive the phrase "as far as the comparison is concerned" was inserted in the text of Arts. 3a(1)(a) and 7(2) on the insistence of the Scandinavian countries as a safeguard against lowered standards of consumer protection. The intended function of the amendment was, among others, to ensure that stricter national rules on misleading advertising would continue to apply to misleading elements in comparative advertisements. Similar interpretation was elaborated in an Explanatory Statement of the European Commission submitted to the Council session of 9 November 1995.[441] This detail from the history of negotiations was obviously familiar to the representatives of Member States governments, but had not come to the attention of the academic community.

More generally, the difficulty experienced by German scholars in making sense of Art. 7 Directive 84/450 after the amendment probably stems from their experience with the versatility of the concept 'misleading advertising'. Decades of 'elastic' interpretation of this concept by German courts demonstrate that it can be interpreted in a liberal but also in a highly restrictive manner, either of which could prejudice the harmonisation objectives of the Directive. In this light it is understandable that commentators find it logical to derive more precise limitations to Member States' competences from the text of the Directive. In addition, it is presumably only in German legal doctrine that the distinction between a national and a European standard of deception is so finely elaborated and well established.

Contrary to the prevailing view in German legal doctrine, the Bill submitted by the Federal Government interpreted Art. 3a(1)(a) (prohibiting misleading comparative advertising) as leaving the prerogatives of Member States to set more stringent standards for protection against misleading advertising unaffected. Art. 7(2) is not found to contradict this interpretation. It is seen to clarify that farther-reaching national standards can only apply to the element of deception, and not the other criteria for

---

[437] Art. 3(1)(a), Directive 84/450 as amended by Directive EC/97/55.
[438] Tilmann (1999), 550.
[439] Tilmann (1999), 550; Henning-Bodewig (1999), 385 ff.
[440] See Dölling (1996), 61.
[441] Doc. SN/281/95. Quoted after Drs. 14/2959, 7.

permissibility of comparative advertising. Therefore no transposition of this specific provision is considered necessary. Instead, § 3 UWG is complemented with a sentence amplifying that the prohibition of misleading advertising applies equally to information in the course of comparison.[442]

The discrepancy noted above between scholarly and governmental interpretation exemplifies how enigmatic formulations of European legislation will not always yield to traditional interpretation using the instruments of legal dogmatics. More specifically, literal and systematic textual interpretation perfectly suited to encode many domestic statutes may actually lead astray when applied to European legal acts. Therefore those who have participated in the negotiations and know backstage details of the legislative process may be in a better position to fit the bits and pieces of the puzzle into a more coherent interpretive pattern.[443]

Even following the transposition of the Directive into German law, many questions remain unclear and provoke controversial interpretations. The most important among them is the definition of the term 'comparative advertising.'[444] At least three interpretations were advanced in the literature. Proceeding from the broad meaning given to the concept of comparative advertising, some authors considered all advertising with reference to a competitor or to his goods, services or enterprise to be within the scope of the Directive. This implies that advertisements which comment exclusively on the products, services or personal relations of a competitor, without setting them in relation to the advertiser's own goods or business, would be qualified as comparative. Such an expansive understanding leads to bizarre results, especially if we assume that the conditions listed in Art. 3a Directive 97/55 apply cumulatively in any situation of comparative advertising. Thus, given the requirement in Art. 3a(1)(c) of objective comparison of material, relevant, verifiable and representative features of goods and services, the Directive would prohibit any comparison based on subjective, emotionally-coloured traits such as taste, value, trendiness, etc.[445] At the same time, in a world of homogenisation of consumer goods, commentators observe that this type of image-advertising is increasingly integrated in communicative and goodwill-oriented strategies of companies. Moreover, inputs of witty and facetious content may be valuable *per se* for making advertising a more attractive and entertaining medium in general. Likewise, advertising not related to goods and services but exclusively to personal relations of a competitor (personal advertising) would under this view be impermissible. Such advertising identifies a competitor and should therefore be qualified as comparative. Since it does not compare goods and services, however, it should be considered in breach of Art. 3a(1)(c) Directive 97/55 and consequently be prohibited.[446] It is questionable whether the Directive really aimed at such far-reaching restrictions of the freedom of commercial communications.[447]

---

[442] Drs. 14/2959, 7.

[443] See, however, the recent interpretation by the ECJ in *Pippig* this section, below.

[444] See Ch. 6.2.2.2.

[445] See Henning-Bodewig (1999), 391. Henning-Bodewig gives the example of a 'Pepsi-Cola' advert, where an archeologist in the distant future 'excavates' a 'Coca-Cola' bottle and wonders what this strange object had been used for. The competitor in this advert is clearly identified, so the advertising should arguably be classified as comparative under the Directive. The comparison, however, is not of objective features but of such elusive traits like potential to survive in competition. Should it be prohibited for failure to comply with Art. 3a(1)(b).

[446] See Tilmann (1999), Henning-Bodewig (1999), 385 ff.; Ohly/Spence (1999).

[447] See Henning-Bodewig (1999), 385 ff.

An alternative reading suggests that Art. 2(2a) contains an implied requirement of comparison, which has not been explicitly mentioned simply to avoid repetition. In order to be classified as comparative, the advertising should in other words not only identify a competitor but also contain an element of juxtaposition with the goods, services, enterprise or other characteristics of the advertiser.[448] This view means that disparaging advertising, including pure denigration of a competitor, would/does not fall within the scope of the Directive but is left to the jurisdiction of the Member States.[449] An additional restriction of the definition is achieved by limiting it to a competitive relation.[450]

Finally, some suggest that in tune with the Directive's preamble, the definition of comparative advertising should be broadly construed, while the conditions for admissibility should, in contrast, be applied with a degree of caution and common sense. In this reading personal advertising will be covered by the definition. Not all conditions in (a)-(g) will be considered applicable, however, but only those with direct bearing on personal advertising. For instance, there is no room for reasonable application of (b), as it requires comparison of goods (with similar features). By contrast, the prohibition in (e) of discrediting and denigrating advertising is quite meaningful in this context.[451]

On a more general level, these interpretational debates demonstrate the awkward results which European lawmaking sometimes produces as it enters the autonomous sphere of national legal orders. While drafting the Directive few may have been able to anticipate the maze of arguments and counter-arguments triggered by the integration of European legal provisions into the finely woven fabric of German '*Professorenrecht*'. The fine art of legal dogmatics characterizing German private law continues to follow the demanding logic of system coherence and conceptual harmony, even at the cost of some dysfunctionality. More than just '*Glasperlenspiele*' these interpretational dialogues attempt at preserving the ideal of private law as a source of legal certainty and a guarantee of individual rights.

German courts were well familiar with the ongoing process of European harmonisation (and liberalisation) of comparative advertising. Even before the Comparative Advertising Directive was adopted one could find references to the text of earlier drafts in court decisions. Thus in the "*Preisvergleich II*" decision of the BGH

---

[448] In this sense Köhler/Piper (2002), 866 ff.

[449] Tilmann (1999), 546. § 14 UWG thus is viewed as exempted from the scope of the Directive.

[450] Henning-Bodewig considers advertisings of the sort "Only Revlon has more colours" for leather furniture and "Our Yoghurt is the Rolls Royce of yoghurts" to fall outside the scope of the Directive due to lack of competitive relationship. Henning-Bodewig (1999), 392. Of different opinion apparently Spink/Petty (1998), 855, at 862.

[451] This interpretation is supported by the history of the Directive. In its opinion on the 1991 Commission proposal for a Directive, the European Parliament proposed a new condition of permissibility, namely that comparative advertising "does not extend to the competitor's person or circumstances." OJ C 337/140. This provision, somewhat revised, was incorporated in the amended proposal by the Commission reading: "does not refer to the personality or personal situation of a competitor." Neither of these proposals, however, was included in the final text of the Directive. Instead the term "circumstances" is inserted in the prohibition against discrediting or denigrating comparative advertising. In the German version of the Directive "circumstances" is translated as "Verhältnisse" (i.e. "relations").

the Court expressly mentioned the then topical draft of the Directive.[452] The attention focused, however, mostly on the proposed restrictions and not on the principle of permissibility advanced in the draft.

In the case in point the defendant had conducted comparative tests of the prices of certain product categories (households articles, foodstuffs and textiles) in six consumer and discount marts in North-West Germany. The results of these tests were summarized in comparative price-lists without identifying the compared supermarkets. The defendant then claimed that his prices were 2.56 to 6.37 percent lower than those of the competitors in two of the three product categories. This conclusion was then emphasized by additional visual and verbal elements in the advertising. The BGH found this price comparison to be conflicting with the bonos mores standard of § 1 UWG. The Court then explicitly turned to the Draft Directive and held that the comparative price lists used by the defendant did not comply with the requirement of verifiability, laid down in Art. 3a Section 1 (c) of the Draft.

> Für einen Preisvergleich, dessen Vollständigkeit und Richtigkeit für den Verbraucher nicht nachprüfbar ist und der daher dem Leser eine nur scheinbare Objektivität und Marktübersicht vermittelt, kann jedenfalls im Grundsatz nichts anderes gelten als für einen lückenhaften Vergleich. Denn bei einem solchen Vergleich, der vom Leser auch mit einigen Mühen nicht nachvollzogen werden kann, besteht die offensichtliche Gefahr des Missbrauchs, insbesondere die Gefahr einer ergebnisorientierten Auswahl der in den Vergleich einzubeziehenden Wettbewerber und Waren.[453]

One cannot escape the impression that the concept of "verifiability" is given a very demanding scope and meaning. In the Court's view the concept seems to imply a possibility for the targeted consumers to verify the advertising claims without much effort. The Court has no difficulty in finding support for this interpretation in the text of the draft directive:

> Auch soweit in der Europäischen Union durch Ergänzung der Richtlinie 84/450/EWG über irreführende Werbung eine Harmonisierung beabsichtigt ist, die eine Änderung des deutschen Rechts erforderlich machen wird, geht es um die Privilegierung des nachprüfbaren Vergleichs; der nicht nachprüfbare Vergleich soll dagegen nach dem Richtlinienentwurf des Rates untersagt sein (Art. 3 a Abs. 1 lit.c Richtlinienentwurf)....[454]

With its decision "*Testpreis-Angebot*" pronounced after the Comparative Advertising Directive was adopted (but before its implementation in Germany) the BGH seemed to take an open course of breaking with its previous case law.[455] The Court expressly declared its intention to ensure the transposition of the Comparative Advertising Directive into German law even before expiry of the transposition period. Given the broad margin of discretion allowed by the general clause of § 1 UWG and the duty of Community-compliant interpretation of national legislation the court sought to demonstrate that no legislative intervention was necessary and that the judiciary could

[452] BGH GRUR 1996, 983 ("Preisvergleich"), 983 ff.
[453] BGH GRUR 1996, 983 ("Preisvergleich"), 983 ff., at 984
[454] BGH GRUR 1996, 983 ("Preisvergleich"), 983 ff., at 984-85.
[455] BGH GRUR Int. 1998, 891("Testpreis-Angebot").

be trusted to do the job. The "*Testpreis*" decision was followed by a few additional judgments, where the Directive was interpreted and applied before any formal implementation legislation to have entered into force.[456]

The practical outcome of these first decisions has, however, prompted a number of commentators to express doubts whether a long-expected and long-advocated liberalisation of comparative advertising will eventually obtain in Germany. Some for instance noted that the *Testpreis*-Angebot involved a situation of what would earlier have been classified as *Systemvergleich* and consequently been outside the restrictive doctrine on comparative advertising.[457] In this respect the new claims of dramatic liberalisation were somewhat exaggerated. In doctrine it was even suggested that comparative advertising might now be subject to even closer scrutiny if the previously applied exemption were no longer valid.[458]

Despite the determination of the courts to follow the new wind from Brussels, it is far from certain that a genuine liberalisation of comparative advertising will obtain in Germany.

> In conclusion, assessing the effects that the Directive on Comparative Advertising will have in Germany, I tend to be rather sceptical concerning the liberalisation which has been hoped for. In view of the strict requirements set forth by the Directive concerning the permissibility of comparative advertising it might well happen that some time from now we might wonder whether it would not have been better to do without the Directive and to continue to hope for liberalisation of the case law of the Federal Supreme Court.[459]

Among the most remarkable developments in jurisprudence confirming the trend towards liberalisation of comparative advertising set off by Community law is the decision of the BVerfG reversing the above discussed BGH decision in the case *Therapäutische Äquivalenz*.[460] The BVerfG restated its earlier pronounced view that the constitutionally guaranteed freedom of expression extends also to commercial statements like the purely commercial advertising, which has valuing content molding public opinion.[461] It examined the protected good under § 1 UWG and found it to consist in the fairness of competition based on performance (Leistungswettbewerb). Such competition should be maintained free from competitive acts that violate the dominant legal-ethical perception in the interests of competitors, the other participants in the market and above all the consumers. With reference to Baumbach/Hefermehl the Court moves on to enumerate some of the specific implications of this general protective aim, namely disapproval of practices consisting in exerting unfair influence over the free decision of the customers, obstruction of competitors by means not based on performance, such as imitation and exploitation, creating of competitive advantage through breach of statutory duties, etc. This protective good (Schutzgut) is perfectly compatible with the GG and even flows from the principle of private autonomy,

---

[456] BGH GRUR Int. 1999, 69 („Preisvergleichsliste II"); BGH GRUR Int. 1999, 453 („Vergleichen Sie").
[457] See Ch. 5.5.1.1 above
[458] See Ohly/Spence (1999); Henning-Boweig (1999) .
[459] Bastian (2000), 160.
[460] See BVerfG WRP 2001, 1160 ("Therapäutische Äquivalenz")
[461] See BVerfGE 102, 347 („Benetton-Werbung")

enshrined in Art. 2 (2) GG. This good, however, should be analyzed in the specific case considering the potential threat embodied in the practice at issue. It should further be carefully weighed against other constitutional goods, notably the fundamental freedom of expression. In the relevant case the competent courts had not sufficiently considered the threat to Leistungswettbewerb and have not carried out the balancing test prescribed by the court.[462]

The decision is highly interesting because the BverfG undertakes what could be called a methodological analysis, scrutinizing the methods employed by the BGH and the lower instance courts in establishing violations of the UWG and of its general clause. The BVerfG requires that in the application of the UWG the courts do not proceed from abstract factual situations as distilled from its case law, but rather make a concrete assessment of the immediate threat and impairment of the protected good, namely of workable competition. In the particular case in point the Court even requires an analysis of the market for medicines and assessment of generics on this market.[463] Only when such threat is convincingly proven in the specific case should the courts proceed with balancing against other constitutionally protected interests such as freedom of expression. A proportionality analysis is also required regarding the appropriateness and fitness of the restriction to achieve the desired legislative objective.[464]

Sweden: change affirming the institutional core?
In contrast to Germany, the liberalising objective of the Comparative Advertising Directive was perceived to be compatible with the Swedish approach dating from the first consumerist wave of the late 1950s. As elaborated in chapter 6, conscious measures were undertaken in Sweden to break with the influence of traders, traditionally suspicious of comparative advertising. The restrictions on various forms of commercial comparisons were gradually substituted with an information-based and consumer-oriented approach, setting strict requirements of truthfulness, relevance and objectivity. The work on the Directive was consequently regarded as reinforcing this basic outlook.

Significantly, the Comparative Advertising Directive was the first act of harmonisation in the area of fair trading that the Swedish government had an opportunity to influence. The intended direction of influence was to keep alive the liberalisation spirit of the Directive, while not allowing the new act to encroach on established consumer protection standards. This was also the reason behind the above mentioned 'Nordic' amendment to Arts. 7 and 3a(1)(c) Directive 97/55. As a senior civil servant at the Swedish Ministry of Justice involved in the negotiations summarized the outcome:

> The idea with this solution is that countries which prohibit comparative advertising shall be forced to permit such advertising, whereas countries where comparative

[462] BVerfG WRP 2001, 1162.
[463] *Ibid.*, 1163.
[464] *Ibid.*, 1162.

> advertising is allowed but where consumer protection is more far-reaching will not be forced to reduce their level of consumer protection.[465]

The 'Nordic' amendment underlines that other aspects of comparative advertising, for instance its effect on children, possible unfairness due to intrusiveness, etc., are not to be regarded as fully harmonised and remain within the domain of the Member States' regulative competences.[466] In doctrine doubts have been raised, however, whether a clear line can be drawn between rules merely affecting comparative advertising and rules on the comparison as such.[467]

Compared with Germany, it is indeed remarkable that the transposition of the Comparative Advertising Directive in Swedish law was carried through without significant doctrinal or legislative debate. The Government Bill 1999/2000:40 recommended a literal incorporation of Art. 3a Directive 84/450/EEC into the 1995 MFL (now 8 a § MFL). Concerning the relation between the misleading advertising and the comparative advertising parts of the directive in legal doctrine, it was considered undisputable that the Comparative Advertising Directive allowed Member States to sustain stricter standards regarding misleading advertising. 8 a § restated the requirement that the comparative advertising should not be misleading. Apart from some regrettable overlap of 8 a § with the existing general prohibition on misleading advertising (6 § MFL), the amendment was not believed capable of bringing about any changes in the habitual strict standard for evaluating deceptive comparative advertising in Swedish law. Moreover, the Comparative Advertising Directive was not regarded to limit the freedom of Member States to regulate advertising in terms of fairness and compliance with legal norms outside the scope of the MFL (e.g. rules on children advertising, alcohol, drug and tobacco advertising and the like).[468]

While the Comparative Advertising Directive in its permissive part is in conformity with dominant Swedish case law and attitudes, the multiple layers of conditions stipulated in Art. 3a may well have an effect opposite to the Directive's original tenor. As noted by Bernitz, on a number of points the Directive goes in a more restrictive direction than is customary in Swedish marketing practices law.[469] This applies in particular for factual situations at the interface with exclusive intellectual property rights, e.g. creating confusion with another's trademark, discrediting and denigration, the virtual prohibition of comparison addressing goods with protected geographical indication of origin. Likewise stringent requirements of relevance and similarity of the compared goods may render comparative advertising more difficult than prior to the implementation of the Directive. Given that the majority of countries in the Community used to entertain more rigid standards on comparative advertising, Bernitz conjectures that these attitudes may 'spill over' into Swedish judicial practice through the activism of companies and their lawyers.[470]

---

[465] Jesper Alwall, Legal Adviser in the Consumer Unit of the Ministry of Public Administration (Civildepartementet), Promemoria: Ang. Förslag till direktiv om jämförande reklam, 1995-12-12, quoted after Dölling (1996), 60 (my translation).
[466] Bernitz (2002a), 11 ff., 16.
[467] Howells/Wilhelmsson (1997), 145.
[468] Dölling (1996), 60-61; Bernitz (2002a), 19.
[469] Bernitz (2002a), 25, 27 ff.
[470] In this sense Bernitz (2002a), at 21, 24, 25

Misgivings about the undue restrictive effects of the new provisions on comparative advertising could be found in the comments of the KOV in the consultations connected with transposition of the Directive. The Agency expressed doubts as to the systematic classification of the new rule among the catalogue rules. An infringement of these catalogue rules could under the new MFL of 1995 be sanctioned by a special market disruption fine (*"marknadsstöringsavgift"*).[471] The appropriateness of this sanction for situations of comparative advertising going beyond the case of misleading comparisons was questioned. The Council on Legislation also supported this position.[472]

Indeed, claims to apply the new provision of 8 a § MFL in a restrictive and allegedly Community-compliant manner already started to reach Swedish courts.[473] One of the first decisions of the Market Court invoking the newly implemented Directive is on the application of the French Champange association.[474] The leading Swedish producer of dairy products had launched a new brand of yoghurt marketed with the designation "yoghurt with champagne taste". Contrary to the views expressed in German doctrine and to the claims of the plaintiff, the Market Court refused to classify this advertising as comparative and falling under 8 a § MFL. To substantiate its view the Court ruminated that yoghurt and champagne were completely different products that could not be seen to be in a competitive relation with each other. The Court thus interpreted the scope of the Directive (and the implementing provision in MFL) narrowly, excluding all comparisons between different non-competing products.[475] In the Swedish legal literature this view is criticised as excessively restrictive, being hard to conform with the requirement of similarity of the compared products laid down in Art. 3a(1)(c) of the Directive.[476]

The result-oriented interpretation of the ECJ

The Court of Justice has so far had only two occasions to interpret Directive 84/450/EEC as amended by Directive 97/55/EC. In the *Toshiba* case[477] the Court was asked to give preliminary ruling in proceedings pending before the Landgericht Düsseldorf between the German company Toshiba Europe GmbH and another German company, Katun, selling non-original spare parts. Katun had marketed non-original spare parts and consumable items for Toshiba photocopiers by reference to the product numbers specific to the original spare parts produced by Toshiba. The Landesgericht

---

[471] See on the new MFL below.

[472] See Council on Legislation, prop. 1999/2000:40, 51.

[473] See MD 2002:20 ("Champagne"). See also MD 2003:16 ("L O Smith") with explicit reference to the Directive and to the *Toshiba* ruling of the ECJ seeking to find argument for a broad prohibition of comparative advertising.

[474] See MD 2002:20 ("Champagne")

[475] Eventually the Court proceeded to try the case under the doctrine of goodwill exploitation (renommésnyltning) and found the marketing to be in conflict with the general clause on good marketing practice on the basis of this doctrine.

[476] See Nordell, *Marknadsrättens goodwillskydd* (Stockholm, Media Mercur, 2003a), 83; Nordell, 'Champagnesmak! Kommentar till MD 2002:20' (2003b) *NIR*, 94 ff.

[477] Case C-112/99 *Toshiba* [2001] ECR I-7945.

raised among other things the question of whether such advertising was to be considered as comparative in the meaning of the directive.[478]

The parties in the proceedings expressed very divergent views on this issue. According to Toshiba Europe Directive 84/450/EEC as amended did not apply in the case at issue since there was no comparison of product features.[479] It thus sustained a narrow interpretation of the concept of comparative advertising in line with the third alternative discussed above. Conversely, Katun, the Austrian government and the Commission submitted that the marketing was to be considered as comparative advertising within the meaning of the directive. The customer could identify the manufacturer of the original items and the product numbers, moreover, were a shorthand way of comparing technical features of a product, indicating its compatibility with the original manufacturer's equipment.[480] The French government, as an intervening party, enlarged on the ambiguities of the Directive. It pointed out that Art. 2(2a) of Directive 84/450 as amended did not require that there be a comparison, but suggested that the concept of comparison may have to be taken into account only at the stage where the lawfulness of the comparative advertising is assessed.[481]

In its findings the Court underlined the very broad definition of the term advertising and the desire of the Community legislature to render a broad meaning to the term 'comparative advertising' as well. It therefore rejected a narrow understanding requiring comparison of goods and services. The Court held:

> In order for there to be comparative advertising within the meaning of Article 2(2a) of Directive 84/450 as amended, it is therefore sufficient for a representation to be made in any form which refers, even by implication, to a competitor or to the goods and services which he offers. It does not matter that there is a comparison between goods and services offered by the advertiser and those of a competitor.[482]

Addressing the relation between the definition in Art. 2(2a) and the conditions for permissibility in Art. 3a the Court notes that "on a literal interpretation, they would render unlawful any reference enabling a competitor, or the goods or services which he offers, to be identified in a representation which did not contain a comparison within the meaning of Article 3a."[483] Such literal interpretation would in the case in point result in contradiction with the Trade Mark Directive.[484] The Court therefore opted for an alternative, teleological interpretation, taking as a point of departure the objectives of the directive.

> According to the second recital of the preamble of Directive 97/55, comparative advertising will help demonstrate objectively the merits of the various comparable

[478] "Is advertising by a supplier of spare parts and consumable items for an equipment manufacturer's product to be regarded as comparative advertising within the meaning of Art. 2a of the Directive if the advertising indicates the manufacturer's product numbers (OEM numbers) for the relevant original parts and consumable items for reference purposes in order to identify the supplier's products?"
[479] Case C-112/99 *Toshiba* [2001] ECR I-7945, para 22.
[480] *Ibid.*, para 23 ff.
[481] *Ibid.*, para 26.
[482] *Ibid.*, para 31.
[483] *Ibid.*, para 33.
[484] Directive 89/104/EEC, OJ 1989 L 40/1.

> products and thus stimulate competition between suppliers of goods and services to the consumer's advantage.
>
> For those reasons, the conditions required of comparative advertising must be interpreted in the sense most favourable to it.[485]

The ruling in *Toshiba* seems to support a broad definition of the concept 'comparative advertising' without, however, requiring a blind application of all the requirements for permissibility listed in Art. 3a. Tactically, this interpretation takes a broad approach when the advertising is to be covered by the liberalising effects of the directive, and a narrow approach when interpreting the prohibitions. It is not clear, however, to what extent the decision should be seen as confined to the specific facts of the case, or whether it could be treated as having more general interpretational value. A broad definition of comparative advertising in conjunction with the detailed list of limitations may produce very restrictive effects that, however, unlike those in *Toshiba*, do not contradict any other Community act. Nevertheless, the decision suggests that one should not lose sight of the main goal of the directive, namely that of liberalising comparative advertising. Arguably, the Court would not wish to see the Directive employed for purposes contrary to the original legislative intention.

The second case involving the Comparative Advertising Directive is *Pippig Augenoptik GmbH*.[486] The case concerned an aggressive comparative price advertising campaign for spectacles, presenting tendentiosly the prices charged by Pippig (plaintiff in the main proceedings) as excessively high. Some of the adverts in the campaign omitted to indicate the different quality (and the brand) of the lenses in the compared spectacles. One of the main questions referred to the ECJ was about the relation between the standards of deception applying for comparative and non-comparative advertising and the degree of harmonisation of these standards. More specifically the referring Austrian court sought an authoritative interpretation of the expression "as far as the comparison is concerned" in Art. 7(2). Was this expression referring to statements regarding the product of the advertiser, regarding the competitor's product or only regarding the relationship between the two? And, importantly, could a stricter national standard of deception apply to the whole comparison by force of Art. 3a(1)(a) of the Directive.

Surprisingly, the Court takes a view similar to the one advanced by Tilmann and shared by most German legal scholars. In the opinion of the Court there is a textual contradiction between Art. 3a(1)(a) and Art. 7(2) of Directive 97/55/EC, which makes literal interpretation insufficient. Given such contradiction, the Court follows the result-oriented method of interpretation already announced in its *Toshiba* ruling and confirms its decisiveness to proceed from the main objective of the Directive, namely liberalisation of comparative advertising.[487] With reference to Recital 18 Directive 97/55/EC the Court emphasizes the proclaimed aspiration to achieve an exhaustive

---

[485] *Ibid.*, para 36 f.

[486] Case C-44/01 *Pippig Augenoptik*, judgment of the Court of 8 April 2003, nyr.

[487] "Faced with the apparent textual contradiction, those provisions [of Arts. 3a(1)(a) and 7(2)] must be interpreted in such a way as to take account of the objectives of Direcive 84/450 and in the light of the case-law of the Court accordnng to which the conditions required of comparative advertising must be interpreted in the sense most favourable to it." *Ibid.*, para 42.

harmonisation of comparative advertising, which would make comparative advertising possible throughout the Internal Market. This brings the ECJ to the conclusion that divergent national standards of deception should not apply to comparative advertising in its entirety. Like the reading suggested by Tilmann this interperetation leaves the reference to Art. 2(1) in Art. 3a(1)(a) fully mysterious. Once again the Court demonstrates that it can always surprise with interpretations that are neither constrained by dogmatic textual considerations, nor particularly interested in the political background to legislative acts. The ECJ's self-perception as guardian of the 'integration logic' in Community law remains unshaken.

7.1.1.3 Regulating television advertising with an emphasis on children advertising

As discussed in the preceding chapter, advertising was only one of the multiple aspects of television broadcasting activity tackled in the Television Directive.[488] The main thrust of the Directive was to promote the free movement of television broadcasting services throughout the Community. Harmonisation of rules on television advertising was thus only subordinate and instrumental to the first-order priority of achieving 'Television Without Frontiers'.[489] In most countries within the Community television and radio broadcasting are subject to special legislation. The transposition of the Television Directive into national law was therefore carried out through amendments in these legal acts. The extent to which this special legislation impacts on national marketing practices law depends primarily on the connection ensured by national law between fair trading standards and violations of other legal norms.[490]

Germany: no visible influence on marketing practice law

The regulatory regime of television and radio broadcasting in Germany is highly idiosyncratic. One of the most prominent characteristics of this regime is that it falls within the decision-making competencies of the *Länder* and not of the Federation. Consequently, the legal basis for regulating radio and television activity is complex. Of central importance is the State Treaty on Radio and Television Broadcasting in United Germany.[491] On the basis of this Treaty the German States have adopted their respective State Media Laws (the Broadcasting Act of the State of Nordrhein-Westfalen, the Media Act of the State of Saarland, etc).[492] The control of advertising in radio and television broadcasting is entrusted to special public law agencies, the so-called State Media Institutions (*Landesmedienanstalten*, LMA). The LMA enact common guidelines on advertising, the latter serving also as a vehicle of transposition of the advertising rules in the Television Directive.[493] Similar guidelines are enacted by the public services broadcasting institutions, ARD and ZDF. Other instruments of self-regulation, like the Guidelines of the German Advertising Council on Alcohol Advertising, also play a role in the overall regime of television advertising. Generally,

---

[488] Directive 89/552/EEC, OJ 1989 L 298/23 as amended by Directive 97/36/EC, OJ 1997 L202/61.

[489] See the semi-official title of the Directive 'Television Without Frontiers.'

[490] On the doctrine of '*Vorsprung durch Rechtsbruch*' in German unfair competition law, and on '*lagstridighetsprincipen*' in Swedish marketing practices law, see Ch. 5.5.1.1 and Ch. 5.5.2.4.

[491] Staatsvertrag über den Rundfunk im vereinten Deutschland of 31.8.1991 (RfStV, most recently amended GVBl. I 2002 Land Hessen, 779).

[492] See Eisenhardt, 'Werbung gegenüber Kinder' (1997) *WRP*, 283 ff., at 287; Engels, 'Wettbewerbsrechtliche Grenzen der Fernsehewerbung für Kinder' (1997) *WRP*, 6 ff.

[493] Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen, 10.2.2000.

the desire is to give media a broad mandate for voluntary self-regulation and control, and to keep direct state intervention to the necessary minimum.[494]

The State Media Institutions are also responsible for drawing up and implementing protective provisions concerning children advertising.[495] Until recently the LMA Guidelines contained strict requirements as to the content of advertising directed to children on the basis of § 7 II Nr. 2 RfStV. As of 2003 a new State Treaty on the Protection of Human Dignity and of Adolescents is in force. In its § 6 the Treaty lays down specific rules on children advertising in electronic media, closely following the provisions of Art. 16 of the Television Directive.

Theoretically, the principle of *Vorsprung durch Rechtsbruch* in German unfair competition law allows for the integration of these media-specific provisions in the *bonos mores* standards of UWG. In particular, it should not be problematic to qualify protective rules concerning children advertising as morally bound (*sittlich-fundierte*). However, the influence of these specific rules and regulations over the standards of fair completion has so far remained limited, provoking criticism in the legal literature.[496] It is astonishing that the area of unfair competition, otherwise characterized by intense enforcement, has produced so little case law on children advertising. The explanation is usually found in the limited interest of competitors and their associations in combating a practice they themselves are engaged in, or may want to be in the future.[497] Given the weakness of case law on children advertising in UWG and its limited basis in German legal doctrine, it is not surprising that the Television Directive failed to provoke significant debate in the field of unfair competition. The effect of the Directive seems confined to the area of media law.

Sweden: challenge of the institutional core and resistance to change
Meanwhile in Sweden, television advertising targeting children became one of the most intensely debated regulative issues both in the 'technical' context of adapting marketing practice standards to European law, and pertaining to Sweden's overall accession to the EU. The debate has engaged politicians, academics, industry representatives and experts, but also the community at large. These emotive reactions can be better understood against the backdrop of the electronic media landscape in Sweden.

Television broadcasting in Sweden started in 1956 and was until 1991 exercised exclusively by the state-owned public broadcasting company *Sveriges Television AB* (SVT).[498] As a country with a relatively long-standing tradition of public service broadcasting (financed entirely by licence-fees), Swedish regulators and the public in the mid-1990s had limited experience of television advertising and of commercial

[494] Engel gives television broadcasting as a typical area of German law, building on 'regulation through organization and procedure'. See Engel, 'Regulierung durch Organisation und Verfahren' in: Immenga/Möschel/Reuter, *Festschrift für Mestmäcker* (Baden-Baden: Nomos, 1996), 119.
[495] § 6(1) RfStV, see Engels (1997), 7.
[496] Engels (1997), 15; Eisenhardt (1997), 293.
[497] See Engels (1997), 15; Eisenhardt (1997), 293.
[498] Channel 1 was launched in 1956 and Channel 2 – in 1969.

television in general.[499] Discussions in the 1970s on allowing television advertising ended with the rejection of this alternative on various grounds, including the intrusiveness of TV advertising and the possible negative influence of advertising on programme content. Another important concern was the economic situation of the daily press.[500]

In the beginning of the 1990s new technologies like satellite and cable broadcasting made cross-border television possible. Together with gradual Europeanisation, technological developments necessitated reform and liberalisation of the Swedish television-broadcasting sector. In this context, the prohibition of television advertising stood out as increasingly untenable. The stepwise changes were carried out in a controlled manner. SVT's monopoly over terrestrial transmission was broken in 1991, when one additional, privately owned broadcasting company, TV4, was granted broadcasting rights via the terrestrial network. TV4 committed itself to work along the lines of public service television.[501] At the same time, the company permitted to broadcast commercial advertising and to finance its activity through advertising income.[502] Subsequently, advertising was allowed for other forms of radio and television broadcasting, such as local radio, cable and satellite broadcasting.[503] The two public service channels of the state-owned Swedish Television continued to work on the basis of licence fees, thus remaining 'free from advertising.' In a comparative perspective Sweden has been "one of the last countries in Europe to give up its resistance to such an activity [television advertising]".[504] Some of the parties consulted in the course of preparatory work, notably the KOV, remained strongly opposed to liberalisation.[505]

These reserved attitudes to television advertising explain the even more restrictive stance on children advertising. With the 1991 amendments of the Radio Act (*Radiolag*, RL)[506] a number of requirements on television advertising were introduced, applying only to terrestrial transmissions. 11 § RL provided that an advertisement broadcast during a commercial break on television must not be designed to attract the attention of children less than 12 years of age. Neither could persons and characters playing prominent roles in programmes designed for children from this age group appear in such advertisements. This provision was passed with the overwhelming support of the stakeholders involved.[507] The prohibitions were subsequently incorporated into the Radio and Television Act (*Radio- och TV-lag*, RTVL) of 1996.[508]

---

[499] See prop. 1995/06:160, 41-42; 84. Cf. Kallersand, *TV-reklam riktad till barn – regler och attityder* (Stockholm: IFIM series, Nr. 96, 1998), 8 ff.

[500] SOU 1973:10. See Levin, *Satellitreklam och konsumentskydd* (Stockholm: Nordstedts, 1987b).

[501] This meant that the programmes had to comply with the requirements of 'geographic justice', 'editorial independence', and 'diversity and balance' and provide a varied programme content of high quality.

[502] Prop. 1990/91:149. The rights and obligations of TV4 are determined by agreement between the company and the Swedish state. In return for the right to broadcast commercial advertising TV4 pays concession fees to the state.

[503] Prop. 1995/96:160, 106; SOU 1994:105.

[504] SOU 1992:49, 87.

[505] Ibid.

[506] Radiolag (SFS 1966:755), amended by SFS 1991:1066.

[507] 11 § RL (SFS 1966:755) as amended by SFS 1991:1066. See prop. 1990/91:149. Cf. prop. 1995/96:160, 106. Similar rules were later on introduced in the Cable Broadcasting Act (lag om kabelsändningar till allmänheten (SFS 1991:2027), prop. 1991/92:53.

[508] 7:4 RTVL (SFS 1996:844).

Initially, enforcement of the provisions on children advertising to children could proceed along twin tracks. The Supervisory Board for Radio and Television exercised control over all television broadcasting, including advertising and could issue injunctive orders subject to penalty payment.[509] The procedure was of an administrative law character. A parallel avenue of enforcement was opened by the general clause of good marketing practices in the MFL.[510] The Market Court had early recognized the requirement of lawfulness of advertising (*lagstridighetsprinciplen*) as an integral part of the ethical standard of good commercial practice. As demonstrated in Ch. 5 above, this principle has frequently been used by the KO as a shortcut to enforcing product-specific and media-specific consumer rules, as well as provisions which lend protection to vulnerable consumer groups, like children.[511]

Given the efficiency of enforcement under MFL, the 1996 RTVL entrusted the KO with exclusive authority to supervise the rules on children advertising and on drug advertising in broadcasting.[512] The 1995 MFL in its 22 § expressly regulates the possibility to impose the newly introduced 'market disruption fine' for breach of specific statutory provisions regarding television advertising (7:3, 7:4 and 7:10 RTVL).[513] The requirement of lawfulness thus makes the regulation of television advertising of direct relevance to marketing practices law.

The liberalisation of television broadcasting was carried out in parallel with the approximation of Swedish legislation to the requirements of the EEA Agreement and, subsequently, with preparation for full membership in the EU. The rules of the Television Directive, including the provision on children advertising (Art. 15), were familiar to the Swedish lawmaker. However, in the deliberations on the first amendments to the RL, which for the first time permitted television advertising and introduced the prohibition of advertising to children less than 12 years, these provisions were not systematically taken into account.[514] The Marketing Practices Inquiry drew attention to possible conflict between the Swedish prohibition and the more permissive rule in the Television Directive.[515] In the context of marketing practices law, the Inquiry regarded television advertising to children as the most problematic point in the interface between European law and Swedish law.[516]

---

[509] 17 a § RL.
[510] 2 § MFL (SFS 1975:1418); 4 1 § MFL (SFS 1995:450).
[511] See Ch. 5.5.2.5.
[512] 9:2 RTVL (SFS 1996:844), cf. 10:7 RTVL. This division of supervisory activities between the Supervisory Board for Radio and Television and the KO was made possible not least by the approximation of the sanctions under the RTVL and MFL. Both statutes allow the imposition of a fine for breach of relevant provisions of 5,000 to 5m. Swedish crowns, though not exceeding 10 percent of the broadcasting company's annual turnover. Cf. 10:6 RTVL and 24 § MFL. This sanction is clearly inspired by the system of fines in Community competition law.
[513] Other provisions to be enforced in the same manner are the restrictions on alcohol advertising in 4:10 Alcohol Act (alkohollagen, SFS 1994:1738) and the prohibition of tobacco advertising in 14 a § Tobacco Act (tobakslagen, SFS 1003:581)).
[514] See SOU 1992:49, 86, referring to the statements by the Minister responsible on children advertising in prop. 1990/90:149, 121.
[515] SOU 1992:49, 85 ff.
[516] SOU 1992:49, 86.

The Inquiry first proposed an express provision that would allow the scope of the Swedish MFL to be modified so as to comply with likely requirements of future international agreements. Modifications were to be possible in two directions: *(i)* expanding the scope of the act to broadcasts emanating from Sweden but addressed exclusively to other Community Member States; and *(ii)* limiting this scope in regard to broadcasts emanating from other Community Member States and directed to the Swedish market. Secondly, the Inquiry found the prohibition of television advertising directed at children under 12 years old to "constitute undoubtedly a trade barrier in the meaning of ... Art. 30 (now Art. 28) EC Treaty".[517] It therefore proposed abolishing the prohibition and substituting it with rules in conformity with the Directive's Art. 16.

Despite this rather categorical position taken by the experts[518] the Swedish government, notably a centre-right one, was not ready to change its attitudes. The Government Bills purporting to ensure the necessary approximation of the MFL with European standards only partly followed the advice of the Marketing Practices Inquiry. The scope of Swedish marketing law was expanded to encompass television broadcasts emanating from Sweden and exclusively directed at other Community Member States. In contrast, the so-called '*effektlandsprincipen*',[519] i.e. the old principle of applicability of Sweden's MFL to marketing practices emanating from foreign jurisdictions but having effect on the Swedish market, continued to apply.[520]

Importantly, the two Bills did not follow the recommendation of the Marketing Practices Inquiry to rescind the prohibition of children advertising. This recommendation was sharply criticized by a number of institutions and interest groups consulted, such as the KOV, the Council on Children Environment, the Supervisory Board for Radio and Television, Swedish Television, associations like Save the Children, Home and School and the Church of Sweden. The Government, together with the Legislative Council, considered the question to be legally complicated but concluded that there were serious arguments suggesting that the prohibition was in compliance with EC law. In the absence of an authoritative interpretation by the ECJ, the prohibition was retained.[521]

Following Sweden's accession to the EU, television advertising directed at children was embraced as a priority issue in the Government's consumer policy efforts at European level. In 1995 a working group was mandated to propose a strategy for Swedish consumer policy in the EU. One of the priority tasks suggested by the working group was to "actively work towards a European prohibition of television

---

[517] To arrive to this conclusion the Inquiry referred to the case of a Greek prohibition of television advertising of toys. In 1986 the Commission had made objections to Greece as to the compatibility of this prohibition with the principle of free movement of goods. In a reply to a parliamentary interpellation the Commission had stated that the Television Directive indeed allowed Member States to lay down stricter rules in respect to children advertising. However, these rules ought to be consistent with Art. 30 of the Treaty. As a consequence thereof Greece limited the prohibition to military toys. See *ibid.*, 86.

[518] Note, however, the dissenting opinion of the Deputy KO Per Eklund on the issue, SOU 1992:49, 91.

[519] On the 'effektlandsprincipen' see prop. 1970:57, 93.

[520] Prop. 1992/93:75, 33 ff.; 1992/93:110. Cf. 2 § 1975 MFL, introduced with SFS 1992:1361.

[521] Prop. 1992/93:75, 35 ff.

advertising to children" in the Television Directive, clearly hoping to reproduce Swedish policies at European level. [522]

This objective was confirmed in a subsequent government document on the general direction of Sweden's work in the field of consumer policy in the EU. Children were defined as a particularly vulnerable group. Arguments for preventing commercial actors from enticing children into purchasing via the suggestive television media were considered well founded.[523] In this document the Government reported on its attempts to influence the text of the Television Directive, saying that the Commission had committed itself to a study of the effects of advertising on children.[524] Notably, the issue of television advertising to children and its incorporation in the Television Directive was taken up among the key policy priorities of the newly elected Social-Democratic cabinet in 1995.[525]

The battle to gain recognition for the Swedish policy of prohibition was fought on many fronts. Given the similarly restrictive provisions existing in most Nordic countries, a coordinated approach within the auspices of the Nordic Council was considered an appropriate strategy. The Nordic Consumer Ombudsmen coordinated their attitudes and elaborated common guidelines for ethical standards to be applied to TV-advertising, including children advertising.[526] In 1995 the Nordic Council commissioned a report on the effects of television advertising on young children, and its conclusions supported a strict regulative approach.[527] Meanwhile, various public institutions launched campaigns in order to counteract the aggressive children advertising policy of TV3, a Swedish-owned company broadcasting to Sweden and Norway from the United Kingdom. In 1995/96 the Swedish KOV published a report entitled: "What does TV3 broadcast to the children?"[528] In 1996 the Supervisory Board for Radio and Television carried out a systematic examination of the programme content offered by TV3, including children advertising.[529] The Board noted that TV3 failed to respect the Swedish prohibition. It also alleged that TV3's children advertising was in violation of Art. 16 of the Television Directive. Interestingly, the Board reported these violations to its counterpart in Britain, the Independent Television Commission (ITC). The latter, however, did not find the advertising to constitute an infringement of the Directive. Finally, in a joint move against children advertising, the Norwegian KO and the Swedish KO sued advertisers broadcasting via

---

[522] Dir. 1995:32, see Skr. 1995/96:181, Konsumentpolitiken i EU – mål och inriktning för det svenska arbetet, Bilaga 1, 66. The Television Directive was at that time in the process of amendment, resulting in Directive 97/36/EC amending Council Directive 89/552/EEC.

[523] Skr. 1995/95:181, 45 ff. Förbud mot TV-reklam riktad till barn.

[524] Skr. 1995/96:181, 45.

[525] Ibid.

[526] See Common Rules on the Evaluation of TV-advertising of August 1991 issued by the Consumer Ombudsmen of Denmark, Finland, Iceland, Norway and Sweden (Felles spilleregler for fjernsynsreklamen), attachment 5, SOU 1992:49, 143 ff..

[527] Nordiska Ministerrådet, Barn og TV-reklame – tre nordiske undersøgelser, Nord 1992:4. The report claimed that children aged under 8 could generally differentiate between advertising and programme content, but not when the advertising was expressly directed at them. *Ibid.*, 200 f, 141.

[528] 'Vad sänder TV3 till barnen?' KO rapport 1995/96:12, 8-17. See Kallersand (1998), 51.

[529] Granskningsnämnden för Radio och TV, Årsbok 1997, 61. Quoted after Kallersand (1998), 51.

TV3 from England, *Lego Mattel* in the Norwegian case and *De Agostini*, in the Swedish case.[530]

The ruling of the EFTA Court in the *LegoMattel* case gave new impetus to the debate.[531] The Court found the Norwegian prohibition (analogous to Sweden's) of television advertising directed at children to be unenforceable against companies broadcasting their advertisements via television based in another Member State. Television advertising to children qualified as subject matter within the co-ordinated field of the Directive and was therefore covered by the 'home country control principle'. The EFTA Court found the attempts of the Norwegian Market Court (*Marknadsråd*) to enjoin this advertising to amount to 'secondary control' on television broadcasts. Some years later a similar decision, providing more opportunities for legislators to deviate from the Directive, was pronounced in the joint cases *De Agostini & TV-Shop*.

The facts of the joint cases *De Agostini &TV-Shop* were as follows. In the first case *De Agostini*, the subsidiary of the Italian publisher of a children magazine 'All about Dinosaurs' advertised on television the possibility of collecting and assembling the pieces of a plastic model dinosaur when purchasing several issues of the magazine. Children were urged to buy the magazine and to get the model "for 6.50 Swedish crowns only", although this was the price of one issue. The KO found the advert to infringe the RTVL's prohibition of targeting children less than 12 years of age with television advertising and to constitute improper marketing practice under the general clause of the MFL. The Ombudsman therefore applied to the Market Court for an injunction restraining De Agostini from broadcasting such advertisement. Alternatively the KO sought an injunction against the same advert on grounds of its deceptiveness. In the Tele Shop cases a telemarketing enterprise advertised a cosmetic product with alleged health effects and a detergent for its ecological qualities. Consumers were urged to order the products within 24 hours in order to profit from exceptional prices. The prices, however, turned to be the ordinary prices charged when purchasing the same products in the shop serviced by the same company. All adverts were transmitted via two broadcasting companies: the Swedish-based TV4 and the UK-based TV3.

A question of principle in the joint cases concerned the harmonized areas of advertising under the Television Directive. More concretely, the Court had to take a stand on the issue of whether children advertising was an area comprehensively harmonized under the Directive or whether the Directive left room for more stringent national rules. Under the first interpretation, the Swedish ban on TV advertising targeting children less than 12 years of age would not be enforceable upon advertisers using the broadcasting services of a TV operator established in another Community Member State. The second interpretation would sustain the powers of Swedish supervisory authorities to enjoin such advertising even when emanating form abroad.

---

[530] Joined Cases E-8/94 and E-9/94 (reference for an advisory opinion from Markedsrådet): *Forbrukerombudet vs. 1. Mattel Scandinavia A/S and 2. Lego Norge A/S,* OJ C 239, 14/09/1995, 6; Joined Cases *Konsumentombudsmannen v. De Agostini Verlag* C-34 & 35, C-36 [1998] ECR .

[531] Joined Cases E-8/94 and E-9/94 *Mattel and Lego Norge A/S,* OJ C 239, 14/09/1995, para 6. Reference for an advisory opinion from Markedsrådet.

As far as children advertising is concerned, the Court ruling in the *De Agostini* case was pretty straightforward. According to the judgment those areas of advertising explicitly mentioned by the Directive should be considered exhaustively harmonized. The implication of this interpretation is that the Swedish prohibition of children advertising cannot be invoked in respect to broadcasts under another Member State's jurisdiction. The reasoning in regard to children advertising could most probably be extended to the advertising of alcoholic beverages regulated in details in Art. 15 of the Television Directive. In this part the judgement was in line with the case law of the EFTA Court in the *Mattel/ Lego* case and fairly predictable. Its undisputed advantage was that it contributed to legal certainty.

A different aspect of delimiting the objective scope of the Directive was to clarify its relation with the Misleading Advertising Directive. According to the KO the Television Directive did not at all address this issue, which left Member States at complete liberty to apply their national legislation on the basis of the Misleading Advertising Directive. By contrast, Advocate General Jacobs had argued (pointing, among other things to the title of Chapter V of the Directive, Television Advertising) that all advertising should be considered harmonized under the TV Directive, including misleading advertising. He introduced a distinction between 'fields coordinated by the Directive' and the 'specific subject-matter regulated by it'. The idea was that even where certain aspects of advertising policy were not explicitly addressed by the Directive's provisions, the principle of "home country control" ought to apply and the recipient state was not to be in a position to enforce stricter national provisions. In addition the AG insisted that, since misleading advertising was co-ordinated in another Community Directive, this field should also be considered co-ordinated for the purposes of the Television Directive (a sort of co-ordination by moonlighting). This line of reasoning, however, ill accords with both the express wording of Art. 7 of the Misleading Advertising Directive and with Recital 17 of the Preamble to the Directive 89/552/EEC, reading:

> Whereas the Directive, being confined specifically to television broadcasting rules is without prejudice to existing or future Community acts of harmonisation, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions and competition.

The far-reaching interpretation of the Directive advanced by AG Jacobs did not meet with the sympathy of the ECJ. The Court concluded that the Television Directive had left the area of misleading advertising untouched. Consequently, control over misleading advertising did not constitute a secondary control (para. 37).

The ECJ's *De Agostini* judgment was received with mixed feelings in Sweden. There was disappointment, especially on the part of the KOV, that the Swedish prohibition could not be enforced with respect to broadcasts emanating from another Member State. However, the pill was sugared by the Court's refusal to qualify the prohibition as being in conflict with the free movement provisions of the EC Treaty. This implied continued enforcement of the prohibition with respect to domestic broadcasts.[532]

[532] Cf. the press release issued by the KO on 20th November 1998, on the occasion of the decision of the Market Court confirming the ECJ ruling. The release is entitled: "Success for the Consumer Ombudsman concerning TV

The Swedish Consumers' Association (*Sveriges Konsumentråd*, SKR), the umbrella organization formed with the participation of LO and KF[533], urged Swedish consumers to boycott TV3 broadcasts.[534] The boycott was supported by the SKR's member organizations, such as LO, KF, TCO, as well as by the KOV, by individual consumers and journalists. The Swedish International Development Cooperation Agency (SIDA) and the Swedish Foreign Ministry announced that they would suspend promotion campaigns planned via TV3. Another boycott was announced by "Save the Children Sweden". The only support these measures received from the business community came, surprisingly enough, from the Swedish Advertising Union.[535] TV 3 remained largely indifferent to the boycott, stating that it would not yield to political pressure.[536] Kallersand concludes that the whole campaign had fallen wide of the mark and commercial stations would continue to broadcast children advertising.[537] The efforts of the Swedish government to gain support for a Community-wide prohibition of television advertising to young children have likewise been unsuccessful.

Competition between legal orders? Excurs

In the preceding chapter it was pointed out that the harmonisation approach in the Television Directive corresponds to a model which in the economic and legal literature is referred to as 'competition between legal orders'.[538] The minimum harmonisation principle, straddling between 'home country control' and 'mutual recognition' clauses, confronts Member States willing to regulate more stringently with a dilemma of reverse discrimination. Domestic service providers remain bound by the stricter national requirements and cannot rely on Community non-discrimination principles for improving their competitive position.[539] Provided that strict regulation involves high costs of compliance, such operators have two alternative avenues of action. They can either move to a jurisdiction with relaxed standards, or attempt to put pressure on national legislatures towards liberalising the existing regulatory regime. This harmonisation approach purportedly harnesses the forces behind state protectionism to work towards closer integration. Clearly, this powerful method of integration exerts pressure on national decision-makers to adapt national legislation so as not to put domestic operators at a disadvantage. Even so, many commentators have expressed concerns that this mechanism of integration may result in a 'race to the bottom.' In their attempt to attract investors, Member States may engage in a continuous process of lowering regulatory (and social) standards.

---

advertising to children". The abstract reads: "TV4 shall not be able to direct advertising at children. However, children advertising on TV3 cannot be stopped. The much debated pilot case of De Agostini is thereby conclusively decided. The company's advertising is condemned on many grounds." (My translation), see http://www.kov.se/mallar/sv/pressmeddelande.asp?lngArticleId=530&lngCategoryId=509.

[533] On this organisation, see Ch. 7.4.2.2 below.

[534] Sveriges Konsumentråd, "Vill du att dina barn ska kunna titta på TV utan att behöva utsättas för reklam?", 1997. On the boycott, see Kallersand (1998), 58 ff.

[535] See Kallersand (1998), 59.

[536] Ibid.

[537] Kallersand (1998), 63.

[538] See Reich (1992a), 861 ff.; Bernard (2000) 25 *ELRev*, 57 ff.

[539] The Court has consistently refused to regard reverse discrimination as falling under Community law, see Nikolaysen (1991), 95 ff., Maduro (2000), 120 ff.

The 'race to the bottom' argument is in economic and legal doctrine often countered by theories of regulatory competition.[540] According to this line of reasoning, drawing on American federal experience, reliance on mutual recognition has the unique advantage of maintaining a variety of regulatory models and policies throughout the Community. Under conditions of a genuinely integrated market, the model predicts that market forces will work towards selecting the better regulation. But that does not mean that several models cannot be sustained within one general legislative framework, for instance in a federal one. At least theoretically, the ultimate choice belongs to consumers who may 'vote' for or against different regulatory approaches through their purchases.[541]

Both the 'race to the bottom' and the 'regulatory competition' scenarios, as well as the problems they entail, are nicely illustrated by the *De Agostini* case (referred to above). Following the principles of the Television Directive as interpreted by the Court, the unconditional Swedish ban on television advertising which targets children under 12 years old remained ineffectual in respect to advertising broadcasts emanating from another Member State's jurisdiction. In contrast, Swedish law could be effectively enforced on advertising broadcasts emanating from broadcasting companies established on Swedish territory. As an interim result there are two competing 'products' in the form of broadcasting services. One is the broadcasting services of TV3 that are adjusted to British regulatory preferences (with more liberal rules on children advertising). The other are TV4's broadcasts complying with the Swedish regulatory regime of strict prohibition. In theory, the outcome of regulatory competition should ultimately be decided by consumers. In this particular case, regulatory competition promises *prima facie* to work quite successfully. It is a matter of a clear and well-defined regulatory issue, whereby an average consumer can easily identify the alternative products and their different regulatory approaches.

Swedish consumers may consequently boycott TV3 and reduce its viewing figures or abstain completely from subscribing to TV3 services.[542] As we have already seen, however, attempts to 'politically' mobilize a diffuse majority, even around a high profile issue such as children advertising, are likely to fail. Consumer mobilization is at best weak and transitory. Moreover, television broadcasts are a complex service, consisting of a number of components. Although consumers may be willing to abstain from children programmes interrupted by advertising, they may be attracted by other components of the programme mix (such as popular sequels, shows, sporting events, etc.) The prospects for such a strategy are consequently rather gloomy.

Conversely, consumers may display their support for the Swedish regulatory approach by switching to TV4 children programmes and to other 'advertising-free' public service channels. Assuming that the Swedish ban enjoys widespread consumer support, TV4 may gain a competitive advantage over TV3 by abiding by the more restrictive regime. But this strategy again may not be that simple. The crux is that the

---

[540] See Sun/Pelkmans (1995), 67; Van den Bergh (1998), 129. Critical Reich (1992a), 861; Editorial Comments, Are European values being hovered away?, 30 *CMLRev.* 1993, 445.

[541] For a convincing criticism of this theory based on constitutional and institutional economic analysis, see Maduro (1998a), 136 ff.

[542] This may be an impracticable choice, though, given the system of 'channel packages' that are usually used by distribution companies.

regulation effectively prevents consumer support for the specific product (advertising free children programmes) to materialize in financial gains for TV4. Commercial broadcasting companies are dependent on advertising, and consumer interest in a certain programme or policy is measured by the amount of advertising attracted by the said programme/policy.[543] By forbidding advertising which targets children under 12, the regulator thus cuts the link between consumer preferences and company profits. If consumers support the regulation and are in a position to demonstrate their support by changing consumption patterns (viewing), this would have no effect on the incentives of the economic operators, here meaning the broadcaster.

Applying the 'race to the bottom' argument to the case in point, Swedish-based television-broadcasting companies (such as TV4) subject to the restrictive regime may utilize one of two avenues. The first is to move to a jurisdiction with more liberal rules on children advertising (such as the UK). The second is to lobby the Swedish legislator to lift the ban. There is also a third and probably more realistic mode of action. Companies may opt to stay (given that the decision of choosing a place of establishment is made on numerous and complex grounds) but try to adapt their economic activity. Arguably, being deprived of advertising income from children programmes televised during peak viewing hours for minors, these companies can decide to change their programming mix or abandon the child audience altogether. They may move away from children's entertainment programmes and instead search for other programming niches. Thus, paradoxically, consumers will at the end of the day be left with more children's programmes with advertising than before the regulation.

Indeed, this is what seems to have happened with TV4. Anecdotal evidence demonstrates that in contrast to TV3, TV4 has starkly reduced its children's programmes in the most popular time-span (in the early morning hours and in the late afternoon hours after school/day-care). Instead these time-spans are now filled with adult programmes. Conversely, TV3 has increased the time devoted to children's programmes and presumably attracted all advertising cash from producers of child-oriented products. In this respect, it appears that the choice open to Swedish consumers may actually have been reduced.

Another paradoxical result of the country-of-origin principle, applied in this case, may be that the pressure exerted on the Swedish government by foreign advertisers of children products will be reduced. Generally, advertisers established in other Member States than Sweden are in a worse position to be heard in the Swedish political process, compared to domestic advertisers. Their interest in lobbying or contesting the Swedish regulation via the courts will arguably diminish, given that they can reach the Swedish public through broadcasts emanating from other Community Member States. Domestic advertisers, in their turn, may not have an interest into abolishing the ban, since they are known to the local audience and have adapted their marketing practices to the restrictive Swedish legislation. Moreover, they can use broadcasts originating from other Community states.

---

[543] To quote the terse language in an info to be found on TV4 webpage: "TV4 is a television channel that lives on advertising income. Without advertisers who buy advertising time, there will be no TV4." http://www.tv4.se, Reklam och nyhetsavbrott i program.

The conclusion from the above, admittedly cursory treatment, appears to be that predictions derived from either model ('competition between legal orders' and 'the race to the bottom') will not operate as in 'sterile' academic conditions. Consumers' preferences for regulative policies have poor chance to be recognized by pure market competition, which refutes the 'competition between legal orders' model. At the same time, economic operators do not seem to be prepared to easily change jurisdiction, which is at odds with prophecies of 'social dumping'. The viability of the Swedish regulative approach will at the end of the day probably depend on the extent of 'identification' of representative institutions with the issue concerned. The latter, in turn, will certainly be influenced by the political support the government expects to receive for the particular regulative policy. In the case of children advertising the consensus behind the Swedish prohibition appears stable, which may be one reason for the bold combative strategy assumed by public institutions.

7.1.1.4 Discounts, gifts and other promotional offers

Whereas children advertising can clearly be described as an issue close to the 'heart' of the Swedish government, regulation of rebates and combined offers has been a domain with strongly expressed German interests. As shown in the preceding chapter, the regulative issue of promotional offers first entered Community law via ECJ jurisprudence on free movement of goods. Already in the *Oosthoek* ruling of 1982, the Court declared national provisions restricting combined offers to constitute a barrier to intra-Community trade.[544] The measure in point was, however, exempted from the prohibition in Art. 28 (ex Art. 30) of the EC Treaty as satisfying mandatory requirement for ensuring fair trading and consumer protection. The *GB-INNO* case did not directly pertain to rebates but could be interpreted as signalling a critical stance to unfair competition rules with no immediate benefit to consumers.[545] Finally, in the *Yves Rocher* case the ECJ explicitly addressed § 6d UWG, pronouncing this provision to be in conflict with Community rules on free circulation of goods.[546]

Promotional offers were tackled in positive Community law for the first time in the Electronic Commerce Directive.[547] On the particular issue of promotional offers the Directive adopts a harmonisation approach very similar to the one in the Television Directive. Member States with restrictive rules are given the freedom to retain these rules. However, stricter national rules cannot be enforced in respect to ISS provided by service providers established in other Community Member States. Most recently, the Commission's Directorate Internal Market submitted a draft Regulation on promotional offers, which aims at comprehensive harmonisation.[548]

Germany: gradual surrender of (burdensome) national institutional legacies

It has already been mentioned that the German Rebates Act[549] and the Free Gifts Regulation[550], stemmed from the 1930s and bore the unmistaken imprint of the

[544] Case C-268/81 *Oosthoek* [1982] ECR 4575.
[545] Case C-362/88 *GB-INNO-BM* [1990] ECR I-667.
[546] Case C-126/91 *Yves Rocher* [1993] ECR I-2361.
[547] See Ch. 6.2.2.5; Art. 6(c) and (d) of the E-Commerce Directive.
[548] COM (2001) 546 final.
[549] Rabattgesetz, RGBl I 1933, 1011, repealed by BGBl I 2001, 1663.
[550] Zugabeverordnung RGBl. I 1932, 121, repealed by BGBl.I 2001, 1661.

Zeitgeist of economic *dirigism* and protectionism between the two world wars.[551] These acts were considered as annex laws (*Sondergesetze*), complementing the unfair competition legislation. They have been subject to remarkably active enforcement under the general clause of the German UWG, mainly on the initiative of competitors and *Wettbewerbsverbände* using the doctrine of *Vorsprung durch Rechtsbruch*.[552] At the end of the 1980s the acts became an object of increasing criticism on the part of legal scholarship, politicians and economic operators seeking to enhance their competitive freedom. Legal scholars argued that the courts tended to apply an overly expansive interpretation of the two statutes thus contributing to creating new or maintaining existing restraints on competition.[553] The legislative developments around these two acts provide a vivid example of the differential impact of alternative forms of European integration on the national institutional context. At the same time, they allow us to see how European influences become intricately involved in internal processes of reform.

With the expansion of the ECJ's activism in the sphere of marketing and advertising in the late 1980s and early 1990s, many argued that the Rebates Act would not withstand the test of conformity with the fundamental Community freedoms.[554] In the light of the *Cassis de Dijon* jurisprudence and in particular after the ECJ judgement in *GB-INNO*,[555] legal scholars contended that German restrictions on rebates and combined offers were in conflict with Community law and ought to be abolished.[556] This position was corroborated by the Court's ruling in *Yves Rocher*.[557] The European judiciary and legislature were thus expected to render assistance for the deregulation of national law. Indeed in 1994, drafts for abolition of the two acts were first proposed by the CDU/CSU and FDP faction in the Bundestag.[558] The Government followed suit with a separate Bill on the abolition of the Rebates Act. The Bill provided two major reasons for the reform: firstly, the need for liberalising the German market and for improving competitive conditions for German business, and secondly, the need to comply with European requirements. The Government explicitly referred to the *Oosthoek* and the *GB-INNO* judgments of the ECJ, interpreting them as setting clear demands for change.[559] Moreover, following the ruling of the European Court in *Yves Rocher*[560] the European Commission had initiated proceedings against Germany under Art. 226 (ex Art. 169) EC Treaty, urging the Federal Government to take measures in respect of a number of provisions in the Rebates Act and in the UWG.[561] The threat with European

[551] On the history of the acts and more recent legislative developments see Meyer, 'Rabatt- und Zugabe-Regulierung auf dem Prüfstand' (2001) *GRUR*, 98 ff.
[552] A detailed review of the caselaw of the BGH and the State Courts can be found in Sosnitza (1995), 127 ff.
[553] Sosnitza (1995), 139 and 163 with further references.
[554] See Lehmann (1995), 380 ff., at 381; Schricker (1994a), 586 ff., 590 ff.
[555] Case C-362/88 *GB-INNO* [1990] ECR I-667.
[556] Schricker (1994a), 586 ff.; Lehmann (1995), 380 ff.
[557] Case C-126/91 *Yves Rocher* [1993] I-2361.
[558] See BT-Drs. 12/6722 ; BT-Drs. 12/6723.
[559] See BR-Drs. 116/94, 5 ff.; BT-Drs. 12/7271.
[560] Case C-126/91 *Yves Rocher* [1993] I-2361.
[561] Reasoned opinion by the Commission A/88/189, quoted by the Federal Government in BT-Ds. 116/94, 5 ff. See Schricker, 'Reformen im Recht des unlauteren Wettbewerbs' (1994c) *ZRP*, 430 ff., at 432.

law was, however, substantially weakened after the *Keck* decision of the ECJ announced a more tolerant approach to national laws on selling arrangements.[562]

Parliamentary deliberations were heated. Kurt Faltlhauser, an MP from the CDU/CSU coalition, noted his amazement that such a petty and mundane issue such as promotional offers could produce so emotional reactions.[563] The answer to his query was to a certain extent provided by MP Albert Pfuhl from the SPD faction. Pfhul compared German unfair competition law to a wall. With the abolition of the Rebate Act only a stone from this wall would be pulled out, which could make the wall collapse.[564] Throughout the discussions, SPD representatives tried to antagonize the CDU/CSU with its traditional electoral following, the *Mittelstand*, and to describe the reform as a concession to the coalition partner FDP. Despite the controversies surrounding the proposals and the weakened support yielded by Community law, in 1994 the Bundestag managed to pass a law abolishing the Rebate Act.[565] Important for the success of the reform was the unequivocal support received from consumer associations.[566]

At this juncture, however, the Bundesrat took upon itself the task of defending the German *Mittelstand.* The Bundesrat praised the Rebate Act as an appropriate instrument for protecting the interests of small and medium-sized enterprises, and also of consumers. It insisted that the Rebate Act was an integral part of German competition law and that possible changes should only be conceived within a "harmonious and cohesive concept of reform of unfair competition law as a whole."[567] The *Bundesrat* noted that European law *post Keck* did not set any clear demands for change of national law. The draft was consequently referred back to the *Bundestag* with instructions to consider more narrowly formulated liberalisation provisions, keeping the core of the Acts unchanged.[568] A second revised draft by the *Bundestag* prompted the *Bundesrat* to summon the Mediating Commission (*Vermittlungsaussschuss)* on 8 July 1994.[569] The reform plans ground to a halt. The efforts to repeal the Combined Offers Regulation were likewise unsuccessful and did not even pass through the Bundestag. The Act was amended only to allow the practice of offering compensation for public transportation to the business premises.[570]

---

[562] Micklitz, 'Perspektiven eines Europäischen Privatrechts' (1998b) *ZEuP* 253 ff., at 255 with reference to Kisseler (1994), 1 ff., 9.

[563] BT-Plenarprotokoll 12/233, 20282. Judging from statements of other MPs the reform plans had unleashed a mass protest among small and medium-sized enterprises. One of the MPs speaks of a storm of protest letters and another claims that he had never received so many faxes and letters. *Ibid.*

[564] „Es ist ja eine ganze Mauer, die wir dann anpacken müssen, und wenn mann enen Stein herauszieht, bricht die ganze Mauer zusammen." *Ibid.*, 20287.

[565] The law was passed with the decisive votes of the CDU/CSU and FDP coalition. See BT-Plenarprotokoll 12/233, 20304.

[566] See Minister of the economy Günter Rexrodt, Parliamentary records, *Ibid.*,20291.

[567] See BR-Drs. 116/94, Stellungnahme des Bundesrates, 2.

[568] *Ibid.*, 2-4.

[569] BT-Drs. 12/7715; BR-Drs. 602/94.

[570] This practice had been previously qualified by the BGH as an impermissible combined offer, BGH GRUR 1991, 542 ("Biowerbung mit Fahrpreiserstattung"). See Fezer (1992), see Ch. 5.5.1. See Beschlussempfehlung und Bericht des Rechtssausschusses, BT-Ds. 12/7911; BT-Ds. 12/3164. Gesetz zur Änderung der Zugabeverordnung, BGBl. I 1994, 1688. See Schricker (1994c), 436.

The situation changed dramatically with the adoption of the E-Commerce directive. The German government had worked actively to prevent a direct and binding regulation on rebates in the Directive. Indeed, as a result from these negotiations the E-commerce Directive now sets minimum information requirements regarding promotional practices, but expressly allows Member States to keep their more restrictive rules and regulations on this issue.[571] Yet, in view of the very broad concept of 'coordinated field' adopted in the Directive and the expansive application of the principles of 'home country control' and 'mutual recognition', this exemption can only be maintained in respect to domestic operators. Conversely, Member States are not in a position to assert their restrictive rules in respect to service providers established in other countries of the Union.

This harmonisation approach created a radically different starting position for legislative deliberations. Only some months after the adoption of the Directive the German Government submitted Bills on the unconditional and comprehensive abolition of the Rebates Act[572] and of the Combined Offers Act.[573] The reform was in the words of the Government "urgently" needed and the reasons for this were stated concisely but clearly. After the entry into force of the E-Commerce Directive, the far-reaching German prohibition of rebates would "threaten to expose the undertakings established in Germany to discrimination."[574] In addition, the Government stressed the need for modernisation of German unfair competition law and pointed to the inhibitive effects of the Rebate Acts on innovation. This time the reform endeavours of the Government received an overwhelming support on the part of industry and trade, as well as by consumer organisations.[575] Remarkably, the Bundesrat accepted the draft on abolition of the Rebate Act without any objections, and that of the Combined Offers Regulation while only suggesting some minor changes.[576] The two acts were repealed as of 24 July 2001.[577] The information requirements in Art. 6(c) and (d) Directive 2001/31/EC were literally incorporated into § 7 II Nr. 3-4 of the Act on Telecommunication Services (Teledienstengesetz, TDG).[578]

The developments in the German regulative regime on rebates and promotional offers following the E-commerce Directive are indeed remarkable. Years of deliberation, of political and interest group struggles were withered away – as if by a magician's wand – only months after the Directive's adoption. The principle of 'mutual recognition' obviously threatened to expose the German regulative model to 'regulatory competition' and the model's chances of survival were overwhelmingly estimated as bleak. It appears that the 'regulatory competition' scenario this time really unfolded 'by the book'. How can we explain the difference between the reaction of the Swedish legislature in the case of children advertising and that of the German legislature in the case of promotional offers? Finally, the same harmonisation approach was applied in

[571] Cf. Art. 6 (c) and (d).
[572] BT-Drs. 14/5441, 5 ff.
[573] BT-Ds. 14/5594.
[574] *Ibid.*, 1.
[575] BT-Drs. 14/5441, 7-8.
[576] BR-Drs. 12/01; BR-Drs. 13/01.
[577] Gesetz zur Aufhebung des Rabattgesetzes, BGBl. I 2001, 1663; Gesetz zur Aufhebung der Zugabeverordnung, BGBl. I 2001, 1661.
[578] Cf. BT-Drs. 14/6098.

both cases, i.e. minimum harmonisation combined with mutual recognition and home country control. In the Swedish case, however, the prohibition of children advertising was retained, while in the German case, promotional offers were rapidly liberalised.

One major difference in the two situations is, it seems, the character of the regulative issue in point. Regulation on children advertising is typically paternalist in nature, requiring strong majoritarian engagement. It is moreover a well-defined, sensitive and visible issue, easily attracting public attention. The prohibition of promotional offers has in contrast its roots in protectionist policies and is mainly a result of interest group lobbying. Although it has been widely propagated as a consumer protection measure, the general consuming public would hardly have strong feelings in defence of the prohibition. Viewed from this perspective it may be concluded that the Community mutual recognition approach, and the ensuing 'competition between legal orders', are more effective against protectionist measures than against well-identified, high-profile regulative issues of majoritarian politics. In a way, if we assume that one of the main functions of protectionist measures is to insulate certain privileged groups from competition, then mutual recognition arguably hits at the heart of such measures and effectively deprives them of their raison d'etre. Paternalist politics may become more difficult to sustain when exposed to regulative competition, but their objective lies on a different plane.

Another important difference seems to be the internally generated impetus for reform. In Sweden the prohibition of children advertising was relatively recent and there were hardly any noticeable internal moves to change the *status quo*. Demands for approximation of the Swedish standard to that of the Television Directive were thus arguably perceived as predominantly external pressure. In Germany, by contrast, the internal pressure for reform had been long-standing and massive. Restrictions on promotional offers were increasingly perceived as hampering competition and as depriving consumers of valuable opportunities to recoup a portion of traders' excessive expenses on marketing. Harmonised European law was in this context only the 'last straw'. It could be speculated that political parties, relying on *Mittelstand* constituencies, welcomed European law as an opportunity to carry through necessary legislative changes without loosing political influence among these constituencies.[579]

Finally, one should not forget the divergent macro-institutional constraints, notably the different characteristics of the German and the Swedish legislative process. As discussed in Chapter 5 above, the legislative process in Germany is complex and cumbersome, divided between different institutions (the Bundestag and the Bundesrat) and building on a system of multiple checks and balances. In Sweden, in contrast, the model was characterised as majority parliamentarism. A government enjoying broad

[579] In the Economic Commission of the German Bundestag the Christian-Democrats still voted against the reform. In the Parliamentary debates several deputies criticised the reform as hostile to the Mittelstand. The phenomenon of 'hiding' behind decision made at the European level is well documented in the political science literature on European integration. See Marks/Hooghe/Blank, 'Integration Theory, Subsidiarity and Internationalisation of Issues: The Implications for Legitimacy, *EUI Working Papers*, RSC No. 7, 26: "Lack of autonomous control has advantages as well as disadvantages for member states executives. State executives can hide behind decisions that are made in the European Council or in interlocking policy making with the Commission. They can fend off domestic opposition and defuse ideologically charged issues by claiming that they must adjust to arrangements they cannot change."

popular support can pass changes rapidly and without major opposition. Arguably, reform in the area of promotional offers was long overdue in Germany but was impeded by the opportunities for obstruction inherent in the legislative system.[580] In Sweden, conversely, the Government stood firmly behind the prohibition and the legislative process does not offer many avenues for action in a different direction.

Sweden: changes in anticipation of European integration
In Sweden promotional offers were first subjected to special regulation with the 1970 MFL, and this was carried over in the 1975 MFL.[581] Certain combined offers and trading stamp systems were prohibited under threat of criminal sanctions.[582] Most of the cases before the Market Court were, however, based on the general clause of good marketing practice.[583] The prohibition of premium offers was explicitly conditioned on whether the practice would make it more difficult for the consumer to judge the value of the offer. The regulative regime had its underpinnings in the principle of promoting rational consumer choice. With the reforms of marketing practices law in 1995 the criminal provisions on promotional offers were considered obsolete and were repealed. In their place stepped a requirement for providing clear, complete and non-confusing information about the conditions for using a promotional offer.[584] The change was conceptualised as a transition from a principle of prohibition to a principle of abuse. The reform was carried through without any appreciable resistance.[585]

Against this backdrop, the E-Commerce Directive came only as an acknowledgment of the timeliness and righteousness of the new approach. The Swedish legislator could feel satisfied to have acted as a precursor of European developments. The rules of the Directive concerning commercial communication and sales promotions, in particular, were seen to correspond to the principles enshrined in the general clause of good commercial practices in 4 § MFL. They were in line with the identification requirement of 5 MFL and with the information requirement on sales promotions in 13 § MFL (SFS 1995:450). Therefore no transposition was considered necessary.[586] The only change that was regarded as imperative was with respect to unsolicited e-mails.[587]

7.1.1.5 Protection of the private sphere
Without going into much detail, a word will be said on the transposition of secondary Community law concerning unsolicited commercial communication. The relevant Community acts are the Distance Selling Directive[588], Directive 97/66/EC on processing of personal data and of protection of privacy in the telecommunication sphere[589] and the E-Commerce Directive.[590] Touching upon this particular subject matter is of interest because it once again demonstrates the divergence in approach

[580] Political scientist speak of veto points. See Knill (2001), 24; Immergut (1992), 57 ff.
[581] See Ch 5.4.2.3.
[582] 7-8 §§ MFL (SFS 1975:1418). Cf. Kombinationserbjudanden (KOV, 1984), 47 ff.
[583] 2 § MFL (SFS 1975:1418).
[584] 13 § MFL (SFS 1995:450), see Ch. 7.4.2 below.
[585] See prop. 1994/95:123.
[586] See Ds. 2001:13, 95 f.: "Those requirements set in Art. 6 of the Directive already exist in Swedish law, mainly in the form of different provisions in the MFL."
[587] Ds. 2001:13, 96 ff.
[588] Directive 97/7/EC.
[589] OJ 1998 L 24/1.
[590] Directive 2000/31/EC.

between the Swedish and the German legal and institutional systems and the respective differential impact of harmonisation. It was mentioned in the national chapters that in Germany unsolicited telephone advertising and intrusive home visits or marketing on the streets have traditionally been classed as a special category of unfair competitive conduct (*belästigende Werbung*) and respectively restrictively treated under § 1 UWG.[591] In Sweden, this type of advertising has not been expressly addressed in legislation and, although principally considered within the scope of the general clause, has received relatively little attention in the practice of the KOV and the Market Court.[592] It should be noted, however, that in a fashion distinctive of Swedish consumer policy and in line with the 'soft corporatist' model presented earlier, the issue of unsolicited advertising has been addressed by way of voluntary agreement between the involved parties, in this case the Swedish Direct Marketing Association (SWEDMA), the Swedish Post Office and the KOV. Under this agreement all consumers wishing to be left free from advertising could announce this on their post box whereafter this desire had to be respected.[593]

This difference in outlook has partly been preserved in the course of negotiations and transposition of relevant Community Directives. For instance, in Germany it was not a matter of much debate that by the transposition of the Distance Selling Directive, the more restrictive 'opt-in' solution envisaged in this document concerning the legality of distant communications should be adopted.[594] Likewise, one of the most vibrant discussions around the Electronic Commerce Directive was about defining the limits of unsolicited e-mail advertising (spam).[595] This type of advertising has in several court decisions been subsumed under the conceptual category *Belästigung* and consequently prohibited as unfair competitive conduct under the general clause of § 1 UWG.[596] Germany consequently insisted on being able to uphold this high standard of protection of the private sphere and personal integrity also within the framework of European harmonisation. Although this restrictive approach was not widely accepted in other Member States, Germany succeeded in negotiating an exemption from the Directive's country-of-origin principle for regulation of 'spam'.[597] Given the prevailing restrictive treatment in case law, no need for transposition was seen to exist.[598]

---

[591] Baumbach/Hefermehl (1998), Belästigung (at 508) with sub-catogries: Anreissen; Strassenwerbung; Telefon-, Telefax, E-Mail, Briefkastenwerbung; Zusendung unbestellter Waren; Hausbesuche; Werbung im Todesfall; Haustürgeschäfte; Geschmackloses Werben (508-526).

[592] See a summary report by the KOV on aggressive marketing methods, Ds. 1999:35, 71 ff.

[593] See prop. 1999/2000:40, 14; Ds. 1999:35, 19 ff.

[594] The two alternatives are known as an 'opt in' solution (Art. 10.1) and 'opt out' solution (Art. 10.2). See Reichelsdorfer, 'eMails zu Werbezwecken – ein Wettbewerbsverstoss?' (1997) *GRUR*, 191 ff.; Leupold. 'Die massenweise Versendung von Werbe e-Mails: Innovatives Direktmarketing oder unzumutbare Belästigung des Empfängers?' (1998) *WRP*, 270 ff.; Lehmann (1999), 180 ff.; Busche, 'Werbung per electronic mail: Eine neue Herausforderung für das Wettbewerbsrecht?' (1998) *WRP*, 1142 ff.; Leistner 'Werbung, Commercial Communication und E-Commerce' in: Lehmann (ed.), *Electronic Business in Europa* (München: Beck, 2002), 275 ff., at 282 ff. with a review of the case law.

[596] See the case law reported by Leistner (2002), 282 ff.

[597] Cf. Annex 'Derogations from Article 3', last indent: "the permissibility of unsolicited commercial communication by electronic mail." Concerning the debate in the German scholarly literature prior to adoption of the Directive see Hoeren (1999), Lehmann (1999), Spindler, 'Kapitalmarktgeschäfte im Binnenmarkt. Der Einfluss der E-Commerce Richtlinie auf das Internationale Vertragsrecht' (2001) *IPRax*, 400 ff.

[598] BT-Drs. 14/6098, 12. That the solution is not altogether satisfactory becomes evident from the ongoing debate in the legal literature described by Leistner and the lack of case law from the BGH. Leistner (2002).

In Sweden the opt-out alternative in the Distance Selling Directive and in Directive 1997/66/EC was supported by the majority of stakeholders in the course of legislative consultations. It should be added that interested business circles were impressively well represented in the consulting procedure.[599] Trade associations in the sphere of direct marketing were quick to enter an agreement on a self-regulatory code of conduct concerning telephone advertising. In 1999 a special Association on Protection of Consumers in Respect to Telephone Advertising" was formed (by interested sellers) and entrusted with maintaining an opt-out register on telephone advertising NIX-tele. The KOV meanwhile approved rules on telephone marketing laid down by the same association. Similar registers are envisaged for direct advertising (NIX-reklam).

In its proposal the Ministry of Finance expressed the view that "the legal provisions be drafted so as to recognize the fundamental need for protection of consumers but at the same time balance the interests of traders against the interests of consumers in a reasonable and smooth way."[600] Proceeding from this balance-of-interests understanding the Ministry advanced a proposal of opt-out regulation of advertising by electronic mail and (under certain reservations) by telephone.[601] Against the backdrop of hectic self-regulation within the industrial sector affected, however, the government decided to stick to the more liberal approach and to test the functioning of opt-out registers (apart from advertising through automatic calling machines and telefax, where opt-in registers were anyway introduced as a minimum harmonisation standard in the Directive).[602] A similar stand was taken in respect of unsolicited advertising via electronic mail, despite the misgivings that such registers would be ineffective.[603] Of the arguments factored in by the government two appear to have played a decisive role: possible competitive disadvantages for Swedish industry against foreign competitors and possible inhibitive effects of an opt-in solution on technical developments in an expansive area.[604]

The question of whether to introduce a general prohibition of unsolicited e-mail advertising or an opt-in register was again put on the legislative agenda in the course of transposition of the E-commerce Directive.[605] The government, however, did not change its position. The country subscribed to the opt-out principle, even though the efficiency of such opt-out lists is justifiably doubted by many. The only organizations to voice concern in the legislative deliberations were the SKR and the public KOV.

---

[599] Among them SWEDMA, the Association of Direct Marketing Enterprises (Direkthandelsföretagens förening), Swedish Post Order Association (Svenska postorderföreningen), the Advertising Association of Sweden (*Sveriges Reklamförbund*, SRF), Association of Swedish Advertisers (*Annonsföreningen*, AF), the TU, Näringslivets delegation för marknadsrätt, the Swedish Marketing Federation (Sveriges Marknadsförbund), the SI, Swedish Federation of Trade (*Svensk Handel*, SH), a number of major enterprises in the telecommunication industry.

[600] Ds. 1999:35, 27.

[601] Cf. draft 16 § MFL: "A trader cannot use (telephone) telefax and electronic mail, automatic calling machines and other similar automatic systems for messages, unless the consumer has agreed thereto in advance." Ds. 1999:35, 95.

[602] See 13 a § MFL (SFS 1995:450).

[603] See prop. 1999/2000:40, 20.

[604] Prop. 1999/2000:40, 20. Cf. the critical comments by the SKR, "Cowardly decision on e-mail advertising", press release of 25.1.2000.

[605] See Ds. 2001:13; 95 ff.; prop. 2001/02:150, 73.

These voices were, however, too weak to preponderate over general economic policy considerations. [606] The only amendment introduced in the 1995 MFL was a provision reproducing literally Art. 7(2) Directive 2000/31/EC.[607]

With the Data Protection Directive the need for introducing a full-fledged protection of the individual sphere was for the first time debated in the context of Swedish marketing practices law. The effect of Europeanisation appears to have been to sensitise different stakeholders to the relevance of individual rights and the protection of personal integrity.[608] In legal doctrine too, the Directive has been quoted as an example of the importance of individual human rights in the context of consumer law.[609] Olsen notes that in other European countries, and in particular Germany, the protection of privacy has been used more actively for the protection of consumers. She suggests that the issue of *'Drittwirkung'* of human rights, i.e. the effect of human rights against private persons and entities, should also be broached in Sweden. Arguably, also in this respect, harmonisation has infused more individualist values into this legal discipline. It is not excluded that in view of the more restrictive attitude taking shape in Member States like Germany, but also in other Nordic countries, such as Finland and Denmark, Sweden might gradually change its stance.[610]

7.1.2 Changes in enforcement

7.1.2.1 Enforcement provisions in substantive law directives

In the previous chapter I gave an account of different rules of procedure and enforcement incorporated in a number of substantive-law Community directives, such as the Misleading Advertising Directive, the Television Directive, the Distance Selling Directive and the E-Commerce Directive. As far as these rules concern the structure and functions of national decision-making procedures, they did not provoke any substantial changes in either German or Swedish fair trading law. The main reason is evidently that these provisions are shaped in such a way as to cover the major models of enforcement of fair trading law applied in the Community Member States. Thus German private law enforcement and the Swedish mixed system equally satisfy the generally weak requirements of these directives.[611]

A look at the German legal literature suggests that there have been attempts to attach stronger binding force to some of these requirements. The main direction appears to be to argue for extending the generous German model of private law enforcement to other Community Member States. In particular the need for granting litigation rights to consumer and trade associations has been recurrently stressed in scholarly and political debate.[612]

---

[606] See KO Rapport 2000:21, Spärrregister för e-postreklam.
[607] See 13 a and 3 §§ MFL (SFS 1995:450).
[608] See the proposal by the Consumer Agency on aggressive marketing, Ds. 1999:35, 71 ff., referring to Rapport 1997:3, KOV.
[609] Olsen (2001-02), at 840.
[610] The position of these countries is diligently given as a positive example in the Swedish debate. See SKR, Press release of 25.01.2000.
[611] Note, however, that in some Member States even these weak requirements provoked changes. For instance, England was forced to introduce a separate administrative procedure for tackling fair trading claims as a last resort. Changes were also considered necessary in the Italian system of enforcement. See Bastian (1998/99), 199 ff.
[612] See Micklitz (1998a), 937 ff.

7.1.2.2 The Injunctions Directive

More specific and substantial requirements in the sphere of enforcement were set up with the Injunctions Directive of 1998. As already elaborated in the previous chapter, the Directive, adopting a sober approach, did not set out to harmonize national enforcement procedures, but instead relies on the principle of mutual recognition of enforcement entities. In itself, the Directive consequently does not formally require any changes in respect to internal enforcement procedures. It was anticipated, however, that the Directive would set in motion a process of regulatory competition between different enforcement approaches. In particular, it could reasonably be expected that countries, which by way of the Directive were forced to recognize a right of action of foreign consumer associations, would have a hard time denying such a right to similar domestic entities.[613]

Germany: Expanding the right of action of consumer associations: the Injunctions Act

Although Germany could easily fulfil the requirements of the Directive by simply granting national treatment to foreign consumer organizations and administrative entities, the Directive was taken as an occasion to get a comprehensive grip on collective action in German civil law.[614] The Max-Planck Institute for Foreign and Private International Law in Hamburg was commissioned to prepare a comprehensive comparative study on legal forms of collective action for bundling of equivalent interests in civil procedure. The main forms of such action to be considered were the action by organization (*Verbandsklage*) and the group action (class action). The study submitted an extensive recommendation to the lawmaker, dividing the proposed measures into strongly recommended (das *sollte* der Gesetzgeber tun) and optional (das *könnte* der Gesetzgeber tun). In addition the expert team pointed at some measures that were to be avoided or postponed (das *sollte* der Gesetzgeber *nicht*, bzw. *noch nicht* tun).[615]

The gist of the recommendation was to extend the *Verbandsklage* beyond the scope of the specific consumer-related subject matter as required by the Injunctions Directive. A collective injunctive action by way of organization was to be available for any situation when a defendant's conduct had affected multiple legally protected individual interests, provided the protection of those interests belonged to the chartered objectives of the plaintiff union. The proposal thus aimed at a comprehensive reform of the rules on civil procedure. As a guarantee of the seriousness of the litigation union (Verband) the study suggested introducing threshold requirements, for instance a minimum number of members (75). Such requirements were, however, to be relaxed in respect to business associations, depending on their economic importance, size, industry sector, etc.[616]

Among the optional measures the study listed two forms of collective action. The first consisted in extending a right to claim damage compensation to associations. The second possible measure concerned introducing a right to damage compensation by

[613] One of the main targets of this Directive seems to have been Great Britain, where consumer associations have been step-motherly treated in respect to procedural rights. See Reich (1992b), Rott (2001), 401.
[614] See Basedow/Hopt/Kötz/Baetge (1999).
[615] Basedow/Hopt/Kötz/Baetge (1999), 3-5.
[616] Basedow/Hopt/Kötz/Baetge (1999), 4.

way of class action (*Gruppenklage*) but only for selected areas. Generally the difficulties of delineating the scope of admissible collective action were underlined, and in particular problems concerning distribution of the awarded damages among the members of the union or of the group, questions of litigation costs, attorney fees, conflict of interests, etc.[617]

The institutional option that was discarded most emphatically by the study was, predictably, granting a right of action to a public authority or to other public entities. The institute of the Ombudsman was rejected as incompatible with German legal tradition, inefficient and bearing the signs of a "forced blessing" for the citizens.[618] Interestingly, in the economic analysis of the Verbandsklage submitted by Hans-Bernd Schäfer in the same study, this author suggests that the complications associated with conflict of interests and principal-agent problems in the case of *Verbandsklage* can sometimes be so great that government intervention might be more cost-efficient.[619] These arguments, however, do not seem to have influenced the conclusions of the expert group. The ringing endorsement of the group goes for a model where the pursuit of individual rights is left to the citizens. The experts warn, however, against introducing *Verbandklage* for non-personified general public interests.[620]

The German lawmaker followed only partially the expert group's recommendations. As a first step the Injunctions Directive was transposed through amendments in the Unfair Contract Terms Act (§§ 22 and 22a AGBG) and in the UWG (§ 13 II Nr. 3).[621] The reform was criticized as creating a disparate regime for different consumer-related subject matter and as minimalist.[622] Moreover, the placing of general provisions on *Verbandsklage* in a legislative act devoted to unfair contract terms (AGBG) was regarded as unfortunate from the point of view of systemic coherence. Partly responding to this criticism, only a year later the Bundestag passed a new Injunctions Act (Unterlassungsklagengesetz, UklaG).[623] The act did not change the basic approach, but ensured transparency and consistency of the regulative framework. The legal standing of consumer and other associations (Verbandsklage) and in particular their right to institute injunctive proceedings was treated separately from substantive-law subject matter. A solution was sought on a general basis for all situations of infringement of consumer-related norms. The Injunctions Act became an integral part

---

[617] Basedow/Hopt/Kötz/Baetge (1999), 6.

[618] „Nicht empfohlen werden kann schliesslich die Schaffung von Zivilklagebefugnissen für Behörden oder andere öffentliche Stellen (z. B. *Ombudsmänner*). Dies würde die Errichtung eines in Deutschland bislang unbekannten Typs von Behörde erfordern, dessen Aufabe darin bestünde, die Rechte Privater einzuklagen. Das erscheint nicht nur ineffizient, sondern gerät auch leicht in den Geruch staatlicher Zwangsbeglückung der Bürger. Die klagweise Geltendmachung ihrer privaten Recht überlässt man den Bürgern daher besser selber." Basedow/Hopt/Kötz/Baetge (1999), 7. See, however, the more balanced view by Koch, 'Der Verbandsklage in Europa' (2000) *ZZP*, 413 ff., 428.

[619] Schäffer (1999), at 86 ff.

[620] „Der Schutz von Interessen, die nicht mit konkreten personen verbunden sind, ist in erster Linie Aufgabe des öffentlichen Rechts. Ein praktisches Bedürfnis zur Einräumung zusätzlicher zivilprozessualer Verbandsklagemöglichkeiten in diesem Bereich ist nicht erkennbar.", *ibid.*, 7.

[621] BGBl 2000 I, 897; Art. 3: Änderung des AGB-Gesetzes; Art. 4: Änderung der UWG. See BT-Drs. 14/2658.

[622] See Greger, 'Verbandsklage und Prozessrechtsdogmatik: Neue Entwicklungen in einer schwierigen Beziehung' (2000) 113 *ZZP*, 399 ff., 400. According to commentators this refom created three sets of procedural rules: for litigation in the area of consumer law in general, for litigation on the basis of unfair contract terms and for unfair competition. See Rott (2001), 412.

[623] BGBl. 2001I, 3173. Cf. BT-Drs.14/6040, 37 ff.

of the large-scale reform aimed at modernizing the German law of obligations.[624] The provision on the right of action for an injunction of consumer associations in UWG (§ 13 II Nr. 3) was, however, retained.

The above-described legislative changes go beyond the minimum requirements of the Directive in two important respects. The right of action for an injunction is introduced not only for violations of the specific Community acts explicitly mentioned in the annex of the Directive, but also for violations of other provisions in German law aiming at the protection of collective consumer interests.[625] Secondly, and importantly, while Community law addresses exclusively injunctive actions by consumer protection associations and public bodies, for internal situations the German act extends the broadly defined right of action in § 2 UKlaG to industry and trade associations.[626] Business associations are, however, not covered by the category 'qualified entity' and are consequently unable to use the privileges provided by the Injunctions Directive in litigation before foreign courts and administrative bodies.[627] In the doctrinal debates the opinion has been expressed that Chambers of industry and commerce can be regarded as 'public bodies' protecting the interests of consumers. This view has remained isolated, though.[628]

The implementation of the Injunctions Directive brought about major changes in the substantive and formal requirements for legal standing of consumer associations in German unfair competition law. The pursuit of a uniform approach for all areas of collective action by consumer associations logically led to synchronization of the substantive requirements under general civil law and unfair competition law. § 13 II Nr. 3 UWG refers to the AGBG/UKlaG and the UKlaG adopts some of the criteria in the UWG.[629] As a result, the stringent requirements for standing previously only applicable under AGBG are now extended to actions under unfair competition law.[630] The substantive criteria concern membership, tasks and activity of the organizations. According to § 4 II UklaG a consumer association must have legal personality. Protection of consumer interests on a non-profit and non-temporary basis must belong to the tasks of the association as stated in its by-laws. In addition the association must demonstrate that it consists either of other associations (umbrella union) or has at least 75 individual members and that it has existed at least one year before registration. In the context of unfair competition law a long-standing debate on the requirements for legal standing of consumer associations was thus brought to a conclusion.

---

[624] An underlying objective of this legislative endeavour was the integration of the scattered consumer protection rules, partly resulting from transposition of Community Directives, into a cohesive well-balanced regulative framework within a reformed BGB. See Entwurf eines Gesetzes zur Modernisierung des Schuldrechts, BT-Drs. 14/6040. Cf. BGB, BGBl. I, 42 ff.

[625] See § 2 UKlaG. The term 'collective interests' is not explicitly used in the new German legislation, but this restriction can be inferrred from the *travaux preparatoires* as well as from the phrase 'im Interesse des Verbraucherschutzes' in § 2 I UKlaG. See Rott (2001), 415, with reference to BT-Drs. 2658, 27. Cf. Micklitz (2001), 87 ff.

[626] § 3 I Nr. 2 and 3 UKlaG. Cf. BT-Drs. 14/6040, 37 ff.

[627] See Baetge (1999), 336.

[628] Baetge notes that in the language of the Directive the public bodies have to be *specifically* responsible for the protection of consumers. *Ibid.*, 336 f.

[629] See § 2 III UKlaG about abusive litigation restating § 13 V UWG.

[630] See § 4 II UklaG in conjunction with § 13 II Nr. 3 UWG

More fundamental is the reform in respect to formal requirements. The new Injunctions Act introduced a uniform procedure of registration for all consumer associations wishing to enjoy the status of 'qualified/entities' under the German Act and under the Injunctions Directive and the ensuing rights to legal standing in injunction proceedings.[631] The registration procedure is consequently a requirement not only for cross-border, but also for internal actions for an injunction. The examination of whether consumer associations meet the requirements of the law is entrusted to a newly created body, the Bundesverwaltungsamt (Federal Administrative Office). Registration with the Office serves as a proof of capacity to sue. A test that has previously been carried out by the courts is now transferred to an administrative body. Also in this respect a long-standing controversy is resolved. Interestingly, at no stage in the legislative process was there any talk of subjecting the right of action of business associations to similar requirements of registration.

With the reform the legislator confirmed the prevailing view in doctrine and in case law that consumer associations are not only granted legal standing (*Prozessführungsbefugnis*), but also enjoy independent substantive right of action (*Sachlegitimation*).[632]

Despite the far-reaching coordination between the rules on right of action in the Injunctions Act and in the UWG some differences still persist. Thus, for claims based on the general clause of § 1 UWG consumer associations still have to prove that "substantial interests of consumers are affected" (see § 13 II Nr. 3, 2 UWG).[633] On a different note, commentators see the new right of action for an injunction as offering better opportunities for 'qualified' consumer associations to pursue violations of consumer-related legislation without having to rely on the doctrine of *Vorsprung durch Rechtsbruch*. The difficulties of substantiating competitive advantage under this doctrine have in the past been perceived as particularly cumbersome by consumer associations.[634] A matter not addressed by the Injunctions Act is that of litigation costs and the costs of pre-trial notification.[635] Whereas many commentators expressed hopes that the reform would finally resolve the soaring issue of *Abmahnvereine* by expressly excluding or restricting the right to compensation for notification costs, consumer associations pleaded for a legislative provision codifying the controversial judge-made rule.[636] The Directive did not, however, provide any support in this respect. In contrast to Germany, the problem of abuse of litigation rights has obviously not been considered pertinent by the European lawmaker.

Summing up, the changes provoked by the need for transposition of the Injunctions Directive in Germany have been much more comprehensive and ambitious than the Directive requires. The Injunctions Act has opened new avenues for protecting

---

[631] § 4 UKlaG.

[632] See Greger (2000), 399 ff., at 403, pointing at the change in language from „Ansprüche auf Unterlassung... können geltend gemacht werden" (§ 13 AGBG, old) to „Ansprüche stehen zu" (§ 22 III AGBG). Cf. BT-Drs. 14/2659, 52.

[633] On proposals for annulment of this requirement in the new comprehensive UWG reform see below, Ch. 7.3.1.2.

[634] See Micklitz (2000), 87, 102.

[635] For a detailed analysis of the question of litigation costs of consumer associations, see Halfmeier (2001).

[636] For the critical view on compensation of notification costs see Baetge (1999), 348-49.On this doctrine see Ch. 5.3.3.3.

collective consumer interests. It has arguably raised the status of consumer organizations and has withered away some obstacles to efficient enforcement. The reform has again been guided by aspirations for systemic coherence and has remained confidently anchored in the domain of civil law and procedure. With its emphasis on the rights of action of consumer organizations the Directive has been perceived as acknowledgement of the German model of decentralised enforcement. Noting that the Verbandsklage is an alien body engrafted in civil procedure Greger nevertheless asserts:

> Wenn man keine Behörden- oder Ombudsmann-Lösungen will, sondern an einer privatrechtliche Lösung festzuhalten gedenkt (wofür im Zeitalter der Deregulierung trotz verfassungsrechtlicher Vorbehalte gegenüber einer quasi-staatsanwaltsschaftlichen Funktion privater Verbände einiges spricht), dann sollte man sich der Mühe unterziehen, für diese artfremden Zivilprozesse wenigstens artgerechte Verfahrensregeln zu schaffen.[637]

Sweden: no visible changes in the distribution of litigation powers

The transposition of the Injunctions Directive in Sweden took a different course. The Swedish lawmaker opted for a minimalist approach introducing only those changes that were regarded as imperative for ensuring compliance. The act transposing the Directive into Swedish law (Act on access to justice for certain foreign consumer authorities and consumer organisations, hereinafter Access to Justice Act)[638] exclusively tackles the position of *foreign* 'qualified entities' before Swedish courts. It does not have any impact on internal legal and institutional arrangements. Even the question of which Swedish public bodies and organisations shall be elicited=?? as 'qualified entities' to have the right to defend collective consumer interests in other Member States did not receive much attention. It was left to the government to draw up the list of bodies, fulfilling the criteria in Art. 4 Directive 98/27/EC.[639] Eventually, the only body that is included on this list is the KOV with the KO.[640] None of the consumer organisations in Sweden has expressed interest in being included.

The Injunctions Directive, then, has hardly brought about a visible redistribution of litigation powers in Swedish marketing practices law and in consumer law in general. As mentioned earlier, consumer organisations, together with wage-earners organisations, have since 1970 enjoyed *locus standi* under the Swedish MFL. While this right was for years dependent on the decision of the KO not to institute proceedings, with the 1995 MFL this subsidiarity arrangement was abolished. Yet consumer and labour associations have scarcely used their procedural rights. The central position of the KO in the Swedish system of enforcement of collective consumer rights has never been really challenged. Obviously, the expense-free and risk-free way of signalling possible violations to KO and relying on the latter's intervention is an attractive avenue for underfinanced and understaffed consumer

---

[637] Greger (2000), 411.

[638] Lag om talerätt för vissa utländska konsumentmyndigheter och konsumentorganisationer (SFS 2000:1175); prop. 2000/2001:34; Ds. 2000:32.

[639] Prop.2000/2001:34, 31 ff.

[640] See Commission communication concerning Art. 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under Art. 2 of this Directive, OJ 2003 C 159/2.

organisations. Has the Injunctions Directive changed anything as regards the litigiousness of consumer associations? Hardly. They step rather as representatives of consumers on the international stage, acting as the face of the Swedish consumer movement to the outside world.

With the implementation of the Directive the KO only saw his powers expand, allowing him to initiate proceedings before courts and competent authorities of other Member States. These powers have to my knowledge not been actively used as yet, and there is widespread scepticism as to whether this solution is practicable. Judging from the position of the Nordic Ombudsmen on marketing practices and e-commerce and from reactions in the course of transposition of the Injunctions Directive, these bodies favour alternative solutions to cross-border litigation problems. One possibility discussed is that of facilitating international recognition and enforcement of court decisions in market law matters. Under such an alternative arrangement the Swedish Market Court would assume jurisdiction whenever unfair commercial practices target the Swedish market, in the assurance that an injunction would be enforced in the defendant's country of domicile.[641] Another alternative is seen in enhanced cooperation between national consumer protection bodies, whereby a competent body in one Member States could act as legal representative for its counterpart in another Member State.[642]

In defining the remedies that can be sought by foreign 'qualified entities' before Swedish courts, the Swedish lawmaker went beyond the minimum requirements of the Injunctions Directive. Consumer protection authorities and organizations from other EEA are under Art. 3 of the Access to Justice Act authorised to claim prohibition and injunction under the 1995 MFL. In addition they may claim the imposition of fines prescribed for violation of the respective prohibitions and injunctions. Finally, such bodies can seek an injunction to pay the Swedish State a special fee for violation of certain provisions of the RTVL.[643] In one respect the rights of foreign consumer protection bodies remain, however, more limited than the rights of their Swedish counterparts. 'Qualified entities' from other Member States were not given the right to claim market disruption penalties before the Market Court. This sanction is indeed rather unique in comparative perspective. The legislative intention has expressly been to limit the recourse to this sanction to more serious cases of infringement. The risks of the sanction been misused by organisations and administrative bodies having a different litigious culture prompted this restriction.

A look at the list of qualified entities under the Injunctions Directive referred to above brings us once again to one central theme in this study, namely the divergent approach to consumer protection (and fair trading) and the differential reliance on public and private enforcement in Sweden and Germany. In the list Germany is the country with most numerous organizations notified as 'qualified entities'. The only authority registered from Sweden is the KO, which places this country at the other end of the

---

[641] Provided, of course, that the latter was a Community Member State. In this sense Bogdan (1998a), 534; Bogdan (1998b), 371.
[642] See prop. 2000/2001.
[643] 10:5-6 RTVL (1996:844).

continuum between centralised and decentralised model of enforcement of consumer law, including consumer-related fair trading law.[644]

7.1.2.3 The public/private divide and the evasive scope of national fair trading law

The last instance of influence of European integration to be discussed in this section refers to the territorial scope of national fair trading law. That problem was already touched upon in the analysis of the Television Directive and its impact on Swedish marketing practices law. As the *De Agostini* case demonstrated, the Swedish MFL could not be applied to broadcasts originating from another Member State if the intervention was on grounds falling within the Directive's coordinated field, such as children advertising. The country-of-origin principle adopted in the Directive consequently curtailed the scope of application of Swedish marketing practices law on this particular issue. The same problem, but on a broader scale, arises under the E-Commerce Directive. Whereas the coordinated field of the Television Directive was limited to selected regulative issues, the coordinated field in the E-Commerce Directive covers all requirements to information society services. According to Art. 2(h) Directive 2000/31/EC the concept 'coordinated field' refers to requirements of general and of specific nature and encompasses not only harmonised rules in the Directive, but all requirements laid down in national legislation. The ensuing extensive scope of the country-of-origin principle threatens, at least *prima facie*, to affect the jurisdiction of national courts and authorities in fair trading matters not only selectively but comprehensively.

At the same time, the Directive explicitly declares that it does not establish additional rules on private international law, nor deal with the jurisdiction of Courts (Art. 1(4) Directive 2000/31/EC). This declaration suggests that the jurisdiction of national courts, at least in private law matters, remains untouched, as does the applicability of national choice-of-law rules. The uncertainty is further exacerbated by an additional qualification in the Directive's Preamble: provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in the Directive.[645]

In Germany, the relation between the country-of-origin principle and national rules on private international law has been one of the most controversial issues discussed in the course of transposition of the E-commerce Directive. Commenting on an early Draft of the Directive Hoeren called the question of the private international law implications of the country-of-origin principle "one of the darkest spots" of the (then Draft) Directive.[646] The perplexity is well captured by Ohly, calling Art. 1.4 Directive 2000/31/EC 'the Magrit clause' (after the famous painting by René Magrit picturing a pipe with the inscription '*Ceci n'est pas une pipe*'). In Sweden too, the ambiguity of the Directive in this particular regard created considerable problems of interpretation and transposition. The main source of confusion, I submit, is the divergent perceptions of the dividing line between public and private law in the different Member States and the failure (or conscious avoidance) of the Community legislature to openly tackle this problem. The area of fair trading law with its mixed character and divergent national

[644] See Bogdan (1998), 537 who suggests that the list of qualifed entities should be kept broad.
[645] Preamble, Rec. 23 Directive 2000/31/EC.
[646] Hoeren (1999), 192, 195.

approaches demonstrates the intricacies of achieving a coherent legislative framework in a multi-level system of governance, where rules at the Community level do not substitute national rules, but rather have to coexist forming complementing layers of regulation.

Germany: the country-of-origin principle a challenge to established private international law doctrines

Opinions in German doctrine varied widely concerning the correct interpretation of the Directive regarding the relation between the country-of-origin principle and private international law in the particular case of unfair competition law. There was considerable confusion regarding both aspects of private international law, broadly conceived, namely jurisdiction and applicable law. The Directive was commonly criticized for being unclear and leaving much to be desired in terms of certainty and predictability.

A tacit assumption shared by almost all scholars involved in the debate is to treat unfair competition law as an area of private law, belonging to the category of the so called *quasi-delicts*. This view is in line with accepted German doctrinal qualifications and is generally not disputed.[647] Certainly, when interpreting the Directive's definition on the scope of the coordinated field some authors note that the Directive uses a language familiar from administrative and public law. Thus Art. 2(h) speaks of 'requirements' and Recital 22 of the Directive's Preamble emphasises that ISS should be '*supervised* at the source of the activity' (emphasis added). Generally, the country-of-origin principle in Community law is seen to pertain to administrative business law.[648] This seems at first sight to militate in favour of a narrow understanding of the coordinated field, not encompassing (private) unfair competition law. At the same time, Recital 21 of the Directive explicitly mentions requirements to on-line advertising to fall within the scope of the coordinated field.[649] Given that the difference in regulative regimes on commercial communications had been pointed out as one of the main legal obstacles to electronic commerce in the Commission's explanatory memorandum, and given the long-standing case law of the ECJ scrutinizing national fair trading law under Community free movement provision, the view prevailed that the coordinated field should be understood to cover unfair competition law rules.[650]

In respect of *jurisdiction*, the private law conceptualisation of German unfair competition law has traditionally supported the view that the Brussels Convention on

---

[647] See Reich/Nordenhaus, *Verbraucher und Recht im elektronischen Geschäftsverkehr* (Baden-Baden: Nomos, 2000), 147 ff.; Mankowski, 'Das Internet im Internationalen Vertrags- und Deliktsrecht' (1999a) *RabelsZ*, 256 ff.; Mankowski, 'Internet und internationales Wettbewerbsrecht' (1999b) *GRUR Int.*, 909, at 1001.

[648] See Thünken, 'Multi-State Advertising over the Internet and the Private International Law of Unfair Competition'(2002) 51 *ICLQ*, 909 ff., at 928 ff.; see also Roth 'Der Einfluss des Europäischen Gemeinschaftsrecht auf das IPR' (1991) 55 *RabelsZ*, 623 ff., at 666 ff. Roth rightly notes that the Community's efforts to accomplish the Internal Market are mainly directed towards the area of economic (supervisory) law. Consequently, he sees the country-of-origin principle as primarily belonging to the domain of international administrative law. The same author nevertheless identifies a number of intricate repercussions on private international law, including the areas of advertising and unfair competition law.

[649] Spindler (2001), 400 ff., 401.

[650] See Thünken (2002), 927.

jurisdiction and enforcement of judgements in civil and commercial matters[651], (now substituted by the Brussels Regulation[652]) applies for determining jurisdiction in disputes based in unfair competition law.[653] On the subject of unfair competition, neither the Convention nor the Regulation contains any specific rule leading to the application of the general jurisdictional principles. Under the main rule of the Brussels Regulation (Art. 2) the courts of the country of the defendant's domicile will have jurisdiction. In matters of tort, *delict* or *quasi-delict* the alternative rule of Art. 5(3) grants jurisdiction also to the courts in the country where the harmful event occurred. Following the case law of the ECJ, the place of the harmful event includes the place where the effects were felt.[654] Following these principles both the courts in the country of origin and those in the country of destination are as a rule entitled to exercise jurisdiction in unfair competition disputes.

The country-of-origin principle advanced in the E-Commerce Directive builds, however, exclusively on control at the source of activity.[655] If taken seriously, this rule would imply that the authorities in the country of destination should be denied competence to prosecute and intervene against services having their origin in another country. Even for civil law prosecution, as in the case of misleading advertising, the courts in the country of destination should declare themselves incompetent to try a complaint. As some German scholars have pointed out, such a broad understanding of the country-of-origin principle would, however, be tantamount to revising the main rules of the Brussels Convention, something the Directive expressly denies doing.[656] The country of origin would not necessarily coincide with the place of the defendant's domicile, or with the place of committing the tort. Viewed from this perspective, the claim in Recital 23 of the Directive's Preamble that the Directive did not deal with the jurisdiction of the courts, seemed to stand in blatant contradiction to the results from a consistent application of the country-of-origin principle.

To avoid this contradiction, some authors suggest that the general jurisdictional rules, including those of the Brussels Convention, should remain applicable. The country-of-origin principle is nevertheless seen to exert an indirect influence, namely by reducing the attractiveness of the alternative Art. 5 jurisdiction (in the country where the harmful event occurred).[657] On a general level, the country-of-origin principle was expected to strengthen the general jurisdictional rule of the Brussels Convention/Regulation at the expense of the special one, in keeping with the main objectives of these instruments.[658]

---

[651] Brussels Convention, OJ 1978 L304/36.
[652] Brussels Regulation (EC) No 44/2001, OJ 2001 L12/1.
[653] See Mankowski, 'Das Herkunftslandprinzip als Internationales Privatrecht der E-Commerce-Richtlinie' (2001) 100 *ZvglRWiss*, 137 ff, at 175-6.
[654] Case C-21/76 *Mines de Potasse d'Alsace* [1976] ECR 1735. According to the Court's ruling in *Sheville* concerning the distribution of allegedly defamatory publication in more than one country, this is the place where the harmful event has caused damage to the injured party. See C-68/93 *Sheville v. Presse Alliance S.A.* [1995] ECR I-415. See Kur, 'Das Herkunftslandprinzip der E-Commerce-Richtlinie: Chancen und Risiken' in: *Festschrift für Willie Erdmann* (Köln: Carl Heymann, 2002), 629 ff., 635 ff.; Thünken (2002), 925 ff.
[655] See Rec. 22 Directive EC/2000/31.
[656] See Kur (2002), 629 ff., 635; Mankowski (2001), 175 ff.
[657] Kur (2002), 636.
[658] Ibid.

In respect of *choice of law rules* the discussion focused on the issue of whether or not the country-of-origin principle could be regarded as a conflict-of-law rule.[659] Commenting on the Draft Directive, Hoeren saw two possible interpretations of the approach suggested by the Commission. The country-of-origin principle could either be regarded to encompass private international law rules, meaning that the conflict-of-law rules of the country of origin (establishment) would be followed. Or, the country-of-origin principle could be itself treated as a universal principle of private international law, pronouncing the place of establishment of the service provider as the one and only relevant connecting factor for determining applicable law to electronic commerce. In both cases the country-of-origin principle would influence private international law. In the second interpretation it would, moreover, turn upside down all the established doctrine in the latter discipline.[660]

In the legal literature the conception of the country-of-origin principle as a conflict-of-law rule was first advanced by Nina Dethloff. Even before the entry into force of the E-Commerce Directive, Dethloff pleaded the advantages of the country-of--origin over the place-of-market principle (*lex loci competitionis*), especially in the case of multi-state acts of competition typical of electronic commerce.[661] In this understanding Art. 3(1)(2) Directive EC/2000/31 contains a reference to the country of origin as a connecting factor for multi-state conflicts, thus overriding the usually valid principles of private international law.[662] This reading of the Directive follows a familiar line of reasoning interpreting the rules on the four freedoms in primary Community law as having conflict-of-law implications.[663] Dogmatically, this interpretation, even if in different nuances, was shared by a number of authors.[664] Spindler suggested that Art. 3(2) of the Directive should be conceived of as a kind of hybrid construction between conflict-of-law rule and a substantive corrective norm (*Sachnorm*), which does not yield to satisfactory dogmatic classification in neither private international law, nor

---

[659] How one should qualify the impact of the country-of-origin principle – as a conflict-of-law rule or as a substantive law restriction – is, allegedly, not a purely academic matter. Kur sees the practical relevance of such distinction in that in the first case the more favourable (i.e. less strict for the ISP) law of the country of establishment should be considered by the court *ex officio*, whereas in the second case the objection about more restrictive rules in the applicable law should be treated as an exception to be substantiated by the defendant in the proceedings. See Kur (2002), 629 ff., 638; see also Ohly, 'Das Herkunftslandprinzip und Kollisionsrecht' (2001) *GRUR Int.*, 899ff, 902 ff. Contra Ahrens, 'Das Herkunftslandprinzip in der E-Commerce-Richtlinie' (2000) *CR*, 835 ff, 838.

[660] Hoeren (1999), 195.

[661] Dethloff, 'Marketing im Internet und Internationales Wettbewerbsrecht' (1998) *NJW*, 1596 ff., at 1599; Dethloff, 'European Conflict-of-Law Provisions Governing Unfair Competition' (1999) *Commercial Communications*, 2 ff., at 4 ff.; Dethloff, 'Europäisches Kollissionsrecht des Unlauteren Wettbewerbs' (2000) *JZ*, 179 ff, at 181. A more hesitant view is expressed by Dethloff after entry the into force of the E-Commerce Directive, especially in light of the blunt statement in Art. 1(4) that the Directive does not purport to establish new rules of private international law. See Dethloff (2001), 54.

[662] Dethloff (2001), 179 ff.

[663] Basedow, 'Der kollissionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis' (1995) 59 *RabelsZ*, 1 ff. On the basis of a survey of ECJ jurisprudence on the basic Community freedoms Basedow elicits a general principle of application of the law more favourable of intracommunity trade to be inherent in these rules. In the area of unfair competition the principle is seen to materialize in cases like *GB-INNO*, *Yves Rocher* and *Clinique*. *Ibid.*, 50 ff. More generally on the influence of Community law on private international law, see Roth (1991), 623 ff.

[664] See Mankowski (2001), 137 ff., 140; Mankowski (1999b), 909 ff., at 912; Spindler (2001), 400, at 403; Thünken, 'Die EG-Richtlinie über den elektronischen Geschäftsverkehr und das internationale Privatrecht des unlauter Wettbewerbs' (2001) *IPRax*, 15 ff., at 20; Thünken (2002), 940.

European law.[665] Proposals were advanced to introduce expressly the country-of-origin principle as a governing connecting factor for cross-border situations of unfair competition in the private international law part of the German Civil Code (EGBGB).[666] Some were critical of the repercussions this regime might have for national unfair competition law on legal policy grounds.[667]

Those who reject a conflict-of law understanding of the country-of-origin principle in the E-Commerce Directive observe that such an interpretation is in blatant contradiction with the express intention of the Community legislator not to establish new rules of private international law (Art. 1(4)).[668] It can consequently only be sustained if a substantial degree of incompetence in the field of private international law is imputed to the European lawmaker.[669] Nevertheless, most of the commentators concede that even though the country-of-origin principles cannot be seen as a pure conflict-of-law rule, it affects private international law rules in their substantive scope.

In an attempt to reconcile what appears irreconcilable, more complex, multiple-step tests are advanced in the legal literature. It is suggested that the country-of-origin principle leaves the doctrine of the place-of-market unaffected, but at the same time acts as a sort of 'filter' on the substantive results reached under the traditional choice-of-law approach.[670] In other words the courts in the place of business will normally assume jurisdiction and, following *lex loci competitionis* (the connecting factor allegedly accepted in the majority of European legal systems) will apply their national competition law (*lex fori)*. In a second step, the substantive outcome from applying these rules should be weighed against the standards in the country of origin and corrected accordingly if the latter standards are more permissive.[671] This interpretation pays due regard to the disclaimers in Recital 23 and in Art. 1(4) of the Directive (see above). It also respects the insistence of the European lawmaker that the law applicable under relevant conflict-of-law rules should not restrict the free movement of ISS (Recital 23, *in fine*). Thus the dominant view appears to be that, while the country-

---

[665] Spindler (2001), 401: „Dieses Dilemma wird sich wohl nur so lösen lassen, dass man zwar Art. 3 I, II als kollisionsrechtlichen Normen begreift, jedoch nur als eine eigenartige hybride Konstruktion zwischen Kollsionsrecht und sachrechtlichem Korrektiv,die sich weder befriedigend kollisions- noch europarechtlich erklären lässt."

[666] Thünken (2001), 21, 22.

[667] The most vocal critic appears to be Mankowski. Thünken agrees on some of the critical points but on balance considers the arguments in favour of the country-of-origin principle as a new conflict-of-law rule to weigh heavier than those against. Thünken (2002), 936 ff.

[668] Fezer/Koos, 'Das gemeinschaftsrechtliche Herkunftslandprinzip und die E-commerce –Richtlinie' (2000) *IPRax*, 349; Sack, 'Das internationale Wettbewerbsrecht nach der E-Commerce-Richtlinie (ECRL) und dem EGG-/TDG-Entwurf' (2001) *WRP*, 1408 ff., at 1409, 1417; Ohly, (2001), at 901; Ahrens (2000, at 837; Nickels, 'Neues Bundesrecht für den E-Commerce' (2001) *DB*, 1919 ff., at 1922.

[669] Sack (2001), 1408 ff., at 1409.

[670] Sack (2001), 1411; Ohly (2001), 901; Kur (2002), 637-38. Kur rightly notes that in contrast to the general principles of free movement of goods and services the filter here consists not of primary Community law, but of the substantive rules in the country of origin. The law of the market remains applicable, but it may be restricted in its substantive scope after being subject to an evaluating "filtering" test, namely the substantive standards in the country of origin.

[671] See Bodewig (2000) 475 ff., at 479 ff. Discussing the possibilities for exemption from the country-of-origin principle laid down in Art. 3(4) Bodewig notes that, in contrast to the '*Cassis de Dijon'*, such possibility exists only on grounds of consumer protection and not of fairness of commercial transactions. He rightly expresses doubts that national regulations with mixed objectives (e.g. the German regulation on combined offers) would pass this test, *ibid.*, 480.

of-origin principle is not itself a conflict-of-law rule, it affects the existing conflict-of-law rules and their substantive scope of application. It works as a kind of secondary connecting factor ("doppelter Anknüpfung").[672]

For situations where the on-line advertising and marketing are exclusively directed at a country other than the country of origin the above described approach would often mean that the law of the country of destination would apply as *lex loci competitionis*. The country-of-origin principle will not change this, but may come to correct the substantive outcome in case the legal standards in the country of origin are less restrictive for the ISP than those in the country of destination.[673] This conclusion is well grounded in the wording of Arts. 3(2) and 1(4) Directive EC/2000/31. More controversial is the situation where the law in the country of establishment is stricter than the law in the country of destination. Also in these cases of applying the conflict-of-law rule of *lex loci competitionis* scholars argued that the advertiser should be allowed to derogate from the stricter rules of the country of establishment if he/she complied with the laxer rules in the country of destination. It made little practical sense to protect service recipients against conduct fully acceptable in their own country.[674] As a combined result, the country-of-origin principle was interpreted as a general rule for application of the more favourable law.

Of course, most commentators note the variety of practical situations that may occur in a network environment. More specifically, it may be difficult to ascertain the place where the competitive interests collide or where relevant consumer interests are affected. In typical Internet marketing a web page can be accessible from many places, which brings up problems of multistate competitive acts. Or conversely, on-line marketing can be specifically tailored to the conditions (cultural and legal) of a particular market.[675]

Summing up, the prevailing opinion in German doctrine prior to transposition of the Directive by the German lawmaker has been that the country-of-origin principle does not affect the classical conflict of law rule of the law of the country where the competitive interests collide.

Interestingly, in the process of transposition of the E-Commerce Directive the Government initially embraced the understanding of the country-of-origin principle as a rule of applying the most favourable law. In defining the scope of the country-of-origin principle the original government proposal expressly stated that the principle

---

[672] See Ohly (2001), 902; Kur (2002), 638.

[673] And conversely, in case the advertiser would make it clear that he differentiates his marketing in order to comply with local legal rules, then he might be refused the protection under the country of origin regime (provided the latter is less restrictive). Kur (2002), 642, 644.

[674] „Zwar enthält [das Herkunftslandprinzip] eine ausdrückliche Bestätigung des Grundsatzes, dass für die Entscheidung über die Rechtmäßigkeit einer grenzüberschreitenden Handlung nicht die Rechtsordnungen aller berührten Länder zu beachten sind, sondern dass das Recht des Herkunftslandes den entscheidenden Maßstab bildet. Allerdings ist nach dem oben ausgeführten Sinn und Zweck der Richtlinie zu entnehmen, dass dieser Grundsatz nicht dazu herangezogen werden kann, die Verbreitung von Kommunikationsdienstleistungen zu verhindern, die im Herkunftsland selbst keine kommerzielle Wirkung entfalten, während sie nach dem Recht anderer Länder (möglicherweise) zulässig sind." Kur (2002), 642.

[675] For a detailed analysis see Mankowski (1999), 909 ff.; Kur (2002), 639 ff. with further refernces.

applied only as far as the rules of private international law did not require otherwise.[676] Then the proposal tried to delineate the complex implications of the country-of-origin principle for private international law. According to a proposed second sentence of § 4 I TDG-E, national law indicated as applicable by the relevant rules of private international law, should not be applied if this application would imply a restriction upon the free movement of information society services. More specifically, such a restriction was considered to be at hand when the rules of the applicable law would go beyond the requirements of German law.[677] Sack called this provision a new *'privilegium germanicum'*.[678] In the case of ISS provided to German recipients by operators established in other Community states, the law indicated as applicable under private international law rules would likewise not be applied if it contained restrictions to the free movement of ISS, going beyond the requirements of the state of origin.[679]

It appears that the German government construed the term "requirements" broadly so as to encompass both rules of public and of private law. Yet only in the case of public law requirements was the country-of-origin principle expected to work in full swing as a tool for division of competences. In the case of situations of private law character with a cross-border element, general private international law rules would continue to apply, and the country-of-origin principle was regarded to play only a correcting role. The rules of the country of origin are in the understanding of the German legislator to be considered as a yardstick for the compatibility of national rules with the free movement of ISS as established in the Directive.

By such a reading each private law situation with a cross border element would require a two-step test. First, the court has to follow the conventional rules of private international law and to establish the rules of which state are to be considered as applicable law. Then, in a second step, these rules have to be compared in substance with the rules of the country of origin in order to make sure that the rules of the applicable law do not introduce more burdensome regime for the respective ISS. Despite assurances to the contrary it seems that the above interpretation allows for the country-of-origin principle to step in place of private international law rules, or at least that it corrects substantive results achieved under conventional choice of law rules.

For situations of unfair competition law this reading amounted to a comprehensive "rule of applicability of the more favourable law". This interpretation was, however, disapproved by the *German Bundestag*. First to voice a strong objection was the

---

[676] § 4 TDG-E „Herkunftslandprinzip": (1) „In der Bundesrepublik Deutschland niedergelassenen Diensteanbieter und ihre Teledienste unterliegen den innerstaatlichen Normen auch dann, wenn die Teledienste in einem anderen Staat innerhalb des Anwendungsbereichs der Richtlinie 2000/31 ... im Binnenmarkt geschäftsmäßig angeboten oder erbracht werden, soweit sich nicht aus den Regeln des internationalen Privatrechts etwas anderes ergibt." BT-Drs. 14/6098, 5.

[677] § 4 I Nr. 2 TDG-E: "Auf solche Teledienste ist das nach den Regeln des internationalen Privatrechts maßgebliche Recht eines anderen Staates jedoch nicht anwendbar, soweit dadurch der freie Dienstleistungsverkehr über die Anforderungen des deutschen Rechts hinausgehend eingeschränkt werden würde." BT-Drs. 14/6098, 5.

[678] Referring to a much debated rule of § 38 EGBGB, see Sack (2001), 1412.

[679] § 4 II (2) TDG-E: „Auf solche Teledienste sind die nach den Regeln des internationalen Privatrechts maßgeblichen Normen nicht anwendbar soweit dadurch der freie Dienstleistungsverkehr über die Anforderungen des Niederlassungsstaates hinausgehend eingeschränkt werden würde." BT-Drs. 14/6098, 5

Bundesrat.[680] The *Bundesrat* found the language of the proposed § 4 I first and second sentences wholly unclear and proposed that this provision should at least be clarified to the addressees of the act through examples. The Government did not find this proposal acceptable and defended its position. It underlined again that German public law would only be applicable to ISS provided by operators established on German territory. As to private law, it was a question of liability rules and rules of conduct as well as other mandatory private law rules. The law indicated by the relevant rules of private international law would not be applicable if its substantive rules were to be stricter than the corresponding rules in the country of establishment. The operator would, however, be able to profit of less restrictive rules applicable by force of choice-of-law rules.[681] The Government had duly notified the Commission of the proposed rule.[682]

Given the lack of clarity, the Salomonic decision was finally taken to completely abstain from formulating an express provision on the relationship between the country-of-origin principle and the rules of private international law. Sticking as closely as possible to the text of the Directive was selected as the least risky approach, whereby national operators would not lose any competitive advantage that might be possibly gained by alternative interpretations.[683] According to an editorial comment, this legislative restraint was adopted partly under "gentle pressure" by the EU.[684] Arguably, the proposed rule requiring weighing different regulative regimes against each other in substantive terms, threatened to undermine one of the man goals of the Directive, namely that information service providers comply with one, and only one, legal system in their activity.[685] Judging from the debate on the interpretation of the proposed provisions on the country-of-origin principle in the Government Bill, the decision to abstain from explicit rule, is certainly a wise one.[686] If the purpose of the Directive has been to create a light and transparent regulative framework, the planned German provision was very well in a position to compromise this objective, at least for operators interested in the German market.

The revised German Act on Telecommunication Services (*Teledienstengesetz*, TDG)[687] expressly transposes both the positive and the negative aspects of the country-of-origin principle. According to the first section of § 4 TDG, service providers established on German territory shall comply with domestic German norms even when they provide services to recipients in other countries of the European Community. Conversely, the TDG guarantees that the provision of information society services by

---

[680] BT-Drs. 14/6098, Stellungnahme des Bundesrates, Anlage 2, 32 ff.
[681] BT-Drs. 14/6098, Gegenäußerung der Bundesregierung, Anlage 3, 36.
[682] Ibid.
[683] BT-Drs. 14/7345, 31, Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Technologie, Begründung, Deutscher. „Die schwierige Umsetzung des Herkunftslandprinzips kann am besten bewerkstelligt werden, indem man sich möglichst eng an dem Wortlaut der einschlägigen Richtlinienbestimmungen orientiert. Die Fassung des § 4 I TDG wird dementsprechend angepasst. Des Weiteren wird § 4 Abs 1 TDG an den im Entwurf in § 4 V (1) TDG-E synonym verwandten Begriff des „Geltungsbereichs" der Richtlinie angepasst."
[684] Hoffmann, 'EGG – Eine Reihe von Problemen des elektronischen Rechtsverkehrs ungelöst' (2002) *MMR*, 65 ff.
[685] Hoffmann (2002), 66.
[686] See the numerous possible interpretations of these provisions for various hypothesis discussed by Sack (2001), 1408 ff.
[687] BGBl. I 1997, 1870 ff. amended through BGBl. I 2001, 3721 ff.

operators established in other Community States to recipients in Germany shall not be restricted by a double control (§ 4 II TDG). In the explanatory memorandum to the Bill the Government elaborates that public law is basically inapplicable to such ISS. German public authorities, therefore, are not entitled to undertake measures in respect to such services. The latter operators should only comply with one set of rules, namely those of the state of establishment. As to the conflict-of-law implications of this rule, the task of clarifying the meaning of Community legislation was left to national courts and ultimately to the European Court of Justice.

It is remarkable that the whole discussion of the transposition of the E-Commerce Directive has almost exclusively been conducted from the perspective of German unfair competition law.[688] The majority of scholars have proceeded from the tacit assumptions that *(i)* unfair competition law rules are 'requirements' in the sense of the Directive and *(ii)* that they are private law rules and hence, in a cross-border situation, invoke the application of private international law rules on jurisdiction and applicable law. These assumptions are inevitably coloured by the specific legal culture and tradition in which the scholars are raised and which they represent.

Sweden: awakening to a private law understanding of marketing practices law
A shift away from German legal reality can demonstrate that the Electronic Commerce Directive may be less confusing if refracted through a different institutional prism. A public law conception of marketing practices law implies that such rules relate less problematically with the country-of-origin principle advanced in the Directive. Neither is the Brussels convention seen to apply. Nor are conflict-of-law rules directly affected since in cross border situations it is a question of division of competences between different jurisdictions and not a matter of private law relations and of choice-of-law rules.

Indeed, in contrast to Germany, Swedish marketing practices law has, since the enactment of the 1970 MFL, been considered a domain of public law, or alternatively a mixed area with elements of both public and private law.[689] The 1970 and 1976 MFL did not directly address questions of jurisdiction and applicable law. The *travaux préparatoires* to the 1970 MFL stated, however, that, since the statute was conceived as laying down primarily the responsibility of the state for policing the market in the interests of consumers, classical rules on private international law should not apply. Instead, very much as in antitrust law, the Government Bill defined the territorial scope of application of the act following the so-called "effektlandsprincipen".[690] According to this principle, Swedish courts have jurisdiction to apply Swedish marketing practices law to marketing conduct having noticeable effect within Swedish territory, even when the responsible trader is established abroad.[691] The scope of

[688] For a more sophisticated view on the private international law of multistate advertising, informed by comparative analysis of divergent regulative models; see Reich (1992b); see also Roth (1991), 671 in the context of the right of corrective statement in the Television Directive.
[689] See Bernitz (1969), cf. Ch. 5.2.2.3 above.
[690] Prop. 1970:57, 92 f.
[691] See Levin (1987b), 143; Bernitz, *Marknadsrättslig kontroll av reklam-TV*, No. 76 (Nordisk Ministerråd NORD, 1988), 17 ff. with reference to decisions where the Market Court has applied Swedish law to the marketing conduct of foreign traders. The doctrine of noticeable effect was tested in the case MD 1989:6 ("Scanorama"). The case concerned an alcohol advertisement inserted in a publication distributed by SAS on board its aircraft. According to a statement in the Government Bill to the Act on Advertising of Alcohol and

Swedish marketing practices law, thus, coincids with the jurisdiction of Swedish public authorities.[692]

This view corresponds to the general understanding of marketing practices law as public law, having as its primary function to protect collective consumer interests and being enforced primarily by public authorities, notably the KO. But even proceedings instituted by private persons and organisations, such as competitors, consumer and business associations, were regarded as essentially of a public law character. Dogmatically, the main reason given for this view in legal doctrine is that compliance with injunction orders is eventually ensured by penalties to be paid to the public purse.[693] Following this line of reasoning, it is not surprising that the question of whether Swedish courts should apply foreign law to marketing practices having effect exclusively or predominantly abroad was never seriously discussed in preparatory work or doctrine. Marketing practices of Swedish traders on foreign markets were simply not regarded as coming within the scope of the MFL.[694]

The question of the scope of the MFL popped up first in the course of the legislative discussion on the transposition of the Injunctions Directive. Given the focus on cross-border litigation by foreign 'qualified entities', much of the debate revolved around issues of jurisdiction and applicable law. It appeared important to define the scope of application of the new act and to gauge its possible consequences in terms of substantive outcome. In this respect, however, the Directive did not offer much guidance. Art. 2(2) Directive 98/27/EC expressly states that the Directive is "without prejudice to the rules of private international law, with respect to applicable law". The immediately following reference to the law of the Member State "where the infringement originated" or "where the infringement has its effect", was considered too casual and tentative, and thus unable to provide basis for conclusive interpretation.[695]

The *travaux préparatoires* to the new Act on Right of Action reflect a hesitant shift in position on this question. Initially the Government considered defining with greater

---

Tobacco, the Act applied to advertising which was "directed at an international audience, including the Swedish one". Nevertheless, the Court reached the conclusion that the advertisement in point should not be enjoined since only a small portion of it reached the Swedish public and it was not particularly directed at this public. The Court underlined the importance of weighing all the circumstance of the individual case in their complexity. Cf. Bogdan (1998), 540, praising the flexibility of this approach.

[692] See Pålsson, *Svensk rättspraxis i internationell processrätt* (Stockholm: Norstedts, 1989), 53; Bogdan (1998) 541.

[693] "Men även i de fall där talan väckts av t.ex. en berörd näringsidkare eller en sammanslutning av konsmenter, näringsidkare eller en sammanslutning av konsumenter, näringsidkare (se t.ex. 38 § MFL) måste den anses vara av övervägande offentligrättslig karaktär, eftersom den direkt eller i förlängningen handlar om böter vilka betalas till staten." In a footnote the author nevertheless adds that the situation could change if the claim concerned compensation of damages or other payment to the affected competitor or association. "Saken skulle kunna komma i ett annan läge om talan avsåg skadestånd eller annat slags belopp betalbart till den näringsidkare eller sammanslutning som väckt talan." Bogdan (1998a), 533-54. Similar Bogdan, 'Kollektiva konsumentintressen i den internationella processrätten' (1994/95) *JT*, 905. (1994/95), 905.

[694] It was only after the entry into force of the Injunctions Directive, obliging national courts to award foreign entities' standing to litigate in defence of collective consumer interests before national courts and authorities, that the question was given some consideration. See Bogdan (1998a), 541. On the transposition of the Injunctions Directive see Ch. 7.1.2.2 above.

[695] See prop. 2000/2001:34, 23.

precision the jurisdiction of Swedish courts under the Act. A provision was proposed limiting the scope of application of the law to infringements, which affect consumers in other States of the EEA, and which are committed by someone domiciled in Sweden (or having other substantial connection with Sweden).[696] In its opinion, the Council on Legislation suggested that the proposed rule might be seen as contravening the Brussels and Lugano Conventions, if those two conventions should be applicable to the matter of jurisdiction. The Council, however, was quick to add that the provisions to which the new law extended were outside the scope of private law as defined by the conventions ('civil and commercial matters'). A conflict with the Conventions could therefore hardly arise. In its subsequent analysis the Government was more diffident. It noted that the distinction between private and public law was uncertain and shifting, in particular when seen in a comparative and international perspective.[697] The Government underlined that the concept 'civil and commercial matters' under the Brussels Conventions should be autonomously interpreted in view of the objectives of the Convention and independent of the national orders of the signatory States. It was therefore not self-evident how the ECJ would classify market law if the question would be brought before the Court. In light of this uncertainty, the lawmaker preferred not to stipulate an express rule on jurisdiction.[698]

This cautious position is also reflected in the discussions on applicable law. The Government Bill includes, arguably for the first time in the context of Swedish market law, a section on possible application of foreign law by Swedish courts.[699] Previously the issue was largely disregarded in legislative and scholarly work as being irrelevant to public law matters. The Government reasons around the various situations that might arise, especially in view of the divergent standards of protection in different Member States allowed by the relevant consumer protection Directives. Applying Swedish law to the conduct of Swedish traders in a Member State with stricter rules would deprive consumers in that State from a protection they legitimately expected to receive. The reverse situation, of applying a stricter Swedish rule to such conduct, could give rise to distortion of competition and place Swedish traders at a competitive disadvantage. Despite the advantages of a clear rule on applicable law, leaving the matter to the courts was again preferred as a more reasonable approach.[700]

Bogdan argues that as a consequence of the Injunctions Directive Swedish courts for the first time might find themselves competent to try cases of unfair trade practices committed by Swedish traders on foreign markets and affecting foreign consumers. In his view it is highly unlikely that Swedish courts would apply Swedish marketing practices standards to such practices. In the case of more restrictive Swedish rules, this would have the undesired effect of distorting competition by putting Swedish traders at a disadvantage in relation to their competitors on the relevant foreign market (who would not have to comply with Swedish rules). At the same time it would be difficult for the courts to interpret general concepts of fairness and truthfulness without knowing the habits and perceptions of the local public.[701]

---

[696] See 1 § Lagrådsremissens lagförslag, prop. 2000/2001:34, 47 ff.
[697] Ibid.
[698] Prop. 2000/2001:34, 27.
[699] Prop. 2000/2001:34, 23 ff.
[700] *Ibid.*, 27.
[701] Ibid.

With the adoption of the E-Commerce Directive the discussion was renewed. Initially, transposition appeared less problematic in Sweden than in Germany. The coordinated field was interpreted as consisting solely of public law rules, i.e. rules and regulations pertaining to the relations between the state and the individuals.[702] Conversely, it required no further elaboration that private international law was concerned with private law conflicts. The Government memorandum on transposition of the E-Commerce Directive defined private international law in the following way:

> Private international law consists of rules determining which country's law should apply in private law conflict with the international element, i.e. choice-of-law rules. Private international law in its true sense does not include rules concerning the territorial scope of application of the laws.[703]

Proceeding from these two basic assumptions, the Government memorandum saw no conflict between the country-of-origin principle and national private law rules. The country-of-origin principle implied a re-definition and a clear limitation of the territorial scope of application of the Swedish MFL but this did not raise issues of private international law. In fact, what caused perplexity among experts involved in the transposition of the Directive was the recurrent disclaimers exempting private international law from the scope of the country-of-origin principle. These references to private international law were, however, not seen to have any bearing on Swedish marketing practices law.

Many parties in the consultation procedure were, however, critical of the strict distinction between public and private rules in the interpretation advocated in the memorandum.[704] It was in particular pointed out that the exemptions of certain issues of private law from the scope of the country-of-origin principle (notably private autonomy) indicated that other, not explicitly exempted areas were within this scope. The Government conceded that this interpretation was plausible under the kind of strict textual interpretation usually applied when interpreting Swedish statutes. The Directive, however, was not a product of national legislation, but a result of a complex process of negotiations where many political wills have to be reconciled through a compromise decision. Whereas the Government agreed that the interpretation advanced in the memorandum appeared convincing, it found the unclear text of the Directive to leave room for alternative readings. Therefore it was desirable to stick to the text as much as possible and leave future interpretation to the courts.[705] The view thus prevailed that the country-of-origin principle refers mainly to public law rules.

---

[702] Ds. 2001:31, 90.

[703] Ds. 2001:13, 87.

[704] Prop. 2001/02:150, 59 ff.

[705] "En svensk författningstext skulle ju normalt tolkas på detta sättet. Direktivet är dock resultat av ett omfattande och bitvis besvärlig förhandlingsarbete där flera viljor har måst tillgodoses inom ramen för kompromisslösningar. Detta innebär att direktivtexten inte kan tolkas på samma sätt som en svensk författningstext. Enligt regeringen talar mycket för att bedömningen som gjordes i promemorian är riktig. Samtidigt är Direktivet oklart och någon uttrycklig regel som anger att civilrättsliga frågor inte omfattas av direktiver finns inte. I sista hand är det en uppgift för EG-domstolen att avgöra direktivets innebörd. Den svenska regleringen bör därför nära ansluta till direktivtexten, vilket också är den lagstiftnings teknik som valts i de flesta länder." *Ibid.*, 62.

Nevertheless it was decided that this should not be specified in the law, so as not to pre-empt future interpretations by the Community judiciary.[706]

The attempts to disentangle Community Directives have increasingly brought Swedish law- and policy-makers, as well as legal scholars into contact with divergent understandings of consumer law and policy. Criticism of the 'effektland' principle in Swedish marketing law is being voiced from different quarters. Some scholars even consider this principle obsolete.[707] Bogdan takes a more balanced view. His critique of the Injunctions Directive is that it chooses the most difficult and tortuous road to a common market in consumer justice. Instead of opting for mutual recognition and enforcement of injunctions, the respective organizations and authorities are referred to lengthy proceedings before foreign courts, in foreign languages.[708] Another critical observation by Bogdan refers to the principle of the law of the country of origin that the Injunctions Directive indirectly promotes. Naturally courts would be more inclined to apply *lex fori,* and in this the Directive helps them by giving preference to flying jurisdiction.

Jurisdictional gaps and overlaps
The above-described tribulations of the transposition process suggest a number of problem areas for the future of harmonized Community law. Understandably, the institutional context underlying the transposition process differs between the fifteen Member States, which may produce divergent and even bizarre results. The transposition of Community legal acts is usually channelled through the regular venues of national legislative processes. National governments, legislatures, legal doctrine, and stakeholders are active participants in this process and are inevitably influenced by deeply embedded conceptual and ideological beliefs and expectations.

Thus, in interpreting the country-of-origin principle the Swedish government readily classified marketing practices legislation as public law requirements. To apply these public law requirements to information society services emanating from another Community Member State was in the Government's view against the letter and the spirit of the Directive, even when the services were directed at the Swedish market. In this respect the Swedish government is ready to exercise regulative restraint. By contrast, in Germany the Government, supported by legal doctrine, subsumed unfair competition law under private law and seeks complex formulae to ensure the compatibility of this view with the country-of-origin principle. Under this understanding the courts are expected to continue to apply the traditional *lex loci competitionis* rule and the country-of-origin principle is assigned only the role of a correcting factor.

This difference in interpretation may at worst lead to a regulatory gap. We can assume the hypothetical situation of an ISP established in Germany and directing its marketing exclusively to the Swedish market. Applying the main rule of the Brussels Convention/Regulation, German courts will consider themselves competent to deal with the claim only if the place of establishment coincides with the defendant's place

[706] Prop. 2001/02:150, 63.
[707] Åkerman/Thunman, 'Jurisdiktions- och lagvalsproblem på Internet' (1997-98) *JT*, 432 ff.
[708] Bogdan (1998), 542.

of domicile.[709] The optional rule of Art. 5 may not apply if Germany is not considered as the place where the harmful event occurred (if the activity is only taking place in Sweden). Conversely, the Swedish KO will most probably consider himself incompetent to intervene, since the activity is conducted by a foreign (German) ISP and the country-of-origin principle applies. The Market Court will likewise refuse to assume jurisdiction on the same grounds. The Brussels Regulation will not be considered applicable because marketing practices regulation is not considered to fall under the concept of "civil and commercial matters."[710]

In terms of applicable law, a German court, if it assumes jurisdiction, will presumably apply Swedish law, following the place-of-market principle (*lex loci competitionis*). Yet if this law is stricter than German law, the court may refuse application on the basis of Art. 1(4) and Recital 23, *in fine*. Swedish courts, if they assume jurisdiction, will tend to apply German law as the law of the country of origin even if it is stricter than Swedish law. As a result, stricter Swedish fair trading law will never affect German-based service providers, whereas stricter German law may affect them only if the case is tried by Swedish courts.

An alternative, but equally unsatisfactory situation may arise if an ISP established in Sweden targets exclusively the German market. Then Swedish authorities will most likely consider themselves obliged to react and to take their responsibility for all community citizens under the country-of-origin principle. At the same time, however, German courts may also assume jurisdiction under Art. 5(3) of the Brussels convention (which also coincides with the jurisdictional rule in German UWG).[711] Swedish courts will apply Swedish law and will not consider recital 23 to have any relevance to the case, since it is not a matter of private international law rules. Even if German law is more permissive, the enterprise will have to comply with the stricter Swedish rules. German courts will apply German law as *lex loci competitionis*. They will in a second step invoke Swedish law only to compare substantive results. Only if Swedish law is more permissive will they restrict the application of German law to the level of the Swedish regulation. As a result, there will be an overlap of jurisdictions and a tendency for Swedish courts to treat Swedish enterprises stricter than German courts.

Generally, German courts will tend assume jurisdiction applying either the main rule of Art. 2 or the alternative rule of Art. 5(3) of the Brussels Convention/Brussels

---

[709] Kur indicates that the two may not necessarily coincide. Kur (2002), 634.

[710] A change may be underway, though. See the discussion in the Government Bill above; cf. the comments by Bogdan provoked by the recent ECJ judgment C-167/00 *Verein für Konsumentinformation v. Henkel* [2002] ECR I-8111. Bogdan, 'Om Bryssel/Luganoreglernas tillämpning i marknadsrättsliga mål' (2002-03) *JT*, 410 ff. In this judgment the Court holds a dispute between a consumer organization and a private company concerning unfair terms of consumer contract to be "civil and commercial matter" in the sense of the Convention. Moreover, the Court sees no objection for the dispute to be tried by the court in the place where the damage occurred (*forum delicti*). In the opinion of the Court, the optional jurisdiction rule of Art. 5(3) did not require actual damage to have occurred. It sufficed with potential damage. Given the uncertain distinction between market law disputes and civil law disputes, at least in Swedish law, Bogdan suggests to extend the scope of application of the Brussels Convention to expressly cover market law subject-matter and avoid drawing an arbitrary line between private law and public law lawsuits.

[711] See Mankowski, 'Wettbewerbsrechtliche Gerichtspflichtigkeits- und Rechts-anwendungsrisiko bei Werbung über Websites' (2000) *CR*, 763 ff., at 769.

Regulation. Conversely, Swedish courts will only consider themselves competent when the ISP is established in Sweden. As to applicable law, if Swedish rules are stricter than German rules, an ISP established in Sweden will still be subject to the stricter rules. Conversely, judging from doctrinal discussions, it is not excluded that German courts may in effect grant a privileged status to ISPs established on German territory by always applying the more favourable rules. If German rules are stricter and an ISP is established in Germany, Swedish law will apply as *lex loci competitionis* and the country of origin rules will not be invoked.[712] Summing up, the prospect of achieving a 'harmony of decisions' is bleak.

The only chance lies in the attentive and open process of communication between national implementation authorities, including the courts. It seems that the legislative process of transposition has already taken its first steps on this path. Indeed, occasional comments in the preparatory materials suggest that Member State Governments consult each other in the process of transposing Directives. Moreover, it appears that the Commission has a hectic time in supervising national implementation processes. In both German and Sweden the Commission has intervened at one stage of the procedure or another, suggesting inadequacies in interpretation and transposition and not always with success.[713]

In both countries the legislatures ultimately opted for non-legislation, by reproducing the text of the Directive and abdicating from attempts to provide guidelines for interpretation and application of the law. The question is left to the courts and to the inventiveness of private litigants. The tentative interpretations provided in the *travaux préparatoires* will, however, presumably have an impact on the willingness of public authorities and private parties to experiment with the law.[714] In Sweden the KO will most probably not feel encouraged to intervene against foreign ISP directing their services at the Swedish market. In Germany, conversely, individual competitors and consumer and business associations will not hesitate to file lawsuits in Germany against advertising and marketing directed at the German market, even when the ISP is established in another Member State. Applying established private international law doctrine, the courts most probably will consider themselves competent to deal with the issue (Brussels Convention) and will moreover tend to apply German law as *lex loci competitionis*, i.e. the law of the country where the competitive interests meet. An approximation of approaches may be certainly achieved via the Luxembourg court. This would, however, entail a growing number of references and increased caseload for this institution. All in all one cannot but agree with Joerges that "the most important impasse in the Europeanisation process is an institutional one".[715] Given the limited size of the European judiciary, the task of guiding the process of implementation of Community law is indeed daunting.

7.1.2.3 Implementing or appropriating European law?

The comparative survey over the implementation of a number of Community fair trading directives provides rich evidence of the differential impact these instruments

[712] Such interpretation is at least advanced by Ohly (2001), 905.
[713] See the reaction of the Parliamentary Committee on Civil Law, 2001/02:LU 29.
[714] Prop. 2001/02:150, 64 ff.
[715] Joerges, 'Interactive Adjudication in the Europeanisation Process: A Demanding Perspective and a Modest Example' (2000) *ERPL*, 1 ff.

exert over national institutional frameworks. Once a Community legal act is adopted and published it enters the autonomous sphere of national legal orders, where a process of reinterpretation is launched that follows its own institutional logic. The texts of Community directives meet different institutional contexts in terms of actors and organizations involved, as well as institutional legacy. The process of implementation is, thus, simultaneously a process of domestication and appropriation of abstract Community rules and their adaptation to the specific national institutional context. The established national interpretive communities get engaged in a renewed debate over the meaning and the exact implications of Community rules. Surprisingly, although most Community directives build on intensive comparative work, the implemenation debates are still carried out prevailingly along national lines. In the discussion on the Comparative Advertising Directive and the E-Commerce Directive German scholars refer almost exclusively to their peers. Likewise Swedish lawyers quote Swedish preparatory work and doctrine. The discussion remains encapsulated within individual Member States, which accounts for certain myopia and perpetuation of prevailing national (sometimes not convinving) interpretations.

The intensity of the debate apparently depends on the divergence between the ideology of Community legislation and of corresponding national institutional frameworks. In the case of Germany, there has been a clear tension between the general philosophy of Community fair trading directives and some of the traditional attitudes under German unfair competition law. This has become evident already with the Misleading Advertising Directive, but is best illustrated by the implementation of the Comparative Advertising Directive and the E-Commerce Directive. With their more ambitious harmonisation approach and liberalisation tenor the last two directives have required substantial changes not only in formal provisions but also in the way of thinking about fair trading law. Interestingly, the E-Commerce Directive adopting the 'country-of-origin' approach to harmonisation has been much more successful in purging German unfair competition law from guild-like doctrines and restrictions. The Comparative Advertising Directive with its numerous conditions often with unclear scope and meaning opens multiple avenues for interested actors to seek to dampen the effect of the Directive and preserve the *status quo*.

For Sweden the pressure toward adaptation appears to be much less palpable. The Community approach of integrating consumer interests in fair trading law for the purpose of opening markets and intensifying competition fits well with the traditional Swedish approach, which combines an emphasis on consumer interests with a liberal non-interventionist economic policy. The majoritarian approach as a way to overcoming particularist interests has apparently an attraction both for the Swedish welfarist state as well as for the Community. The most significant tensions have been instead associated with the implementation of the Television Directive. The paternalist charge of Swedish regulative policy on children advertising has visibly come into conflict with the Community thrust towards an integrated market of television broadcasting services.

Where Community law can probably provoke rethinking is the area of consumer privacy. Although protecting consumers from intrusive advertising has not been

foreign to the Swedish legislator[716] the attempt at balancing the interests of traders against the interests of consumers has arguably brought to certain neglect of the interests of individual consumers and consumer minorities. In this light, European law may come to infuse some individualist values into Swedish consumer law beyond the dominant majoritarian approach.

Generally, the debate on the Electronic Commerce Directive and its influence on national conflict-of-law rules has revealed the limitations of thinking of fair trading law in terms of sharp distinctions between private and public law. The E-Commerce Directive and the Injunctions Directive invite private law oriented German lawyers to acknowledge that an injunction on certain type of conduct has a regulative dimensions even when triggered on the initiative of private actors. Conversely, Swedish lawyers entertaining a public law view on marketing practices law, are prompted to revise their attitudes and to give more consideration to private interests.

7.2 Judicial discourses over national institutional legacies

Even more intriguing interaction between different national institutional traditions and the Community institutional framework unfolds through the process of negative integration. The role of the European Court of Justice as a pacemaker of European integration has been explored in numerous accounts, which will not be repeated here. In the following I will instead focus on the influence of the Court's intervention on national institutional frameworks. In terms of participation, what is characteristic of the process of negative integration is that it provides a channel for more vigorous representation of interests that are normally not represented in the national political process.

The dynamics of communication between national judiciaries and the ECJ within the mechanism of reference for a preliminary ruling under Art. 234 (ex Art. 177) EC Treaty is arguably quite different from that of harmonisation through the Community political process. In the centralised model of harmonisation, decision-making is abstract and future-oriented. The perspective is long-term and Member States can exercise control over, or at least are be aware of, the contents of the resulting Community acts. This gives opportunity for anticipatory adaptation of the national institutional framework ensuring compatibility with the new European regulative regime. In the case of negative integration, the intervention of the ECJ is incidental and situation-specific. National measures are occasionally precluded, but the Court does not give any instruction as to the new national rule that has to come in place of the abolished one. In this sense the intervention is indeed 'negative' in that the Court only strikes down says incompatible rules and regulations but does not give 'positive' guidance for action.[717] This leaves national institutions in disarray and the consequences can be difficult to predict.

Interestingly, in the area of fair trading the record of references for preliminary ruling from German and Swedish courts reveals considerable differences, both in terms of substance and in the nature of the referring courts. This can possibly be explained by divergences in the mechanisms of enforcement in Germany and in Sweden and in the

[716] See the rather early introduction of a Doorstep Selling Act (Hemförsälningslag, SFS 1981:1361)
[717] In this sense Knill (2001), 215 ff.

underlying ideology of the institutional framework. In the following I will try to illustrate the differences by a brief review of the case law on the consumer image of the ECJ, largely prompted by German courts and the cases on advertising restrictions that have been brought before the ECJ by Swedish courts.

7.2.1 The *Verbraucherleitbild* debate: a battle over interests or over concepts?

As discussed in the national chapters, German courts have traditionally applied a very low threshold of deception under § 3 UWG. The 10-15 percent quota of potentially deceived consumers, which is normally sufficient in order to prohibit an advert as misleading, has become proverbial. The notion of consumer used as a benchmark for this assessment (*Verbraucherleitbild*) is said to be the one of the credulous and inattentive customer.[718] Consumers are not expected to read advertising material carefully, to actively seek information or to mistrust commercials. A distinguishing trait of the system is the frequent recourse to empirical evidence, such as opinion polls or market surveys on the reactions of consumers at a given commercial message. Generally, there is an attempt to ascertain the 'actual' expectations and perceptions of consumers. Scholars speak of an empirical *Verbraucherleitbild.*[719]

European Community law does not formally establish any particular consumer image. In its case law on free movement of goods, however, the ECJ has often advanced information as a less restrictive way of providing consumer protection than outright import prohibitions and restrictions.[720] Likewise soft law Community instruments such as the first and second programmes for a Community consumer information and education policy have stressed the importance of consumer information.[721] Arguably, these documents have advanced the ideal type of an active and informed consumer willing to take advantage of the opportunities provided by a Common Market.

Most of the encounters of the *Verbraucherleitbild* in German unfair competition law with European Community law have taken place within the context of the ECJ's jurisprudence on free movement of goods. As demonstrated above even in the presence of harmonised rules in the Misleading Advertising Directive the ECJ has not considered itself prevented from testing the application of national deception standards for conformity with primary Community law on free movement of goods.

Already in the early days of European integration importers had to learn by experience the harshness of German deception standards. In the *Prantl* case, which was not in itself an unfair competition law case, the defendant asserted in passing that German competition law was one of the most rigid in the world. The consumer image on which this law was based was according to Mr. Prantl that "of an infantile, almost pathologically stupid and negligently inattentive average consumer".[722] The Court, however, did not have to take a stand on this provocative statement.

---

[718] On different ‚consumer images' in the European union see Wilhelmsson, T., 'Consumer Images in East and West' in: Micklitz, H.-W. (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa?* (Baden-Baden: Nomos, 1996c), 53 ff.

[719] For a detailed discussion see above Ch. 5.5.1.2.

[720] See among others Case C-261 *Walter Rau* [1982] ECR 3961; Case C-178/84 *Commission v. Germany (beer purity)* [1987] ECR 1227.

[721] See OJ 1975 C 92/1; OJ 1981 C 133/1.

[722] Case 16/83 *Criminal proceedings against Karl Prantl*, [1984] ECR 1299, para 1306.

The discussion on the existing discrepancy in the notion of 'consumer' in German unfair competition law and in Community law and policy intensified with the *GB-INNO* and *Yves Rocher* judgments of the Court. Although the ECJ did not make any specific statement on a European consumer image it insisted again on information as the foremost instrument of protecting the interests of consumers.[723] Abstract prohibitions such as the restriction on eye-catching price-comparisons in § 6e UWG were dismissed by the Court as based on a paternalistic attitude to consumers and being disproportionate to the aim of consumer protection.[724] In German legal literature the decisions were seen to promote a normative consumer image of the reasonable and attentive average consumer with unlimited capacity to absorb and process information and to make rational decisions on this basis. Some speak of '*der mündige Verbraucher*', i.e. the consumer who has come of age.[725] In the language of economic theory, the Community is sometimes critically seen to proceed from the unrealistic model of the rational man ('*homo economicus*') accepted in neo-classical economics.[726]

Without taking a stand on a given ideal type consumer, the ECJ has on a number of occasions made very categorical assessments about consumer expectations and the likelihood of consumer deception in particular factual circumstances. In the *Pall* case the referring German court was inclined to see deception in the use of the sign ® next to a trade mark, when this trade mark was not registered in the country of marketing. The ECJ ventured a different estimation as to the relative importance of specific kinds of information for consumers and undertook the balancing of interests itself:

> ... even assuming that consumers, or some of them, might be misled on that point, such a risk cannot justify so considerable an obstacle to the free movement of goods, since consumers are more interested in the qualities of a product than in the place of registration of the trade mark.[727]

Similarly specific was the position of the Court in the *Clinique* case. The Court made a brief analysis of the facts, stressing in particular that the products were presented as cosmetic products and were not sold in pharmacies, but in perfumeries. Importantly, the Court attached particular attention to the fact that the same product was marketed in other countries and did not mislead consumers there.

---

[723] See BGH GRUR 1994, 306 ("Yves Rocher II") confirming the ECJ's ruling and dismissing the injunction claim.

[724] "Moreover, the prohibition in question goes beyond the requirements of the objective pursued in that it affects advertising which is not at all misleading and contains comparisons of prices actually charged, which can be of considerable use in that it enables the consumer to make his choice in full knowledge of the facts." Case C-126/91 *Schutzverein gegen Unwesen in der Wirtschaft e. V. v. Yves Rocher GmbH* [1992] I-2361, para 17.

[725] See Leible (1994), 179, with further references.

[726] See Reuter, 'Neues zu Euro-Marketing und §§ 6e, 7 UWG: Der EuGH-Entscheid zu Schlussvekauf und Preisgegenüberstellungen' (1990) *BB*, 1649 ff.; On the conceptual model of homo economicus in European law, see Doepner, 'Verbraucherleitbilder zur Auslegung des wettbewerbsrechtlichen Irreführungsverbots' (1997) *WRP*, 999 ff.; Doepner/Hufnagel (1998), 177 ff.

[727] Case C-238/89 *Pall* [1990] ECR I-4827, para 19.

> Finally, according to the very wording of the question referred, those products are ordinarily marketed in other countries under the name 'Clinique' and the use of that name apparently does not mislead consumers.[728]

On the basis of this cursory analysis the ECJ concluded that "the clinical and medical connotations of the word '*Clinique*' are not sufficient to make that word so misleading as to justify the prohibition of its use on products marketed in the aforesaid circumstances".[729] Also in this case the standpoint of the Community Court is in contradiction with the opinion of the referring national court, which inferred:

> ... the claims in the application are pertinent since it is possible that an appreciable portion of the sector of the market concerned might attribute prophylactic or curative medical effects on the skin to Clinique range of cosmetics[730]

The ECJ's decision in *Clinique* has been subject to criticism on multiple grounds and not only in the German literature.[731] It has been claimed that the Court has proceeded from the unrealistic assumption of a common European public opinion (*Verkehrsauffassung*).[732] Thereby the Court had disregarded the possibility of linguistic, cultural and other differences between consumers in different Member States. [733] More importantly, the Court was criticised of having pre-empted a more careful investigation on the real perceptions of German consumers that could have been undertaken by the referring court.[734]

The above-referred *Nissan* judgment interpreting the Misleading Advertising Directive provoked a turbulent reaction in legal doctrine and had repercussions on the consumer image debate. The judgment seemed to address two controversial issues in the German doctrine on the standard of deception, namely the requirement of relevance of a message for consumers' purchasing choice and the threshold of deception. The ECJ underlined the importance of ascertaining that the advertising claims affect a significant number of consumers in order to qualify an advert as misleading. The reference to 'significant number' was, however, made in two instances with slightly different connotations. Concerning the claim that the cars were new the ECJ instructed the national court to consider whether awareness of the fact that the cars advertised as new were registered before importation "would have deterred a significant number of consumers from making a purchase." The interpretation advanced in the ruling appeared to emphasise the requirement in Art. 2(1) *in fine*, qualifying advertising as misleading if likely to affect the economic behaviour of the recipients.[735] This requirement could be understood, as in German law, in the sense that the advertising

---

[728] Case C-315/92 *Clinique* [1994] ECR I-337, para 21.
[729] *Ibid.*, para 23.
[730] See C-315/92 *Clinique* [1994] ECR I-337, Opinion of AG Gulmann, para 2, sixth indent, at I-320.
[731] See Weatherill (1999), 56, 69.
[732] See Leible (1994), 179; general on the concept of a European 'Verkehrsauffassung' see Streinz, 'Gibt es eine europäische Verkehrsauffassung?' (1991) *Zeitschrift für Lebensmittelrecht*, 242 ff.
[733] The often advanced criticism that the decision disregarded a linguistic problem which was probably specific to the German language (meaning hospital) does not consider the fact that the term 'Clinique' has the same connotation in at least three other Community languages: English (clinic), French (clinique) and Danish (klinik). The 'majority' logic of the Court might have therefore been justified. For criticism, see Weatherill (1999b), 56.
[734] See Leible (1994), 179.
[735] Art. 2 (2) Directive 84/450. In this sense Schricker (1990), 112 ff.

should be in any way likely to attract the attention of the customers.[736] The Community Court, however, arguably required that a significant number of consumers had actually made their purchasing decision while the risk for deception was still present.

A different role was attached to the number of affected consumers in the interpretation of the second claim, namely that the cars were cheaper. The national court was instructed to establish, whether "the decision to buy on the part of *a significant number of consumers* to whom the advertising in question is addressed *was made* in ignorance of the fact that the lower price of the vehicles was matched by a smaller number of accessories on the cars sold by the parallel importer".[737] Here it appears that the number of consumers is decisive not only regarding the relevance of the advertising for consumers' decision to purchase a good but also for setting the threshold for ascertaining deception. Only a significant number of misled consumers would justify a prohibition, implying a high threshold for deception. The Court, moreover, appeared to demand an evidence of actually deceived consumers. Both the requirements of significant numbers and of actual deception were seen to stand in blatant conflict with the wording of the Directive.[738]

Following the *Nissan* ruling, German courts and the BGH in particular have made a visible effort to square the circle and strike a balance between the interest of unimpeded intra-Community trade and sustaining a reasonable standard of deception. In two cases where the circumstances were very similar to the *Nissan* case, the BGH refused to enjoin an advert for import cars deviating from the standard model sold in Germany, if the importer sufficiently clearly indicated that the car is imported ("*EG-Neuwagen*").[739] As to the warranty, dealers were considered under a duty to inform the customers, that the period was shortened only if more than two weeks of warranty period had expired.[740] In both decisions the BGH diligently refers to and interprets the ECJ's ruling in *Nissan*.

Only a few years later a more specific test of the compatibility of German deception standards – and of the underlying *Verbraucherleitbild* – with European Community law was carried out by the ECJ. In the *Mars* decision the Court was asked to take a stand on the application of the German provision against misleading advertising to a particular factual situation and on the compatibility of this application with Art. 28 (ex Art. 30) EC Treaty. At the centre of the dispute was the importation and marketing in Germany of ice-cream bars (of the Mars, Snickers and Bounty brands), whose quantity was increased during a short publicity campaign and the wrapping marked '+10%'. The plaintiff in the main proceedings, the *Verein gegen die Unwesen in Handel und Gewerbe* (Association against Improper Practices in Trade and Business), claimed that such an advertising was capable of misleading consumers in a two-fold manner. The

---

[736] According to Schwanhäuser: "Nach bisheriger Auffassung reicht es aus, wenn die beanstandete Angabe geeignet ist, die Kauflust des Verkehrs „irgendwie" – im Sinne der allgemeinen Wertschätzung – zu beeinflussen." Schwanhäuser (1988), 180 ff.

[737] See Case C- 373/90 *Nissan* [1992] ECR I-131, para 16.

[738] See Sack, 'Die Beurteilung irreführender Webung für Importfahrzeuge aus EG-Staaten nach EG Recht' (2000) WRP, 23 ff.; Sack (1998b), 242.

[739] BGH GRUR 1225 ("EG-Neuwagen II").

[740] BGH GRUR 1122 ("EG-Neuwagen I").

presentation was first likely to induce consumers into thinking that the price of the marketed ice ream bars remained the same as previously, something that could not be guaranteed under a free price-building system.[741] Secondly, since the band marked '+10%' occupied more than 10 percent on the wrapping the new presentation would give the impression to the consumer that the volume and weight of the product had been increased to an extent greater than indicated.

The Court did not accept these arguments. Against the contentions of the *Verein* that a not insignificant number of consumers would be misled by the presentation in point, the ECJ held:

> Reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of a publicity marking relating to an increase of a product's quantity and the size of that increase.[742]

Thus, the stage for the conflict of '*Leitbilder*' was set: the reasonably circumspect consumer of Community law on the one hand, against the casual and gullible customer of German unfair competition law, on the other. Or, as some writers put it: 'Lieschen Müller' or 'M. Dupont'?[743] In spite of the many nuances in scholarly opinion, legal commentators indeed aligned in two camps of defenders and, respectively, of critics of the German consumer image.[744]

In the legal literature the traditional German positive or empirical consumer image has been praised as being in better conformity with reality. The low threshold for ascertaining deception allegedly provided for a high level of consumer protection. To counter objections against the low 10 percent barrier for deception, Kisseler has coined the much-quoted phrase that, in the context of a large German market, 10 percent of misled consumers actually are equivalent to millions of consumers.[745] In the same vein, the method of market surveys has been commended as guaranteeing that the consumer image used by the courts is based on actual perceptions and not on a normative and abstract notion of public opinion.[746] Kisseler defends this method by using analogy with the high reliability of opinion polls in politics.[747]

---

[741] In the event this was the case, the practices were suspected of constituting breach of the antitrust rules of the German GWB, restraining producers from imposing binding prices on the distributors.
[742] Case C-470/93 *Mars* [1995] I-1923, para 24.
[743] See Keilholz (1987), 393.
[744] See Reese, 'Das "6-Korn-Eier"-Urteil des EuGH –Leitentscheidung für ein Leitbild?' (1998), *WRP*, 1035 ff.
[745] „Unter diesen Voraussetzungen muss man wissen, dass eine Quote von zehn bis fünfzehn Prozent einem Bevölkerungsanteil von acht bis zwölf Milionen Bundesbürgern entspricht. Würde man deshalb von dieser gewährten Methode (der Demoskopie) abgehen, dann müsste man zugleich even die Meinung vertreten, dass acht bis zwölf Millionen Bundsbürger irregeführt werden dürfen, weil sie einen unbeachtlichen Teil der Verbraucherschaft darstellen". Kisseler (1994), 5. Of the same opinion Deutsch (1996), 541, at 546.
[746] See Deutsch (1996), 541 ff., at 546 with further references. On recent developments in the case law, see Köhler/Piper (2002), § 3, Rdnr. 139, 986.
[747] „Dabei bietet dieses Mittel eine wirklich repräsentative Möglichkeit die Meinung der Verbraucher zu erfassen. Schliesslich wird in allen Ländern der Gemeinschaft die Demoskopie im politischen Bereich eingesetzt und die dabei erzielten Ergebnisse stellen doch in der Regel einen sehr klaren Annährungswert an tatsächliche Meinungen, insbesondere im Vorgriff auf Wahlen dar. ...Die gleiche Glaubwürdigkeit geniesst die Demoskopie in Deutschland auch hinsichtlich der Ergebnisse von Meinungsumfragen im Bereich des Wettbewerbsrechts, und zwar zu Recht, weil dort die Fehlerquoten ebenso gering sind wie bei der Demoskopie im politischen Bereich". Kisseler (1994), 5.

In the quarter of the critics, the German *Verbraucherleitbild* has been criticised as exaggerated and patronizing. It has been pointed out that a threshold of 5 percent of potentially misled consumers (occasionally used by German courts) corresponds to the rate of mentally retarded students in need of special assistance.[748] In a polemic exchange with Kisseler, Sosnitza noted that a 10 percent deception threshold implies that 90 percent of consumers (or 72 Million German citizens) have not been misled.[749] The constitutional and competitive implications of this fact are being brought out. Those who correctly understand a message are prevented from commercial information that could probably be valuable to them.[750] Importantly, a number of authors have questioned the core argument of the defenders of a high standard of deception, namely that it is equivalent with high level of consumer protection. - increasing insistence on consumer protection as a more legitimate filter for definition of the public interest.[751]

Upon the backdrop of this doctrinal controversy it is clear that German courts have been in disarray. In an attempt to regain the lost world of doctrinal cohesion, a solution has again been sought from the European Court of Justice in the *Gut Springenheide*[752] case. It should be noted that the case concerned the interpretation of the deception standard – and indirectly the consumer image – in product-specific acts of secondary Community law, namely Council Regulations on the common organisation of the market of eggs (Regulation 1907/90 and Regulation 1274/91). At the centre of the main proceedings was the marketing of eggs with the description on the package: '6-Korn – 10 frische Eier' (six-grain – 10 fresh eggs). In each package a slip of paper was inserted, describing the advantages of eggs laid by hens fed on six different varieties of cereals. In fact only 60 percent of the hens' feed was composed of the six types of cereals. The Federal Administrative Court had to ascertain whether this promotion was in conflict with Art. 10(2) of Regulation 1907/90 as misleading.

The German Federal Administrative Court set out to clear the uncertainty once and for all. The German Court referred the following three questions:

> In order to assess whether statements designed to promote sales are likely to mislead the purchaser, must the actual expectations of the consumers to whom they are addressed be determined, or is the aforesaid provision based on a criterion of an objectified concept of a purchaser, open only to legal interpretation.
> If it is consumers' actual expectations which matter, the following questions arise:
> - Which is the proper test: the view of the informed average consumer or that of the casual consumer?
> - Can the proportion of consumers needed to prove a crucial consumer expectation be determined in percentage terms?
> - If an objectified concept of a purchaser open only to legal interpretation is the right test, how is that concept to be defined?

[748] Schricker (1975), 225; Emmerich (1990), 203.
[749] Sosnitza (1995), 204; cf. Keßler (1990), 73 ff.
[750] Sosnitza (1995), 181 ff. Similar Keßler (1990), 73 ff.
[751] Beater (2000a), 82 ff.
[752] Case C-210/96 *Gut Springenheide* [1999] I-4657.

The questions were carefully formulated to cover all the nuances of the German doctrinal discussion. The normative vs. the positive consumer image, the role of opinion polls, the threshold of deception – all important elements for a coherent, logical and all-sided analysis were presented in manner conducive for an exhaustive response.

Those who expected a clear and unambiguous answer remained, however, disappointed. In one respect the ECJ indeed attempted to be comprehensive, namely by addressing the standard of deception not only in the Regulation in point, but also in other Community acts and in the case-law of the Court under Arts. 28-30 (ex Arts. 30-36) EC Treaty.[753] Otherwise, the Court failed the expectations first by melting the three questions and answering them together.[754] Referring to its previous case law the Court noted that when it had to determine whether a description or statement was liable to mislead, it had usually taken into account the "presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect, without ordering an expert's report".[755] The same guidance appears in a rather authoritative form in the summary response to the reference, where it says that "the national court *must* take into account" the said expectations (my italics).[756] In this part the decision certainly pleased those who wanted to see German standards revised.

The Court, however, proceeded further and opened for preserving national institutional idiosyncrasies. It stated that it "has not ruled out the possibility that in certain circumstances at least, a national court might decide, in accordance with its own national law, to order an expert's opinion or commission a consumer research poll for the purpose of clarifying whether a promotional description or statement is misleading or not."[757] In the summary of the preliminary ruling the same idea is expressed somewhat more clearly "where the national court has particular difficulty in assessing the misleading nature of the statement".[758] Moreover, in the absence of any Community provision on this point the ECJ left it to the national court to determine the percentage of consumers misled by a statement "sufficiently significant to justify, where appropriate, banning its use".[759] Interestingly in the proceedings, the German Government submitted the view that where the statement in point addressed all consumers, judges should be able to decide whether a statement is misleading without recourse to market surveys and opinion polls as they belong to the general public.[760] Only where a statement addressed a clearly defined group, like experts or children, were surveys warranted.[761]

---

[753] See the critique of this catch-all approach in Reese (1998) *WRP*, 1035 ff., at 1038.
[754] See Case C-210/96 *Gut Springenheide* [1999] I-4657, para 27.
[755] *Ibid.*, para 31.
[756] *Ibid.*, para 37.
[757] *Ibid.*, para 35.
[758] *Ibid.*, para 37, *in fine*.
[759] Case C-210/96 *Gut Springenheide* [1999] I-4657, para 35-36.
[760] It is interesting to note that the Swedish Government also intervened in the proceedings. It advocated a normative consumer model ("how consumers in general could be assumed to understand [a statement]") and against the need for opinion polls. Case C-210/96 *Gut Springenheide* [1999] I-4657, Opinion of AG Mischo, para 49.
[761] *Ibid.*, Opinion of AG Mischo, para 51-53. The German Government asserted in particular: "Only when the legal rule covers all consumers and is intended to protect them from the danger of being misled and the

The judgment left many questions unanswered. From the vague statements it was hard to elicit what kind of 'certain circumstances' would justify recourse to empirical surveys and, more importantly, on what basis shall the national court determine the percentage crucial for banning a misleading statement. The most important crux in the German *Verbraucherleitbild*, the customary low percentage of deceived consumers, remained seemingly unaffected by the judgment. Another important issue, namely the relation between national deception standards and the deception standards in binding Community legislation, in acts of minimum harmonisation and in the context of Community law on free movement of goods, likewise did not receive a conclusive answer.

More precise response on this question was received in the *Estee Lauder* case decided two years later.[762] From this ruling it appears that the European *Leitbild* of the 'average consumer', reasonably well informed and reasonably observant and circumspect' should be applied when ascertaining deception under binding Community Directives and when trying the compatibility of national deception standards with Community rules on free movement of goods. But even in this test the national court was left free to commission market surveys and to set the particular threshold of deception. The Court also emphasizes that one justification for deviation from *Verbraucherleitbild* could consist in 'social, cultural and linguistic factors' make a given term mean something different to the German consumer as opposed to consumers in other Member States.

The Court proved less tolerant for differences in national perceptions in the case *Adolf Darbo.*[763] The case concerned interpretation of the provisions aimed against fraud in Directive 79/112/EEC on the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer and in the implementing provisions of the German Act on Foodstuffs and Consumer Products (*Lebensmittel- und Bedarfsgegenständegesetz*, LMBG). The plaintiff in the main proceedings, the *Verein gegen Unwesen in Handel und Gewerbe Köln eV*, claimed that the designation 'naturally pure' used for a jam that contained the jellying agent 'pectin' as well as residues of lead and cadmium, should be prohibited as misleading to consumers. The Court underlined anew that in assessing whether an appellation or advertising is misleading the national court should take into account "the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect".[764] However, in contrast to *Gut Springenheide* and *Estee Lauder*, the Court undertook itself the test of determining possible deception.

An additional nuance that has crept into the assessment is the increased emphasis on the connection between relevance of certain product feature and the willingness of consumers to apprehend information about this feature.

---

promotional statement in question is also addressed to all consumers does the question of law prevail over the question of fact." *Ibid.*, para 52.

[762] Case C-220/98 *Estee Lauder ('lifting')* [2000] ECR I-117.

[763] Case C-465/98 *Adolf Darbo AG* [2000] ECR I-2297.

[764] *Ibid.*, para 21.

> ... consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients the display of which is required by Article 6 of the Directive.[765]

This argument obviously is intended to counteract objections about information overkill and the limited capacity of consumers to process and grasp abundant product information. The answer of the Court is: those who search will find! And, conversely, those who do not search are obviously not interested to find. This position may be criticised as detached from real-life markets and consumers. Nevertheless, one should again see this analysis as a normative one, weighing consumer interests of correct information against the interests of open markets.

Despite the lingering ambiguities, the case law of the Court gives now a more clear expression of the preference of the Community lawmaker and judiciary for the 'average consumer' as a benchmark in determining the standard of deception. In the absence of 'particular difficulties' for ascertaining deception, or cultural, linguistic or other specificities of national consumers, national courts are invited to apply this normative model. At the same time, the Court wisely refuses to come with a general and binding rule on an issue so much dependent on the circumstances in the individual case. It still remains difficult to predict under what circumstances will the Community Court be ready to give more precise instructions on applying Community law to the facts of the case, and when will this task be reserved for the national court.

The described debate on the consumer image very sharply demonstrates the difficulties in the communication between national judiciaries and the Community Court. National courts formulate their questions in the context of national doctrinal and judicial discourse and are in search of answers that would allow them to fit European law in a harmonious way within the complexity of national legal constructs. The Community Court, conversely, is concerned to ensure an effective process of market (and legal) integration. It confines itself to the specific situation and avoids making too broad and general statements of interpretation. In this way the Court retains the necessary margin of discretion to decide differently in a future situation of alleged infringement of the basic Community freedoms. Put incisively, the European and the national judiciaries often talk at cross-purposes.

Beater rightly notes that the debate on the consumer image in German and in European law suffers from serious distortions, because it proceeds from an implicit assumption of uniformity of problems and objectives pursued in national and European law.[766] In reality, however, whereas national courts focus on substantive unfair competition law, the European Court always takes into account not only, and not primarily, substantive law criteria, but chiefly the approximation and harmonisation objectives immanent in European integration.[767] The primary task of the Luxembourg Court is not to choose the 'best' consumer image in terms of substantive outcome, but to ensure the smoothest possible coexistence of differing expectations and normative models in an integrating market and polity. As the Court has repeatedly stated:

---

[765] *Ibid.*, para 22, with reference to Case C-51/94 *Commission v. Germany* [1995] ECR I-3599, para 34.
[766] See Beater (2000a), 77 ff.; Beater (2000b), 967 ff.
[767] Beater (2000a), 78.

> In a common market system consumer protection and fair trading ... must be guaranteed with regard on *all sides* for the fair and traditional practices observed in the various Member States.[768]

Seen in this light, it is questionable whether the much-discussed conflict of *Verbraucherleitbilder* in European and in German law has a genuine existence and basis. At a more general level Dehousse has described this as 'the level of analysis problem'.[769] According to Dehousse European and national law, being systems of different level, may nominally enact similar legal regulations and entertain similar policies, but they actually pursue different objectives. Taking the example of environmental regulation, while at the national level rules and policies are drafted with the dominant objective of achieving the optimal level of environmental protection (material objective), at the European level the rules pursue primarily the promotion of European integration. A high level of environmental protection comes only as a secondary objective. By applying the criteria developed for judging the success of environmental policy at the national level and applying it at the Community level, a process of 'homogenisation' takes place, which however disregards the different objectives pursued at the different levels.

In a much quoted and often repeated statement, the Court of Justice held that "the legislation of Member States must not crystallize given habits so as to consolidate an advantage acquired by national industries concerned to comply with them".[770] Similar idea of evolving consumer expectations with the evolution of the common market is reflected in another popular quotation:

> Consumers' conceptions, which vary from one Member State to the other, are also likely to evolve in the course of time within a Member State. The establishment of the common market is, it should be added, one of the factors that may play a major contributory role in that development.[771]

The Court thereby implied consumer habits instilled by continuous consumption within the framework of a homogenous national market. The Court's jurisprudence in respect to the German prohibition of misleading advertising and the associated consumer image can likewise be explained as part of the efforts of the European judiciary to prevent crystallization. This time, however, not of consumer habits, but of habits of courts and litigants created in the course of continuous litigation within a closed national institutional model of enforcement. It is less convincing to contend that German consumers are collectively more gullible and therefore more likely to be misled by the '+10%' advertising campaign of 'Mars' ice-cream bars or as to the health properties of *Clinique* cosmetic products. What is at stake are the expectations

---

[768] See Case C-16/83 *Prantl* [1984] ECR 1299, para 2; Case C-179/85 *Commission v. Germany ('pétillant de raisin')* [1986] ECR 3879, para 11.

[769] Dehousse (1994), 761 ff., at 765 with reference to Singer's classical analysis of comparative politics, Singer, 'The Level of Analysis Problem in International Relations' in: Knorr/Verba (eds.), *The International System: Theoretical Essays* (Princeton, NJ: Princeton University Press, 1961), 77 ff.

[770] Case C-170/78 *Commission v. United Kingdom* [1980] ECR 417, para 2; Case C-178/84 *Commission v. Germany* (purity requirement for beer) [1987] ECR 1227, para 32. See Weatherill (1999), 51.

[771] Case C-178/84 *Commission v. Germany* [1987] ECR 1227, para 32.

of institutional actors – prevailingly competitors and trade associations specialised in litigation, as well as the well rehearsed way of reasoning of a network of courts, practising lawyers and legal scholars.

The problem can also be analysed in terms of institutional participation. The German conceptual model of consumer has evolved in the course of decades of intensive enforcement of German unfair competition law. As seen in the previous chapters, competitors' interests have massively dominated the process of enforcement through the generous access of competitors and business associations to the adjudicative process. The low threshold of deception must consequently be seen not as a product of exaggerated concerns for consumers, but rather as a bias in favour of established competitive positions. Few, if any, of the precedents quoted as establishing the 10 percent threshold of deception in German law, have been set on the initiative of consumer organisations. Instead it has been competitors and Wettbewerbsverbände that have systematically brought new cases before the courts and acted as avengers of the allegedly disadvantaged consumer minority. As argued earlier, the courts have limited influence over the influx of cases and are in their information heavily dependent on the litigants. Affected parties that lack legal standing can not influence the decisions by courts. It is thus repeat-players in litigation under UWG that have stood for information about and presentation of the reality of markets, including perceptions of consumers and the interests involved.

This incremental and long-term process has crystallised institutional behaviour and institutional expectations of the relevant actors. The accessibility of courts and their generous tackling of the standards of UWG have encouraged the litigiousness of competitors and of the Wettbewerbsverbände. The process has not the least been promoted by an impressive apparatus of lawyers specialised in unfair competition law and by abundant commentaries and legal writing on the part of scholars and practitioners.[772] German entrepreneurs have arguably come to adapt to this institutional environment. Receiving and voluntarily complying with pre-trial notifications, or seeking themselves recourse to litigation for competitive purposes has been internalised as part of the institutional behaviour on the German market. Importantly, for decades, this process has been relatively well insulated from outside influences. Neither the legislative, nor the judicial processes have provided channels for effective influence and incorporation of the interests of foreign entrepreneurs or of foreign consumers in the decision-making process.

7.2.2 Defending the paternalist state

Turning to the discourse of Swedish courts with the European judiciary in the area of fair trading law, the topics, style and general direction of is quite different. The amount of cases in the filed of fair trading referred to the Luxembourg Court by Swedish courts is predictably much lower. In fact we will discuss only two cases. This is easily explained by the Sweden's limited experience of EU membership, by the size of the

[772] Notably, a number of judges have throughout the years produced voluminous commentaries on unfair competition law and procedure, cf. Pastor/Ahrens (2001); Gloy, *Handbuch des Wettbewerbsrechts* (München: Beck, 1994); Köhler/Piper (2002).

jurisdiction, but also by the model of controlled and centralised enforcement discussed earlier.

7.2.2.1 De Agostini and the Swedish prohibition of children advertising

The *De Agostini* case discussed above did not refer only to the interpretation of the Television Directive. One of the major questions was whether the Swedish prohibition could be seen as conflicting with Community rules on free movement of goods and services. Obviously, a positive answer to this question would imply that the ban would be precluded also in respect to domestic broadcasters such as TV4. On the basis of the *Keck* jurisprudence commentators professed that the Swedish prohibition of children advertising would be sustained since being a 'selling arrangement'. Surprisingly, the Court did not repeat its Keck formula. Using a very careful language, it seemed to leave the 'door' of Art. 28 (ex Art. 30) EC Treaty open ajar for possible more extensive interpretation:

> As regards the second condition, it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.
>
> Although the efficacy of the various types of promotion is a question of fact to be determined in principle by the referring court, it is to be noted that in its observations De Agostini stated that television advertising was the only effective form of promotion enabling it to penetrate the Swedish market since it had no other advertising methods for reaching children and their parents.[773]

However, the opportunity for more rigorous control of national legislation was respectfully left to the referring court. Interestingly, without taking a clear stand on the issue of whether the prohibition contravened Art. 28 (ex 30) EC Treaty in the first place, the ECJ urged the national court to consider whether the measure was justifiable under the 'mandatory requirements' test and under Art. 30 (ex 36) EC Treaty. As commentators have noted, the Court seemed to "amalgamate the rules of *Cassis* and *Keck* into one test."[774]

Similar mixture of activism and restraint was demonstrated on the issue of compatibility of the Swedish prohibition with the free movement of services. Since television advertising is consistently treated by the ECJ as a service, the ban on such advertising constituted a clear case of restriction of the free movement of services.[775] By not mentioning the criterion of discrimination as necessary for a measure to come under Art. 49 (ex 59), the Court reaffirmed its settled case law that also indistinctly applicable measures on advertising can be contrary to the Treaty rules on free movement of services where they restrict this movement and cannot be justified by objective of general interest. At the same time the ECJ showed respect for the policy concerns underlying the national prohibition and entrusted the final decision on proportionality possible grounds for exemption to this court.[776] In the legal literature

---

[773] Joined Cases C-34/95 & 35/95 *De Agostini & TV Shop* [1997] ECR I-3843, para 42-43.
[774] Greaves (1998), 318.
[775] *Ibid.*, para 50.
[776] *Ibid.*, para 54.

the case was commented as a step towards relaxing the *Keck* formula.[777] Importantly, the ECJ seemed to invite the national court to make a critical evalation of the national regulatory approach. Although the decision was not preemted the express reference to one specific fact of the case, namely the difficulty of the importer to penetrate the national market due to the lacking opportunities to advertising its product.

Back in Sweden, the Market Court had to decipher the laconic guides provided by the ECJ. However, given the rather open-ended formula of the ECJ's ruling the Market Court after lengthy deliberations the Market Court did not consider itself empowered to override a firm and consistent policy line followed by the Swedish political process. With one dissenting opinion the Swedish prohibition was upheld.[778]

7.2.2.2 Gourmet and the Swedish prohibition of alcohol advertising

The second encounter of the ECJ with Swedish marketing practices law and with the KO was in the *Gourmet* case.[779] Like in *De Agostini*, at the heart of the case was not a typical rule of fair trading law but rather using the general clause of the MFL as a short-cut to enforcement of advertising prohibitions in so-called 'annex' legislation. The case concerned in particular the prohibition of advertising of wine, spirits and strong beer (with an alcohol content above 3,5 percent per volume) in periodicals stipulated in the Act on Alcohol Advertising of 1978.[780]

Similar to *De Agostini*, the *Gourmet* case touched upon one of the very sensitive strings of Swedish public policy with venerable history and emotional charge, namely alcohol policy. A policy of moderating alcohol consumption has been an integral part of the Swedish regulatory tradition since at least the early 19th century and has its roots in a Lutheran moralist outlook, but also in a background of excessive alcohol consumption and abuse.[781] The teetotallers movement (nykteriströrelsen) was among the first broad-based popular movements to arise in Sweden in the 1830s and had a particularly strong political influence during the 19th and the first half of the 20th century. In an official referendum held in 1922 a proposal of a total ban on alcohol was rejected only by a narrow majority of 28,3 against 27,2 percent of the total number of those entitled to vote. Among the instruments for reducing alcohol consumption throughout the years counted an early socialization of all trade with wine and spirits, high taxation, restrictive regime on serving alcoholic beverages in public places and even a personal ration-book for wine and spirits (motboken) between 1914

---

[777] See Greaves (1998), 318.

[778] MD 2000:4 ("De Agostini").

[779] Case C-405/98 Konsumentombudsmannen (KO) v Gourmet International Products (GIP) [2001] ECR I-1795.

[780] 2 § alkoholreklamlagen (SFS 1978:763). The Act introduced a sophisticated system of control over alcohol advertising, building on a combination of express prohibitions, prescriptions and KOV guidelines. See Ch. 5.4.2.4. Interestingly, already back in 1976 the Commission devoted some attention to the question of possible restrictive effects of the proposed legislation on free trade within the framework of GATT and EFTA. The Commission, however, quickly reached the conclusion that the relevant international agreements allowed exemptions from the principles of free trade on grounds of protection of human life and health. See SOU 1976:63, 192 f. Since 1 January 2000 the provisions of this act were transferred largely unchanged to the Alcohol Act, cf. 4:8-13 alkohollagen (SFS 1994:1738).

[781] For a brief account of the history of alcohol policy in Sweden, see prop. 1998/99:134, 28 ff. Warnling-Nerep refers to earlier examples of 'public' measures restricting alcohol consumption dating back as far as 1622; see Warnling-Nerep, 'När svenska alkoholrestriktioner möter europeiska dryckestraditioner' (2002-03) *JT*, 991 ff.

and 1955.[782] If we recall the discussion on different public interest justifications for regulatory intervention, Swedish alcohol policy may be classified as 'self-paternalist'. Individuals (majority voters) decide to preclude or severely limit certain consumption choices, "so that they will be prevented from yielding to momentary temptations which they deem harmful to themselves."[783]

Restrictive alcohol policy was one of the 'hot potatoes' in the negotiations leading to Swedish membership in the Union and remains a recurrent subject of controversies.[784] As a result of adapting to the requirements of Community law Sweden gradually dismantled important bulding blocks of the system of measures restricting alcohol consumption.[785] In 1996 the Government appointed an Inquiry Commission to review the regime of alcohol advertising taking into account the changed conditions for trade and consumption of alcohol.[786] In response to mounting pressure from the European Coommission in 1998 a new round of legislative deliberations was launched for comprehensive revision of the Alcohol Act with the overriding objective to strike the impossible balance between traditional Swedish regulatory values and respect for the common market. The results from the Inquiry Commission on alcohol advertising were integrated in the Government Bill on comprehensive amendments of the Aclohol Act.

The 1998 Commission Report paid special attention to the relation of Swedish advertising restrictions with European Community law. Generally, the Inquiry Commission took the view that in the light of the *Keck* judgment advertising restrictions would not fall under the scope of Art. 28 (ex Art. 30) since they only related to 'selling arrangements'. Alternatively, the restrictions were regarded as exempted from the prohibition of Art. 28 by force of Art. 30 (ex Art. 36) and as satisfying mandatory requirements of consumer protection under the *'Cassis de Dijon'* doctrine.[787] One problem with the regime was that light beer (up to 2,25 percent alcohol content per volum), which was a uniquely Swedish product, did not fall within the definition of alcoholic beverage and could thus be advertised freely in all media. Swedish brewers who were well-adapted to the restrictive Swedish alcohol policy used the same brands for both light and strong beer. Thereby advertising of light beer had the indirect effect of promoting the sales of strong beer as well. Under these circumstances importers who did not produce light beer were clearly placed in a disadvantageous position. The Swedish Competition Agency had opined that this

[782] Retail sale of alcoholic beverages was handed over to special municipal companies (*systembolag*) as early as 1855. Since 1873 these companies were directed to abstain from profit (*desinteresseringsprincipen*). In the 1920s also wholesale trade and production of alcoholic beverages were monopolized. The ration-book was introduced in 1914 and was abolished in 1955. The same year the municipal *systembolag* merged into a single state company called 'Systembolaget'. See prop. 1998/99:134, 29 f.

[783] Calabresi/Melamed (1972), 1113.

[784] On the complex relationship between Swedish alcohol policy and Community law, see Warnling-Nerep (2002-03), 991.

[785] With Sweden's accession to EU the monopoly on production and wholesale trade was abolished. In the wake of the *Franzén* ruling of the ECJ licensing rules were liberalized and supervision fees reduced. See Case C-189/95 *Franzén* [1997] ECR I-5909; prop. 1998/98:134, 30 ff., 76 ff.

[786] The objective has not been liberalisation, but rather sharpening of the advertising restrictions which were seen to play an important role in a climate of plurality of actors and widened access to alcohol. See SOU 1998:8, 304, Dir. 1996:33.

[787] The restrictions were based on genuine health policy grounds, which the Community Court had recognised as legitimate in its *Aragoneza* judgment. SOU 1998:8, 211 ff.

regime could not be regarded as neutral from a competition point of view.[788] From a different perspective, the status quo was also criticized by teetotaler organizations as undermining the effect of the prohibition.

The Inquiry Commission took these concerns seriously. To avoid any suspicion of protectionism and in order to make the prohibition more effective, the Commission proposed to preclude any possibility of advertising light beer under the same brand and commercial signs as strong beer. Thus, by making the prohibition even more comprehensive any accusation of protectionism could be preempted and the public health justifications for the restrictions would be more trustworthy. This proposal, however, provoked powerful protest on the part of the affected industry. The Swedish Brewers Association, the Advertising Association and the Association of Wine and Spirits Wholesalers raised strong objections on grounds of possible conflict with freedom of expression and trade mark law.[789] The Government conceded that in view of the increasing role of business self-regulation, there was no need to change the existing regime. Surprisingly, the question of the relation of the existing selective prohibition with Community law was not addressed in the Government Bill.[790] The rules under the previous Alcohol Advertising Act were consequently incorporated in the Alcohol Act with only slight modifications.[791]

Against this backdrop the *Gourmet* case represented one more challenge to the Swedish alcohol policy. The defendant in the case, Gourmet International Products (GIP), published in Sweden the magazine *Gourmet* with a clear gastronomic profile. The magazine was distributed in two editions. The first was directed to the public at large. The second edition was available only upon subscription, whereby only 10 percent of the subscirbers (about one thousend) were private individuals. The subscriber edition was distributed with a supplement for advertisements and editorial comments. One of the issues of the subscriber edition contained three pages of advertisements for wine and whisky. The KO found the advertising in this issue to violate the prohibition in 2 § Alcohol Advertising Act[792] and to be in conflict with good commercial practice. KO applied before Stockholm City Court for an injunction restraining GIP from placing advertisements for alcoholic beverages in magazines. At this juncture GIP contended that the Swedish prohibition was contrary to Community provisions on free movement of goods and services and required the question to be referred to the ECJ for a preliminary ruling under Art. 234 (ex Art. 177).

It is interesting to observe that unlike the *De Agostini* case where KO himself sought to bring the case before the Community Court, this time the Ombudsman tried to prevent the involvement of Community institutions and appealed the decision for preliminary reference.[793] Pointing to the *Keck* and *Franzén*[794] rulings of the ECJ and to Art. 30 (ex Art. 36) EC Treaty KO claimed that the prohibition was compatible

[788] SOU 1998:8, 177.
[789] Prop. 1998/99:134, 133.
[790] The Government's attention was probably distracted by more important questions related to liberalisation of licensing and taxes, which were discussed in the same Bill.
[791] Alkohollagen (SFS 1994:1738).
[792] 2 § alkoholreklamlagen (SFS 1978:763)
[793] See MD 1999:6 ("Gourmet"I)
[794] Case C-189/95 *Franzén* [1997] ECR I-5909.

with Community law and a reference would unnecessarily delay the proceedings.[795] The Market Court dismissed these claims and upheld a broad right of lower instance courts to seek preliminary ruling from the ECJ.

With the *Gourmet* case AG Jacobs received a renewed opportunity to penetrate the 'soul' of the Swedish wefare state. As in *De Agostini*, the opinion of the AG is a passionate plead for relaxing the *Keck* doctrine and for return to a more stringent line in the ECJ caselaw on free movement of goods based on a substantive test of market access. The AG found the Swedish prohibition to be clearly within the scope of the *Dassonville* definition of measures having equivalent effect to quantitative restrictions. Furthermore he did not consider the *Keck* doctrine to be applicable since the restrictions on advertising did not apply equally in fact, but instead disproportionately prevented the access of foreign producers to the Swedish market and thus upheld engrained consumer preferences for local brands.[796] The priviliged position accrued by Swedish brewers through the advertising of light beer was inferred as a heavy-weighing argument demonstrating the differential effect of the regime in respect to domestic and foreign producers.[797]

The crucial question was whether the prohibition could withstand the test of proportionality. The AG remarked somewhat in passing that the final decision on this question should be left to the national court.[798] Then he embarked on a detailed policy and factual analysis apparently trying to limit the decision-making leeway of the national court. Three main arguments were used for substantiating the disproportionality of the measure: (i) the sweeping and extreme character of the prohibition;[799] (ii) the availability of abundant editorial material devoted to alcoholic beverages and protected under the Freedom of the Press Act,[800] and (iii) the possibility of Swedish brewers to circumvent the ban by advertising light beer. All in all, the AG was convinced that a prohibition of the kind applied by the Swedish lawmaker was restrictive of intra-Commnuity trade and disproportionate. Similar conclusions were reached on the issue of compatibility of the advertising restriction with Art. 59 EC Treaty.

The Court followed the opinion of AG Jacobs only in part. Importantly, the Court explicitly held the Swedish restrictions to constitute an obstacle to intra-Community trade under Art. 28 (ex 30) EC Treaty.[801] It referred to the 'equal access' opening in the *Keck and Mitouard* judgment[802] and to its reasoning in *De Agostini* about the possible greater impact of an outright advertising prohibition on products from other Member States.[803] In contrast to *De Agostini,* however, this time the ECJ did not leave

---

[795] With reference to RB 49:7.
[796] Case C-405/98 *Gourmet* [2001] ECR I-1795, Opinion of AG Jacobs, para 33.
[797] *Ibid.*, Opinion, para 33.
[798] *Ibid.*, Opinion, para 48.
[799] *Ibid.*, Opinion, para 55.
[800] *Ibid.*, Opinion, para 61; see also para 59.
[801] Case C-405/98 *Gourmet* [2001] ECR I-1795, para 25: "A prohibition on advertising such as that at issue in the main proceedings *must* therefore be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States." (emphasis added).
[802] Joined Cases C-267 & C-268/91 *Keck and Mitouard* [1993] ECR I-6097, para 17.
[803] Joined Cases C-34/95 & 35/95 *De Agostini & TV Shop* [1997] ECR I-3843, para 42.

the question about the restritive effect of the measure on Community trade to the national court. The Court held that "even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation" it was able to conclude that the advertising prohibition in point was "liable to impede access to the market by products from other Member States more than it impedes access by domestic products."[804] Again the conserving influence of advertising restrictions on the pattern of beer consumption and the abundance of 'editorial advertising' were the main factors tipping the balance. By taking itself the decision on the question of whether the measure is caught under Art. 28 the Court moved an important step further away from *Keck* than in *De Agostini*.[805]

On the decisive issue of proportionality the Court adopted a much more permissive attitude than the AG. It stated there was no evidence before it to suggest that the public-health grounds on which Swedish authorities relied were diverted from their purpose and used to discriminate against imports. However, the Court refused to go beyond this *prima facie* assessment and to give conclusive judgment on the issue of whether there were alternative policy instruments capable of achieving the intended public interest objectives with less effect on intra-Community trade. A judgment on this issue called for anlysis "of circumstances of law and of fact which charaterise the situation in the Member State concerned, which the national court is in a better position than the Court of Jurstice to carry out."[806] In this part of the judgment the ECJ undertakes a conscious comparative institutional analysis. Instead of tackling the substantive question of proportionality the Court prefers to first address the institutional question of who is better suited to decide in this matter. Transpiring in this analysis are constitutional concerns about the legitimacy of the Court's decisions and institutional concerns about the advantages and disadvantages of alternative decision-making processes.[807]

Concerning the compatibility of the advertising restrictions with Community rules on free movement of services, the ECJ confirmed the bold lines of interpretation drawn in its earlier jurisprudence. There was no dispute between the parties that advertising should be regarded as a service. Referring to its *Alpine* judgment[808], the Court repeated that freedom to provide services could be relied on by undertakings as against the Member States of their establishment when the service was provided to recipients established in other Community Member States.[809] Given the international character of the advertising market for the products at issue (wine and spirits) the Court had no difficulty to establish that the Swedish advertising prohibition restricted the free provision of services and intra-Community trade.[810] The proportionality test was, however, again entrusted to the national court.

---

[804] Case C-405/98 [2001] ECR I-1795, para 21.
[805] Similar Bernitz, 'Gourmet-målet – kan det diskriminerande svenska förbudet mot alkoholreklam godtas av folkhälsoskäl?' (2001a) *ERT*, 402 ff., at 422.
[806] Case C-405/98 [2001] ECR I-1795, para 33.
[807] For a comprehensive analysis of the ECJ jurispridence on Arts. 28-30 from a comparative institutional perspective, see Maduro (1998a), 150 ff.
[808] Case 384/93 *Alpine Investments* [1995] ECR I-1141, para 35.
[809] Case C-405/98 [2001] ECR I-1795, para 37.
[810] *Ibid.*, para 39.

Arguably, the ECJ's attempt in *Keck* to reduce its case-load and to enhance the predictability of its judgments by employing the formal test of 'selling arrangements' has not been particularly successful. It may again be submitted that the classification proposed by AG Tesauro's in the *Hünnermund* case, was more in line with market realities. With the stormy development of new media, the dynamic aspect of advertising is ever more apparent. Regulations and restrictions of marketing practices have clear bearing on intra-Community trade and sticking to a formalistic test would imply to allow a wide range of restrictive measures to pass the Community threshold. An alternative market access test, however, as advocated by AG Jacobs and in legal doctrine, is too elusive to be able to serve as a firm basis of the Court's caselaw. The *Keck* formula thus probably would retain its importance as a 'rule of thumb', but the list of exceptions will probably be growing.

The alternative approach that seems to be taking shape is to relax the *Keck* requirements but to entice national courts to take a greater share of responsibility in the making of Communuity law. The ECJ confines itself to pointing at the restrictive character of the measure and to conducting a *'prima facie'* test of the likelihood of the measure to achieve the intended public interest objective. The second part of the proportionality test is, however, left to the national court. As in *De Agostini*, also in *Gourmet* the Court "seems to be giving the idea of a 'job-sharing' with the national courts another try."[811]

According to Bernitz the *Gourmet* ruling of the ECJ confronted Stockholm City Court with a kind of judicial review that had not have a counterpart in national Swedish law.[812] The KO was also placed in a bizarre situation. Instead of enforcing the law, the Ombudsman had to defend the law, which even did not pertain to its core competencies. Given the careful approach of the Market Court in the *De Agostini* case, probably few expected an internal judicial *coup d'etat* against the cherished Swedish alcohol policy. Surprisingly, however, the national court accepted the invitation by the ECJ for a joint fine-tuning of the complex relationship between national regulatory policies and the requirements of an Internal Market. In a manner highly unusual for the Swedish judiciary Stockholm City Court embarked on a bold proportionality assessment of the legislation at issue, weighing the effects of the existing restrictions against alternative policy solutions.[813] In final analysis it found the prohibition to be disproportionate and in conflict with Community free trade principles. This conclusion was confirmed by the Market Court.[814]

Both courts found the ruling of the ECJ in its part on the restrictiveness of the Swedish prohibition on intra-Community trade to be binding. Therefore the courts focused on the proportionality assessment. In the opinion of the Market Court proportionality assessment required a comprehensive weighing of interests, i.e. whether the advantages for the public interest from the prohibition were proportional to the

---

[811] Feiden, 'Europeanisation of European Law Adjudication. A Comment' (2000) ERPL, 17 ff.
[812] See Bernitz (1999), 425; Favoreu, 'Constitutional Review in Europe' in: Henkin/Rosenthal (eds.), *Constitutionalism and Rights* (New York: Columbia University Press, 1990), 38 ff, at 24
[813] T 8-1111-97, judgment of 4 April 2002 ("Gourmet").
[814] MD 2003:5 ("Gourmet" II).

drawbacks for intra-Community trade.[815] The scientific evidence as to the potential of the measure to reach its objective was inconclusive and contradictory. After invoking a number of scientific studies on the effect of advertising on alcohol consumption, the most KO could infer was that alcohol advertising had 'some importance' for drinking behaviour.[816] The Market Court found on the one hand, the prohibition not particularly effective in view of the existing alternative channels of advertising (Internet, satellite TV and radio) and editorial publicity. On the other hand, the importance of the prohibition was regarded as relatively limited given the panoply of other restrictive measures on advertising (like the requirement of applying particular moderation in advertising of alchol or the prohibition of billboard advertising) and on alcohol consumption in general.[817] On balance both courts found the prohibition to be far-reaching and disproportionate. The courts, however, correctly interpreted their mandate as only a 'negative' one, acting as the 'agents' of the ECJ in enforcing primary Community law. Although the Market Court referred in passing to the 23 percent barrier accepted as proportional in the *Aragonesa* ruling of the ECJ, it found it to be the task of the lawmaker to define an appropriate threshold in a general manner. The application of the national measure in the particular case was thus precluded, but the courts did not see themselves empowered to give positive guidance to the national lawmaker.

At several instances in the decision of the Swedish Courts the word 'loyally' is used.[818] Having in mind the generally reserved attitude to judicial review of legislation in Sweden, this is indeed a remarkable development. It remains to be seen whether the case will remain isolated or whether it is indicative of a change in the mind-set in direction toward judicial empowerment.[819] What can be predicted is that the decision in *Gourmet* will encourage more parties to seek recourse to European legislation and reference to the ECJ.

After the spectacular outcome from the *Gourmet* saga the reactions were mixed. In the words of Warnling Nerep in Swedish media 'moderate criticism' was leveled at the bold conduct by the courts, but generally the reactions remained reserved. Only a month after the decision the Government set in motion the legislative machinery in order to adapt Swedish regulation to the changed conditions. The fear was that in the wake of the *Gourmet* judgments traders would make use of the opened leeway and pour alcohol advertising over Swedish consumers.[820] That these fears were exaggerated was later on admitted by the Government.[821] The proposed reform set the threshold for permitted alcohol advertising in periodicals at 15 percent per volume. In

---

[815] It may be interesting to note that the plaintiff GIP in its defence argued that the proportionality of the Swedish prohibition should be assessed following the methodology advanced by the Commission in its Communication "TheFollow-up to the Green Paper on Commercial Communication in the Internal Market", COM (1998) 121 final. MD 2003:5, 19.

[816] MD 2003:5, 10 ("Gourmet II").

[817] MD 2003:5, 27 ff. ("Gourmet II").

[818] T 8-1111-97, 28 with reference to Art. 10 EC; MD 2003:5, 24;

[819] This development is in line with the predictions of Abrahamsson about the increased role of judicial norm control and the increased role of courts to provide protection to individuals against measures by national legislatures. See Abrahamsson, 'Domstolsväsendets anpassning till EES och EG' (1993) *SvJT*, 805 ff.

[820] That these fears were exaggerated was evidenced by the almost marginal increase of alcohol advertisements after the Market Court decision.

[821] Prop. 2002/03:87, 13.

its policy analysis the Government, visiby irritated by the conduct of the Market Court underlined that restriction on advertising were and remained an important instrument in a successful policy of moderation of alcohol consumption. The availability of alternative means did not imply that one should discard this instrument. Therefore the Government proceeded from the principle: lowest possible alcohol content of permitted advertising which would pass the test of compatibility with Commuinty law.

The draft legislation followed an accelerated procedure whereby only a couple of stake-holders were consulted. Among those consulted only the State Public Health Institute and the KOV could be regarded to represent the public interest of reduced alcohol consumption. Most of the other consulted parties presented the viewpoint of wine and spirits traders or of advertisers.[822] All consulted interest organizations and public authorities had some objections to the proposal with the exception of the Public Health Institute. The latter had nothing to object to the draft, which is also remarkable, given that the threshold was changed with as much as 12 percent. Most of the objections were based on Community law and referred to the risk of renewed lawsuits and preliminary reference. The KOV is among those insisting that Community law should be carefully considered. [823] It may be interesting to observe that in the Government Bill to the previously reported amendment of the Alcohol Act was consulted also with various courts. Stockholm City Court for instance objected to the proposal of even moe far-fetched prohibitions of alcohol advertising. The treatment of courts as 'authorities' (*myndigheter*) implies a regular involvement of the courts in the process of commenting of draft legislation. The recent amendment was not consulted with any judicial bodies. The gradual engagement of the judiciary in a process of judicial review of legislation may have the effect of input of 'division of powers' thinking of a more classical manner *á la Montesquieu.*

The limited circle of consulted stakeholders and the accelerated procedure caused the indignation of the Council on Legislation which remarked that the proposal had not followed a sufficiently deliberative and open procedure.[824] To show respect to the concerns of the Council on Legislation, the Government appointed a Special Expert Inquiry to explore the opportunities for even stricter prohibition in the future, which would be acceptable from a Community law oint of view.[825] The Bill passed Parliament and the amendment of the Alcohol Act entered in force on 15 May 2003.[826]

7.2.3 Institutional implications

Both Germany and Sweden stand out as activist countries in preliminary reference proceedings in the field of fair trading law. The number of cases referred from German courts is certainly higher, but this is only natural in view of this country's size and longer membership in the Community. The interesting fact is that for the few years of EU membership a small jurisdiction such as Sweden has produced several of the seminal ECJ cases in the area of marketing and advertising.

---

[822] Swedish Brewers' Association (Svenska Bryggareföreningen), The Association of Alcohol and Wine Suppliers (Sprit & Vinleverantörsföreningen), TU och AF. Prop. 2002/03:87, 7, 17.
[823] Prop. 2002/03:87, 17.
[824] Prop. 2002/03:87, 20.
[825] Prop. 2002/03:87, 14.
[826] SFS 2003:166.

The cases where Swedish fair trading standards have been scrutinised for their conformity with primary Community law concern some of the most distinctive features of the Swedish regulatory model. In the *De Agostini* case it is the protective Swedish welfare state with its paternalist attitude, especially vis-à-vis weak and vulnerable groups (notably children), which is at stake. In the alcohol advertising case majority decisions of the sort described as 'self-binding' have been questioned.[827] The two cases demonstrate yet another peculiarity of the Swedish communication with ECJ. By the public law character of enforcement prevailing in Swedish marketing practices law, there has been a tendency for the KO to step as an emanation of the Swedish regulative model. Through the KO the Swedish state has identified itself with these majoritarian policies in a diverse European context and has to an extent defended its regulative choices. Thus it is not (or not exclusively) private interests that have been brought to the fore, but also majoritarian (paternalist) concerns.

The KO, especially in the *De Agostini* case has actively sought litigation in order to obtain confirmation for the validity of the Swedish advertising prohibition. This kind of assertive public interest litigation probably comes to appease concerns expressed in the literature that European integration, and especially the enforcement model of the Community, accord preferential treatment to individual and group interests, while diffuse majoritarian interests (e.g. of consumers and tax-payers) remain underrepresented.[828] Given the constitutional and institutional diversity of Member States and the availability of a variety of enforcement models, Member States with prevailingly majoritarian policies may ensure that voice is given to diffuse majorities as well.[829] Admittedly, however, there is a risk that such initiatives will remain sporadic and cannot match the huge number of lawsuits aiming at asserting individual and minoritarian group interests.

There is another aspect of the story as well. Interestingly, accession to the EU has opened a new arena in Swedish law for questioning the (constitutional) validity of economic legislation. Legislation like that on prohibiting children advertising or alcohol advertising may despite its commendable motives be a result of an overrepresentation of a vocal majority over the minoritarian interests of the affected industry. Equally possible is an instance of substituting the interests of the majority for group and sectoral interests that were not an intended beneficiary of the regulation. Much in line with Komesar's analysis, the courts (here the European judiciary) provide a suitable institution for questioning the constitutionality of legislation or administrative action which suffers of majoritarian bias. In the future, especially if Swedish courts are perceptive for proportionality reasoning there may be more lawsuits of this category to reach the ECJ.[830]

---

[827] On these notions see Ch. 2.2.3 above.

[828] See Weiler (1999), 62-63; Wheatherill (2000), 107.

[829] According to Komesar: "Where the skewed distribution produces majoritarian bias, the resulting action by the political process converts the skewed distribution into a uniform high distrbution. The side that wins in the political process does not have to muster the resources to litigate the constitutionality of the resulting legislation. The state will bear the burden of defending the legislation in court." Komesar (1994), 136.

[830] See Komesar (1994), 137. "Judicial review of legislation can serve as a means to counteract or deal with political malfunctions such as majoritarian and minoritarian bias. The effectiveness of such review, however, depends on whether the government action will be challenged in court. The courts cannot review what they do not see. The analysis of litigation presented in this book strongly suggests that concentrated high stakes victims are more likely to litigate than dispersed low stakes interests. Thus, roughly speaking, if courts offer protection

In the cases of the German *Verbraucherleitbild* debate and of the Swedish restrictions on alcohol advertising the ECJ has been confronted with outgrowths of doctrines and policies with a long history and deep roots in national legal and institutional tradition. As the national chapters purported to demonstrate, the *Leitbild* of the gullible consumer, and the low thresholds for ascertaining deception have been part of German unfair competition law already at the beginning of the century. One can also say that the doctrine was formed under the long-term influence of active litigants - competitors and their associations – having broad incentives to defend their competitive positions via legal action. It is the same associations and competitors who are plthe complainants in most relevant cases before the ECJ (with the exception of the *Gut Springenheide*, where prosecution was initiated by a public authority).[831] The Community Court is obviously not in a position to comment on the incentives of national plaintiffs once they enjoy standing under national law. Yet the excessive concern of competition associations for the gullible consumer may indicate a representational bias. By pursuing the interests of established traders (Bestandsschutz) these associations may tend to overstate the risk of deception and to attach relevance to the alleged perceptions of an excessively small portion of consumers. The resulting pull of the standard of deception downwards symptomatically would have impeding effects on competition and would thus eventually harm the interests of broad consumer majorities.

In *Gourmet* a prohibition on advertising of even low-percent alcoholic beverages is part of a policy restricting alcohol consumption dating back to the mid 19th century. While certainly the prohibition is not a product of business lobbying, it was hardly fully deprived of protectionist bias.[832] Local producers were well adapted to the restrictive Swedish policy and could conveniently rely on consumer loyalties evolved through long-lasting consumption. Moreover, through the advertising of light beer Swedish brewers could keep their brands alive in consumers awarness of their brands awake. With Weatherill one can therefore argue that the Court's activism may be indicative of a process of "destruction of the deadwood of biased national market regulation, accumulated over centuries, which it is the very purpose of the EC to sweep away on a tide of economic and political reform." [833]

At the same time, the review of case law above also demonstrates that the image of the ECJ as an institution engaged excessively in a (constitutionally questionable) deregulative activity under an unreserved free market ideology is exaggerated. The Court has shown a consideration for genuine national concerns, and has tended to leave sensitive issues to the national judiciary. Where genuine consumer interests have been at stake the Court has been ready to uphold national protective measures.[834] At the same time the Court has not been prepared to accept the argument that national idiosyncracies by the sheer fact of their long-term existence should be always

---

to both harmed majorities and harmed minorities, the harmed minority is more likely to actively seek that protection. On this basis, majoritarian bias is more likely to be corrected by judicial review."

[831] Interestingly, there is to my knowledge no single case of consumer association that has reached the ECJ under the 'consumer image' debate.

[832] See MD 2003:5, with reference to the opinion by Bernitz.

[833] See Weatherill (1999), 51 ff., at 54.

[834] Similar Stuyck (2000), 389.

respected and perpetuated. Knill refers to negative integration as a "Europeanisation mechanism by way of changing domestic opportunity structures".

It has been convincingly argued that one of the major tasks of the European judicial process is to give more effective representation opportunities to and to take into account interests that have been largely disregarded in the national political process.[835] Apart from importers, who are frequent litigants in preliminary ruling proceedings, the Court by its position as guardian of the Treaties and a central pillar of European integration takes a broader view on diffuse interests. It is not only the interests in the country of litigation that have to be considered but also the interests of all Community citizens. Arguably, a restriction on imports imposing a cost on the producer may indirectly affect all Community consumers. Traders involved in intra-Community commerce do not keep their costs segmented along national markets. A cost imposed by national restrictions will, by way of higher prices, be passed on all European consumers, who have not voted for and probably are not interested in keeping the restriction in question.[836] So the balance the Court has to make is a delicate one: are there specific needs of national consumers (or groups of consumers) that legitimize a stricter level of protection and a restriction on imports. The choice is between solidarity of all Community consumers with the special needs of national consumers (or groups of consumers) or accepting the disadvantage incurred to a group of consumers for the sake of the aggregate consumer welfare throughout the Community. It is a choice between majority and minority interests.[837]

7.3 European influences in the turbulence of internally generated reform

The preceding section presented and compared the immediate response of national legislature and doctrine to some of the most significant European acts of relevance to fair trading law. The analysis took as a starting point separate areas of intervention as defined in the respective European acts, treating them in isolation from the general context of national fair trading law. But this is an unrealistic description, serving only academic purposes. In real life, European developments can never remain in isolation. They inevitably enter the trajectory of internally generated processes of institutional reform or institutional resistance to change. Thus European integration affects institutional frameworks not only directly, but also indirectly by accelerating or slowing down voluntary change and adaptation undertaken upon the initiative of

---

[835] Maduro, 'Keck: The End? The Beginning of the End? Or Just the End of the Beginning?' (1994) *Irish Journal of European Law*, 30 ff.; Maduro, 'Reforming the Market or the State?' (1997) 3 *ELJ*, 55 ff.; Maduro (1998a).

[836] For a categorization of different consumer interests, see Beater (2000a), 139 ff. Beater differentiates roughly between two major categories of consumer interests: protection against exaggerated prices and protection against disadvantageous decisions. The second category is then subdivided into: protection of the basis of decision; protection of the decision process; protection against excessive pressure through combined offers.

[837] In a similar vein, Drexl regards the standard of deception and the underlying *Verbraucherleitbild* to imply the weighing of interests of different groups of consumers against each other. The model of normative efficiency advanced by Drexl builds on recognising the interdependedness between markets and legal institutions. In this light, a larger European Market logically requires raising the threshold of deception because a Common Market means more competition, which decreases the need for intervention. At the same time, a low threshold of deception, by insulating national markets, deprives 'intelligent' consumers from broader choices. "So ist es nur konsequent, für den europäischen Binnenmarkt die Irreführungsschwelle anzuheben, weil auf einem grösseren Markt potentiell mehr Wettbewerb besteht und umgekehrt ein national strengeres Irreführungsrecht Entscheidungsalternativen der "intelligenteren" Verbraucher durch eine Abschottung des nationalen Marktes verhältnissmässig stärker einschränken würde."Drexl (1998), 203 ff.

national institutional actors. In this role the course of influence is not easily predictable and depends very much on the momentum gathered for change, on the power of institutional persistence and on the potential of affected interests to mobilize for effecting institutional change. Capturing these more subtle processes of interaction between national and Community institutions will allow us to conceptualise the role of European integration and the prospects for institutional convergence more realistically.

7.3.1 Germany: reform in the shadow of European integration

German unfair competition law, as we left it in the late 1980s, had evolved into a close-knit system of prohibitions, giving rise to impressive litigious activity and arguably exerting palpable restriction on economic freedom and the choice of marketing strategies by economic actors. The attempts to integrate consumerist ideas into the rigid normative construction of UWG ended in spectacular failure. Only incidental and marginal changes found their way into the legislative text. In contrast, new restrictions were added with the 1986 UWG Novelle, aiming quite openly at strengthening the position of already privileged interest groups. This situation had clearly left consumer protection advocates embittered and disappointed. It had likewise alienated liberally oriented groups and had unleashed a debate on the anticompetitive effects of the statute. Against this backdrop, European influences acquired particular importance and meaning, often of a kind which European legislators and judiciary can hardly have intended or envisaged .

7.3.1.1 The 1994 UWG Novelle [838]

At the beginning of the 1990s a new round of reform discussions on the German UWG was launched under the catch-word 'deregulation'.[839] The reform was part of a package of measures for the overall purpose of making Germany more attractive as a place for business and investments.[840] The Bill advanced by the CDU/FDP parliamentary group, spoke of a "close-meshed net of prohibitions, in which traders are constantly getting ensnarled", and seriously questioned whether these prohibitions met the needs of contemporary markets.[841] In doctrine as well, the allure of the high standards and intense enforcement of German unfair competition law had visibly faded, giving way to criticism and resentment. The following statement by Schricker is typical:

> Als man vor gut dreissig Jahren anfing, sich Gedanken über die europäische Harmonisierung des Rechts des unlauteren Wettbewerbs zu machen, war das Selbstverständnis des deutschen Wettbewerbsrechts noch ungebrochen. Ziel der Rechtsangliechung konnte nur sein, das hohe Schutzniveau des deutschen Rechts in der Gemeinschaft durchzusetzen.[842]

---

[838] Deregulierung des unlauteren Wettbewerbsrechts: Gesetz zur Änderung des UWG BGBl I 1994, 1738. See BT-Drs. 12/7325. For a comprehensive analysis of the reform see Schricker (1994a); Schricker (1994c).

[839] See Schreiben des Bundesministerium der Justiz von 15. September 1993 zur Novellierung des Gesetzes gegen den unlauteren Wettbewerb (1993) *GRUR*, 877 ff.

[840] BT-Drs. 12/5620, Bericht der Bundesregierung zur Zukunftssicherung des Standorts Deutschland, in particular at 50.

[841] BT-Drs. 12/7345, 4.

[842] Schricker (1994a), 586 ff.

Parallel to the rethinking of national law, a change was visible in the previously reserved and even deprecatory attitudes to European developments in fair trading law. European law was now at the centre of debate and was called upon to play a dual role of justification for the need of reform and benchmark for the evaluation of proposed changes. The *GB-INNO* ruling in particular provoked a storm of reactions. Advocates of deregulatory reform argued for the urgent need of bringing the UWG in line with European requirements, arguably extending the normative implications of this decision. Of course, not everybody praised the decision. Opponents to reform banished the Court's activist stand and warned against the imminent risk of depreciation of standards in German unfair competition law, similarly exaggerating the effects of the ruling. In any case the 'united front' for defence of the national regulatory model seems to have been cracked, revealing the plurality of interests within the national context.

At a more general level, European law was seen to constitutionalise the principle of open markets with free competition. This principle was arguably enshrined in Arts. 3(g) and 3(a) of the EC Treaty and was at the heart of secondary Community law and of ECJ jurisprudence. In particular commentators pointed to the renewed process of harmonisation of rules and regulations regarding commercial communication. Despite the *Keck* ruling by the ECJ, it was argued that many of the excessive standards of German unfair competition law could hardly stand a test of conformity with Community law.[843]

Substantively, and in response to the *GB-INNO* and *Yves Rocher* rulings of the ECJ, the reform targeted some of the catalogue provisions of the UWG exerting most palpable restrictive effect on the competitive freedom of traders. Obvious candidates for liberalisation included the controversial innovations introduced with the 1986 UWG Novelle.[844] § 6e UWG, prohibiting eye-catching comparisons with prices charged previously, was a counterpart to the Luxembourg provision declared by the ECJ in *GB-INNO* to be incompatible with the basic Community freedoms. The German prohibition, moreover, was expressly tackled by the ECJ in the *Yves Rocher* ruling and found to be trade-restricting and /disproportionate. Particular attention was aroused by the Court's insistence that consumers could hardly be harmed by correct information. This liberal, consumer-oriented logic, followed by the ECJ in both *GB-INNO* and *Yves Rocher*,[845] was seen to extend to other German restrictions as well, such as the prohibition of quantitatively limited promotional offers in § 6d, and to the severe restrictions on rebates and combined offers as well as to the restrictions on marketing of direct sales by producers and wholesalers.[846]

---

[843] See Lehmann (1994), 380 ff.

[844] Schricker calls these provisions "Mittelstand-political saplings engrafted in unfair competition law", see Schricker (1994a), 432.

[845] The BGH had reportedly adapted its case law to these rulings in the case "Meister-Aktuell", GRUR 1990, 378. See (1994) *DZWir*, 213.

[846] The restrictive regime for advertising direct sales by producers and wholesalers to end-consumers (§§ 6a and 6d UWG) was likewise qualified as unnecessary and having nothing to do with the objectives of consumer protection. Pointing at the extensive interpretation of these provisions by the courts, Schricker deplores the attempts of the judiciary to conserve the forms of trade distribution stemming from the 19th century and carry them over into the 20th. See Schricker (1994a), 592.

But these were excesses that had resulted from the legislative process and were easier to pinpoint and eventually to cope with. The real trouble was seen to lie in the countless prohibitions and restrictions that had evolved through case law on the basis of the general clauses of §§ 1 and 3 UWG. Schricker, with unconcealed sarcasm, provided an indicative list of exotic judge-made categories of prohibited conduct unparalleled in other legal systems, such as enticing customers through psychological pressure (*'psychologischer Kaufzwang'*) or through excessive allure (*'übertriebenes Anlocken'*), abuse of authority (*'Autoritätsmissbrauch'*) or socially harmful market distortion (*'gemeinschaftsschädlicher Wirtschaftsstörung'*).[847] More generally, comparative advertising continued to be restrictively treated by the courts and the standard of truthfulness applied by German courts was unrealistically high.[848]

In the flora of judge-made rules, the original reform-plan set out to 'tame' the unwieldy doctrine of *Vorsprung durch Rechtsbruch*. This doctrine had given rise to proliferous case law typically concerning trifling contraventions of legal standards outside the scope of UWG. Competitors and the Wettbewerbsverbände were acting here as a veritable private police force, seeking injunctions in matters of minor importance.[849] Petrol stations were thus challenged with violation of the statute on limited opening hours (*Ladenschlussgesetz*) when selling consumer items. Car-retailers were accused of violating the Act on Weights and Measures when announcing the car performance in terms of the popular measurement horsepower ("PS") instead of the technically required kilowatts ("kW").[850] Computer retailers were charged with violating the standard by advertising in terms of inches ("Zoll") instead of metrical units. In one case a competition association threatened with litigation 950 travel agencies within a short time for indicating, contrary to the requirements, the price of the airport taxes separately from the price of the flight.[851] The original draft of the CDU/FDP parliamentary faction proposed to limit the scope of this judge-made rule by codifying it in a new § 2 UWG and by introducing a threshold requirement of significant (material) statutory breach. The proposed rule read:

> Zuwiderhandlungen gegen Rechtsvorschriften ausserhalb dieses Gesetzes stellen nur dann Wettbewerbsverstösse im Sinne des § 1 dar, wenn durch die Zuwiderhandlung ein wesentlicher Wettbewerbsvorsprung erzielt oder der Wettbewerb wesentlich beeinträchtigt wird.

It should be noted that the proposal did not intend to change the doctrine in its core. 'Undue competitive advantage' was still seen as the basic justification for granting an injunction claim.[852] Nevertheless, the draft rule was met with hostility in professional circles.[853] The GRUR association was among the vocal supporters of the *status quo*, pointing at possible interpretation difficulties in the proposed wording and expressing confidence in the competence of the judiciary to strike an appropriate balance of

---

[847] Schricker (1994a), 588.
[848] Schricker (1994a), 592.
[849] See Lehmann (1995), 381.
[850] BGH GRUR 1993, 679 ("PS-Werbung I"); BGH GRUR 1994, 220 („PS Werbung II").
[851] See the examples given by Schricker (1994c), 432.
[852] For criticism of this basic core of the doctrine, see Micklitz (2001).
[853] Borck, 'Bauchlandung der fliegenden Gerichtsbarkeit'(1994) *WRP*, 350 ff.

interests.[854] Despite the obvious potential of the rule to plug a major source of vexatious claims, in the course of legislative deliberations the amendment was dropped. It was passed on to the following legislative period, when a more ambitious and comprehensive reshuffling of the substantive rules of UWG was to be undertaken.[855]

Reforming the judicial process

More important than the discussion on possible substantive amendments were the changes in enforcement design. The case law of the ECJ where German marketing standards were questioned as overly protective has, as we have seen, not always followed a straight line. Especially after the seminal *Keck* judgement, the position of reform advocates was dramatically weakened.[856] The freedom of Member States to maintain far-reaching standards in the area of marketing seemed revindicated.[857] Yet the sheer volume of cases brought before the ECJ suggested a disproportionate intensity of enforcement of German unfair competition law. Statistical data were brought up, confirming that the rate of enforcement of fair trading laws in Germany was greatly exceeding the average litigation rate in any other Community Member States.[858] Schricker estimated the number of lawsuits under UWG and its annex laws at approximately 15,000-20,000 per year, with a still greater number of out-of-court settlements on the basis of pre-trial notification.[859] For the first time the question of the social costs of excessive litigation was raised in earnest.[860]

Since the courts do not directly control the flow of cases, the focus fell on defining the right to sue. In the polemic words of Schricker, the question was "who was bringing

---

[854] Stellungnahme der GRUR Vereinigung, Eingabe zur UWG Novelle (1994) *GRUR*, 435, at 437. Critical comments in respect of the association's position are expressed by Beater (1995), 217 ff., 227.

[855] See BT-Drs. 12/8089.

[856] See the report of the GRUR Vereinigung (1994) *GRUR*, 435.

[857] Of interest in this context are the critical comments by Leible on the changed practice of German courts after the Keck ruling. Thus the Regional Court of Düsseldorf considered the application of § 6e to a foreign undertaking as irrelevant to intra-Community trade, and therefore refused to refer the case to the ECJ for a preliminary ruling. See Leible (1994), 180, fn. 36 with further references.

[858] On a more general level a similar conclusion is suggested by Alec Stone Sweet and Thomas Brunell on the basis of analysis of broad comparative statistical data on all references for preliminary ruling sent by national courts to the ECJ in the period 1958-1998. Germany stands out as the country with the highest rate of references per year in all areas including free movement of goods and approximation of laws. One explanation advanced by the authors for the variations between countries is "the relative extent to which EC rule-making, as it evolves through case law or legislation, generates tensions or disjunctions between EC and national legal regimes... The more any national regime is required to change in order to meet the (new) demands of EC law, the more references will be produced." In the particular field of free movement of goods Germany has also excelled, with an average of 303 out of 832 references per year. See Stone Sweet/Brunell, 'The European Court, National Judges and Legal Integration: A Researcher's Guide to the Data Set on Preliminary References in EC Law 1958-98'(2000) *ELJ*, 117 ff., 125-26.

[859] Belgium, a country with a relatively brisk litigious activity in fair trading, reported 600 cases in 1993, and in Spain the total number of proceedings reached 120, including those of self-regulatory bodies. See the comparative data submitted by Schricker (1994a), 587. Naturally, representative statistical data in the area are difficult to gather and analyse due to the broad subject-matter and the different venues of enforcement in different countries. Thus the fact that England had only one case brought by the Director of Fair Trading before the courts in three years does not take into account the lawsuits brought by private plaintiffs under common law and equity (passing off, defamation, etc.) as well as self-regulation. Nevertheless, even when the differences in size and population and in ways of enforcement between the different Member States are taken into account, the litigation rate in Germany remains remarkably high.

[860] Vultejus, 'Die Kostenstruktur der Gerichte' (1994) *ZRP*, 150 ff., 151.

all the imponderables before the courts."[861] The answer to this question was not difficult to figure out. The generous *locus standi* of individual competitors and of trade associations and the resulting distortions of incentives for litigation and out-of-court prosecution were not a novel topic in the German legal policy debate. The intense litigious activity of the so-called "*Abmahn- und Gebührenvereine*" was notorious.[862] The Federal Ministry of Justice, presenting its reform proposal, summarized the problem as follows: (*i*) The judiciary has in 1969 recognised the right of trade associations to compensation for their pre-trial notification expenses . These compensatory payments served them as a major source of income. (*ii*) Contractual penalties for breach of voluntarily entered commitments to cease and desist were another source of income for the associations. (*iii*) The notified trader's chances of winning a dispute in court were minimal since the associations focused on clear and easily proven (albeit trifling) competitive misdemeanours. (*iv*) This development was partly promoted by the ease with which the courts assumed jurisdiction under the optional rules of the place where the wrongful conduct occured (§ 24 UWG).[863] A central theme in the reform discussion consequently became the objective of restricting the right of action of competitors and their associations.

The initial proposal of the Ministry of Justice was very ambitious. It sought to restrict the abstract right of action of traders and of trade associations.[864] In addition it purported to banish the practice of awarding compensation for the costs of pretrial notification (*Abmahngebühr*) to competitive associations and to restrict the rule on optional jurisdiction. Ideas to earmark all penalties collected for breach of voluntary entered cease and desist commitments to social objectives were likewise ventilated.[865] Not all of these initiatives, however, were included in the Bill submitted by the CDU/FDP faction – due partly, it seems, to the resistance of interested professional and business circles.[866]

The most important change to be put through was the restriction of the abstract right of action of competitors and their associations. The new §13 II Nr. 1 limits the *locus standi* only to traders competing with same or similar goods and on the same market. Thus the competitive relation is defined, much as in antitrust law, by reference to the same product and geographical market. In addition, the *locus standi* is made conditional on providing evidence that the objectionable conduct is likely to substantially affect the competition on this market. Even more severe are the limitations on the right of action of business associations (§ 13 II NR. 2 UWG). Such associations are granted *locus standi* only if they unite a substantial number of traders

---

[861] "Wo kein Kläger, da kein Richter, oder anders ausgedrückt: Zivilprozesse gibt es nur, wo jemand Interesse hat, solche in Gang zu setzen. Es fragt sich, wer all die wettbewerbsrechtlichen Imponderabilien vor Gerich bringt." Schricker (1994a).

[862] See Ch. 5.3.3.3, and the discussion by Pastor (1969), Borck (1978), Kur (1981).

[863] The situation was assessed in the following way: "Insgesamt hat diese Entwicklung dazu geführt, dass die hohe Verfolgungsintensität und die Konzentration der Abmahn- und Klagevereine auf Bagatellverstösse sowie die rigorose Durchsetzung von Ansprüchen die Gefahr mit sich bringt, dass das gesamte Rechtsgebiet diskreditiert wird." Schreiben des Bundesministerium der Justiz (1993), 879.

[864] It should be reminded that § 13 II Nr. 1 UWG, determining the *locus standi* of competitors, did not require that they were actually affected in their business activity. See Schricker (1994a), 588.

[865] See Schreiben des Bundesministerium der Justiz (1993), 878 ff.

[866] See the objections voiced by the GRUR association (1994) *GRUR* , 435 ff.

competing on the same product and geographical market as the defendant.[867] Like individual competitors, they are required to prove a likelihood that competition in this market could be substantially impaired by the allegedly unfair conduct. Moreover, *locus standi* was granted only to associations that were able to prove that, in view of their personal, material and financial resources, they were credibly in a position to actually realise their chartered objectives.[868] The right of action of the immediately affected trader remained unaffected.

The other important innovation in the field of procedure was the restriction of the so-called "flying jurisdiction". [869] The possibility to sue at the place where the wrongful act occurred was frequently used, especially by Wettbewerbsverbände, which thus could benefit from the privileged position of repeat litigants acting before a familiar court of their choosing.[870]

Not so successful was the fate of the proposal to eliminate one of the most salient grounds for excessive enforcement, namely the judge-made rule on full compensation for the pretrial notification costs. In its comments on the initial proposal of the Federal Ministry of Justice, the Max Planck Institute welcomed the reform. As the Institute indicated, the general rules for compensation of litigation costs in Germany were in themselves extremely generous and conducive to litigation. The doctrine of *Geschäftsführung ohne Auftrag* developed by the courts was creating additional and distorted incentives for abusive lawsuits and notifications.[871] The GRUR Association was, however, of a different opinion and appealed to the Government to reconsider its proposal in this respect. The Association warned that by denouncing this doctrine the legislator would also deprive legitimate and serious associations of an important source of income, essential for the carrying out of their socially useful activity. Such associations would then become dependent on contributions from the public purse.[872] Increasing the dues payable by the members of the associations, as suggested by the Ministry of Justice, was not considered as a viable alternative. Consumer associations also reacted negatively to the proposal.[873]

---

[867] Schricker observes that the new provision does not speak of members thus implicitly authorizing the litigious activity of umbrella organizations (so called "Dachverbände"). See Schricker (1994c), 434.

[868] § 13 UWG: In den Fällen der §§ 1, 3 ,4 ,6bis, 6c, 7 und 8 kann der Anspruch auf Unterlassung geltend gemacht werden:
1. von Gewerbetreibenden, die Waren oder gewerbliche Leistungen gleicher oder verwandter Art auf demselben Markt vertreiben, soweit der Anspruch eine Handlung betrifft, die geeignet ist, den Wettbewerb auf diesem Markt wesentlich zu beeinträchtigen.
2. von rechtsfähigen Verbänden zur Förderung gewerblicher Interessen, soweit ihnen eine erhebliche Zahl von Gewerbetreibenden angehört, die Waren oder gewerbliche Leistungen gleicher oder verwandter Art auf demselben Markt vertreiben, soweit sie insbesondere nach ihrer personellen, sachlichen und finanziellen Ausstattung imstande sind, ihre satzungsgemässen Aufgaben der Verfolgung gewerblicher Interessen tatsächlich wahrzunehmen, und soweit der Anspruch eine Handlung betrifft, die geeignet ist, den Wettbewerb auf diesem Markt wesentlich zu beeinträchtigen.

[869] Borck (1994).

[870] In this sense Schricker (1994c), 433.

[871] Stellungnahme des MPI (1993) *GRUR*, 880, 883.

[872] See Mitteilungen aus der GRUR Vereinigung (1994) *GRUR* , 435.

[873] See the position of the Consumer Union (*Verbraucherschutzverein*), although it asserted it did not claim such costs in its own activity. Stellungnahme des Verbraucherschutzvereins e. V. (1994) *Verbraucher und Recht*, 40 ff., 42 ff.

Eventually the proposal was abandoned and it was again left to the judiciary to strike the balance, despite clear evidence of inefficiency and overenforcement.[874] In his commentary on the procedural law of unfair competition Melullis considers the failure of the lawmaker to accomplish the planned amendment as an endorsement of the practice of the courts. He notes at the same time that curbing the possibilities of compensation for pre-trial notification costs would have been a more effective instrument for steering the litigious activity of the Verbände than the way preferred by the legislator.[875] Two years after the entry into force of the amendments Schricker likewise professed that a genuine curtailment of the excessive enforcement by Verbände would not be possible without addressing the rules of compensation for pretrial notification costs.[876]

The limits of institutional change

The reform was met with tempered optimism in the legal literature. In particular the restriction on the abstract right of action of individual traders and trade associations was almost overwhelmingly greeted as a step in the right direction.[877] Schricker discerns in this particular amendment a return to the tort-law roots of unfair competition law. The right of action is in his view divested of the corporatist character it had acquired through the practice of the *Abmahnvereine* and reconnected with the substantive competitive interest.[878] Beater likewise refers to the existing systems of enforcement recalling its corporate origins (the associations as successors of the guilds) and refers to the BGH ruling from 1969 as part of the tradition of self-regulation of the economy that had shaped the 1896 UWG.[879] The reform, however, was criticised for not "going to the root of the evil", namely the excessively restrictive substantive provisions as well as for sustaining the main source of perverse incentives for litigation.[880]

Subsequent experience indeed corroborated misgivings about the potential of the amended UWG to meet the requirements of a more balanced enforcement. The restriction of the right of action of trade associations could probably curb the worst excesses of the system. Most of the less serious *Verbände*, however, quickly found

---

[874] See BT-Drs. 12/7345, 6.

[875] Melullis (1995), 437.

[876] „Auf die Dauer wird man freilich kaum umhin können, das eigentliche Fundament des Abmahnunwesens, den aus dem Gesichtspunkt der Geschäftsführung ohne Auftrag abgeleiteten Aufwendsersatzanspruch erneut kritisch ins Auge zu fassen. ... Dass der Gesetzgeber nicht schon 1986 den Aufwendungsersatz abgeschafft hat, ist nur eine Folge der Hoffnung auf die Wirksamkeit der damals neu eingeführten Missbrauchsklausel des § 13 Abs. 5 UWG; diese Hoffnung hat sich aber nicht erfüllt. Sollte sich erweisen, dass auch die vom Änderungsgesetz 1994 in § 13 eingeführten Kautelen nicht greifen, müsste der Aufwendungsersatzanspruch fallen. Da eine richterrechtliche Korrektur nicht zu erwarten ist, sollte der Gesetzgeber klarstellen, dass der Abmahnende auf eigene Rechnung handelt". Schricker (1996a), 478.

[877] Beater (1995), 219 ff.

[878] „Die Regelung des Klagerecht schließlich führt das UWG in Richtung auf seine deliktsrechtlichen Ursprünge zurück. Die Klage der gewerblichen Verbände wird ihres Charakter einer korporativen Populärklage entkleidet, den sie in der Praxis der Abmahn- und Klagevereine angenommen hatte; das Klagerecht wird allgemein wieder enger mit dem materiellen Wettbewerbsinteresse verbunden." Schricker (1994c), 430 ff. Similar Schricker (1996a), 473.

[879] Beater (1995), 220.

[880] See *Ibid.*

ways of adapting to the new requirements.[881] There may additionally be a psychological barrier on the part of the judiciary to applying the new criteria stringently. The courts, when approached with a claim, have at a very early stage to make the assessment of the plaintiff's activity and status on the basis of a full record of financial, material and formal factors. A denial of *locus standi* amounts to an accusation of fraud and dishonesty. This calls for serious investigation and is a serious allegation.

The failure of the reform to face and solve the problem of *Abmahngbühre* was another serious limitation, which, moreover is hard to explain, given the manifest problems and apparent efficiency losses entailed by such a scheme. One can hardly ascribe the incomplete reform to legislative incompetence or confusion. Legislative developments are probably better understood as examples of institutional persistence and surviving symbiosis between organisations and institutional framework. The enforcement design of the UWG and the ingenious spin by German courts on the issue of compensation for costs have given fertile soil for the flourishing of prosecution and litigation as a lucrative business. Not only associations and their staff but also a large number of specialised lawyers have profited from these opportunities,. This powerful lobby group has been among the main opponents to any reform endeavour. Another outstanding problem was the question of fixing the amount at dispute. The 1994 Novelle did not change anything in this respect. The uncertainty and the occasional exorbitant sums of the amount at disputepersisted.[882]

Despite the almost unanimous criticism in the literature against the excessive litigious activity of *Wettbewerbsverbände*, this criticism was only rarely coupled with any constructive reform proposals concerning enforcement and institutional choice. In particular, the question of granting a mediation role or *locus standi* to an administrative body or an Ombudsman never resurfaced in the public and scholarly debate. Interestingly, the positive balancing role of such institutions for the definition of the public and consumer interest has been acknowledged in some contributions. Thus Lehmann, when criticising the loss of any proportion in the exercise of procedural rights by the so-called *Abmahn-* and *Gebührenvereine* (notification and fee-collecting associations), specifically addresses the abundant claims based on alleged *Vorsrung durch Rechtsbruch*. He draws attention to the contrast in the enforcement strategies used by governmental authorities and by private competition associations. Whereas associations tend to sue for any, even the most insignificant violation of relevant statutory rules and regulations, governmental bodies know how to "separate the wheat from the chaff".[883]

---

[881] See Gloy, 'Hat die Einschränkung der Klagebefugnis gewerblicher Verbände sich bewährt?' (1999) *WRP*, 34 ff., at 40: "Es hat sich für die agilen Verbände gezeigt, dass es ein Leichtes war, sich auf die neue Situation einzustellen und die nötigen Voraussetzungen für die Zuerkennung der Klagebefugnis hinsichtlich der erheblichen Zahl der Mitglieder zu schaffen."

[882] See Ulrich, 'Die UWG-Novelle 1994 und der Streitwert in Wettbewerbssachen' (1995) *WRP*, 362 ff.

[883] Lehmann (1995), 382. The 'filter' function of a public authority on the definition of the public interests and on dampening on prosecution of trifle cases is underlined by Bastian: "Grundsätzlich spricht für eine Behördenlösung, dass durch sie die Verfolgung von Bagatellverstössen engedämmt würde, da sich eine Behörde bei Ausübung ihres Aufgreifermessens auch an Zweckmässigkeitsüberlegungen orientieren müsste." Bastian (1998/99), 213

Likewise Schricker, in his article on the hundredth anniversary of UWG, directs devastating criticism at the activity of the competition associations and is rather disillusioned as to the possibility of legislatively distinguishing the profit-oriented associations from the "genuine" ones.[884] After painting a rather bleak picture of the prospects for improved private law enforcement of collective interests, he once again returns to the system comparison made in the 1970s. While reiterating his earlier rejection of an enforcement model involving a public agency, he admits some of the main advantages of this latter alternative, namely better control over and greater restraint in public interest litigation.

> Eine zur Bekämpfung unlauteren Wettbewerbs berufene Behörde oder ein Ombudman werden dagegen eher abwägen, das Für und Wider berücksichtigen und auch Allgemeininteressen, insbesondere die Wahrung der Wettbewerbsfreiheit, mit in Rechnung stellen.[885]

It seems that in this article Schricker for the first time countenances – albeit diffidently – the thought of a possible alternative enforcement model in Germany, provided that no adequate means be found of dealing with the *Verbandsklage*.

> Die Klage der gewerblichen Verbände erfreut sich zwar seit den Zeiten des RGs der Vermutung, öffentliche Interessen zu wahren; wer die Praxis kennt, wird aber freilich Zweifel hegen. Das Pathos des Schutzes von Verbraucher- und Allgemeininteressen scheint nicht selten strapaziert zu werden, um den individuellen Anlagen einzelner Wettbewerber oder Gruppen solcher zum Erfolg zu verhelfen, die den Verband mit einer verdeckten Rechtverfolgung beauftragt haben und ihn im Fall des Unterliegens schadlos halten.[886]

This description can be neatly analysed with the tools of economic and institutional theory. The judiciary is not in a position to control the inflow of litigation and the substantive 'quality' of the cases. The ordinary civil courts are moreover ill-positioned to set '*de minimis*' limitations and to restrict and change expectations about existing opportunities already created by earlier jurisprudence. The courts have relatively limited capacity to overview the economic effects of the particular case. Moreover, diffuse low-stake interests are underrepresented and therefore there is a clear risk of the judiciary working with highly imperfect intellectual models of the preferences of all the actors affected. In addition, the principal-agent problem leads to a dilemma between the desire to make the system of enforcement more efficient and to control abuse of procedural rights.[887]

---

[884] „Zwischen unerwünschten gewinnorientierten Verbände und seriösen Verbänden abzugrenzen, fällt freilich schwer. Ganz allgemein muss die Verbandsklage den Effekt haben, tendenziell das Verbotsniveau zu erhöhen. Wenn in der Mehrzahl der Wettbewerbsprozesse auf der Klägerseite eine routinierte, sachkundige Partei steht, die aus Gebührengründen, zur Erfüllung von Aufträgen oder in Verfolgung des Satzungszwecks systematisch darauf hinarbeitet, Geschäftspraktiken als unlauter verbieten zu lassen, während die Beklagtenseite typischerweise an Wissen und Erfahrung unterlegen ist, muss sich dieses Übergewicht der Klägerseite im Laufe der Zeit auswirken. Die konstant bessere Darstellung der Verbotsargumente wird sich in zunehmender Strenge der Judikatur niederschlagen." Schricker (1996a), at 478.

[885] Schricker (1996a), 478.

[886] Ibid.

[887] See Ch. 5.6.2.1 with reference to Schäfer (1999), 86 ff.

7.3.1.2 Institutional interlocking in a multilevel system of governance

Unquestionably the most remarkable recent development in German unfair competition law is the ongoing fundamental reform of the UWG.[888] This reform is announced in the legal literature and in the political debate with the catchwords: modernisation, Europeanisation and integration of consumer interests.[889] It takes a holistic approach and seeks to rethink and reshuffle the underlying assumptions, ideas and structures of the century-old construct of unfair competition law. The proposed draft (UWG-E) changes the order, the legislative technique and the inherited normative language of the statute. It reformulates and supplements the substantive provisions and advances innovations in the sphere of remedies. No previous reform has attempted such a radical and comprehensive grip on the institutional framework of German unfair competition law. At the same time, the intention is to carry over those "established well-tried principles and core values of German unfair competition law that are worth preserving" and to infuse them into harmonised European law.[890]

What the reform does not set out to change is the fundamental institutional choice between private and public ordering and the basic enforcement design of the 1909 UWG. It is instructive that in its Action Plan "Consumer Protection" the Federal Government in one breath proclaims the necessity to modernise German unfair competition law and announces its intentions to defend the advantages of the flexible and ostensibly cost-efficient German system of private enforcement.

> Um die Deregulierung in Deutschland voranzubringen und Bürokratie abzubauen, wird sich die Bundesregierung weiterhin für die Beibehaltung des in Deutschland praktizierten, effektiven zivilrechtlichen Systems des Verbraucherschutzes einsetzen. Der entsprechende Verordnungsvorschlag der Kommisssion der hier ein behördliches Verfahren der Zusammenarbeit vorsieht, stösst auf erhebliche Bedenken.[891]

Apparently, no connection between the "particular restrictiveness"[892] of German unfair competition law and the model of enforcement is seen (or at least acknowledged) to exist. It is noteworthy that the Government talks of a civilistic system of enforcement of *consumer protection* and not of unfair competition law, which arguably does not correctly represent the bias in the existing institutional framework in favour of the interests of competitors. This position is all the more remarkable, given the fact that it is exactly the pro-competitor bias of German unfair competition law that is among the main reasons for legislative reform.[893]

---

[888] See BR-Drs. 301/03, Gesetzentwurf der Bundesregierung; BR-Drs. 301/1/03, Empfehlung der Ausschüsse.

[889] See Fezer (2001), 989 ff.; cf. the objectives of ther reform stated in the Government Bill: „Das geltende Gesetz gegen den unlauteren Wettbewerb ist modernisierungsbedürftig. .. Auch unter europapolitischen Gesichtspukten gilt es, das deutsche Lauterkeitsrecht zu liberalisieren. Ausserdem soll der Verbraucher den ihm gebührenden Stellenwert in einem modernen Lauterkeitsrecht erhalten." Drs. 301/03, 1.

[890] Köhler, H./Bornkamm, J./Henning-Bodewig, F., 'Vorschlag für eine Richtlinie zum Lauterkeitsrecht und eine UWG-Reform'(2002) WRP, 1317 ff., at 1324.

[891] BT-Drs. 323/03, 17.

[892] BT-Drs. 301/03, 18.

[893] See the press release of the Federal Ministry of Justice, announcing Government Bill Nr. 32/03 of 7.5.2003: „Die Novelle verstärkt den Schutz der Verbraucherinnen und der Verbraucher vor unlauteren Wettbewerbshandlungen. Das Gesetz schafft einen angemessenen Ausgleich zwischen den Interessen der Wirtschaft und denen der Verbraucherinnen und Verbraucher." Cf. the statements of the Minister of Justice

A particularly intriguing aspect of the reform is its close interweaving with European developments. Already in the late 1980s the Commission Directorate General (DG) 'Internal Market' initiated a discussion on commercial communications and the need for further European harmonisation and liberalisation in this field. The deliberations influenced the E-Commerce Directive and culminated in the proposal for a Community Regulation on sales promotions in the Internal Market.[894] Independent from this work, in the late 1990s the Commission DG SANCO started to probe the terrain for a return to the macro-project of harmonising European fair trading law. After a comprehensive study on the feasibility of a general framework of fair trading[895] the legislative process at the Community level was gently set in motion.[896] In contrast to the sluggish pace of harmonisation in the 1960s, this time the institutional machinery is moving surprisingly smoothly, the attraction probably lying in the promise of simplification of the existing regulative framework.[897]

The harmonisation endeavours of the Commission are openly set on the track of a liberal consumer protection ideology. In this light Germany's unfair competition law threatens to stand out as inadequate and old-fashioned. The momentum of European harmonisation apparently span off a more fundamental discussion of the modernisation and reform of Germany's UWG. Interestingly, there is visible osmosis between the national and the European reform debate. It is not a question of attempting to directly impose a pre-existing discrete and crystallised national regulative model as a prototype for European harmonisation. Instead arguments advanced in the national context flow over to the European debate and vice versa.

This process of true interlocking[898] can be traced in the early participation of German scholars in the preparatory work of the Commission (the VIEW study), in multiple direct references to European developments, and to the Green Paper on EU Consumer Protection in particular, in the German *travaux préparatoires*, and in the elaboration of position papers by experts and interested groups addressing jointly the two processes.[899] The following statement of the Federal Ministry of Justice is typical:

Brigitte Zypries: "Diese Liberalisierung unterstützt die verbraucherfreundliche Politik der Bundesregierung, die sich am Leitbild des mündigen Verbrauchers orientiert." Retrievable at: http://www.bmj.bund.de/ger/themen/wirtschaft_und_recht/

[894] COM (2001) 546 final; OJ 2002 C 75 E/11; Opinion of the ECOSOC, OJ 2002 C 221/73; Amended proposal COM (2002) 585 final, 25.10.2002.

[895] See Micklitz et al. (2000).

[896] See the Commission's Green Paper on European Union Consumer Protection, COM (2001) 531 final; Follow-up Communication to the Green Paper on EU Consumer Protection, COM (2002) 289 final; Proposal for a Directive 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 (the Unfair Commercial Practices Directive),COM (2003) 356 final.

[897] On these developments see Ch. 8 below.

[898] The term 'interlocking politics' is occasionally used in the political science literature on European integration as a translation of the concept 'Politikverpflechtung' first advanced by Scharpf (1988). See for instance Börzel, 'What can Federalism Teach Us About the European Union. The German Experience', *The Federal Trust*, May 2003. I believe, however, that the German term 'Verpflechtung' is better translated as 'interweaving'. 'Interlocking' would correspond to the German word 'Verzahnung' and conveys the idea of a joint and interdependent movement, associated with gear-wheels.

[899] See Fezer (2001); Köhler/Bornkamm/Henning-Bodewig (2002).

> Die Reform des deutschen UWG und die Harmonisierung des europäischen Lauterkeitsrechts sind komplementär. Es gilt, sowohl das eigene Haus durch einen Vorschlag für ein neues UWG in Ordnung zu bringen, als auch in Brüssel die konzeptionellen Vorstellungen der Bundesregierung für eine Harmonisierung des europäischen Lauterkeitsrechts zur Wirkung zu bringen.[900]

Substantive rules

Substantively, the main innovation indeed seems to lie on the level of explicit and consistent recognition of the consumer interest in fair trading law.[901] The reform is announced as an integral part of the Federal Government's 'Consumer Protection' Action Plan .[902] Judging from statements made in the political debate, it recognises the important role consumers play in the competitive process and the close connection between liberalisation and consumer protection. According to the Minister of Justice the reform is oriented after the image of the responsible consumer (*"mündige Verbraucher"*).[903] A paramount expression of this new approach is given through the much delayed explicit integration of consumer protection among the objectives of the law. The UWG-E now includes a portal paragraph reading:

> § 1 Zweck des Gesetzes
>
> Dieses Gesetz dient dem Schutz der Mitbewerber, der Verbraucherinnen und der Verbraucher sowie der sonstigen Marktteilnehmer vor unlauterem Wettbewerb. Es schützt zugleich das Interesse der Allgemeinheit an einem unverfälschten Wettbewerb.[904]

As discussed in previous chapters, the objective of consumer protection was acknowledged in legal doctrine and, at least nominally, in judicial case law. At the same time, I have argued that the failure to include such a clause, even if symbolic, in the text of the statute has had some very specific and pragmatical consequences for German unfair competition law. It has not signalled a true 'paradigm shift' as occasionally required in scholarly and political discourse and has indirectly confirmed the traditional course of judicial decision-making.[905] Needless to say, it is uncertain whether the new formula will bring about a change in thinking. In preparatory documents the new provision is unassumingly presented as codification of already

---

[900] Press-release of the Federal Ministry of Justice Nr. 32/03 of 7.5.2003 "Kabinett verabschiedet modernes Wettbewerbsrecht.", 239.

[901] Cf. Regierungsentwurf: "Der Verbraucher wird als Schutzsubjekt erstmals ausdrücklich im Gesetz erwähnt.", BR-Drs. 301/03, 20.

[902] See BR-Drs. 323/03, Bericht der Bundesregierung – Aktionsplan Verbraucherschutz.

[903] Press-release Nr. 32/03 (2003).

[904] Entwurf eines Gesetzes gegen den unlauteren Wettbewerb (UWG-E). BR-Drs. 301/03, 1.

[905] See Fezer (2001), 991: "Die Entwicklung des Lauterkeitsrechts zwischen Beginn und Ende des 20. jahrhunders, die Rechtsprechung des EuGH zur Verwircklichung des Binnenmarktes als eines Rechtsprinzip und zum Schutz der Freiheit des Waren.- und Diesnstleistungsverkehrs, die rechts- und wirtschaftliche Diskurs zur Integration des Verbraucherrechts in das Recht der Wirtschaftsordnung, die Rechtserheblichkeit dr Konsuumentensouveränität in einer marktwirtschaftlichen Wettbewerbsordnung und die Stellung der Verbracuher als glechgewichtiger Marktpoartner sind schlaglichtartig formulierte Daten eines Paradigmenwechsels zum Schutz der Verbraucherinteressen im Wettbewerbsrecht. Verbraucherschutz ist in eigenständiger Topos einer europäioschen Rechtsharmonisierung im Wettbewerbsrecht."

established practice made upon the insistence of consumer associations.[906] Experts plead that "the law of unfair competition should not be reduced to mere consumer protection." They underline the complementarity of interests of consumers and competitors and assert that "the protection of competitors always serves the interests of consumers as well, since it safeguards the interest of consumers in workable competition."[907]

As to other protected interests, the draft likewise codifies the interests of the general public in workable competition, remaining loyal to the tradition stemming from the 1920s. The proposed § 1 does not use the time-honoured concept 'performance competition' (*Leistungswettbewerb*) but the term 'undistorted competition' (*'unverfälschten Wettbewerb'*).[908] Nevertheless, the underlying ideas should be regarded as equivalent. The concept emphasises the close connection between free and fair competition in classical ordo-liberal understanding. The authoritative comments to the Government Bill do not specifically elaborate on this point.

The draft UWG (UWG-E) relies, as its precursor, on a general clause (§ 3 UWG-E), thus preserving the core idea of broad delegation of lawmaking powers to the judiciary.[909] An important element of the reform is the fact that for the first time a *'de minimis'* threshold is built into the system of unfair competition law. This threshold is based on assessment of appreciable impact (*'nicht unerheblich verfälscht'*) on competition and, being integrated in the general clause, extends to all situations of unfair competition. This amendment is the first signal of some of their broad decision-making powers being taken away from the courts. Arguably the threshold forms the German counterpart to the principles of proportionality and appreciable effect as developed by the ECJ on free movement of goods and services.[910] The ECJ conducts a proportionality test to assess whether a legitimate objective could be achieved by means less burdensome to the Common Market.[911] In a similar manner, the threshold rule in § 3 UWG-E requires the courts to make a proportionality appraisal and to intervene only where the alleged conduct cannot be left to the market. In fact it contains a legislative expression of confidence in the market to take care of the less perceptible conflicts of interests between market actors.

At the same time the Government Bill tends to deplete the importance of this innovation:

---

[906] „Dadurch wird die Rechtsprechung zum geltenden UWG aufgenommen und gleichzeitig eine Forderung der Verbraucherverbände erfüllt." BR-Drs. 301/03, at 20 under the subtitle „Inhaltliche Schwerpunkte" and at 22 with reference to the 'Schutzzweckwandel' and the case law giving more recent recognition of the triad of protected interest, including those of consumers: BGH GRUR 1999, 75 ("Güllepumpen"); BverfG *WRP*, 2001, 1160 ("Benetton"), BverfG GRUR 2002, 455 ff. Cf. Referentenwurf, 23.01.2003, 19.

[907] See Köhler/Bornkamm/Henning-Bodewig (2002), 1324.

[908] See the discussion in Fezer (2001), 998 f.

[909] See Fezer (2001), 994: „Ihrer rechtlichen Struktur nach sind Generalklauseln als Delegationsnormen zu verstehen die die Jurisdiktive als Institution zur Bildung von Rechtsätzen anhand einer einen einzelnen Rechtsfall entscheidenden Rechtsprechung ermächtgen." With reference to Teubner (1971).

[910] Explicitly on the need of a *'de minimis'* threshold (*'Bagatellklausel'*) and, with reference to the ECJ case law on a European consumer image, Fezer (2001), 1000.

[911] See Fezer's interpretation of the *Keck* ruling of the ECJ as a test of appreciable impact on the Internal Market, Fezer (2001), 993.

> Damit soll zum Ausdruck kommen, dass die Wettbewerbsmassnahmen von einem gewissen Gewicht für das Wettbwerbsgeschehen und die Interessen der geschützten Personenkreisen sein muss. Dies bedeutet indes nicht, dass dadurch unlautere Wettbewerbhandlungen zu einem beachtlichen Teil legalisiert werden. Vielmehr soll die Verfolgung von lediglich Bagatellfällen ausgeschlossen werden. Dementsprechend is die Schwelle auch nicht zu hoch anzusetzen.[912]

Hesitant expression is thus given to the lawmaker's desire to reduce the litigation rate , but it ultimately devolves on the courts to interpret this warning more or less extensively.

The other noteworthy novelty in the general clause concerns legal language and can be found in the departure from the confided formula of *'gute Sitten'*. Given the century-old conceptual history of the *'gute Sitten'* in German private law with all the ensuing emotional and legal-cultural charge, this is certainly a major concession to the Europeanisation process. But it is likewise an instance of exogenous influences triggering a rethink of engrained habits and concepts and making possible the weeding out of deeply rooted but inadequate institutional excrescences.

The significant changes proposed include the introduction of a detailed catalogue of examples of unfair trade practices. In one of the many preliminary drafts discussed by experts, the catalogue was divided into situations concerning the interests of consumers and situations affecting competitors' interests.[913] In the final version, however, preference has been given to an integrated catalogue, probably to underscore the traditional consolidated approach to consumer and competitor interests that distinguishes German unfair competition law. At first sight the catalogue seems to codify the judge-made law in this field. There are, however, important modifications as well. Notably, a number of provisions are unified by the concern of guaranteeing free and informed consumer choice. This concern underlies the prohibition of competitive acts exerting pressure or other undue and unobjective influence on consumers (cf. § 4 Nr. 1 UWG-E) as well as the general prohibition of surreptitious advertising (cf. § 4 Nr. 3 UWG-E). In the same vein, the catalogue takes specific account of the vulnerability of certain consumer groups, introducing topics scarcely represented in German unfair competition law hitherto, such as protection of the interests of children (cf. § 4 Nr. 2 UWG-E).[914]

Yet the true significance of the catalogue may consist more in what it omits than in what it states. Throughout the years, by dint of intense communication between judiciary and doctrine, the case law on unfair competition has grown into an opaque thicket of restrictions on competitive conduct. The rules and prohibitions have become increasingly incongruent and difficult to explain, justify and predict. By not mentioning some of the developed categories the catalogue sends a signal to the judiciary. *Verlockung*, *Wertreklame*, *Verunsichernde Werbung* and *Umweltbezogene Werbung* have been among the examples of excesses of judicial zeal to combat unfair

---

[912] BR-301/03, Regierungsentwurf, 31.
[913] See Köhler/Bornkamm/Henning-Bodewig (2002), 1319 ff.
[914] § 4 Nr. 2 UWG-E. On the case law under the present UWG cf. Ch. 7.1.1.3 above.

competition and which are not mentioned in the catalogue.[915] The catalogue can therefore be regarded as an attempt to 'tame' judicial discretion and perfectionism.

Whether this attempt will be successful is difficult to gauge. As a general observation, the catalogue still contains some broadly defined prohibitions, which have previously functioned as floodgates for bringing disputes before the courts. Many of the *Tatbestände* that have evolved under the activism of individual competitors and the *Wettbewerbsvereine*, have found their way into the new/old statute.[916] Thus the catalogue codifies judge-made prohibitions on pressure-marketing (§ 4 Nr. 1) and on obstructive competition (§ 4 Nr. 10). The decisive difference lies in the, sometimes numerous, qualifications added. For instance, exerting marketing pressure is brought in relation to the likelihood of affecting the autonomy of consumer decisions. A prohibition requires, moreover that the pressure is incommensurate and unobjective. Obstructive competition is prohibited if it is undertaken purposefully (*gezielt*). Generally, however, the law-maker stops short of taking radical departure from established doctrines and the signals are ambiguous.[917] Ultimately it will again depend on the judiciary whether old prohibitions are reintegrated in the law by interpretation of the general clause and the catalogue rules.

The most noticeable omissions are in the sphere of what is usually called economic police law (*Ordnungsrecht*).[918] Restrictions of seasonal sales and bankruptcy sales, prohibitions of advertising with limited quantities or with sellers' capacity of wholesalers and producers – all these controversial regulations will be unconditionally abolished if the draft turns into legislation. As is evident from the account in previous chapters, these provisions have invariably emerged as a response to transient needs of economic groups after successful channelling of their interests through the political process. The rules have been often criticized as unnecessary interventions in economic life, petrifying existing market structures and protecting particularist interests.[919] In the wake of the liberalisation of rebates and special offers and partly anticipating future European developments, the draft therefore adopts an information approach, for instance to sales promotions.[920]

The shift from prohibition to information approach can be noticed in other provisions as well. For instance, while striking the abstract prohibition with previous prices, a more specific prohibition of deceptive price comparisons is introduced (when the announced price has only been charged within a limited period of time).[921] The enforcement of this provision is supported by an obligation to provide information of previous prices. In addition, the abstract prohibition of advertising with limited

---

[915] On these categories see Baumbach/Hefermehl (1998), *Verlockung, Wertreklame*, at 527; *Verunsichernde Werbung*, at 573, and *Umweltbezogene Werbung*, at 576.

[916] Fezer (2001), 998, quoting approvingly the systematisation introduced by Hefermehl : *Kundenfang, Behinderung, Ausbeutung, Rechtsbruch, Marktstörung*.

[917] Cf. the comments in the Government Bill on obstructive competition: "Die weite generalkaluselartige Fassung stellt sicher, dass alle Erscheinungsformen des Behinderungswettbewerbs einbezogen werden, einschliesslich des Boykotts, des Vernichtungswettbeweb, aber auch z. B. des Missbrauchs von Nachfragemacht zur Ausschaltung von Mitbewerbern." BR-Drs. 301/03, 36.

[918] Fezer (2001), 1001.

[919] See Schricker (1994); Lehmann (1995), Fezer (2001).

[920] Cf. § 4 Nr. 4 and Nr.5 UWG-E.

[921] Cf. § 5 II UWG-E.

quantities is substituted by a possibility to seek injunction enjoining advertising when it is proven that the quantities are limited and inadequate to satisfy the created demand.

At the outset of legislative debate some bold proposals were advanced in the area of mandatory information disclosure. A number of expert studies advocated the Swedish model of a general duty to provide important information to consumers. In the course of legislative deliberations such proposals were, however, discarded as imposing undue costs and burden on business.[922]

The transition to a better-defined catalogue of prohibitions implies several changes. It brings about, firstly, a clear shift of decision-making from the judicial to the political process. It limits judicial autonomy to define the rules of business conduct.[923] Secondly, and indirectly, the catalogue is a recognition that when things are left to the judiciary, certain interests and macro-economic consideration are not taken into account, or are only imperfectly considered. The decisions and corresponding judge-made rules, increasingly reflect the views of a community of repeat "users" of the system, often in open contradiction to efficiency and to the detriment of other interests deserving respect and protection.

Thirdly, the catalogue represents an acknowledgment that the shift towards a more consumer-friendly jurisprudence cannot be expected to take place exclusively through the mediation of the courts. The catalogue gives the legislator a chance to instruct as to the direction of future interpretation of the general clause. A loyal interpretation in the spirit of the new statute would suggest a more serious balancing of diffuse consumer interests against those of certain well-organised and well-represented interest groups. Finally, it is a recognition of the growing plurality of society, both on the national level, but also in view of processes of Europeanisation and globalisation.[924] In this environment one cannot expect economic operators to adapt their conduct to organically evolved jurisprudence that reflects only the interests of well-represented circles in the domestic political and judicial process. Instead, a transparency of values is needed.[925]

Enforcement

In contrast to previous UWG reforms , the present draft puts no special emphasis on enforcement. One innovation is worth mentioning, though. Astonishingly, the draft of

---

[922] See the following comments of the *Bundesrat*: „Seitens der Befürwörter von weiteren Informationspflichten wird zur Begründung eines weitergehenden Regelungsbedarfs ein Paradigmenwechsel im Lauterkeitsrecht angeführt. Dieser Wechsel soll darin liegen, dass die generellen Verbote durch Informationspflichten ersetzt werden. Eine Lokerung des Wettbewerbsrechts sei indes nur dann vertretbar, wenn der Abnehmer ausreichend informiert werde. ... Der Gesetzentwurf trägt diesem Grundsatz insoweit Rechnung, als mit Blick auf die Aufhebung des Rabattgestezes und der Zugabeverordnung für diese Formen der Wertreklame in § 4 Nr. 4 Informationspflichten geregelt werden. Im Übrigen findet jedoch kein Paradigmenwechsel durch eine generelle Aufhebung von Verboten statt, weshalb es nicht gerechtfertigt wäre, die Unternehmen mit weitergehenden Informationspflichten zu belasten." BR-Drs. 301/03.

[923] Fezer (2001), 994.

[924] Similar Fezer (2001), 998.

[925] On the critique of the general clause as a source of uncertainty, see Fezer (2001), 994, underlining the consensus in German legal literature as to the success of the method of judicial law-making via general clause. A plea for clearer analysis of values underlying the general standards of fair trading is to be found in Beater (2000), 8 ff.

a new UWG, instead of curbing the excessive litigation incentives created by the rule on costs of pretrial notifications, seeks to formally incorporate this rule in the text of the statute.[926] The Government Bill makes a caveat that associations authorised to litigate in the name of collective interests should be considered as a rule in a position to bear the expense of a notification without involving a lawyer in cases of average complexity.[927] So it will be for the courts to interpret the concept of 'erforderliche Aufwendungen'.

Another change is that the *locus standi* of the abstractly affected competitor is abolished. These competitors are said to have no separate interest worthy of protection ("kein schutzwürdiges Eigeninteresse an der Geltendmachung von Abwehransprühen").[928] The limitations on the *locus standi* of trade associations introduced with the 1994 UWG Novelle are preserved. Indicative is the position of the Bundesrat, which insists on retaining not only the organizational requirements on these associations (substantial number of directly affected members) but also a '*de minimis*' requirement concerning the impact of the allegedly unfair conduct on the market. The Bundesrat points out that the right of action of collective entities needs to be restricted more substantially than the right of action of the immediately affected competitor. Therefore, and contrary to the view expressed in the Government Bill, the Bundesrat does not accept the '*de minimis*' threshold in the general clause (§ 3 UWG-E) as a sufficient deterrent.[929] The restriction should be mirrored by a restriction of the right of action of consumer associations: "soweit die Zuwiderhandlung wesentliche Belange der Verraucher berührt."[930]

Of course, the more radical proposal for reform lies in the renewed attempt to introduce the possibility of a specific action for compensation of damages limited to the exhaustion of the gains from an unlawful conduct (*Gewinnabschöpfung*). Symptomatically, this proposal has met with the strongest objections in the Bundesrat and its chancing of passing the legislative vote are slim indeed.[931]

7.3.2 Changes in anticipation of European integration:

7.3.2.1 The legislative process: the 1995 MFL

The Swedish model of marketing practices law that emerged during the 1970s was still highly centralized at the beginning of the 1990s and dominated by the KOV/KO. The fundamental choices made in the heyday of consumerism still enjoyed relatively widespread support. There was, however, mounting pressure toward finding a better balance between collective and individual interests. Legal scholars critically observed that 'unfair competition law' had fallen into oblivion as a legal discipline.[932] The discussion in the early 1980s of the use of guidelines in the work of the KOV as an instrument of 'producer influence' did not result in formal changes. Nevertheless in

---

[926] § 12 I UWG-E
[927] BR-Drs. 301/03, Entwurf der Bundesregierung, 53.
[928] BR-Drs. 301/03, Entwurf der Bundesregierung, 46.
[929] BR-Drs. 301/03, Stellungnahme des Bundesrates, 10-11.
[930] BR-Drs. 301/03, Stellungnahme des Bundesrates, 12.
[931] For details of this proposal, see Köhler, H., 'UWG und Verbraucherschutz' (2003) *GRUR*, 265 ff.; Micklitz/Stadler, 'Der Reformvorschlag der UWG-Novell für eine Verbandsklage auf Gewinnabschöpfung' (2003) WRP, 559 ff.
[932] See Bernitz (1984), 115 ff.

the wake of the 1983 Governmental Committee the number of guidelines actually drawn up under the auspices of KOV dropped substantially. In doctrine and in the legislative process, voices were raised arguing for a better representation of business interests, both in the substantive provisions of the statute as well as in the enforcement design.

As mentioned above, in 1992 the government set up a Government Inquiry Commission to analyse the needs for change of the MFL (Marketing Practices Inquiry). The initiative for revision of the MFL was partly triggered by the KOV, which in a memorandum had suggested reconsidering the existing legislation, primarily with a view to revising and invigorating the system of remedies and sanctions. In addition, the need was argued for greater precision in the general clause. The other more specific appeal for change came from the Federation of Swedish Industries and concerned the overly restrictive rules on combined offers.[933] The government assigned the inquiry to an individual expert (särskild utredare) thus deviating from the previous model of committees with well-defined interest representation.[934]

The instructions expressly stipulated by the government included observing the need to adapt legislation to the 'acquis communautaire'.[935] The Commission presented a separate report on this issue, concluding that compliance with formal European standards raised few concerns.[936] The European acts in the area of fair trading were few, often of a minimum character, and generally corresponded to the existing Swedish body of statutory and judge-made law. Yet fully fledged membership of the European Community (Union) was arguably setting different and more demanding requirements of compatibility, going far beyond formal rule-implementation. This point was emphasized by Bernitz in his book on unfair competition law, published the same year as he led the Marketing Practices Inquiry. Noticing that Sweden would have no problems in meeting the modest formal requirements of Community law in the area of unfair competition law, Bernitz insisted on seeing the question into a broader perspective. It was not only the legal, but also the factual economic integration with the Community Member States, which demanded changes to the existing economic legislation. One task for the lawmaker was to ensure that Swedish and foreign enterprises worked under equivalent conditions. Foreign enterprises would reasonably expect to receive in Sweden a similar level of protection to that in their home countries, and Sweden was to live up to these expectations.[937]

---

[933] Dir. 1991:79, Direktiv om översyn av marknadföringslagen, SOU 1993:59, Bilaga 1, 599.
[934] The investigator was Prof. Bernitz.
[935] See reference to the general instruction to all committees and individual investigators to consider aspects of adaptation to EU law, dir. 1988:43.
[936] SOU 1992:49.
[937] "Saken måste emellertid ses i ett bredare perspektiv. Helt oavsett den rättsliga formen för det svenska samarbetet med EG pågår en stark, faktisk ekonomisk integration. Svenska företag arbetar på alltmer internationaliserad marknad och över huvud under i stort sett samma marknadsbetingelser som företag i andra västeuropeiska länder. Det behov av skydd mot otillbörlig konkurrensåtgärder som föreligger i dessa länder kan man utgå ifrån i regel också finns hos oss. Europeiska företag torde normalt räkna med att de i Sverige får ett skydd mot otillbörliga konkurrensåtgärder som ungefär motsvarar en europeisk normalstandard som den i korthet presenterats i 10-punktsuppräkningen i föregående avsnitt. Det bör vara en deluppgift inom ramen för en allmän Europaharmonisering av svensk rätt att tillse att vi når upp till denna skyddsnivå." See Bernitz (1993), 39 f.

In this broader context the reform can be seen as one expression of a general move toward creating a more conducive business environment, corresponding to the demands of an integrating European market. The institutional framework had to be adapted so as to provide Swedish and foreign economic operators with equal opportunities to those existing in the majority of Community Member States. Thus, the reform can be regarded as a result of Europeanisation, understood broadly as spontaneous adaptation and coordination between institutional frameworks. The Governmental Inquiry presented its proposals in 1993, when discussions concerning Sweden's accession to the EU and the consequences for Swedish law of such accession were at their most intense. The report was soon followed by a Government Bill and the new MFL entered into force – somewhat symbolically – on 1 January 1995, the same date as Sweden became a full member of the EU

Prima facie at least, the new MFL does not set out to revise the underlying 'ideology' of Swedish fair trading law. The interests of consumers continue to occupy a central place in the preparatory materials and in the final provisions of the statute. Promotion of consumer interests is again declared the main objective of the law in the preamble. Without much debate, however, the Government Bill inserted promotion of the interests of trade and industry as a second main objective of the statute, side by side with that of protecting consumer interest.[938] The rationale was scanty:

> In contrast to 1 § of the present law it is now stated that the law shall not only promote consumers' interests but also the interests of industry and trade. Even if the law to a great extent is concerned with consumer interests, the government considers it appropriate to give prominence to the interests of industry and trade in this context. As stressed in the preparatory materials for Act the now in force, traders have an interest in competition not being carried out by unfair methods. Generally the interests of consumers and traders should coincide concerning the question about the ethical standards to be applied to advertising and other marketing.[939]

It seems that the reference to the *travaux préparatoires* to the 1970 MFL serves largely to underline continuity and to dampen the impression of radical change. At the same time I submit that this seemingly minor amendment may be regarded as symptomatic of a change of more symbolic significance. Indeed, if a main thread can be traced running through the variety of substantive and procedural provisions, it is that of a return, albeit cautious, to classical individualist and private law features of marketing practices law as a legal discipline. This is attested both by some of the most important innovations in substance as well as by the new arrangements on *locus standi*, litigation costs and remedies. The cautious nature of the return, however, needs to be borne in

---

[938] Compare 1 § MFL (SFS 1975:1418) "Denna lag har till ändamål att främja konsumenternas intressen i samband med näringsidkarens marknadsföring av varor, tjänster och andra nyttigheter och att motverka marknadsföring som är otillbörlig mot konsumenter och näringsidkare" with 1 § MFL (SFS 1995:450) "Denna lag har till syfte att främja konsumenternas *och näringslivets* intressen i samband med marknadsföring av produkter och att motverka marknadsföring som är otillbörlig mot konsumenter och näringsidkare."

[939] „Till skillnad mot 1 § den nuvarande lagen anges att lagen inte bara skall främja konsumenternas intressen i samband med marknadsföring, utan även näringslivets intressen. Även om lagen till största delen är inriktad på konsumentintressena är det enligt regeringens mening angeläget att också framhålla näringslivets intressen i sammanhanget." Prop. 1994/95:123, 162.

mind. In many respects the government does not go the whole way suggested by the Inquiry. Most steps toward liberalisation and bolstering the interests of individual traders are thus cautious and often balanced by equivalent steps to strengthen consumer rights. The final effect may nevertheless be seen as enhancing the individualist flavour of the statute, since economic actors are in a far better position to turn legally formulated rights into real gains.

One example of tempering the liberal spirit of the Inquiry concerns the detailed and extended description of the protected interests advanced by the Inquiry Commission and not included in the Government Bill. According to the Commission the statutory objectives were to be formulated as follows:

> This act has as an objective to promote the interests of consumers and the interests of industry and trade in trustworthy, fair and, from a competition perspective, well-functioning marketing as well as to ensure that consumers have access to necessary information in this regard.[940]

This definition purported to give express recognition to a third category of interests, namely society's interest in workable competition.[941] The intention was probably to bring Swedish law closer to the understanding of the "trinity" of protected interests as accepted in German legal doctrine and recognized in Art. 4(1) of the Misleading Advertising Directive.[942] In his short commentary on the 1995 MFL Bernitz indeed speaks of a threefold objective permeating the statute, namely that of protecting the interests of consumers, those of traders and 'society's interest of workable competition', whereby the last mentioned objective sounds similar to the German concept of Leistungswettbewerb.[943] Certainly, the fact that the government did not expressly single out public interest as a separate objective, may have been due to this objective being considered self-evident. However, it may equally be interpreted as one more proof of the reluctance of the Swedish lawmaker to openly delegate the definition of the public interest to the courts.[944] In view of the very elastic interpretation of the term 'interests of the general public' and 'Leistungswettbewerb' in German law, these may well be understandable misgivings. Moreover, the emphasis on the economic and competition aspects of marketing practices may have been perceived as unduly narrowing down the notion of 'public interest'.

Substantive rules

Substantively, the 1995 MFL did not really bring any revolutionary changes. As the terms of reference for the Marketing Practices Inquiry suggested, the substantive standards established in Swedish marketing practices law had generally gained recognition and did not need radical change. The task was rather to codify the case law and practice evolved under the previous statutes and to achieve greater transparency

---

[940] "Denna lag har till ändamål att främja konsumenternas och näringslivets intresse av en vederhäftig, tillbörlig och från konkurrenssynpunkt väl fungerande marknadsföring samt att säkerställa att konsumenterna har tillgång till behövlig information i samband därmed", SOU 1993:59, 59.

[941] Bernitz (1997).

[942] Directive 84/450.

[943] Bernitz (1997), 28.

[944] Concerning the institutional discussion, see Ch. 4 and 5.

and predictability for the players affected, primarily traders.[945] The only substantive provisions explicitly addressed in the terms of reference were the restrictions on special offers. The committee had to specifically consider the need for retaining this prohibition.

The new act took over the central provisions from the 1975 MFL, namely the general clauses on unfair marketing and on information disclosure (4 § MFL) and the prohibition of marketing of unfit products (17 § MFL). Despite suggestions made by the Marketing Practices Inquiry, these two general clauses were not changed textually. The government expressed its understanding that the interpretation of the clauses in case law and practice corresponded well to the original as well as to the current legislative intentions. The two general clauses were complemented by a catalogue of more detailed provisions, such as:

- a general requirement on advertising identification (5 § MFL),
- prohibition of misleading advertising (6 § MFL) and of misleading concerning packaging size (7 § MFL)
- prohibition of confusing imitations (8 § MFL),
- detailed regulation of bankruptcy sales, clearance sales and other sales and discounts (9-11 §§ MFL) and
- specific information requirements on rebates and special offers (13 § MFL).

Two of these provisions could be said to represent a radical departure from the previous conceptual approach. The introduction of the prohibition of confusing imitations meant abandoning the restrictive legislative view on the relations between exclusive intellectual property rights and marketing practices law.[946] Indeed the clause was presented as no major innovation, but just a recapitulation of an already established practice of the Market Court. Nevertheless the express introduction of a statutory provision is arguably more likely to be perceived as a turn towards a more competitor-oriented ideology and enabling litigation. The overwhelmingly positive reaction to the provision on the part of all industry and trade organisations says as much.[947]

Similar approbatory reactions on the part of industry triggered the liberalisation of special offers. All the industrial and trade associations consulted approved of the planned liberalisation, which may indicate that the restrictive approach had not been perceived as a particular strategic advantage to a certain level or branch of industry and trade.[948] With the passing years the criminal provisions of the MFL had become obsolete. The artificial categorisation used in the previous act had resulted in some controversial decisions, much criticised in the literature. The general feeling appears to have been that the market was ripe to deal more independently with the issue under certain information requirements. Interestingly, the proposal was supported by the

[945] See SOU 1993:59, 194.

[946] As indicated earlier, preparatory material had stressed that no extension of such rights should occur by way of marketing practices law. See Ch. 5.4.1.2.

[947] See prop. 1994/95:123, 56. The most critical comments to the proposal came from the Competition Agency, which cited the risks to free competition inherent in such a proposal, *ibid.*, at 57.

[948] Comparing with Germany, one can surmise that an absence of a sizeable entrepreneurial middle class in Sweden is one reason for the relatively low profile of marketing practices law as a strategic instrument.

KOV with some reservations. The SKR, by contrast, is among the few organisations critical of, but not fully rejecting, the proposed liberalisation.[949]

The influence of the forthcoming Europeanisation is probably more noticeable, not in direct reception of legal standards but rather in the indirect influence of European competition law and of the free movement principles in the EC Treaty. The work on the 1995 MFL was carried out in parallel with the most serious reform of Swedish competition law since the beginning of the 20th century, crowned with the 1993 Competition Act.[950] This law reform was powerfully influenced by the European model of competition law. It represented a kind of voluntary harmonisation prompted by a desire to simplify the regulatory environment for Swedish enterprises.[951] As indicated earlier, a policy of conscious coordination between the two frameworks has been more or less actively pursued in Sweden ever since the 1970s and has been one of the foundations for distinguishing Market Law as a legal area.[952] The coordination has been based on the intricate interplay between two basic principles, namely keeping the two frameworks distinct in their areas of application, but at the same time allowing for cross-fertilization between their underlying principles and objectives, i.e. the promotion of free and of fair competition. In the Inquiry's Report the interplay between free and fair competition was expressly underlined. The MFL was to be applied so as not to impede unduly free competition and to violate the main premises of the Competition Act.

Interestingly, to support this proposition the Inquiry Commission refers to the *GB-INNO* and *Yves Rocher* cases of the ECJ.[953] The ECJ rulings are interpreted as supporting the view that fair trading law is only sustainable if applied with an eye to the principle of free competition. The position of the Inquiry Commission on regulations of the kind addressed in *GB-INNO* and *Yves Rocher* is clear:

> It is still not unusual to find in the marketing practices legislation of different West European countries provisions which constitute relicts from the time of the guilds, and seem to serve mostly the purpose of providing small enterprises protection against competition... An application of marketing practices legislation that could lead to restrictions of competition should not come into question in Sweden.[954]

7.3.2.2 Redesigning the administrative process

As is usual in fair trading law, more interesting than the substantive reforms are the reforms at the level of enforcement and institutional design. Generally, the 1995 MFL preserved the characteristic institutional design introduced in the 1970s combining elements of administrative and judicial decision-making. The Act did not introduce any direct changes in the structure of the administrative process in fair trading law

---

[949] Prop. 1994/95:123,

[950] Konkurrenslagen (SFS 1993:20).

[951] In this sense Nordell, *Marknadsrätten. En introduktion* (Stockholm: Norstedts Juridik, 2002), 17.

[952] Bernitz (1969).

[953] SOU 1993:59, 198.

[954] "Det är fortfarande inte ovanligt att det i olika västeuropeiska länders marknadsföringslagstiftning finns kvar bestämmelser som utgör skråmässiga relikter och närmast är till för att bereda småföretagare skydd mot konkurrens. De ...berörda avgörandena av EG-domstolen i rättsfallen GB-INNO och Yves Rocher ger exempel på detta. ... Liksom hittills bör en konkurrenshämmande tillämpning av marknadsföringslagstiftningen inte komma i fråga i Sverige." SOU 1993:59, 198.

either. Such changes have, however, taken place gradually, sometimes selectively addressing minor aspects of substance and procedure.

An attempt to reshuffle the Agency and to decentralise or dismantle part of its competencies was made by the centre-right government in 1994. A Committee on Consumer Policy was assigned the task of considering alternative procedures and funding arrangements for the Agency. Some of the proposals were clearly aimed at increasing the possibilities of self-financing and delegation of competencies to non-governmental bodies.[955] With the change of government in 1994, however, these reform plans were abandoned and the Agency's budget even expanded.[956] More unexpectedly, in 2001 the re-elected Social Democratic Government announced its preliminary intention to consider merging the KOV with the Competition Agency.[957] None of these plans, however materialised and the KOV/KO lives on largely unaltered.

The Board of KOV still includes interest representatives, but recently the function of the trade unions and the co-operative movement was taken over by representatives of the two newly formed umbrella organizations of consumer associations, SKR and SKiS.[958] Indeed, one of these associations still includes the two mammoth organizations (LO and KF), so their presence in the consumer policy debate is secured. The relative share of this influence may, however, be said to be diminished or at all events diluted. This reflects the desire to give a broader and more nuanced representation of consumers in the general outline of consumer policy and its implementation.

The present Standing Instructions of the KOV, issued by the Ministry of Justice, lay down the basic goals and priorities of consumer policy, summarizing the conclusions of the last Government Committee on consumer policy issues.[959] Apart from its basic competencies under the MFL and other relevant legislation, the Agency is explicitly empowered to draw up guidelines for marketing as well as for the design of goods and services and for the implementation of the Consumer Credit Act (3 § 3 Instruction).[960] However, in contrast to the previous instructions, the Agency may (*får*), but is not obliged to draw up guidelines. The importance of guidelines is thus reduced by a slight but important change of wording.

As part of the trend towards decorporativisation, some tendencies towards increased legalisation in the work of the KOV and a diminution of conciliatory procedures for decision-making may be detected. One example is the possibility to reconsider consent orders under the regime for individual administrative decisions laid down in the Administrative Procedure Act.[961] Recently, the issue of increasing the powers of

---

[955] SOU 1994:14.
[956] See prop. 1994/95:140.
[957] Statement of Government Policy, 18th September 2001.
[958] The Board consists of ten members, including the Director-General and two representatives of the staff. The Director-General is also Chairman of the Advisory Board.
[959] See SFS 1995:868, cf. prop. 1994/95:140. See on consumer policy SOU 2000:29 and the following prop. 2000/01:135.
[960] SFS 1995:868.
[961] 27 § Förvaltningslagen (SFS 1986:223), see prop. 1994/95:123, 98.

KOV/KO to impose sanctions was raised in a Committee Report on consumer policy *Strong Consumers in a Borderless World.*[962] The Committee draws a comparison between the powers of KOV/KO to issue formally binding injunctions and the powers of other Swedish public agencies, namely the Competition Agency, the National Electrical Safety Board, the Food Administration, the Chemicals Inspectorate and the Medical Products Agency.[963] In all of the reported instances the Committee finds the agencies to be equipped with far-reaching powers to take practical measures mainly in the form of injunctive orders or prescriptions for the implementation of the respective laws. Most weight seems to be attached to the Competition Agency having switched from a negotiation-based model to more rigorous enforcement powers to make the necessary injunctions itself with a possibility of appeal to the Market Court.[964] In addition, the Committee notes that the Food Administration can issue injunctive orders prohibiting the sale and marketing of dangerous foodstuffs or foodstuffs supplied with incorrect labelling, and the Medical Products Agency is empowered to prohibit drug marketing that is misleading or that is not up-to-date, objective and balanced.[965] In summing, the Committee questions whether the interests in legal certainty of the entrepreneurs have not received a greater emphasis than justified in the consumer protection field.[966]

On the basis of this comparison, the Committee advances the radical proposal to furnish KOV/KO with adequate powers to ensure the enforcement of the multiple laws belonging to its domain of competence, for instance to issue binding injunctions and prescriptions of specific conduct.[967] Again a driving argument behind the proposal is to keep the parallel with antitrust law. In addition to this mainly systematic argument, the Committee stands for expanded powers as a means to increased speed and generally increased efficiency of enforcement. Situations where the KOV wants to proceed against many entrepreneurs at the same time, for instance by measures affecting an entire industry are not adequately served by individual court proceedings. Likewise, negotiations may be inefficient and prolonged unless backed by a credible threat of sanctions.[968]

The fate of this quite bold proposal for changing the present institutional balance of powers within the area of consumer protection and market law in particular is worth following more closely. *Prima facie*, the proposal should be seen as grist to the mills of the KOV. Intuitively and following some classical political and economic theories on institutions, it should be in the KOV's "own" interest to acquire more extensive powers and responsibilities. Arguably, such powers would imply increased budgets, influence and status. Yet, surprisingly, among the most active opponents of the proposals one finds the Agency itself. In the report it is stated that: "the Agency rejects the proposal and believes, among other things, that the proposed order can seriously detract from the agency's possibilities steering legal development through its own

[962] SOU 2000:29 Starka konsumenter i en gränslös värld, 367.
[963] A comparison with the Food Administration was also carried out by the Guidelines Committee SOU 1983:40, 59.
[964] SOU 2000:29, 380.
[965] SOU 2000:29, 386.
[966] SOU 2000:29, 401.
[967] SOU 2000:29, 396.
[968] SOU 2000:29, 400.

initiatives .[969] What KOV probably means is that by equipping the Agency with broader administrative powers, the focus of law enforcement would shift from the Market Court to administrative enforcement. This is a justified concern. Having in mind that nowadays the major portion of Agency files are settled through consent orders and only a few per year are submitted for further consideration to the Market Court, the shift that would have been effectuated with the proposed order would have been from informal to formal decision-making (i.e. from a low to a higher visibility arena). The consequence of such a shift might been a necessity to motivate decisions in more detail; a larger number of appeals against Agency decisions and in the end, possibly, greater self-restraint through the choice of enforcement procedure.

The most important actors representing industry likewise rejected the proposal.[970] The public authority is apparently in alliance with the regulated industries in playing down the importance of intensified enforcement technique. The established consensus around informal procedures, co-operation and voluntary compliance and dampened publicity seems to be stable on both sides. Eventually the Government rejected the Committee's innovatory approach and opted for the *status quo*.

Recently, and especially after Sweden's accession to the EU, some commentators have submitted that the corporativist model of government in Sweden is waning.[971] They find evidence for such development in the increased number of one-man legislative committees, without participation of all the important partners and interest groups. A move away from corporatist presence in the management of public agencies is observed.[972] Others argue that the change is less dramatic than claimed.[973] The area of consumer protection and marketing practices offers some evidence in support of the first proposition. At the same time the process of decorporativisation may indeed be slower than at first sight.

7.3.2.3 Redesigning the judicial process

Among the most significant changes of the enforcement design of MFL are the transformations of the role and characteristics of the judicial process. Many of the changes in the structure, functions and composition of the Market Court are in fact closely associated with the vigorous development of antitrust law as a legal discipline following the entry into force of the 1993 Competition Act. Nevertheless, due to the principle of coordination between competition and marketing practices law, the changes have influenced the practical implementation of fair trading law and therefore deserve particular analysis.

Abolishing interest representation in the Market Court

The 1993 Competition Act took the significant and symbolic step of abolishing interest representation in the composition of the Market Court. The institute of interest representation was already criticised with the inception of the Market Court in 1970.[974]

---

[969] Prop. 2000/01:135.
[970] Among them NDM, SI, SRF and SH. Prop. 2000/01:135.
[971] On decorporativisation, see the analysis by Hermansson et al. in SOU 1999:121.
[972] SOU 1999:121.
[973] Jacobsson/Laegreid/Pedersen, 'Transforming States' (2001) *SCORE Rapportserie*, No. 4, 11.
[974] See Ch. 5.4.4.1.

A reconsideration of this corporatist arrangement was first launched after the landmark decision of the European Court of Justice in the case of Langborger v. Sweden.

> The case concerned proceedings before the Rents and Tenancies Court of Appeal (Bostadsdomstolen). According to a mediation clause in Mr. Langborger's tenancy contract, the rent of his apartment was to be determined in negotiations between two local Tenants and Landlords Organisations occupying a central position in the housing rental market, namely the Swedish Property Federation (Sveriges Fastighetsägarförbund) and the Tenants' Union (Hyresgästernas Riksförbund). The case was heard by a Court which included two interest representatives of these organisations. Langborger appealed to the European Court on Human Rights on grounds of Art. 6 ECHR ("right to a fair and public hearing by an independent and impartial tribunal").[975] The Court did not raise any objections against the principle of interest representation in special courts as such. Nor had the Court any reason to doubt the personal impartiality of the particular interest representatives in the specific case. Nevertheless, when it came to the question of their objective impartiality and independence, the Court noted that they were nominated by and had connections with the two organizations who had a common interest in the contract clause being allowed to stand. Therefore the Court concluded that the balance of interests that was present in other cases was at risk in this particular case.

The decision by the ECHR brought about only minor amendments to the legislation on the Rent and Tenancies Court of Appeal.[976] It opened, however, a discussion concerning the justification of interest representation on any adjudicative bodies whatsoever.[977] This question attracted particular attention during the legislative mandate of the centre-right government at the beginning of the 1990s. In the discussion document "The Special Courts in the Future" issued by the Ministry of Justice in 1993[978] the government took the standpoint that special courts are neither a necessary nor a desirable phenomenon and that their function could well be integrated in the system of ordinary courts. The government was particularly critical of interest representation on adjudicative bodies. It was unavoidable that interest representatives would be connected in one way or another to the nominating organizations and that they would show solidarity with these organizations' interests.[979] The position is succinctly put in the following quotation:

> One explanation for the fact that interest members are included in the courts at all is the strong position that organisations of different sorts occupy in Swedish society. It can be claimed that through the years the law maker has tended to satisfy the interests of these organisations at the expense of the individual. The collective regulations (regleringar) in the legal areas under discussion have consequences even for a person who does not belong to the collective or who does not share the collective opinion. That these regulations have been accepted to such a large extent in Sweden is a

---

[975] See Case *Langborger v. Sweden*, ECHR 20/1987/143/197, decision of 22/06/89.
[976] See prop. 1990/91:98, in particular at 33 about the MD. SOU1991:59, Del. 2, 372. Cf. also the discussion in *JT* 1992-93, 376 ff.
[977] See the discussion in Debatt (1989-90) *JT*, 376 ff.; Bernitz, 'Marknadsdomstolen och Langborgerdomen' (1989-90) *JT*, 396 ff.
[978] Ds 1993:34, Specialdomstolarna i framtiden, see in particular 21-26 on interest representation.
[979] See Ds 1993:34.

> consequence of relations specific to Sweden such as, for example, the high percentage of persons and enterprises belonging to different interest associations.[980]

Another Government Inquiry Commission (Ekonomikommissionen), examining the relations between economy and politics in Sweden, concluded that the state should avoid delegating responsibilities connected with exercise of power to these organizations. Nor should organizations be represented in decision-making and adjudicative public organs or sit on the boards of administrative agencies (see the discussion concerning KOV's Management Board above).[981]

These views are easily traceable to the previously discussed alternative perceptions of democracy. A system with interest representatives in special courts reflects a distrust of representative democracy based on strict rules of delegation and separation-of-powers doctrine. A correction of the rigid parliamentary system is attempted by allowing group interests to have a voice in special courts. A more pluralist (polyarchical, to use Dahl's terminology[982]) system of government is the guiding vision. Especially in areas where there are strong and active organizations, their inclusion in the decision-making process is seen to provide legitimacy and acceptance of law enforcement. Contrariwise, those insisting on the abolition of interest representation share a belief in the virtues of representative democracy and stricter separation of powers. Under such conception parliamentary elections are the main source of legitimacy for government . Thus, any delegation of governmental tasks should proceed according to strictly defined and narrowly construed constitutional rules of delegation. Similarly, the courts should act as a corrective to the exercise of public power and should therefore be staffed by independent and professional judges.

With the more general review of market legislation undertaken in the early 1990s by the same government, the question of interest representation once more came to occupy the focus of legislative debate. In the preparatory works to the new Competition Act, the desire was explicitly declared of assigning a more clearly adjudicative role to the Court.[983] Since the formalized negotiating activity under the previous Competition Act was no longer envisaged, there was no particular need to stick to an institutional design with interest representatives. But the government was more strongly motivated by its objection to combining and confusing adjudication with negotiation. Proceedings under the MFL also mainly assumed the character of law enforcement, and it was therefore inappropriate to have any interest representation. The economic experts were to have both practical and theoretical expertise.

---

[980] "En förklaring till att det över huvudtaget förekommer intresseledamöter i domstolar är den starka ställningen som organisationer av skilda slag har i det svenska samhället, och det kan hävdas att det genom åren har funnits en benägenhet hos lagstiftaren att tillgodose dessa organisationers intressen på den enskildes bekostnad; de kollektiva regleringar som finns på det aktuella rättsområdena har ju konsekvenser även för den som inte tillhör kollektivet eller den som inte har samma mening som kollektivet. Att dessa regleringar i så stor utsträckning har accepterats i Sverige hänger bl. a. samman med speciella svenska förhållanden som den höga andelen personer och företag som är organiserade i olika intressesammanslutningar." Ds 1993:34, 23-4.

[981] See SOU 1993:16.

[982] See Dahl, *After the Revolution. Democracy in a Good Society* (New Haven and London: Yale University Press, 1970).

[983] See SOU 1991:59, 370 ff.; prop. 1992/93:56, 57 ff.; bet. 1992/93:NU 17, rskr. 1992/93:144.

One important argument of the Competition Committee for abolishing interest representation was Sweden's increasing involvement in European integration. In the opinion of the Committee the internationalization of trade implied an increased presence of foreign economic operators on the Swedish market. These actors would feel gross uncertainty if disputes were handled by a judicial body partly composed by representatives of domestic industry. Foreign actors might fear that the Court's decisions could be influenced by arguments about protecting the interests of local industry and trade, including the interests of enterprises or the job market. The Committee declared:

> It is important for Sweden's trustworthiness as a European and an international partner that the Market Court be composed so that its position as an independent and impartial tribunal cannot be questioned.[984]

Eventually, with the new Competition Act of 1993, the institute of interest representatives in the Court was abolished. The total number of members was reduced to seven, *viz* Chairman, vice-chairman and five special members. Of the special members one has to be a lawyer with judicial experience and the rest have to be economic experts. The Court is able to take decisions in the presence of three members.[985]

The interest representation in the Court was not abandoned without fight. The corporations represented on the Market Court were all against the reform.[986] As argued in one motion for retaining the existing composition, interest representatives supplied the Court with broad knowledge of economic reality.[987] The absence of interest representation would, according to the authors of the motion, weaken the position of the Market Court and its acceptance in society. The *Lagutskottet*, however, supported the Government in its move to turn the Market Court into a genuine adjudicative organ. The need for basing the decisions of the Court on sufficient knowledge of industry, trade and labour relations and of the consumer economy could be efficiently met by the economic experts sitting on the Court. In addition the Committee pointed to the possibility under the existing Code of Judicial Procedure of calling different experts to testify before the Court, including experts on economic affairs.[988]

With the 1996 MFL the interest representatives in the Market Court were substituted by economic experts. The same applied to the Stockholm City Court, which under the new Act acquired the status of a court of first instance .[989] The opening of courts to technical experts has been accepted rather uncritically in Swedish doctrine and practices. Given the rather weak position of courts generally in the institutional structure of Swedish government, political decision-makers have shown remarkable flexibility and lack of dogma on questions like the composition of courts, temporary

---

[984] "För Sveriges trovärdighet som europeisk – och internationell – samarbetspartner är det angeläget att MD för en sådan sammanställning att dess ställning som oavhängig och opartisk domstol inte kan ifrågasättas." SOU 1991:59, 377.
[985] 3-4 §§ (SFS 1970:417 as amended by SFS 1993:22).
[986] Prop. 1992/93:56, 57 with the views of SI, the SKF, KO, LO and TCO.
[987] Motion 1992/93:N7.
[988] Bet. 1992/93:LU45.
[989] 45-49 §§ MFL. 49 § MFL reproduces the rule in RB 4:10a.

and part-time judges, expert judges etc. This pragmatic attitude has rarely been questioned on constitutional or legitimacy grounds. Nowadays expert members of the Court are in the majority. This fact can primarily be put down to the competence of the Court in competition cases. The preparatory works include many declarations that such dramatic influx of special competence is hardly justified for marketing practices cases.[990]

Status of the Court
With the new Competition Act building on the European model of rigorous implementation of competition rules, the position of the Market Court and the stages of appeal in competition matters changed. The Stockholm City Court was designated as a court of first instance, with the Market Court acting as a court of appeal. The new MFL made symmetrical changes to the sequence of courts for marketing practices cases. The change was viewed as necessary for several reasons. The new MFL introduced more substantial remedies in the form of market disruption fines (*marknadsstörningsavgift*) and damages. Therefore a two-tier procedure was considered to offer better guarantees of due process. Furthermore, the ambition of the law-maker was to uphold the symmetry with the Competition Act, including the system of sanctions and procedure.

The innovations did not fully withstand the test of time. Only a few years after the entry into force of the 1995 MFL a revision was requested.[991] Experience of the newly established sequence of courts was rated negative. Procedure before the Stockholm City Court was slow and protracted and it sometimes took a year before a decision was obtained. Therefore the status of the Market Court as a court of first and last instance was partly restored concerning actions for an injunction or prohibition. If such an action was filed jointly with actions for damages or for a market disruption fine, proceedings were to be instituted with the Stockholm City Court.[992] Surprisingly, the amendment was supported by both the KO and the biggest industrial organizations.[993]

Right of action: emancipation of competitors and private associations
The 1995 MFL did not change the constellation of interests and actors represented in the process of enforcement, with the sole exception of for the first time entitling individual consumers to claim damage compensations.[994] At the same time, the Act considerably shifted the balance between the litigation powers of the interested actors and organisations. One of the most symbolic changes in the procedural system of Swedish marketing practices law was the abolition of the institute of 'subsidiary standing'. As discussed in chapter 5, above, under the 1975 MFL individual competitors as well as business and consumer organisations could lodge a petition with the Market Court only after the KO had announced that he was not interested in the case. The system was intended to bolster the central position of the Ombudsman in the system of enforcement and to give him full overview and control over the flow of cases to the Market Court. The asymmetric distribution of litigious competences between the KO and private litigants was at the centre of several inquiries during the

[990] See Ds. 1993:54; SOU 1991:59, Del 1.
[991] SFS 1996:861, cf. prop. 1997/98:188, bet. 1998/99:LU6, rskr. 1998/99:125.
[992] 38 § MFL (SFS 1995:450).
[993] Prop. 1997/98:188.
[994] SOU 1993:59, 450 ff.; prop. 1994/95:123, 111.

1980s[995], all of them ending with a decision to keep the *status quo*.[996] Therefore it is remarkable that the proposal of the 1993 Inquiry was made without lengthy motivation and was accepted almost unanimously by all consulted parties, including the KOV.[997]

The Inquiry's proposal was, even more remarkably, fully and unconditionally embraced by the Government. According to the Government Bill there were a number of factors suggesting that the 'subsidiary standing' had exerted a stifling effect on the power, will and capacity of individual traders and organisations to use their right of action. The decision of the KO not to take legal proceedings tended to put affected traders and associations at a psychological disadvantage. In contrast, the alleged perpetrators often felt strengthened by this decision before the court had had a chance to decide the matter.[998]

Interestingly, the Government went even further than the Marketing Practices Inquiry in widening the scope of procedural rights of traders and their associations. The Government accepted the Inquiry's proposal to introduce a new sanction, a so-called market disruption fine.[999] While in the original proposal this right was confined exclusively to the KO, the Government found it appropriate also to grant competitors and their associations a subsidiary standing to claim imposition of the sanction. According to the Government Bill the market disruption fine could be a particularly effective remedy for individuals whose interests were immediately affected by the infringement and where the KO would decide not to bring the matter before the court.[1000] At present competitors account for the greater number of lawsuits before the Market Court, though the number of cases remains relatively modest.

Consumer and wage-earner associations appear to be the least affected by the new system of enforcement. Certainly, these associations were also covered by the abolition of the institute of subsidiary standing. The change, however, was clearly introduced with the primary intention of boosting the litigious activity of individual traders and trade associations. In the area of collective consumer interests the KO was still regarded as the main and most efficient enforcement agent. This is particularly evident from the fact that the Government did not find it necessary to extend the (subsidiary) standing for claiming market disruption fines to other than trade associations.[1001]

From administrative proceedings to civil lawsuit

The general tendency of setting Swedish marketing practices law on the 'track' of private ordering was confirmed by the redefinition of the character of proceedings before the Market Court (and now the Stockholm City Court) from administrative proceedings to civil lawsuit.[1002] The 1993 Inquiry had suggested an even further

[995] SOU 1983:40; prop. 1984/85:213; 1985/86:LU10, 1988/89:LU13.

[996] With the amendment advanced in prop. 1984/85:213 the position of interested traders in the preliminary procedure before the Ombudsman was somewhat improved, but only marginally. See prop. 1984/85:213, 50 ff; cf. Ch.5.4.4.2 above.

[997] SOU 1993:59, 457 ff.

[998] Prop. 1994/95:123, 132.

[999] On this sanction see Ch. 7.3.2.3 below.

[1000] Prop. 1994/95:123, 134.

[1001] Prop. 1994/95:123, 134.

[1002] See prop. 1994/95:123, 144.

reaching reform. Swedish law of procedure distinguishes between civil lawsuits allowing amicable settlement between the parties (*dispositiva tvistemål*) and civil lawsuits where such settlement is not possible (*indispositiva tvistemål*). According to the Inquiry Commission, in marketing practices proceedings between two traders it was desirable to apply the rules on civil lawsuits with the possibility of amicable settlement.[1003] The Inquiry underlined the advantages of this arrangement from the point of view of procedural economy. It also suggested that such an arrangement might be conducive to the development of an effective system of industry self-regulation. This proposal, however, was rejected by the government as being too radical in the context of a legal discipline with a strong public law element. Most of the stakeholders consulted were likewise sceptical of the suggestion, notably among them the Market Court, but also the major industry organisations.[1004]

More specifically, the government considered injunction proceedings in marketing practices law to be unsuitable for voluntary settlement. These proceedings rarely concerned purely private disputes. Instead, they were concerned with ascertaining whether particular conduct violated provisions aimed at protecting general consumer and trader interests. The parties could not be allowed a completely free hand in deciding the outcome of such cases. [1005] Eventually, amicable settlement was allowed only in lawsuits on damage compensations. For injunction proceedings and cases concerning the imposition of market disruption fines, the rules on civil proceedings where amicable settlement is not allowed were to apply.[1006]

In legal doctrine this approach is criticized as poorly justified. Apart from the possibility of voluntary settlement, it was difficult to see where the main differences between the two types of proceedings lay and what was the value of keeping proceedings under MFL within the category of *indispositiva tvistemål*. In all essentials these proceedings resembled civil proceedings, for instance in intellectual property lawsuits. A greater emphasis on *ex officio* action of the Market Court, for instance in gathering evidence, was another possible difference, but the Government Bill expressly stated that the main burden of evidence gathering was on competitors.[1007]

Return to classical civil law rules on cost of proceedings

The departure from the administrative character of proceedings under the MFL brought about important changes in another aspect of the system of enforcement, namely litigation costs. The old MFL, proceeding from the vision of KO as a central enforcement agent and a 'prosecutor' of improper marketing practices, was markedly insensitive to the issue of costs.[1008] In contrast to ordinary civil proceedings, the parties to a dispute before the Market Court were supposed to bear their own expenses and costs irrespective of the outcome of the case.[1009] This rule definitely did not encourage

[1003] SOU 1993:461 ff.
[1004] Prop. 1994/95:123, 148.
[1005] Prop. 1994/95:123, 149.
[1006] Prop. 1994/95:123, 150; cf. now 50 § MFL (SFS 1995:450).
[1007] See Nordell (2003a), 111 ff. with reference to prop. 1994/95:123, 150.
[1008] See Ch. 5.4.4.2 above.
[1009] Prop. 1970:57, 69, cf. prop. 1984/85:123, 66.; cf. Ch. 5.4.4.2 above.

litigiousness and has been indicated above as one factor accounting for the remarkably small number of proceedings initiated by individual competitors.[1010]

The Government Bill preceding the 1995 MFL reveals a serious change in thinking on the issue of costs. Most symptomatic is the view of cost rules as an effective economic instrument for achieving a balance between creating incentives for bringing justified claims before the courts and at the same time, disincentives for unwarranted and vexatious claims.[1011] Importantly, budgetary considerations should according to the Government also be taken into account. This intricate balance is found in applying the conventional rules for costs of civil proceedings in disputes involving private parties.[1012] Under the 1995 MFL the rule is even applicable in proceedings where the KO is a party. There is, nevertheless, a safety valve integrated in the rule on costs. In lawsuits based on claims for an injunction or prohibition the competent courts are expressly authorised to decide that the partis shall bear their litigation costs as incurred. As one example of a situation where this exception could be applied, the Government quoted litigation for clarifying matters of principle, obviously implying the precedent-setting function of KO.[1013]

In the course of legislative deliberations many stake-holders representing consumer interests, e.g. the SKR, KF and even the Market Court levelled strong criticism at the change in allocation of costs. They pointed at the inhibitive effect the new rule could exert on the access to justice of consumer organisations. This argument was, however, not given particular attention in the Government Bill.[1014]

The main rules on litigation costs in civil proceedings in Sweden are to be found in Ch. 18 RB. According to RB 18:1 the losing party is obliged to reimburse the prevailing party for the latter's litigation costs. If a party is considered to have prevailed only in part, the compensation may be adjusted and the costs distributed between the parties proportionally to the part of the suit won and lost respectively.[1015] If the conclusive circumstance in the case was unknown to the losing party, the court may direct that each party shall bear its own costs (*kvittning*).[1016] There are in addition a number of devices aimed at encouraging the parties to achieve amicable settlements.[1017]

Litigation costs consist of expenses for preparing the trial,[1018] production of evidence (e.g. the expenses connected with summoning and hearing of a witness), of the party's own appearance in court, reimbursement for the time spent and for loss of income

---

[1010] See Ch. 5.6.3.2 above. Similarly Treis (1991), 80 ff.
[1011] Prop. 1994/95:123, 157.
[1012] 55 § MFL (SFS 1995:450); cf. Ch. 18 RB. See prop. 1994/95:123, 156 ff.
[1013] Prop. 1994/95:123, 157.
[1014] Prop. 1994/95:123, 155.
[1015] See Ch. 18 RB.
[1016] RB 18:3.
[1017] For instance, the costs of mediation and negotiation for the purpose of arriving at a voluntary settlement are as a rule included in the reimbursable litigation costs. In this way the party does not risk incurring additional costs after failed negotiations, see RB 18:1.
[1018] For instance in cases concerning claims for payment, the creditor must always have claimed the debt through a so-called *inkassoservice* (debt collection agency). The costs connected with this service fall within the category of preparing the trial. Ekelöf/Bylund/Boman, *Rättegång*, III, 7th ed., (Stockholm: Norsteds juridik, 1994), 179.

because of the proceedings, etc.[1019] Yet by far the most substantial portion of litigation costs represent counsel's fees.[1020] In contrast to Germnay, attorney fees in Sweden do not follow the value in dispute but are based on an estimation of time spent and quality of service. This implies that "there are not any important cost distinctions between financially quantifiable and non-quantifiable controversies."[1021]

In the light of the above described German discussions, it should be clear that even under the normal rules of costs reimbursement Swedish marketing practices legislation could not turn into a goldmine for profit-seeking attorneys. Notably, cases that are legally simple could never become a source of high attorney fees, since the courts always have the discretion to disregard compensation claims on the ground that the costs were not reasonably incurred or were excessive. This simple rule makes obsolete the whole discussion in German law on the determination of the value in dispute. Likewise it avoids the difficulties of deciding over the value in dispute in less easily quantifiable lawsuits such as those under unfair competition law and in particular lawsuits by private parties in the public interest.[1022] In a discussion of the introduction of the institute of class action in Swedish law, Per Henrik Lindblom compares the Swedish approach to calculation of attorneys' fees with the German practice of determining the attorney fees on the basis of the value in dispute. He qualifies the German rule as coming close to the 'contingency fee' principle in American law.[1023]

In his classical textbook on judicial procedure, Per Olof Ekelöf, the doyen of Swedish procedural law, refers to a statement by Ihring from "Der Kampf um's Recht". According to Ihring, if he had to determine the practical importance of the two propositions "do no injustice" and "tolerate no injustice" he would order the second before the first. Ihring continues that if responsible citizens do not act in this manner, the civil law provisions will not have any penetration in society.[1024] This quotation may to this day reflect the attitude of the German legal community (and probably of society at large).

Commenting on Ihering's proposition, Ekelöf himself gives expression to the alternative (Swedish) approach: "Certainly there is some truth in it [Ihering's proposition]. But here we also see the significance of the rules on litigation costs. It must have a dampening effect on the willingness of the aggrieved party to engage the system of administration of justice if this would be connected with considerable economic sacrifices."[1025] Again, it could be concluded that the solution is in harmony with general (aggregate) welfare albeit at the cost of poorly defended individual rights.

[1019] On costs of judicial proceedings, see Ekelöf/Bylund/Boman (1994), 177 ff.

[1020] Ekelöf/Bylund/Boman (1994), 178.

[1021] See Bolding, 'Access to Justice in Sweden' in: Cappelletti/Garth, *Access to Justice*, Vol. I , Book 2 (Alphen aan den Rijn: Sijthoff and Noordhoff, 1978), 891 ff., at 898.

[1022] See Ch. 5.3.3.3 above.

[1023] See Lindblom, Grupptalan. Det anglo-amerikanska class action institutet ur ett svenskt perspektiv (Stockholm: Norstedts, 1989), 682 ff.

[1024] Ihering (*Der Kampf um's Recht*) quoted after Ekelöf/Bylund/Boman (1994), 182.

[1025] Ekelöf/Bylund/Boman (1994), 182: "Men därmed framstår också klart rättegångskostnadsersättningens stora betydelse. Det måste inverka dämpande på den förorättades lust att anlita rättskipningen, om detta är förbundet med kännbara ekonomiska uppoffringar."

The change from a rule of each party bearing its costs to a general "loser pays" rule can arguably raise the interest in marketing practices cases and give incentives to parties believing themselves to be injured or negatively affected to seek remedy in court. Nowadays the Market Court can award substantial sums in reimbursement for litigation costs. In one case, where there have been proceedings in two instances (the Stockholm City Court and the Market Court), the Market Court found a claim for compensation of litigation costs of about 1,5 million Swedish crowns to be reasonable.[1026]

Remedies: market disruption fine (marknadsstöringsavgift) and damages
The most important innovation in the field of remedies and sanctions was the introduction of the so-called 'market disruption fine'. This sanction was consciously modelled on the fines imposed by the European Commission for breach of Community competition law.[1027] The influence of Community law was thereby not direct but reflected, flowing from the close conformity of the 1993 Swedish Competition Act with Community competition law and from the established tradition of coordination between the areas of competition and marketing practices law. Therefore the market disruption fine represents a deviation from the conventional Swedish administrative sanctions, for instance by requiring fault or negligence as a subjective prerequisite for fine-imposition. The Inquiry observes that this subjective requirement will enhance legal certainty for the individual traders. At the same time the courts are encouraged not to be too rigorous in their assessment of fault or negligence, so that the system of enforcement will preserve its efficiency.

So far the KO has shown reasonable restraint in resorting to this instrument. Only two cases have to my knowledge, been decided with a legally binding effect where a "*marknadsstöringsavgift*" has been imposed. The first case concerned advertising for a weight-loss pill heavily exaggerating its effects and was directed at a repeat perpetrator.[1028] Following a claim by KO, Stockholm City Court imposed a fine of 500, 000 Swedish crowns on the company responsible for the advertising. Indeed this monetary sanction may be particularly appropriate for cases of unserious "fly-by-night" operators who are not interested in building reputation and goodwill. The second lawsuit concerned a promotional offer for travels which did not fulfil the information requirements in 13 § MFL.[1029] In both cases the KO was successful, but the size of the fine sought was relatively modest. It remains to be seen how this innovation in the system of sanctions is going to work in the future.

In chapter 5 I specifically addressed the soft approach to sanctions in the 1970 and the 1975 MFL. One of the most striking examples of inadequate remedies was the limited scope for damage compensation claims. Traders could claim damages only for violation of a valid court injunction issued on the basis of the general improper marketing clause (2 § MFL 1975) or for breach of the few criminal provisions of the

[1026] See MD 2000:25 ("Hästens I").
[1027] SOU 1993:59, 418. On fines in competition cases see Art. 15(2), Regulation 17/62, OJ Spec. ed. 57-62, 87; cf. Weatherill/Beaumont (1999), 912 ff.
[1028] Stockholms Tingsrätt, avd. 8:1, dom 14.4.1997, KBA Internationell Medicinkonsult. It may be interesting to note that only a few months after this procedure, the activity was resumed by relatives of the already sanctioned owners.
[1029] MD 1998:7 ("Fritidsresor"). The Market Court imposed a fine of 200, 000 SEK.

Act (6-8 §§ MFL 1975).[1030] Individual consumers were not granted any right to damage compensation whatsoever.[1031] This limited possibility of seeking damages was found to have its roots in a 'genetic' link of Swedish tort law with criminal law and an ensuing restrictive attitude to compensation for pure economic loss.[1032]

The 1993 Marketing Practices Inquiry set out to break with this tradition. In what could be regarded as a bold approach, it heavily criticized the current rules on damages[1033], stressing the importance of effective damage compensation for ensuring the implementation of the substantive rule. Dogmatically, the 1993 Inquiry sought support for its position in the preparatory work to the Damage Compensation Act, in case law, doctrine[1034], other legislation and notably, again, in the 1993 Competition Act, granting the right of damage compensation to negatively affected undertakings.[1035]

The introduction of damage compensation for infringement of non-criminal market law provisions could be more easily motivated by the more sophisticated structure of the substantive rules discussed above. By drawing up a long catalogue of detailed prohibitions of specific marketing conduct the requirements of subjective element (fault or negligence) usually associated with tort law claims could be adequately satisfied. Liability in damages could thus be neatly confined to violations of the catalogue rules, without compromising the respected principles of legal certainty and predictability in economic life. In addition, it was considered that no distinction should be drawn between a prohibitive injunction and an information order and that both should be able to serve as a basis for claiming damage compensation.[1036] Attempts of competitors to claim substantial damage compensation under the new rule have so far not been particularly successful, probably because of the difficulty of providing evidence of losses incurred.[1037] This may, however, change with more intensive litigation.

The extension of the rules on damages to individual consumers deserves particular attention. What is truly remarkable is the ease with which the Inquiry's proposal passed through the sieve of the legislative process. A controversial measure that in Germany has been at the centre of decade-long debate to no avail was in Sweden turned into reality (at least concerning 'law in the books') in a matter of months.[1038] Certainly, the majority of the most authoritative industry and trade associations, expressed scepticism as to the need and practicability of such a remedy. This scepticism was shared by other influential stake-holders and opinion-makers such as the Swedish Bar Association and the Swedish Association for the Protection of

---

[1030] Prop. 1970:57, 101 ff. See prop. 1993:59, 436 ff.
[1031] Prop. 1970:57, 101 ff.
[1032] See Ch. 4.4.2.2 above.
[1033] 19 § MFL (SFS 1975:1418).
[1034] Kleineman (1987).
[1035] SOU 1993:59, 439.
[1036] SOU 1993:59, 446; prop. 1994/95:123, 110.
[1037] See MD 2001:16 ("Hästens" II) where the plaintiff claimed damages in the size of 10 million Swedish crowns but the Market Court accepted only 300,000 as reasonable compensation; cf. MD 2003:6 ("Kopparbergs Bryggeri).
[1038] See 29 § MFL (SFS 1995:450).

Industrial Property.[1039] Yet, apparently, the reaction of organised industry has been one of reluctance, rather than outrage and firm resistance. The explanation is probably to be found in a combination of factors. Most important, arguably, is the familiar unwillingness of Swedish business circles to appear hostile to consumer-friendly legislative measures. In addition, both theory and common sense suggest that individual consumers are not likely to use litigation opportunities in practice, especially in cases of low value claims (the typical consumer claim under the MFL). Finally, the argument against consumers' right to damage compensation was clearly made more difficult by coupling this right with the equivalent right for traders and trade associations. The benefit to industry and trade of the increased possibility of claiming damages may have been felt to outweigh the loss of possible consumer suits.

Whereas it is undisputable that individual consumers would hardly be motivated to make use of the damage compensation remedy in the 1995 MFL, the Marketing Practices Inquiry acted to a great degree in anticipation of the much-debated Act on Class Action.[1040] This Act has been under legislative deliberation for many years but, due to the more credible threat to mobilize diffuse interest and to be a source of considerable expense to industry and trade, has come up against heavy resistance.[1041] Against this backdrop it is remarkable that even this legislative experiment saw the light of day. Combining an individual right to damage compensation with the possibility of joining claims in one single action may certainly create fresh incentives for litigation. At present, though, it is unclear to what extent the Act on Group Action is going to influence the enforcement pattern of the MFL.[1042] It may be noted that apart from the classical 'class action' institute the Swedish Act affords the possibility of a collective action for damages being brought by a public authority, e.g. KO and by consumer and wage-earners associations.[1043] In the light of the institutional legacy of Swedish consumer protection policy, it may be hazarded that there will be more pressure on KO to use its prerogatives for action on behalf of aggrieved consumers, rather than an abundance of private class action lawsuits. On a more general level, given the non-litigious legal culture dominant in Sweden, one could probably conjecture a moderate application of this statute. Ultimately it is the trust in this culture that accounts for the success of bold legislative initiatives and the limited resistance of the industry affected. It remains to be seen whether this prognosis will be refuted by future developments.[1044]

In a sense the reform of the right to damage compensation under the MFL followed a reversed pattern compared to that typifying the German debate on unfair competition

---

[1039] See prop. 1994/95:123, 108.

[1040] Lag om grupprättegång (SFS 2002:599), prop. 2001/02:107.

[1041] See Lindblom, 'Grupptryck mot grupptalan'(1996) *SvJT*, 85 ff.

[1042] See SOU 1993:59, 452 with express reference to Grupptalanutredningen.

[1043] See 4-6 §§ (SFS 2002:599) stipulating the so-called private group action (*enskild grupptalan*), association action (*organisationstalan*) and public group action (*offentlig grupptalan*).

[1044] The new Act on Class Action in Sweden raises a number of complex issues that cannot be addressed within the scope of the present study. Here it can only be suggested that an analysis of this act from a comparative institutional perspective may shed light on the institutional advantages it offers for the accomplishment of a number of social policy goals. Such analysis will require taking into account the costs and benefits of participation in adjudication and in alternative institutional processes as key units of analysis. See Komesar (1994), 130-133. On the possible application of class action in financial markets, see af Sandeberg, *Prospektansvaret* (Uppsala: Iustus Förlag, 2001).

law. The desire to introduce more generous damage compensation remedies for businesses almost automatically requires that an equivalent benefit should be granted to consumers. In Germany the opposite logic applies: any step toward bolstering the rights of consumers (e.g. by enhancing the procedural rights of consumer organisations or granting better remedies to consumers) is by definition associated with similar rights for business associations. The inherited patterns of giving priority to majoritarian, or minoritarian, interests respectively appears very stable, indeed.

7.4 Actors and organisations involved in enforcement: change or continuity?

7.4.1 Germany

7.4.1.1 Wettbewerbsverbände on the defensive?

The Falckenstein study from the 1970s estimated that the associations (Verbände) accounted for about 45 percent, and competition associations (Wettbewerbsverbände) for about 36 percent of all litigation in unfair competition matters in Germany. The sting of the 1994 UWG reform was aimed at reducing this litigation rate. In the words of Gröning, a judge at the *Kammergericht* in Berlin, if trade associations were share-holding companies quoted on the stock exchange the price of their shares would have plunged to the bottom on the date the 1994 reform was passed by parliament.[1045] Nevertheless, two years after the entry into force of the amendment Schricker ventures to speculate that the number of competition associations and in particular notification and fee-collecting associations has even grown subsequently.[1046] Other commentators also note that the professional litigating unions have not experienced any major difficulties in adapting to the new requirements of the law.[1047] This probably only serves to underscore the difference between the market, the political and the judicial process concerning the conditions for institutional persistence and change.

Will the trend to liberalisation of German unfair competition law entail a gradual weakening of the position of business associations in unfair competition matters? To be sure, the procedural amendments bringing sharpening of the requirements for standing under § 13 UWG, did not affect the situation of established and reputable competition associations like the *Wettebwerbszentrale* and others. Nevertheless, indirectly the reform conveyed a warning that excessive enforcement of the UWG standards was no longer regarded as a wholly positive phenomenon.[1048]

A more recent example of the growing criticism of the activity of the competition associations is the interpellation by a CDU representative in the Baden-Württemberg Landtag to the Minister of Economy in the Länder government.[1049] Questions raised in the interpellation concerned, among other things, the number of collaborators at the *Wettbewerbszentrale*, its membership, and the guidelines given to collaborators and

[1045] „Wären Gewerbeverbände 8 § 13 Abs. 2 Nr. 2 UWG börsennotierte Unternehmen, ihre Kurse wären am 24.Juni 1994, dem Tag, an dem der Deutschen Budestag das UWGÄndG beschloss, ins Bodenlos gestürzt." Gröning, 'Notwendigkeit und Spielräume einer Reform von §1 UWG' (1996) *WRP*, 1135.

[1046] Schricker (1996a), 477.

[1047] See Ulrich (1995) with reference to BGH GRUR 1997, 537 ("Lifting").

[1048] See also Kleine Anfrage quoted by Schricker in the Bundestag 12/7145.

[1049] Kleine Anfrage des Abg. Franz Schuhmacher, CDU, Landtag von Baden-Württenberg, 12 Wahlperiode, Drs. 12/4067. For an earlier parliamentary attempt to check the work of the competition associations, see Schricker (1994c), 432.

lawyers working in the name of the *Wettbewerbszentrale*. The tone of the interpellation is unmistakeable:

> 4. Wie beurteilt er die Arbeit der Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V. in einer Zeit,
> a) in der nach Lockerung von Wettbewerbsnachteilen gerufen wird und z.B. durch Tankstellen-Kioskbetrieb, den Internetverkauf und den Versandgeschäften über die Fernsehwerbung zu allen tages- und Nachtzeiten geworben wird und z. B. dem Einzelhandel dadurch täglcih Kaufkraft entzogen wird,
> b) in der nach zusätzlichen Dienstleistungen gerufen wird, aber Handwerksmeistern und andere Gewerbetreibenden unter Strafandrohung die Dienstleistung in Randbereichen der eigetlichen Tätigkeit untersagt wird?
> 7. Hält sie die zunehmende Kritik an der Zentrale zur Bekämfung unlauteren Wettbewebs e.V. für berechtigt?

Certainly the response by the Minister of Economy is unreservedly positive and reassuring and it is no mere coincidence that the whole document is published on the website of the *Wettbewerbszentrale*. Nevertheless, the interpellation indicates that the climate in which the *Wettbewerbszentrale* works nowadays has changed significantly. Under these new circumstances, competition associations, and the *Wettbewerbszentrale* in particular, do not seem to take a defensive line, but rather seek to promote and strengthen their position through active participation in legislative processes at the European level.

In its position paper to the Commission's Green book on consumer protection, the *Wettbewerbszentrale* reports an unceasingly high number of complaints, voluntary settlements and court proceedings. For 2000 the greater part of the total of 21,491 complaints are reportedly settled voluntarily. In 1,669 cases the arbitration committees of the Chambers of Commerce have been seized and in 840 cases the dispute was referred to the ordinary civil courts.[1050] Sponsored as it is by the broad business community, the *Wettbewerbszentrale* appears especially self-confident. But the bold spirits of the 1980s may have gone for good.

Hoeren, in his commentary on the Draft E-commerce Directive, remarks that Germany is the only country which allows advertising law to be enforced by the kind of policing organisation represented by the renowned *Wettbewerbszentrale*. He sees, consequently, a threat to this particular form of self-control in the expansive scope of the country-of-origin principle as laid down in this Directive. [1051]

On a more general note, Kur predicts that in the future decisive emphasis in European fair trading law will fall on enforcement. She carefully notes the possibilities for the creation of common European structures that could take care of existing interests of prosecution and enforcement, especially in the area of cross-border advertising. Such

---

[1050] Stellungnahme zum Grünbuch der Kommission zum Verbraucherschutz in der Europäischen Union, February 2002, 2.

[1051] „Deutschland is im übrigen das einzige Land, das sein Werberecht über Abmahnorganisationen wie die renommierte Centrale (sic!) zur Bekämfpung unlauteren Wettbewerbs durchsetzen lässt. Diese Form der Selbstkontrolle würde sich zusammenbrechen, wenn es bei Online-Diensten aufgrund des Herkunftslandprinzips nicht mehr oder nur sehr eingeschränkt tätig weren dürfte."

developments could in her view lead to a certain weakening of the traditional German model of private-law enforcement, relying on individual competitors as well as on the litigious activity of consumer and business associations.[1052]

A possible consequence of the evolving new German and European fair trading law from the consumer protection viewpoint could be the *Wettbewerbszentrale* adjusting its priorities accordingly and assuming a more explicitly consumerist profile. Indicative of such an 'identity adaptation' is the emphasis on the positive effects of the activity of the *Wettbewerbszentrale* for consumers in the position papers on draft European legislative measures. Publications by representatives of the *Wettbewerbszentrale* likewise demonstrate increased concern for consumer interests.[1053]

7.4.1.2 Strengthened position of consumer organization

The consumer movement in Germany has also experienced serious changes. Consumer organisations, which were weak and fragmented in the 1970s, have gradually consolidated their positions. The major financial source making this bolstering possible is government and Länder contributions. Another source is the European Community. There is no denying that the evolution of consumer policy at the EU level has had positive spillover in the Member States.

Recently, the most important structural reorganisation of consumer representation in Germany has been carried out since the founding of the first consumer associations in the 1950s. In the 1990s the Government announced its intention of withdrawing from the financing of consumer organisations and transferring this task to the *Länder*. Parallel to this reform a discussion was launched on the need for consolidation and enhanced effectiveness of the existing consumer organisations. The decision was taken to create an umbrella association (*Dachverband*) that would strengthen the representation of consumers at the federal level. On 1 November 2000 the Federation of German Consumer Organisations ('*Verbraucherzentrale Bundesverband e.V.*', vzvb) was founded.[1054]

7.4.1.3 Governmental Consumer Protection Agency?

Institutional developments outside the area of fair trading should not remain unobserved either. In 2002 Germany decided on the setting up of a Federal Agency on Consumer Protection and Foodstuffs Safety (*Bundesamt für Verbraucherschutz und Lebensmittelsicherheit*). Certainly the ambit of this Agency is not as comprehensive as that of its Swedish and Scandinavian counterparts (e.g. KOV). The German Agency is to deal predominantly with issues of consumer health and safety and of ecological consumption. Nevertheless, given the existence of a discrete institutional entity under the broad heading of consumer protection, expansion of its scope of action is not excluded. Such an entity may be a convenient institutional counterpart to the European Commission's Directorate SANCO, and consequently ensure a more efficient response

---

[1052] Kur (2002), 645.

[1053] See Kisseler, 'Ein Meilenstein für den Verbraucherschutz' (1997) *WRP*, 625 ff., commending a decision of the BGH on pyramid schemes.

[1054] The English translation is from the vzbv website . With the foundation of the Federation, the three previous bodies with centralised functions, namely *Stiftung Verbraucherinstitut*, der *Verbraucherschutzverein e.V. (VSV)* and die *Arbeitsgemeinschaft der Verbraucherverbände e.V. (AgV) were* dissolved.

to the numerous legislative initiatives and more mundane tasks of information exchange and monitoring flowing from the Commission.

7.4.2 Sweden

7.4.2.1 The changing role of the KO

In Sweden, European integration has significantly influenced the position of KOV/KO, even if the direction of change may sometimes appear contradictory. On the one hand the position of the KOV may have been enhanced by its new role of representing the Swedish state in international cooperation. The fact that the Community treats consumer policy, also institutionally, as a distinct policy has had a legitimizing effect on the work of the KOV, which might otherwise have been under increased pressure to justify its own existence. More interestingly still, due to the general compatibility of the main ideology of modern Swedish marketing practices law, oriented around classical market failure concepts and compatible with liberal free trade economic outlook, the KOV has been quite successful in pressing the Swedish model on the European agenda.[1055] The Swedish state's intent on sustaining its traditionally high profile in consumer protection policy at EU level, has actively supported this development.[1056]

On the other hand KOV has seen itself challenged to defend the Swedish (and Scandinavian) marketing practices model in the Europeanisation process. Children advertising has turned into an especially acrimonious regulatory problem. In the case of the prohibition of television advertising targeting children under 12 years old, the failure to stop such advertising emanating from another Member State seems to have moved the KO to intensify enforcement of the prohibition in respect of domestic commercial broadcasters. In the years following *De Agostini*, three lawsuits were filed against TV4, all concerning children advertising. Whereas in some of the cases the Market Court accepted KO's argument and banned the advert, [1057] in others it applied a stricter interpretation of the term 'advertising seeking to attract the attention of children under 12 years of age' and dismissed KO's claims for an injunction.[1058]

Judging by the empirical data from the work of the KO, more effort is focused on informal negotiations and reaching decisions by compromise. The most inconspicuous and soft form of intervention is the informal contact – following a complaint or resulting from the Ombudsman's own investigation – and negotiation ending in an equally informal settlement (*uppgörelse*). From the Annual Reports of the KOV until 2000 it was not always possible to discern how great the number of such voluntary settlements was. The statistically reported figures covered the number of notifications (reports, complaints) and the number of consent orders and court proceedings. However, it remains unclear how many of the reports lead to the opening of a file, how

---

[1055] See interview with Jim Murry, Director of BEUC, KonsumentMakt, Nyhetsbev från Sveriges Konsumentråd, Nr. 2 April 2003, 4 referring in particular to the Swedish Director of the DG SANCO legal service. See also Micklitz/Keßler, 'Europäisches Lauterkeitsrecht. Dogmatische und ökonomische Aspekte einer Harmonisierung des Wettbewerbsverhaltens im europäischen Binnenmarkt' (2002) GRUR Int., 885 ff., at 891.

[1056] During the Swedish Presidency the first meeting of consumer Ministers was held. See also Towards a Harmonised View on Fair Trading in Europe, Conference in Stockholm, 9-10 March 2001.

[1057] MD 2001:8 ("Pokémon"); MD 2002:31, ("Hemglass") about advertisements for ice-cream: only part of them directed at children under 12 years.

[1058] MD 2001:5 ("Buena Vista"). An advertisement for Disney's Cinderella video film was not seen to be directed at children under 12 years of age.

many of the files were handled through informal negotiations and how many ended in a successful voluntary settlement. Yet, given the large number of complaints to the KOV and the small number of formal proceedings, including consent orders the reasonable conclusion should be that a considerable portion of cases have been settled in a voluntary manner.[1059]

The reports since 2000 give a more detailed account of the fate of the different complaints. With the advance of new information technology the number of complaints and notifications has increased drastically.[1060] Thus in the Annual Report 2000, 6,368 signals are reported.[1061] During the same year 6,100 files were closed.[1062] From this report it turns out that there are about 500 cases in which the KOV finds a violation of the law, but instead of taking formal steps achieves a settlement on a voluntary basis. It also becomes evident that the form of voluntary settlement in the internal "jargon" of the Agency can assume a variety of forms. The Agency may confine itself to a remark to the trader, or it can try and achieve a voluntary settlement or a commitment by the trader. In any of these situations, however, the compromise is an informal one and possible non-compliance would require renewed procedure. Generally, there seems to be a trend towards a growing number of consent orders with a concomitant reduction of litigation proceedings before the Market Court. Another observation is that the number of guidelines is steadily kept low (an average of 1-2 new or renegotiated guidelines). The Agency seems more involved in issuing prescriptions on the basis of European directives in the area of product and marketing standards.[1063]

Probably most noteworthy is the visible retreat of the KO from the litigation stage. The number of lawsuits brought by KO before the courts has decreased substantially since the introduction of the 1995 MFL, from 17 cases in 1991 to an average of 4-5 cases annually during the years 1996-2001.[1064] Many of the cases filed before the Market Court during the last years concern children advertising, tobacco and alcohol advertising. In addition an emphasis on advertising of financial services and on health-

[1059] See e.g. For 91/92 of 3,055 files: 22 cases and 34 initiated orders; For 92/93 of 3,577: 14 cases and 27 initiated orders; For 93/94 of 4,155 files 13 cases and 37 initiated orders; For 94/95 of 3,591 files: 8 cases and 29 initiated orders). For statistics from the earlier practice of KO, see SOU 1983:40, 59.

[1060] It should be kept in mind that not all notifications concern matters related to fair trading and marketing practices.

[1061] Including 4,884 from consumers, 294 from municipalities, 237 from industry, 525 from governmental authorities and organisations, and 428 on KO's own initiative. KOV Årsredovisning 2000. For 2001 the total number of files is 6,161, the number of consent orders 30 and the cases before MD 7. For 2002 the number of files is 6,484. The number of consent orders is 42 and the cases filed before the MD are 10. KOV Årsredovisning 2001 and 2002.

[1062] The grounds for closing the file have been described as follows: the question has been answered, the signal has been transferred to another competent authority, the file does not call for any action, the same question is part of another file, the consumer interest is insignificant according to KOV's Standing Instructions, KOV has addressed a reprimand (*påpekande*) to the trader, the case involves a private dispute, settlement with individual enterprise or an undertaking by the enterprise, the conduct is not against the law.

[1063] For instance on ecological labelling, on information about electricity consumption of household appliances, etc.

[1064] The relation between the total number of cases under the MFL and the number of cases brought by KO has been as follows: for 1988 – 10 out of 23 cases; for 1989 – 10 of 19 cases; for 1990 – 9 of 20 cases; for 1991- 17 of 24 cases; for 1992 – 10 of 27 cases; for 1994 – 7 of 28 cases; for 1996 – 6 of 25 cases; for 1997 – 3 of 8 cases; for 1998 – 6 of 12 cases; for 1999 – 3 of 9 cases; for 2000 – 5 of 20 cases; for 2001 – 4 of 22 cases. Source: *Marknadsdomstolensavgöranden*, Norstedts Juridik, 1988-2001.

related marketing can be discerned.[1065] Whereas this reaction in the first years after the legislative reform could be explained by the need for adaptation and by the transfer of cases to the Stockholm City Court, the persistently low litigation rate obviously suggests a change in the self-perception of this institution concerning the role it has to play in the process of enforcement. It appears that the emancipation of individual competitors has been taken as a signal that KO should no longer dominate precedent-building and should concentrate itself on the real 'hard nuts' to crack. Of course, another explanation could be that the 1995 MFL, with its catalogue provisions, provides more clarity about the line between lawful and illicit conduct and thus enables the KOV to negotiate more successfully with traders. In the same vein, the accumulated case law may offer good guidance for businesses and again facilitate voluntary settlement. Nevertheless, given the constant emergence of new forms of questionable marketing the passivity of KO speaks rather for changes at the level of institutional identity.[1066]

7.4.2.2 Consumer organizations as new actors on the stage?

One of the most important changes in the constellation of actors and organizations involved in consumer protection has been the bolstered position of consumer organizations. At the beginning of the 1990s the Swedish Government started to provide financial support to private consumer organizations, administered via the KOV. The support was initially allocated only for specific projects. Interestingly, since 1993/94 KOV has also been empowered to allocate financial support for the setting up of new consumer organizations. Under the budgetary year 1995/96 KOV disposed over 4 mln. Swedish crowns for targeted support to private consumer organisations. The same year the Swedish Parliament approved for the first time direct financial allocation amounting to around 2 mln. Swedish crowns to one individual consumer organisation, namely the Swedish Consumers' Association (SKR).[1067] The SKR was founded in 1992 as an umbrella organization for a dozen associations involved in consumer problems in one way or another. Among the founding members are notably the KF, LO and TCO. Other members include women's and pensioners' organizations, local consumer associations, etc. No individual members of these organizations are reported.

In 1994 an alternative consumer organization, the Swedish Consumer Coalition (*Sveriges Konsumenter i Samverkan,* SkiS) was founded, which declares itself to be free of trade, producer or political influence. The organization has a well-defined profile in ecological consumption with member-organizations active in health-related, environmental, animal protection and ethical issues of consumption. The organization also purports to be financed to a large extent by individual contributions, but also receives public funding.

[1065] See KOV Årsredovisning 2002, 12.

[1066] Note, however, that for 2002 KOV reports 10 cases before the MD. So there may be some revitalisation in enforcement through the judicial process. KOV Årsredovisning 2002, 12.

[1067] See prop. 1994/95:100.

Apparently the Government sees a stronger commitment on the part of private actors as a leaner form of handling consumer issues in times of budgetary constraints.[1068] More importantly, however, such a development is considered desirable in the light of Sweden's membership of the EU and the ensuing need for stronger representation of Swedish consumers in the existing networks of European consumer organizations (e.g. BEUC). The most important consumer organizations are created with direct reference to developments at EC level and participation in the work of European legislative committees and other bodies is regarded as an important instrument of increasing Sweden's influence in the consumer-related area.[1069]

When discussing the focus of Swedish consumer policy in the EU, the question of the special place of non-governmental consumer organizations again comes in for special attention. As the SKR points out, consumer protection in the EU tended to shift from the public to the private sphere. NGOs have been allotted a more prominent role in the decision-making process than before. Therefore the Council pleads that consumer organizations should receive more resources to make their voice heard in the dialogue with representatives of other interests.[1070]

Following the structural reform of the KOV, it is not representatives of the trade unions and the cooperative movement but representatives of the two major consumer organisations, the SKR and the SKiS, who sit on the KOV Board. On the positive side, by institutionally singling out consumer protection as a separate objective and creating an organization entirely devoted to this objective, resources are better utilized. Arguably this organization is now one more level removed from the parent-organizations and has better defined goals and activities. There is a chance of creating an organizational culture of consumer protection which will less often come into conflict with alternative loyalties. On the negative side, the label 'consumer organization' masks the interests of constituent organizations and makes them less transparent to the public. This may create false expectations and cause some confusion, not only among domestic consumers but also in the international and European context. Moreover, given their close cooperation with and financial dependence on the government, one matter of concern is that the independence of such organizations will be fragile.[1071]

The two consumer organizations have been actively involved in giving opinions on legislation and in launching campaigns on particular consumer issues. So far, however, no lawsuits by either of these organizations under the MFL have been reported. The organizations obviously still prefer to file a complaint with the KOV and to leave

---

[1068] Prop. 1994/95:140, 30 ff.; SOU 1994:14. See also the report from a consultation forum between representatives of the Government and the popular movements on the latter role in consumer policy. "Folkrörelsernas roll i konsumentpolitiken." Regeringskansliet, Finansdepartamentet. Nr. Fi 99.052.

[1069] "Regeringen arbetar för att hävda svenska intressen samt för ett ökat konsumentinflytande och ett starkt konsumentskydd i EU. Konsumentorganisationernas deltagande i olika EU-organ förstärker Sveriges möjligheter att påverka konsumentpolitiken i EU. En arbetsgrupp som skall ta fram en svensk strategi för arbetet med konsumentfrågor i EU har tillsatts. Arbetsgruppen skall vidare bl.a. föreslå hur konsekvenserna för konsumenterna av medlemskapet kan följas upp..." Prop. 1994/95:140, 41 ff.

[1070] Skr. 1995/96:181, 27.

[1071] See Skr. 1995/96:181, 29. There the government commits itself to a particular kind of 'lobbying' for Swedish consumer organisations before the Commission, promising to point out that they are at a build-up stage – 'uppbyggnadsskede' (obviously with a view to possible financial assistance).

litigation to the resources of the state.[1072] Whether a change occurs in this respect will to a great extent depend on the determination of the KO to retain his monopoly of consumer-related litigation under MFL or his willingness to share these powers with the consumer organizations. The KOV and KO may need a high litigation record for maintaining and raising its budgetary share. It remains to be seen in what direction developments will move.

7.4.2.3 Competitors and their associations

With the 1995 MFL, competitors and their associations finally received recognition as fully-fledged actors in Swedish marketing practices law. The bias in favour of collective consumer interests under previous statutes (despite assurances of equality of treatment) was finally overcome. The MFL not only emancipated competitors and business associations from the requirement of preliminary notification of KO, but also introduced new substantive rules tailored to the needs of economic actors, such as protection against confusing imitation and against comparative advertising. In combination with improved procedural opportunities for reimbursement of litigation costs and damage compensation, the 1995 MFL turned into an attractive instrument for protection of goodwill and investments.[1073] Out of a total of 22 cases under MFL in 2001, 18 were filed by competitors and trade associations. For 2002 the number is even higher – 23 out of 27 cases. Whereas it is early to speak of explosive developments, one can confidently state that the 'forgotten legal discipline' of unfair competition has been discovered by Swedish economic players (and their lawyers) and has found its way into Swedish market law.[1074]

7.5 Comparative assessment

Throughout the last decade, fair trading law in both Germany and Sweden has undergone substantial transformations. Much of this change has taken place under the influence of European integration. In the following section developments will be interpreted in institutional terms. A major issue is whether there has been a shift in the fundamental choice between market, political and judicial process. Then the design of the enforcement procedure will be revisited to identify changes in participation opportunities of interested actors. Finally, the persistence of path dependence and institutional symbiosis will be discussed. An underlying theme is to analyse the influence of European integration over national institutional choices in terms of adaptive efficiency. An important question in this context is whether European integration in its different reincarnations (e.g. positive and negative integration) brings about the desired convergence between national institutional framework or results in 'new divergences'.[1075]

7.5.1. Institutional choice

7.5.1.1 Deciding who decides

Prima facie Germany and Sweden have remained faithful to the fundamental institutional choices made (or confirmed) in the 1960s and 1970s. The German legal

---

[1072] See the recent complaint of SKiS to the KOV alleging high content of allegedly dangerous substance in margarine. SKiS states that it impatiently awaits KOV's reaction.
http://www.konsumentsamverkan.se/13lobby/myndigh/kov/BecelProactive.htm

[1073] See Nordell (2003a), 147 ff.

[1074] Similar Nordell (2003a), 151.

[1075] See Teubner (2000), 243 ff.

system still relies on private ordering with the ordinary courts as decentralised decision-making institutions. Within the Swedish system, the administrative process (KOV/KO) continues to play an important role for the protection of collective consumer interests. On multiple occasions political actors and stakeholder in both legal systems have expressed satisfaction with the working of the respective institutional arrangement in principle. On closer inspection, however, some changes that indicate a rethinking of previous institutional choices and reallocation of decision-making competences can be noted.

In both countries the legislative process has entered more decisively into the field of fair trading through elaboration of the standards of fairness and delineating the competences of different institutional spheres. In Sweden the 1995 MFL introduced a long catalogue of prohibited practices supplementing the general clause of good commercial practice and purporting to achieve increased predictability and certainty. In Germany a similar trend can be discerned within the ongoing reform of the UWG. While these legislative catalogues represent in many respects a restatement of the accumulated case law of the courts, by reformulating judicial doctrines and integrating judge-made rules into legislative texts, codification has the effect of fine-tuning inherited patterns of interpretation. One of the key ambitions of reformendevours is to provide clearer guidance for future decision-making.

The effect of legislative intervention, however, moves in different directions in the two countries. More active participation on the part of the legislator in the German context implies a shrinking margin of interpretative discretion for the judiciary. Although the existence of catalogue rules does not exclude the application of the general clauses of UWG, these rules nevertheless aim at streamlining the practice of the courts. In Sweden's case, clearer rules may have the effect of reducing the scope for informal negotiations and voluntary settlement within corporatist decision-making procedures, and in a sense strengthen the formal-legal element in fair trading law. Once the standards of fair trading are more transparently outlined in the relevant statute, businesses may be less inclined to accept interpretations advanced by KOV in elaboration of guidelines or in individual decisions.

Similar shifts in the allocation of decision-making have been accomplished through the redesigning of enforcement procedure. By raising the formal barriers of access to the judicial process, the German lawmaker sought to limit the role of the judiciary in fair trading and to leave more instances of conflict to the free play of market forces (or to voluntary settlement). The proposals of introducing a threshold of appreciable effect in the general clause of UWG and of accepting the relevance of an advertising message as an element of ascertaining deception are additional devices in the UWG-E purporting to shift decision-making from the courts to the market. If successful, these changes in the UWG would mean substituting the judicial process for the market in a number of trifling disputes that previously constituted potentially litigable claims and created considerable backlog problems for the courts. These reform endeavours indicate a growing recognition of the high social costs of the judicial process, of its limited size and capacity as well as a strengthened confidence in the operation of the market.

In Sweden, there has been almost the reverse trend of assigning greater weight to the judicial process vis-à-vis the administrative one and (in some instances) vis-à-vis the market. The KOV is today less engaged in the elaboration of guidelines. In fact many of the guidelines issued represent the incorporation of annex provisions to European Directives. By abolishing the 'subsidiary' standing of competitors in marketing practices matters and by introducing broader opportunities for reimbursement of litigation costs, part of the conflict situations previously left to the market may now be channelled into the judicial process. Likewise, a turn can be noted toward more classical forms of judicial procedure. This is evidenced by the introduction of a two-tier procedure, with the Stockholm City Court acting as a court of first instance (for some claims). The Market Court, although continuing to act as a special court, has in terms of composition and procedure come closer to resembling an ordinary court.

7.5.1.2 Interests in the political process

The interests in the legislative process concerning fair trading have experienced certain changes as well. Although the actors participating in the relevant legislative deliberations are largely the same, there are visible tendencies towards levelling out instances of overrepresentation of traditionally powerful interest groups. Thus the *Mittelstand* in Germany is still at the heart of much political debate on unfair competition law. Yet, the changes in the Rebates and the Free Gifts Act and the ongoing reform of the UWG demonstrate that the *Mittelstand* is no longer in a position to set the agenda in unfair competition law or to rely on direct legislative intervention to improve its competitive positions. There seems to be a trend toward liberalisation and dismantling of guild-like restrictions of competition.

On the other hand, a certain strengthening in the position of German consumer organisations can be observed. Nowadays, consumer organisations are regularly consulted in the drafting of unfair competition law. As a result of the concentration of several consumer organisations in the Federation of German Consumer Organisations, consumer representation in the political process has probably become more competent and effective. For instance, the endorsement by consumer organisations of the liberalisations of the regulative regime of rebates and special offers has been used as a major argument in the political debate. The strengthening of consumer organisations has proceeded not least under the influence of European integration. The Community has consistently worked to raise the profile of consumer organisations. That support has come in the form of funding, but most importantly by recognizing consumer organisations as stakeholders in the decision-making process at the European level. As noted above, direct participation of consumer organisations in negotiations and implementation of consumer legislation at the Community level has been welcomed, especially by the Commission, as a legitimizing factor for decision-making processes at the supra-national level. In sum, it can be confidently stated that the minoritarian bias in the political process on issues of unfair competition law has been substantially curbed.

In Sweden's legislative process trade unions and the cooperative movement continue to be among the organisations consulted on most issues concerning consumer policy, including marketing practices law. Their activism, however, has been substantially dampened. None of these organisations opposed any of the changes in the 1995 MFL which signalled a shift toward stronger protection of competitors' interests. While

there has been some resistance to the dismantling of interest representation in the Market Court, the protest has not been particularly vocal and has in any case gone unnoticed. It appears in particular that LO in particular has gradually retreated from direct participation in the consumer policy debate, delegating representation of consumer interests to the SKR.[1076]

Conversely, the voice of industry is now stronger and more confident and is respected on a greater number of issues. This is noticeable in the new rules on confusing imitations and special offers, in the reluctance to introduce restrictions on aggressive marketing methods in new media and in the improved access to litigation. While the central position of the KO is still underlined in preparatory legislative material, this is done more as a matter of principle and no longer reflects the records of the courts. Competitors nowadays make up the bigger portion of litigants in marketing practices cases. The pendulum has consequently swung from an excess in representation of the interests of the broad consumer majority (majoritarian bias), to a more balanced position.

For both Germany and Sweden it can be concluded that there is a tendency toward overcoming the previous biases in interest representation in the political process. While the interests of individual competitors and of the *Mittelstand* still find greater response in the German political process and collective consumer interests are given more attention in the Swedish political process, it is rather a question of influence and not of bias.[1077]

7.5.1.3 Participation opportunities in the process of enforcement

Significant changes have been introduced in both countries regarding the process of enforcement, albeit heading in opposite directions. In Sweden the most urgent need has been to emancipate private actors from public tutelage and to strengthen the private law element in enforcement and adjudication. Such developments have been regarded as imperative on two main grounds. First, there has been a widespread perception of unsatisfactory protection of individual competitors against infringements of their legitimate interests in goodwill and fair competition. Second, in times of deteriorating public finances the limits of the administrative model of enforcement have become manifest. The Government has increasingly appealed to industry to take a greater share of responsibility in the enforcement of the MFL. The efforts of the lawmaker have therefore been aimed at improving competitors' incentives for private enforcement of the MFL in the expectation of indirect benefits to the public (consumer) interest. Increased reliance on a 'help to self-help' model has been declared an objective.[1078]

In Germany, by contrast, there has been the contrary demand to limit the right of action of individual competitors and of trade associations and to dampen excessive

---

[1076] Some of the recent changes in the MFL resulting from implementation of Community Directives (such as the Comparative Advertising Directive; the Distance Selling Directive and the E-Commerce Directive) have for instance excited no comments from LO. See prop. 1999/2000:140, 43; prop. 2001/2002:150, 147.

[1077] Komesar underlines the distinction between influence and bias. "Influence is a positive or descriptive issue, bias is normative and prescriptive issue." A minoritarian bias implies a total social cost on the losing majority that is greater than the total social benefit gained by the successful minority. See Komesar (1994), 76.

[1078] See prop. 1984/84:213, 18 ff.;

litigation under the UWG with the ensuing anticompetitive effects. Problems of discrepancy between the incentives of the litigating association, its members and the general public interests in enforcement of legal rules have come to the fore. In both countries changes have meant influencing the incentives for interested actors to use alternative institutional processes by adjusting the costs and benefits of participation and reshaping the design of the respective decision-making process.

Germany: participation in the judicial process
In Germany the general conditions for participation of consumer associations in the judicial process have been reshaped with the UKlaG. The substantive base for enforcement of collective consumer interests has been significantly broadened. The right of consumer associations to seek injunctions is now granted for infringements of collective consumer interests under a broad range of consumer-related statutes. On the other hand, the access of consumer associations to the courts has been made dependent on a number of formal criteria. Requirements of a minimum number of members, of stable existence, of capacity to pursue chartered objectives and, importantly, of formal registration have been introduced across the board. It could be argued that these requirements raise the threshold of access of consumer associations to adjudication. Yet on closer inspection formal criteria for access may have the beneficial effect of guaranteeing certainty and predictability. The decision of capacity for procedural representation has been shifted from the judiciary to the administrative process. Whereas courts used to decide on a case-by-case and *ex post* basis, the competent administrative body decides *ex ante* for all future litigious activity of the association. Moreover, state-subsidised consumer associations such as the *Verbraucherzentralen*, are exempted from formal registration. The amendments arguably introduce a more nuanced approach taking account of the specific conditions for different types of associations, and departing from the generalised 'equal treatment' philosophy of previous arrangements.

In terms of stakes the most important initiative in German unfair competition law is no doubt the presently debated proposal on action for so-called *Gewinnabschöpfung*, i.e. action for absorption of profits from unfair commercial practices. This draft rule has, not surprisingly, provoked the greatest controversy in the course of the legislative deliberations. The question is to what extent, if the draft becomes law, such an arrangement will create true incentives for enforcement on the part of consumer associations. In view of the fact that the recompensed profits will flow into the public purse, the more immediate incentive for the association will arguably be the guaranteed right to attain reimbursement for the administrative expenses associated with litigation. For consumer organisations financed through public funds, additional incentives may lie in increased record of enforcement, which will strengthen subsequent claims for sustained and expanded financing and generally improve the image of the association in political and public debate. More questionable are proposals to extend the claim for damage absorption to business associations.[1079] For these associations, pursuing such claims can be a source of financial income and present an additional distortion of incentives to sue. But in view of the strict requirements of intent or gross negligence, and of systematic infringement and damage caused to a large number of consumers, it can be hazarded that the reform, even if

[1079] See Köhler, 'UWG-Reform und Verbraucherschutz' (2003) *GRUR*, 265 ff., at 266.

accomplished, will hardly bring about a major overhaul of incentives for participation in the judicial process.

One of the chief concerns of the legislative reform of UWG in the 1990s has been to curtail excessive possibilities of enforcement by competitors and by trade associations. To achieve this goal, the rules on access to adjudication for these litigants have been significantly sharpened. A number of formal requirements purport to ensure closer connection between litigation rights and substantive interest in prosecution and to guard against vexatious and ill-founded litigation. Thus trade associations have to show a substantial number of members active in the same market and a likelihood of the alleged infringement significantly affecting competition in this market. In the same vein, associations have to prove capacity to protect the allegedly affected interests. However, the lawmaker has failed to tackle one major source of exaggerated incentives to litigation, namely the rule on reimbursement of pre-trial notification costs. The planned amendment, introducing limits on the reimbursement of the costs for the first notification, did not pass Parliament in the 1994 UWG Novelle. Predictably, the success of the amendments has been contested in the legal literature. The ongoing reform of the UWG goes even further and purports to codify the rule on reimbursement.

The UWG-E builds further on this approach. Instead of influencing the costs of participation, it prefers to set a threshold of appreciable effect and of relevance in the substantive provisions of the draft law. These rules seek to give the courts more flexibility in regulating the flow of cases, sifting out situations that could be satisfactorily dealt with by the market. On the basis of such 'rule of reason' a creative jurisprudence can arguably exercise more active comparative institutional analysis, drawing inspiration from economic theory and from information economics in particular.[1080] To what extent the thresholds set in the substantive provisions will be sufficient to curb distorted incentives for litigation in the future remains to be seen. Here a degree of scepticism will be expressed as to the capacity of the judiciary to change engrained habits of private law adjudication based on conceptions of formal individual rights.

Sweden: participation in the mixed administrative-adjudicative model

Turning to Sweden, one of the main changes in the model of enforcement appears to be the retreat from corporatist arrangements in the administrative and the adjudicative segments of the enforcement design. Although no dramatic transformations have taken place, there is notable dilution of the principle of mandatory participation of established corporate actors in the management of the KOV. The setting up of new organisations with a more clear-cut consumerist profile has been deliberately encouraged. These organisations arguably ensure more adequate representation of a greater diversity of consumer interests in the administrative process.

Despite occasional discussions on possible restructuring of the KOV (and even its merger with the Competition Agency) and redefining its competences, overall the design of the administrative process has been sustained. KOV has preserved its central position as an expert public body on consumer matters working mostly along the lines

[1080] See Beater (2000a), 150; cf. Ch. 5.5.1.1 above.

of negotiations, voluntary compliance and only occasionally pursuing matters in court. Guidelines continue to be among the instruments used by the Agency, though they have come to play only a limited role. The Agency remains open to the public, transparent and easy to reach by individual consumers. The costs of consumer participation in the form of simple complaint were visibly reduced with the advance of new communication technologies. The Agency recently reports of dramatic increase in the number of individual complaints.

On the negative side, enhanced participation tends to strain the resources of KOV and to challenge its capacity to adequately process complaints and prioritize enforcement activity. KO's litigation rate is starkly reduced. More significantly, the selection of infringements to be prosecuted appears somewhat arbitrary with a continued emphasis on paternalist concerns and enforcement of straightforward prohibitions such as that of children advertising or of alcohol advertising. On a normative point, it is submitted that the Agency is badly in need of a strategy for efficient priority-setting. Whereas it may be less realistic to expect a decentralised judiciary (in Germany) to embrace economic theory in its adjudicative activity, the findings of information economics are well suited for guiding regulative intervention. A more conscious use of economic theory in the work of the Agency may arguably help to fine-tune its priority-setting.

Turning to the judicial process, it should be noted that Sweden in contrast to Germany has moved in the direction of enhancing the participation of individual competitors and their associations in the judicial process. The 1995 MFL has provided fresh incentives for private enforcement of the substantive standards of the MFL through litigation. The substantive basis for claims by individual competitors has been expanded, e.g. through incorporation of a prohibition of confusing imitations as well as through the detailed regulation of comparative advertising. The rules on access to the judicial system (the Market Court and Stockholm City court) have been simplified and competitors can now more speedily institute proceedings before the competent court, regardless of the position of the KO.

The change in the rules of compensation for litigation costs has also influenced the costs and benefits of participation in enforcement to the separate actors involved. The effects cannot be assessed unequivocally, but depend on a number of factors. The 'loser pays' principle may certainly dissuade economically weak competitors (e.g. small and medium-sized businesses) from litigation under the MFL due to the risk of incurring substantial costs. At the same time the rule has raised the expected benefits from litigation to parties convinced of their cause for action. Nowadays litigation before the Stockholm City Court and before the Market Court may involve substantial litigation costs. This might promote more experimental litigation on the part of economically powerful competitors and create incentives for testing the limits of the rules of MFL.

By introducing more generous opportunities for claiming damages for violation of the catalogue rules of MFL, the benefits of litigation to individual competitors have palpably increased. The difficulties of proving intent and causal effect and of substantiating the size of the losses suffered are, of course, notorious. But claimants are probing the existing opportunities and the restrictive atttutude of the Market Court may change with time. The new rules on damage compensation in combination with

the possibility for reimbursement of litigation expenses furthermore have the potential for attracting the attention of professional attorneys to the area of marketing practices law. This may in turn raise the profile of the legal discipline.

If we try to find out how changes have influenced the incentive structure for enforcement of consumer interests, the picture emerging is a mixed one. The shift to classical rules on allocation of litigation costs is certainly not apt to encourage economically weak consumer organisations and individual consumers to sue. The opportunity accorded to the courts to decide that each party shall bear its costs may, however, be suitable to invoke in exactly those situations.[1081] Furthermore, litigation costs may not be the main deterrent to litigation for Swedish consumer organisations. As has already been remarked, the dominance of the KO on the litigation stage has made the litigious activity of consumer organisations largely obsolete.[1082] Even now, after the structural and financial expansion of consumer organisations, the latter do not step forward as willing litigants, something confirmed by the discussion on the implementation of the Injunctions Directive.[1083] One interesting question is whether the risk of incurring considerable litigation costs to the public purse may exert a deterrent effect on the KO. Although costs will not be the main factor determining the litigious activity of this institution, it may be conjectured that the new rule has contributed to a more careful selection of instances for prosecution that can be observed in KO's recent performance.

In terms of benefits from participation, Swedish law has confirmed its reputation for openness to 'innovatory' approaches and experimentation. Two types of remedies that are both controversial in a comparative and international context have been introduced within a timespan of a few years. The market disruption fine in the MFL is supposed to achieve the 'absorption of profits' discussed in the present German reform debate. Even more radically, resistance to the institute of class action was finally overcome and the possibility of aggregating consumer claims for damage compensation is now a reality under a large number of statutes, including the MFL. To what extent these new instruments will influence the incentives for participation in judicial decision-making is still early to say. It seems, however, that in the context of the fair trading law, the chances of overcoming collective action problems through the group action institute are limited. One can hardly expect this law alone to call new actors onto the enforcement stage. A more realistic prognosis is that reliance will again be vested in the KO to set the mechanisms of the new law in motion in the interest of consumers.

As a result of the reforms described above, some convergence can be noted in the standing of private actors and associations in judicial proceedings in both countries. The right of action of individual competitors and of business associations is nowadays put on equal standing with that of the KO in Sweden, whereas in Germany legislative amendments have attempted to put reasonable limits to this right of action. The common denominator appears to be – increased pluralism in the system of enforcement.

[1081] According to preparatory material, however, the rule must be applied restrictively. See above Ch. 7.3.2.3 above.
[1082] See Ch. 5.4.5.2 above.
[1083] See Ch. 7.1.2.2 above.

7.5.1.4 The standard of fairness

How has the above evolution in institutional choice and in participation opportunities influenced the standards of fairness? In the account given above, case law was not reported in a separate section but was treated in connection with European developments. This form of presentation was chosen because it better reflects the interweaving of European influences into the texture of national legal doctrines and interpretation. By attempting to combine this jigsaw of bits and pieces into a coherent pattern, one can probably identify different trends in the two countries.

In Germany, consumer protection is slowly but steadily gaining ground in the discourse on unfair competition law. This is clearly visible in legal doctrine, with a striking abundance of monographs and articles treating unfair competition law from a consumer perspective.[1084] The recognition of consumer interests, or rather the change in understanding about the place and content of consumer interests, is less readily discernible in judicial case law. The 'benchmark consumer' in decisions concerning misleading advertisement and marketing has attracted most attention and commentaries. Whereas the courts are certainly moving toward a more realistic, normative *Verbraucherleitbild*, they still occasionally underline that the difference between the European and the German notion of consumer may not be so great after all.[1085] Although recourse to market surveys is considered necessary for ascertaining consumer perceptions when judges do not belong to the consumer circles addressed, the space and significance of such demoscopic surveys seems to be dwindling.[1086] A genuine change in mentalities and ideologies is more uncertain. One factor for such a change to obtain could probably be a growth in the litigation rates of consumer associations. So far the arguments reaching the courts continue to be those of repeat litigants or of competitors. Even if doctrine is respected as an important source of conceptualisation of law and legal policy, doctrine alone can hardly accomplish the conversion.

As discussed in previous chapters, another reason for the persistence of engrained habits is to seek on the level of legal method.[1087] In contrast to English judges trained in the fine art of interpreting and distinguishing a precedent, German courts relate to precedents in a manner similar to statutory rules. Judicial decisions pronounced on the basis of specific facts of an individual case are often looked upon as abstract propositions and tend to be subsequently extended to quite different factual situations.[1088] This technique is generally in line with what comparative lawyers describe as the deductive method of systematic conceptualism characterising the German (or the continental) legal tradition.[1089] In the words of Zweigert and Kötz, continental lawyers "often still feel drawn to a forced 'catgorization' of the facts of the

---

[1084] See Drexl (1998); Beater (2000a); Köhler (2003); Micklitz/Keßler (2003).

[1085] See Micklitz/Keßler (2003), 923 with reference to BGH GRUR 2000, 619, 621 ("Orient-Teppichmuster").

[1086] See Köhler/Piper (2002), 986 ff.

[1087] See Ch. 4.6 and 5.5.1.2 . Cf. Ohly (1997), 268 ff.

[1088] Ohly critically compares this mechanical approach with the discipline and restraint excersied by English judges when interpreting precedents, see Ohly (1997), 315 ff. On the different methods of interpreting precedents, see Esser (1990).

[1089] Zweigert/Kötz (1998). According to Peter de Kruz: "German law thinks in terms of general principles, rather than in pragmatic terms, conceptualising problems, rather than working from case to case." de Kruz, *Comparative Law in a Changing World* (London: Cavendish Publishing, 1999), 91.

case, even a rather crude and simplistic one, in order to bring the case as quickly as possible within the ambit of the closest 'leading principle' (*Leitsatz*)."[1090]

By contrast, in Sweden the legal debate seems to be moving toward greater recognition of private competitors' interests. While an increasing number of German commentators wish to see unfair competition law reformed on a consumer-oriented basis, in Sweden legal scholars have argued that marketing practices law shall open the way to a more explicit recognition of the interests of competitors in fair competition.[1091] From a consumer perspective Olsen has suggested that there is a need for broader conceptualisations, taking into account the complex reality of markets and a plurality of interests. Redefining consumer law into 'law of consumption' has been advanced as one pertinent way of attaining this paradigm shift.[1092] Interestingly, the individual rights perspective in consumer law seems to be attracting increased attention. Thus Olsen highlights the importance of human rights in the field of the 'law of consumption', for instance the right to protection of family life and privacy in relation to aggressive marketing and advertising.[1093] While aggressive trade practices have been noted and counteracted under the Swedish MFL mainly under the heading of rational consumer choice and decrease in general welfare, the human rights perspective represents a novelty.

A similar infusion of individualist values can be noticed in judicial case law. The Market Court nowadays applies rather generous standards of protection of goodwill and reputation. The new provision on confusing imitation has been frequently invoked, as have been doctrines of 'goodwill parasitism' (*renomésnyltning*). This shift has even prompted legal commentators to express concerns that the pendulum may be moving too far in the other direction, sometimes according questionable extensions of intellectual property rights.[1094] A similar development can probably be expected under the new rules of comparative advertising borrowed from the Comparative Advertising Directive (although the first signs have been of a restrictive interpretation).[1095] The extent to which the perspective of individual competitors will come to dominate Swedish marketing practices law will eventually depend on the capacity of the KO and of alternative representatives to introduce a consumer perspective in the decision-making of the competent courts. Arguably, if comparative advertising is left entirely to the litigious impulses of competitors, the criteria of 8 a § MFL may bring about a change of Swedish attitudes in a restrictive direction.

7.5.2 Institutional context and path dependence

In the sections above the emphasis was placed on the changes in institutional choice and institutional participation in German and Swedish fair trading law. The picture emerging is of a legal discipline in a state of flux. This apparent dynamic should, however, not make us lose sight of the less conspicuous evidence of continuity and persistence. Long-term institutional legacies continue to have a clear bearing on fair

[1090] Zweigert/Kötz (1998), 269.
[1091] See Bernitz (1993); Nordell (2003a).
[1092] Olsen (2000-01), 304 ff.
[1093] Olsen (2001-02), 815 ff., at 838.
[1094] Nordell (2003), 151.
[1095] See Nordell (2003), 149, arguing for a more expansive interpretation.

trading law in each of the countries analysed and powerfully influence the potential for institutional change. The inertia inherent in these legacies is not to be underestimated.

As demonstrated in previous chapters, institutional choices in fair trading law have underpinnings in deeper currents of economic, constitutional and private law thinking. These macro-institutional factors to a great extent determine dominant perceptions about the relations between the individual and the state, the role of parliaments, central government, courts and public administration and ultimately the sphere of private autonomy. Whereas macro-institutional factors are also susceptible to change, this change occurs only slowly and incrementally. One can therefore hardly expect Germany to replace the system of decentralised private law enforcement with a model of administrative decision-making in fair trading. The trust in the courts and in decentralised enforcement building on the primacy of private law, and the belief in constrained public administration, account for the persistence of this institutional choice.

Likewise, it is improbable that Sweden will soon abandon its highly idiosyncratic model of centralised enforcement with input of administrative and adjudicative elements. Even though recent years may have witnessed a process of empowerment of the judiciary, there is still a preference for informal procedures, voluntary settlement and mediation, successfully handled by a flexible expert agency. An acute sensitivity about social costs account for the sustained option of controlled, centralised and specialised adjudication.

Needless to say, constraints on the potential for institutional change are in place by virtue of the choices exercised in the past. The debates in Swedish and German law presented above afford multiple examples of institutional inertia and indicate the limits of institutional change. Thus consumer protection is trumpeted forth as a new unifying idea in German unfair competition law, but it is still far from integrated in the thinking and ideologies of judges, repeat litigants and practicing attorneys. Old doctrines (e.g. distinctions between value-based and value-neutral norms, restrictive attitude to comparative advertising, the notion of the 'casual consumer') keep resurfacing in the jurisprudence of the courts.

Despite multiple attempts by the lawmaker to reduce litigation rates and to curb the enforcement zeal of repeat litigants, the most efficient measures have deliberatively been dropped from the legislative agenda. A confrontation with long-term users of the institutional framework is carefully avoided, as is the decisive step of 'closing down' their litigation enterprises. Paradoxically, the urge to modernize and streamline German unfair competition law has produced new volumes of expert opinions, doctrinal debates and preparatory material. The influential legal scholar Hefermehl passed away, but his impressive commentary will be reprinted ad modified by a new generation of commentators. With the work on a new UWG, several new commentaries are in process.

In Sweden the choices made in the 1970s also exhibit tenacity and persistence. KO may have surrendered its central position as enforcement agent under the MFL, but it remains a privileged body when it comes to authoritative definition and representation of consumer interests. Alternative litigants are still viewed as perfoming a

complementary role. A majoritarian tilt in the activity of KOV/KO transpires in the selection of cases to be prosecuted and in the position of the Agency on a number of legal policy issues.

In a similar vein, the declared transition to conventional forms of adjudication has only been partial. The introduction of a two-tier procedure was soon abandoned for the case of injunction proceedings. Although no longer composed of interest representatives, the Market Court is still a special court with a strong expert presence. Curiously, a look at the names of the members of the Court suggests that some of the present experts were previously acting as interest representatives. So the change may be less dramatic than it seems at first blush.

7.5.3 The impact of Europeanisation

To what extent have the changes described above been provoked or influenced by European integration? To be sure, as part of the regulative framework of markets both German and Swedish fair trading law are affected by general societal trends towards deregulation, pluralism and globalisation, impacting on national institutions and policies across the world. Nevertheless, one can confidently contend that important changes would have taken place much more slowly, or not at all, in the absence of European integration.

7.5.3.1 Spheres of influence

As suggested in the introduction to this study, European integration exerts impact on all levels of the institutional framework of fair trading. It requires amendments or annulment of formal rules, redefines institutional choices and enforcement design and gradually changes informal constraints by affecting the mentalities of actors and enforcement bodies.

Formal rules

Already on the formal level of legislative amendments, the effect of Europeanisation on national fair trading law has been considerable. In both Germany and Sweden most of the recent changes in national law can be traced back to European initiatives. Following the passage of the 1995 MFL, Sweden has introduced amendments to this Act on five occasions, four of which were prompted by the need of ensuring compliance with European legal acts. Similarly, in Germany the pace of change in unfair competition law has largely been dictated by Brussels. Community fair trading law is even in terms of legislative technique to this day located in provisions scattered in a variety of Community legal acts. Adapting national legislation to this patchwork of rules and regulations, which follow their own 'integration logic', is obviously a difficult task for domestic lawmakers. Therefore, the tendency among Member States to meet Community requirements with minimalistic changes in national law should at least in part be seen as a system-preserving strategy. For instance, both Germany and Sweden avoided amending their basic fair trading statutes as a consequence of the minimum requirements in the Misleading Advertising Directive.

With the increasing depth and bredth of European integration and the rising pressure toward institutional compatibility, however, such formalist responses to Community requirements are becoming untenable. Whereas previous directives, based on the principle of minimum harmonisation, allowed for preserving national institutional

frameworks to remain largely untouched, recent Community initiatives are increasingly based on maximum harmonisation or the so-called 'internal market principle'. The latter combines country-of-origin with mutual recognition (e.g. Comparative Advertising, E-Commerce Directive). These more demanding forms of harmonisation have increasingly required direct legislative intervention either by way of literal transposition of Community rules in the respective national statutes, or by annulment of restrictive national regulations.[1096]

Institutional choice and design

European integration has also had an important bearing on institutional choice in both Germany and Sweden. The increasingly active involvement of the legislative process in issues of fair trading to be observed in both Germany and Sweden can partly be explained by the need to ensure compliance with European legislative initiatives. The domestic legislative process has been called upon to guarantee that the norms in European legal acts are uniformly transposed throughout the Community. On a deeper level, European integration creates a more complex and non-homogeneous environment with greater diversity of interests, in which a familiarity with the subtler values of the institutional framework no longer can be taken for granted. Therefore legislative intervention may be required to increase normative precision and to make the institutional framework more transparent and predictable for non-national actors.

At the same time, the character and the role of the national legislative process seems to have experienced transformations as well. National legislatures increasingly operate as one link in a broader process of multi-level governance. This is well illustrated by the implementation of Community directives at the national level. Despite participation in negotiations and drafting of Community acts, national governments experience visible problems to disentangle harmonised European law and to provide precise guidance. They tend to cautiously avoid independent interpretation and insist instead on literal transposition.[1097] Concurrently, there seems to be a spontaneous process of mutual observation and adjustment between Member States governments, which helps to remedy such shortcomings.

The enigmatic and sometimes ambiguous provisions of European directives have generally tested the capacity of traditional interpretative communities to provide coherent and reliable guidance for enforcement authorities. In Sweden the traditionally authoritative role of so-called 'instructive' *travaux préparatoires* has been visibly weakened. The practice of preparing legislation through commissions of inquiry based on interest representation has diminished and transposition acts are increasingly elaborated within the auspices of the respective ministries.[1098] German legal doctrine,

---

[1096] See Ch. 7.1 above on the changes following the Comparative Advertising Directive, the Distance Selling Directive, the Electronic Commerce Directive. The abolition of the Rebates and Free Gifts Acts in Germany is an inconspicuous example of expedient legislative intervention as a response to European developments.

[1097] See above the examples of the Comparative Advertising Directive (Ch.7.1.1.2), the Electronic Commerce Directive and the Injunctions Directive (Ch. 7.1.2).

[1098] See Abrahamsson (1993), 808. Similar Bernitz, 'Inför europeiseringen av svensk rätt' (1991-92) *JT*, 29 ff.; Norberg, 'Reflexioner över svenska rättstraditioner i en europeisk rättsmiljö' (1994-95) *JT*, 369 ff.; Nielsen, 'Nordic Sources of Law in a European Environment' in: Cameron/Simoni (eds.), *Dealing with Integration*, Vol. I (Uppsala: Iustus, 1996), 15 ff.; Peczenik, 'Svenska lagmotiv i Europeisk Union' (1994-95) JT, 305 ff.For a discenting opinion see Öberg, 'Några anteckningar om användningen av förarbeten inom gemenskapsrätten' (2000-01) *JT*, 492 ff.; Peczenik, 'Svenska lagmotiv i Europeisk Union' (1994-95) JT, 305 ff. Öberg advocates

with its hermeneutic dogmatic approach, is not always in a position to predict judicial action and guide the process of interpretation of legal rules. Expectations are increasingly directed to the European Court of Justice to produce a conclusive answer.

As far as changes in enforcement design are concerned, European influences are often lurking behind ostensibly autonomous national institutional choices. In the German context, the impetus for reform of the legal standing of business associations has certainly been internally generated. Yet, the incessant flow of cases to the European judiciary has exposed gross inefficiencies in the institutional framework associated with representation bias, previously concealed from national lawmakers. The need to 'discipline' the judicial process and to reduce litigation rates has thereby, at least in part, been induced by integration pressures. The harmonisation of fair trading law, the advance of the European 'average consumer' and the information approach of the ECJ have been perceived as interference in a domain in which German judges were the uncontested arbiters. The interpretative freedom exercised by German judges in unfair competition law subject matter has come under fire from both lawmakers and doctrine. So Europeanisation may in fact have triggered a process of judicial disempowerment.[1099]

In Sweden the revision of attitudes towards interest representation in judicial bodies can be linked to internal political developments.[1100] At the same time, it is indisputable that Europeanisation (including cooperation within the auspices of the Council of Europe) has performed a distinctive and influential role. The *Langborger* judgment of the European Court of Human Rights stirred a major debate and triggered a process of reconsidering established institutional patterns. More generally, the pending membership in the EU was an important factor in changing the composition of the Market Court. It would seem that corporatist procedures which were tenable in a more insulated national context have been challenged by the process of Europeanisation. With the opening up to European trade and cooperation there was mounting pressure to design national institutional frameworks by taking into account the interests of economic actors who are not represented in national political processes. The impact of Europeanisation on the position of the national judiciary in fair trading law also displays opposite pattern in the two countries. Compared to their conventional restraint, Swedish courts seem to display greater activism in review of national legislation for conformity with EC law and assume a more direct reponsibility for norm control. One can speak of a process of judicial empowerment.[1101]

---

for a more active guidance in interpretation of legal acts implementing Community law to be provided in Government Bills. His main argument that there is a need of transparency allowing for a more precise control by the Community institutions is certainly relevant. In reality, however, governments do not appear enthusiastic about keeping this prerogative, exactly because of the deliberately unclear and open character of the European political process.

[1099] See Caruso (1997), "In any other case following European guidelines might result in an experience of institutional disempowerment. It may be better for judges to cling to dogmas of national private law systems."

[1100] The shift from social-democratic to central-right government in the beginning of the 1990s was generally associated with questioning of corporatist features in government.

[1101] In this sense Abrahamsson, Domstolsväsendets anpassning till EES och EG (1993) *SvJT*, 805 ff.; Nielsen (1996). See the *Gourmet* case.

The standards of fairness
Finally, Europeanisation exerts palpable impact on the standard of fairness. Under the influence of the activist *Cassis de Dijon* jurisprudence of the ECJ, some of the basic interpretative principles in German unfair competition law were challenged. Thus the concept of the 'inattentive consumer' at the centre of a voluminous body of misleading advertising jurisprudence has had to be thoroughly re-evaluated. Generally, it can be claimed that the Community's insistence on consumer protection as the basis for regulation of fair trading has revealed the protectionist *Mittelstandschutz* effects concealed in a number of the basic conceptions of German unfair competition law.

In the case of Swedish marketing practices regulation, Community law has been used to challenge equally sacred aspects of national marketing practices law. Both cases that have so far reached the ECJ (*De Agostini* and *Gourmet*) go to the heart of the Swedish regulatory state with its benevolent, paternalistic and protective (not necessarily protectionist) attitudes and its moralist stand. Long-standing values like protecting the weak and the credulous and stringent 'self-paternalism' have been questioned and measured against rational 'proportionality' arguments. Certainly, when faced with issues so closely related to the 'national soul', the ECJ tends to show respect even when such practices may be inefficient and inadequate. But, as the recent jurisprudence demonstrates, the careful balance is being struck carefully without sacrificing basic integration objectives.

7.5.3.2 Convergence or divergence in fair trading law
A major topic in the debate on Europeanisation has been the question of convergence between legal and institutional systems of the Member States. Does European integration bring national institutonal frameworks closer to each other, does it enhance the existing divergencies or does it simply leave these differences unaffected? One straightforward observation from the institutional responses in the area of fair trading in Germany and Sweden is that the effects of integration have been very dissimilar in the two countries. One and the same Community act has produced strikingly different repercussions in the institutional landscapes of the respective legal system. This is visible in scholarly interpretations of specific issues (like the country-of-origin principle in the E-Commerce Directive) but also more generally in the perceptions about the power and direction of European influence. In Germany the impact of Europeanisation on unfair competition law has been one of the most hotly debated issues during the last decade, both dogmatically and as a matter of legal policy. In Sweden reactions have been sporadic and more relaxed.

One explanation for these differing perceptions is that Europeanisation exerts greater adaptation pressure on German unfair competition law than on Swedish marketing practices law. The underlying philosophy of the German regulative regime, but also its practical implementation and enforcement design, have been increasingly challenged by European developments.[1102] The insistence on a consumer perspective as a liberalizing force against particularlist market regulation distinguishes European initiatives in the field of fair traiding. This approach has come into conflict with the competitor-oriented tenor of the UWG and its guild-like patterns of enforcement. More

[1102] On the concepts of institutional 'fit' and 'misfit' as explanatory variables in studying the effects of Europeanisation see Knill (2001), 201 ff.

importantly, European developments have coincided with and enhanced internal currents of institutional change. Within the turbulence of domestic debate, European directives and ECJ case law have played the important role of strengthening the position of reformists.

The perceived power of European influence is a corollary to the degree of resistance to change. Any attempt to shake the century-old construct of the UWG has so far stumbled upon vigorous objections on the part of interested stakeholders. Not only economic operators (notably the *Mittelstand*) but also organizations closely associated with the existing institutional framework (*Wettbewerbsverbände*, specialised lawyers) have been in a position to undermine or neutralize reform endevours and thus to trigger new rounds of reform. The minoritarian bias of the institutional framework has predictably displayed considerable tenacity. Broad consumer majorities occasionally disadvantaged by the excessively restrictive standards of fairness have hardly been in a position to identify detriment to their interests. They have thus rarely been among the engaged supporters of reform. Finally, path-dependence has been strong due to the long-standing continuity of institutional structures and the multiple manifestations of institutional symbiosis.

For Sweden the European 'aquis' in the field of fair trading have only exerted weak adaptation pressure on the institutional framework. Swedish marketing practices law has been regarded as largely compatible both with the ideology and the specific enactments of the European regulative regime. In many respects European integration has indeed provided corroboration of the chosen institutional path. If there has been pressure for change in Sweden coming from Europe this influence is being exerted through demands towards creating a conducive business environment, strengthening individual entrepreneurial positions and ensuring compatibility of institutions. In fact, the most substantial changes in Swedish marketing practices law (e.g. the explicit mention of the interest of competitors in MFL, granting an independent right of action, etc.) took place in anticipation of the pending accession in the early 1990s. But even this adjustment was accomplished relatively smoothly and in the absence of noticeable resistance. This confirms the assumption that a majoritarian bias in the legislative process and in the process of implementation is less persistent than a minoritarian one, especially if the disadvantaged minority is a concentrated and powerful one.

Equally important for the divergent perceptions about the effects of Europeanisation, it would appear, is the value attached to doctrinal coherence in the two legal systems in principle. German unfair competition law has traditionally been considered a conceptually elaborate and self-contained branch of private law. European requirements and interventions have therefore been perceived as highly undesired aberrations, interfering with the friction-free functioning of the system. Within this context the reaction on the part of the judiciary has been to disregard European requirements when possible (like in the case of minimum harmonisation directives).[1103] Where such disregard is difficult to sustain, the attempts to restore lost

[1103] Similar reactions have been described in other areas of Europeanisation of private law. In respect to the implementation of the Unfair Contract Terms Directive, where Community law threatened "an established, well-functioning core area of German contract law", Joerges notes that German lawyers merely restated the basic rethoric of German contract law doctrine and "refused to undergo the painful process of rationalisation involved in private law reform." See Joerges, 'The Europeanisation of Private Law as a Rationalization Process and as a

harmony has tended to unleash hectic activity within the relevant decision-making bodies and interpretive communities.

In Sweden, conversely, doctrinal and conceptual coherence is not a central concern and the legal system has evolved along the lines of a pragmatic functional approach. The public law orientation of marketing practices law arguably makes it more perceptive for the "instrumentally and purposively rational policy reasoning" that characterizes Community law-making.[1104] The concentration of adjudication in a specialised court has had similar effects. The differential reponse to European law of judges of private and adminstrative law has been observed by others.[1105] Whereas the Market Court is hardly a typical administrative court it is supposedly more open for teleological reasoning than ordinary courts and can be expected to be more open for integration arguments in the future as well.[1106] All these factors, together with a more flexible and dynamic legislative process, probably account for a greater measure of tolerance of uncertainty and change.

As a result of the multifaceted developments described above, some convergence can indeed be noted in fair trading law in both countries. On the basis of the analysis of the present institutional framework of fair trading law in Germany and in Sweden it can be argued that, partly under the influence of European integration, the boundary between private and public ordering is becoming more blurred. With the advance of European integration it has become increasingly difficult for German legal scholars to insist on rigid distinctions between private and public law, and on classifications of fair trading law as belonging to the area of private law. Evidently, national law in this area defines the limits of constitutionally guaranteed freedoms and private autonomy on which Community free movement doctrines have a strong bearing. The *Nissan* judgement and some of the cases in fair trading, like *Clinique*, demonstrate the ECJ's readiness to assume the role of an arbiter in drawing the border between free market and private ordering (when consumption patterns have to be adjusted to a new reality of integrated markets. Community law indeed defies the accepted classifications of law.[1107] For Swedish lawyers, the individualist perspective in marketing practices law has become ever more visible. Implementing the E-Commerce Directive and the Injunctions Directive has trigerred a debate on the private law aspects of marketing practices law that may gradually lead to change in traditional conceptualisations.

The elusive boundary between private and public ordering is also visible on the level of enforcement. For instance, the structure and the funding of the most important consumer associations in Germany demonstrate clear elements of public (governmental) involvement. And on the contrary, the internal structure of the KOV in Sweden is organised in a way that provides for participation and influence on the part

---

Contest of Disciplines – An Analysis of the Directive on Unfair Terms of Consumer Contracts', *EUI Working Papers in Law*, No. 2, 1994/95, 17-18; similar Joerges, 'Rationalization Processes in Contract Law and the Law of Product Safety: Observations on the Impact of European Integrationon Private Law', *EUI Working Papers in Law*, No. 5, 1994.

[1104] For the terms 'instrumental and purposive rationality' see Joerges (1994), at 10 with reference to Habermas and Weber.

[1105] See Caruso (1997), 25.

[1106] On the reaction of the Market Court in the *Gourmet* case, see Ch. 7.2.2.2 above.

[1107] Nielsen (1996), 15 ff., at 19 ff.

of private group interests. On the Board of KOV sit representatives of other non-governmental organisations, and its activity in recent years has been self-financed to approximately 25 percent. When defining the enforcement powers of the Agency, the Swedish lawmaker has been careful to retain some basic elements characteristic of private law. Unlike a traditional governmental agency, the KOV in its present design cannot itself impose administrative penalties on private actors. Rather, it acts like a huge consumer organization, pooling complaints and representing consumers before the courts. The procedure before the Market Court is essentially an adversarial one where evidence is weighed by an independent (even though specialised) judicial body.

The ultimate instance of decision-making in fair trading cases is in both countries an adjudicative body. The Market Court in Sweden initially revealed many features of a conciliation body, with participation of representatives of group interests. Recent amendments, however, have increased the legal element in the composition of the Court. In many situations the Market Court now acts as a Court of Appeal, the Stockholm City Court being the court of first instance. There is also a degree of convergence in the standing of private actors and associations in judicial proceedings in both countries. The right of action of individual competitors and of business associations is nowadays put on an equal standing with that of the KO in Sweden, whereas in Germany legislative amendments have attempted to put reasonable limits to this right of action. If we can speak of a common denominator for the changes to the institutional framework, it is the increasing pluralism in the existing systems of representation and enforcement.

Concerning the standards of fairness, in both Sweden and Germany developments have been characterised by a shift towards a more liberal and market-oriented understanding of fair trading regulation. Yet bearing in mind the different doctrinal and ideological starting positions of the two legal and political systems, liberalisation has had to address different tasks. The notion of the average consumer has entered the interpretive language of German courts and may in time come to relax the standards of deception. Comparative advertising has been recognized as permissible, despite the relatively limited effect of the change. Both countries have relaxed the restrictions on special offers and rebates. Overly protective measures and restrictions on certain promotional practices, which served middle and small enterprises rather than consumers, have been reassessed in both countries. This development has in Germany taken place under the visible influence of European integration and has recently been complemented by liberalisation of comparative advertising. The changes have arguably brought the two systems closer to each other than it appears at first glance.

Could one say that these influences move national laws in a direction towards 'more' market and 'more' private autonomy, i.e. that European law reinvigorates the dominance of a private law society?[1108] Careful scrutiny of the outcomes in the two legal systems under analysis does not seem to corroborate this hypothesis. In a country like Germany, European influences seem to have brought about an increased sensitivity to the consumer dimension of fair trading rules, and to have weakened the long-term dominance of structural policy concerns in unfair competition law. Finally, the injunction directive has provoked a debate leading to broadening the access to

[1108] Joerges (1995).

courts of consumer organisations. Issues like the registration of consumer organisations as a necessary prerequisite for expansive right of action have received a prompt and satisfactory solution after decades of fruitless discussions.

Speaking of convergence, it is nevertheless important to be precise about the definition of this term. To be sure, it does not equate with uniformity. Even less than cucumbers[1109], domestic institutions are not cast in the same mould. In many respects the institutions of fair trading in Sweden and Germany reveal unbroken continuity in institutional choice and design, as well as in the prevailing standards of fairness. What can be observed is rather a process of abandoning or mitigating domestic idiosyncracies which become problematic within an integrating Common European market. Thus convergence is more palpable in a negative sense, i.e. in elements that are absent from the framework, rather than in a positive sense, i.e. in the sense of a new and homogeneous European fair trading law.[1110]

7.5.4 Reducing or increasing institutional efficiency?

At the outset of this study, and following North, the concept adaptive efficiency was introduced as a basis for a normative approach towards the evaluation of institutional change, and notably of the effects of European integration on national fair trading laws. According to North adaptive efficiency is "concerned with the willingness of society to acquire knowledge and learning, to induce innovation, to undertake risk and creative activity of all sorts as well as to resolve problems and bottlenecks of the society through time."[1111] Society's ability to solve problems through time is thus dependent on institutional frameworks that permit the maximum generation of 'trials' and that encourage the development of decentralized decision-making processes.

Seen from the perspective of adaptive efficieny, institutional symbiosis and instances of institutional 'lock ins' are undesirable because they prevent innovatory and open adjustment of institutions to new preferences and changed circumstances in technology and the marketplace. On the basis of this argument, one can say that Germany's institutional framework of fair trading law has been responsible for 'lock in' effects. The combination of an open general clause with rapid and efficient access to the courts and opportunities for lucrative collective interest representation of economic groups (*Mittelstand*) resulted in that these economic groups' perceptions about the standards of fair trading found recognition by the courts and in legal doctrine. Their tendency to preserve the status quo dominate all decision-making processes.

Against this background, European influences may enhance the institutional capacity for learning and generation of new 'trials'. Many of the established ideologies of German fair trading law have been unsettled as a result of the institutional framework

[1109] To use a proverbial example from the political debate on technical harmonisation.

[1110] In view of this institutional persistence one can concede to the pessimistic assessment of Teubner: "Against all expectations that globalization of the markets and computerisation of the economy will lead to a convergence of economic regimes and to a functional equivalence of legal norms in responding to their identical problems, the opposite has turned out to be the case. Against all talk of "regulatory competition" which is supposed to wipe out institutional differences, economic regimes under advanced capitalism have not converged. Instead, new differences have been created, even under the unifying attempts of the European Common Market." Teubner (2000), 258.

[1111] North (1990), 80.

and the organizations coming into contact with different value systems formed under different institutional environment (for instance the standard for deception, assessment of rebates and free gifts).

Swedish fair trading law never offered generous opportunities for promotion of sectoral economic interests through litigation. With the advance of consumerism the institutional framework was redesigned with marked orientation towards public intervention limiting the private autonomy of economic actors (e.g. 'producer influence' through quasi normative guidelines by KOV; subsidiary standing to sue of competitors and their organisation; limitation of rights to claim damages and litigation costs). This may have deprived private actors of opportunities to seek effective protection of property-like arrangements. A majoritarian bias has been visible in the choice of cases to be put to trial by the KO. With the advance of European integration, the law-maker has amended the process, so as to achieve a better balance between private autonomy and public intervention. The reform has been an example of anticipatory adaptation, rather than a direct reaction to European requirements.

Generally, both systems have remained within their own macro-institutional constraints in terms of the divide between private and public; the importance of private law and private autonomy in the overall legal system. However, European integration may have broken the spell of old lock-in effects and increased the plurality of decision-making instances and the number of 'trials'. For German law the consumer perspective is nowadays more readily recognised in legislation, case law and doctrine. In Sweden private autonomy has received a boost and individual traders enhanced access to the courts. There are, on the whole, strong indications that European integration questions fundamental ideological conceptions and could provide the impetus for incremental but profound changes in long-term institutional legacies as well.

If we can identify a common denominator of European influences, it may be towards involving a broader spectrum of actors who have developed their own expectations and subjective models under different institutional frameworks. In this sense, and probably only in this sense, we can say that Europeanisation processes bring institutional frameworks closer to the state of adaptive efficiency. Europeanisation can be described as flowing on two levels: on the normative level it requires implementation of common standards as laid down in binding Community acts: directives, regulations, etc. On the level of informal constraints, on the other hand, beyond strictly legalist impact and irrespective of binding force of rules, there is a less conspicuous influence consisting in questioning the justifiability and the reasonableness of domestic regulations. In summing up, I would submit that European integration plays the role of a catalyst in incremental and slow processes of change in court mentality, doctrine and enforcement, affecting a wide spectrum of actors and organizations.

8 PEERING INTO THE FUTURE: TOWARDS A EUROPEAN FAIR TRADING LAW?

The previous chapter provided a glimpse into the dynamic process of interaction between national and Community law. The metamorphosis experienced by harmonised Community law after entering the institutional landscape of individual Community Member States was analysed. The more controversial and less predictable process of instantaneous control over national policy choices through the European judiciary was examined. Although the Court in several instances has announced a retreat from the activist line of the 1970s, it clearly remains capable of challenging national institutional balances by measuring national regulatory policies with the yardstick of basic Community freedoms. Finally, an account of big-scale reform of national fair trading laws returns us to the 'deep waters' of institutional legacies and the turbulence of internally generated institutional reform.

The emerging picture is caleidoscopic and the conclusions far from unequivocal. European integration is hardly likely to bring about a world of legal uniformity. The Community 'acquis' exert different degrees of influence on national institutional frameworks and trigger processes of reform and change, often unintended and never predicted. The result is not necessarily convergence. The most immediate impact of European integration, it was argued above, consists in exposing biases in interest representation in the national political and national judicial processes. By opening these national decision-making processes to new interests (either by way of harmonisation or by way of preliminary references procedures), European legal integration challenges existing symbioses between organisations and institutional frameworks. Importantly, constant communication between national and Community decision-making processes allows recognition of a plurality of interests in an integrated market and polity and promotes, albeit at a slow pace, changes in ingrained habits and ideologies.

In the light of the analysis above, this chapter provides a short account of the recent proposals for a harmonised Community fair trading law. An underlying question is: will this cacophonic mixture of institutional traditions, historical legacies and procedural designs fuse into a harmonious poliphony of different laws and policies?

8.1 The new Commission proposal on comprehensive Community Fair Trading Law

On 18 June 2003 the Commission advanced a proposal for a Directive on unfair business-to-consumer commercial practices in the Internal Market (the Unfair Commercial Practices Directive).[1112] The proposal is by far the most ambitious attempt to find a comprehensive solution to the problem of divergent fair trading standards across the Community following the Ulmer project. It deals chiefly with substantive law issues, advancing a vision of extensive harmonisation combined with the 'internal market' approach familiar from the E-Commerce Directive. Harmonisation is envisaged to proceed on the basis of a general clause supported by a detailed catalogue of practices that would be considered unfair. According to the press release "this single set of rules will replace existing multiple volumes of national rules and court rulings on commercial practices."[1113]

[1112] COM (2003) 356 final.

[1113] Press release IP/03/857, Brussels, 18 June 2003.

Several Commission documents and expert studies form the background of the new initiative. In 1996 the Commission submitted a Green Paper on Commercial Communication in the Internal Market.[1114] The Green Paper was elaborated by the Directorate General Internal Market and bore the imprint of a free trade philosophy. Divergent regulatory standards were chiefly viewed as a frustrating obstacle to cross-border advertising and marketing campaigns. The main thrust of the Paper was consequently the abolition of trade barriers and the promotion of free movement of advertising and marketing services throughout the Community. Liberalisation of commercial communication was the leading strategy.[1115] The concrete results of this endeavour were meagre. An Expert Group on Commercial Communications was set up with the task of mapping out areas for future harmonization and liberalisation.[1116] The only proposal which crystallized from the work of the Group was the proposal for a Community Regulation on sales promotions.[1117]

On a parallel track, Directorate General SANCO launched comprehensive work on a general legislative framework for fair trading. The idea was arguably first advanced in the Consumer Policy Action Plan 1999-2001.[1118] The need for enhancing the protection of consumers from unfair marketing practices was underlined in Council Resolution of 19 January 1999 on the Consumer Dimension of the Information Society.[1119] Following an extensive study on the feasibility of a general legislative framework on fair trading[1120] and a series of meetings and conferences during the Swedish Presidency, the Commission published a Green Paper on Consumer Protection in the Internal Market in which the idea was fleshed out with more detail.[1121]

8.1.1 The ideology

The proposal for a Directive has been drafted under the auspices of DG SANCO. This is reflected in numerous details but most of all in the one-sided approach taken to the issue of commercial practices. The Draft purports to deal exclusively with instances involving actual or potential harm to consumer interests. Commercial practices unfair to competitors only (e.g. misleading advertising among traders as well as disparaging or comparative advertising) are left outside the scope of the proposed Directive. The proposal thus builds on a concept of dividing up the regulation of commercial practices into a consumer-oriented and in a business-oriented part.

This two-track approach has been much criticised in the period of consultations and is presumably going to be among the hardest nuts to crack in the course of legislative

---

[1114] COM (96) 192 final; cf. Follow-up to the Green Paper COM (98)121 final.

[1115] In its legal part the paper built extensively on a large comparative study on advertsing laws in the Community Member States prepared by the MPI in Munich. This study served as a basis of the ambitious loose-leaf edition Schricker (ed.) *Recht der Werbung in Europa* (1996).

[1116] See Micklitz et al., *Feasibility Study* (2000),Volume II, 76.

[1117] COM (2001) 546 final. Many of the ideas in the Green Paper were, however, integrated in the subsequent Electronic Commerce Directive.

[1118] Section 5.2, COM (98) 696.

[1119] Rec. 4(d) and Rec. 6(c), OJ C 23, 28.01.1999, 1.

[1120] Feasibility Study.

[1121] COM (2001) 531 final, 21.10.2001.

deliberations.[1122] The controversy may once again ensue from the dual logic of European integration. From the 'internal' perspective of fair trading law as a legal discipline, the main objectives of harmonization are perceived to be coherence and optimal normative quality. A comprehensive harmonisation approach covering all categories of unfair trade practices and allowing for all-sided balance of the interests concerned would seem to correspond better to such demands.[1123] The external logic of European integration requires, in turn, solutions ensuring a smoothly functioning internal market with minimum encroachment on national sovereignty. If subsidiarity is taken seriously, it may indeed be argued that the consumer protection aspects of fair trading require more decisive regulation at the Community level. Unfair trade practices infringing upon collective consumer interests typically involve public choices and have produced an exorbitant variety of responses under different national institutional arrangements. The individual Member States differ considerably in their reliance on alternative institutions, namely the market, the judicial process and the administrative process. These institutional divergences can arguably frustrate competition and impede consumer transactions. Given the public-good character of the underlying problem of market communication, it is likely to be poorly settled through the market alone. In contrast, problems of market communication among traders should more satisfactorily be settled by the market or through private enforcement. The conventional instruments of private international law ought to be sufficient to cope with possible complexities of cross-border infringements.

At the same time, to draw the line between consumer-related and business-related unfairness is a notoriously difficult matter and may lead to the application of a variety of standards. It may also risk creating new biases. The case of comparative advertising is a good example. In the present conception comparative advertising will remain outside the scope of the Directive. However, if left within the group of business-related rules on marketing, the liberalisation stance of this Directive could be entirely lost at the level of enforcement.[1124]

Overall, it is difficult to see how could one entice industry to assume a greater share of responsibility for maintaining fair commercial practice, while at the same time naming the consumer as a sole beneficiary of the new rules.

8.1.2 Substantive rules

8.1.2.1 General clause

In terms of substantive provisions, the Directive ventures harmonization through a Community-wide general clause prohibiting unfair commercial practices. The Commission confidently proclaims this general prohibition to be "the essential element of the Directive". It expects the prohibition to replace "the existing national general clauses in relation to unfair commercial practices between business and consumers" and to establish "more precise criteria for determining what is unfair than any existing

[1122] See Drexl, 'Community Legislation Continued: Complete Harmonisation, Framework Legislation or Non-Binding Measures – Alternative Approaches to European Contract Law, Consumer Protection and Unfair Trade Practices?' (2002) EBLR, 557 ff, at 572 ff., 581.

[1123] See in this sense Schricker/Henning-Bodewig, 'Elemente einer Harmonisierung des Rechts des unlauteren Wettbewerbsrechts' (2001b) WRP, 1367 ff. (2001), 1372 ff.

[1124] See already now on the lost momentum toward liberalisation the German Bundesrat Ch. 7.1.1.2 above.

national general clause."[1125] Unfair commercial practice is defined by three criteria. (i) The practice must be contrary to professional diligence. (ii) It must materially distort, or be likely to materially distort, the economic behaviour of consumers. (iii) The benchmark for assessment of the impact of the advertising is the average consumer.[1126] By introducing the two elements: material distortion of consumer economic behaviour and 'average consumer' as the European consumer *Leitbild*, the draft seeks to eliminate two of the major sources of exaggerated interpretation and overenforcement of fairness standards (as demonstrated in particular by German unfair competition law). The 'materiality' condition requires that a commercial practice "causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise." The objective is apparently to codify a *de minimis* rule in the standards of fairness and thereby to curb excesses.

In its follow-up Communication the Commission announced that in eliciting the notion of fairness it would proceeed from the valid perceptions in the majority of Community Member States. For minoritarian conceptions the Commission announced its intentions to apply the proportionality test elaborated in the Green Paper on Commercial Communication.[1127]

8.1.2.2 Specific rules

One of the major drawbacks of harmonization via general clause is clearly the risk of conflicting interpretations by different enforcement bodies. The Draft Directive purports to reduce this risk by using two techniques. First, the allegedly most widespread unfair commercial practices, namely misleading advertising (Arts. 6 and 7 Draft) and aggressive advertising (Arts. 8 and 9 Draft), are defined in great detail. Both types of practices have previously been subject to harmonisation but are now addressed in a more comprehensive manner. The provision on misleading advertising, familiar from the Misleading Advertising Directive, is complemented by an explicit rule on deception by omission (Art. 7 Draft). This obviously represents a compromise solution in place of a straightforward information disclosure requirement.

Second, a black-list of specific practices which are covered by the general clause and the Directive's provisions is intended to give practical guidance to law-enforcement authorities.[1128] In this the Draft Directive follows the Feasbility Study. In the Green Paper the Commisson advanced a third alternative for ensuring predictability and harmony in implementation, namely drawing up a non-binding practical guidance with stakeholder participation.[1129] This proposal constituted a contribution with a distinctively Scandinavian (and chiefly Swedish) flavour. It is impossible to escape associations with the present Swedish system with KOV guidelines (described above).[1130] In the final proposal of the Commission, however, this particular arrangement was no longer pursued.

[1125] COM (2003) 356 final, Explanatory memorandum, para 49.
[1126] COM (2003) 356 final; see Art. 5 Draft Directive; cf. Explanatory memorandum, para 51.
[1127] See COM (2002) 289, final, 12.
[1128] See Annex 1 to draft Directive.
[1129] See COM (2001) 531 final, 15.
[1130] See Ex-ante Impact Assessment of the options outlined in the Green Paper on EU Consumer Protection , GFA Management, 29.11.2002, 25.

8.1.3 Form of harmonization

One of the crucial questions that will determine the future Directive's impact on national law is the chosen venue of harmonisation. The Feasibility Study devoted considerable attention to the so-called 'New Approach' developed in the field of technical standards, and explored its applicability to the field of marketing practices. The New Approach essentially builds on a combination of certain minimum mandatory requirements laid down in Community Directives, and a net of non-binding standards elaborated by European standardization organizations under active participation of stakeholders, including consumer organizations. Compliance with voluntary standards would guarantee free access to the Europan market. The Feasibility Study rightly noted the plethora of differences between product standards and marketing standards. The subject of regulation is in the first case the realm of technical aspects of products (size, composition, shape, functionality), and in the second case ethical aspects of commercial communication. The elaboration of standards can in the first case be entrusted with standardisation bodies, whereas no such bodies exist in the area of fair trading. A difficulty not mentioned in the Draft Directive is that technical aspects are quantifiable and (relatively) easy to monitor, whereas information is non-quantifiable, subjectively perceived and therefore difficult to monitor.

An alternative form of harmonisation suggested by the Feasibility Study was the so-called 'mixed approach', combining ambitious harmonisation (on the basis of a general clause and catalogue rules) with an internal market clause and leaving room for non-binding guidance through voluntary codes.

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

The Draft Directive predictably follows the mixed approach. It combines extensive harmonization with an 'internal market'.[1131] As commented earlier, this clause in turn consists of the two complementary principles of home country control (country of origin) and mutual recognition.

[1131] See Art. 4 Propsal for a Unfair Commercial Practices Directive, COM (2003) 356 final.

One of the major promises of the framework directive was that of simplification. The initial intent has been to consolidate the majority of existing provisions of fair trading scattered among various directives would be consolidated and the directives repealed. This is only partly achieved by the proposal. The only pre-existing legal acts that would be absorbed by the Framework Directive would be the Misleading Advertising Directive (without its part on comparative advertising) and the Distance Selling Directive. The large variety of other horizontal and vertical directives will continue to exist.

8.2 Enforcement

The Feasibility Study recognized that the major difference between national institutional frameworks of fair trading lay not so much in the different concepts at the basis of the general clause, but rather in the density of control behind such concepts.[1132] The Study relates the density of control with the dominant concept of competition in national law, the extent to which consumer protection forms part of fair trading legislation and with the competent enforcement authority.[1133] The conclusion drawn is that the importance of the exact wording of the general clause should not be overstated, which seems entirely reasonable. Another quite evident conclusion would be that harmonisation of substantive rules will have limited value if the hihgly divergent national mechanisms of enforcement remain untouched.

8.2.1 Enforcement in the Draft Directive

The Draft Framework Directive itself adopts a minimalist stance on the issue of enforcement. As stated in Arts. 10-13 of the Explanatory memorandum, the Draft Directive only reproduces already existing provisions on enforcement, including in particular Arts. 4 to 6 of the Misleading Advertising Directive. These provisions are extended to the whole area of unfair commercial practices.[1134] Consequently, the Directive allows a centralised administrative and a decentralised civil law model of enforcement. It focuses on the injunction as a main remedy and includes facultative provisions on control prior to publication, publication of the decision and burden of proof. As to legal standing, there are no attempts to strengthen the position of consumer associations. Furthermore, due to the limited focus of the Draft Directive on business-to-consumer relations, no explicit rule on the legal standing of commercial associations is included (as for instance in the Distance Selling Directive).[1135] It will therefore be up to the Member States whether to grant legal standing to business associations in cases of unfair commercial practices harming consumer interests. Member States are required to open avenues for enforcement to "persons and organisations regarded under national law as having a legitimate interest in combating unfair commercial practices." In both Germany and Sweden individual competitors and business associations are considered to have such interest and will consequently be granted legal standing.

Despite the non-assuming tone in the Explanatory memorandum, there is a novelty in the area of enforcement which may provoke massive objections. Draft Art. 13 stipulates an obligation for Member States to lay down penalties for infringements of

[1132] Micklitz et al. (2000) Volume I, 14.
[1133] Ibid.
[1134] Art. 11 Propsal for a Unfair Commercial Practices Directive, COM (2003) 356 final.
[1135] See Art. 11(1) Propsal for a Unfair Commercial Practices Directive COM (2003) 356 final.

national provisions adopted in application of the Directive. These penalties must be effective, proportionate and constitute a deterrent. The penalty is thus not envisaged for violation of an injuctive order (as for instance in Art. 2(1)(c) Injunctions Directive) but for infringement of the substantive standards of the Directive. The provision is formulated in a sweeping and unqualified manner. Interpreted literally it would require penalties for violation not only of the catalogue rules, but also of the general clause. Such an approach will in the majority of Member States be unacceptable from the point of view of legal certainty. Sweden is among the few Member States which stipulates penalty in the area of fair trading (*marknadsstörningsavgift*). Yet even in Sweden the penalty is only enforceable upon violation of (some of) the catalogue rules. This sanction, moreover, is applied very sparingly as a measure of last resort.[1136]

In the Explanatory memorandum to the Draft Directive the Commission presents Art. 13 as reproducing provisions from existing directives. The Commission refers in particular to Art. 10 of the Package Travel Directive,[1137] Art. 11(1) Distance Selling Directive[1138] and Art. 8 of the Directive on the Indications of Prices[1139] as precursors to this rule. Yet a look at these provisons leaves the reader in deep confusion. Art. 10 of the Package Travel Directive states: "This Directive is addressed to the Member States." But there are in this Directive no provisions concerning penalties whatsoever. In addition, Art. 11(1) of the Distance Selling Directive restates the conventional formula on enforcement to be found in a number of Community acts. It instructs Member States to ensure that "adequate and effective means exist for compliance" with the respective Community Act, without mentioning penalties as a sole or central remedy which is 'adequate and effective' There are few States (if any) which envisage penalties for violations of this particular Directive. Finally, the Commission refers to the case law of the ECJ. According to the Explanatory Memorandum (draft) Art. 13 asks the Member States to ensure the Directive's effect in accordance with the ruling of the Court in the case *Commission v. Greece*.[1140] It should again be underlined that this ruling by no way purports, or is in a position, to set a universal requirement of penalty sanction for non-compliance with any kind of Community obligations.[1141]

The only provision which indeed contains a rule on penalties is Art. 8 of the Directive on Indication of Prices. Rules on indication of prices, however, are typically detailed and subject to administrative control. Penalties for infringement of such provisions are a widely accepted and well-suited sanction. By contrast, introducing penalties for the area of fair trading would constitute a radical departure from the approach customary in the majority of the Member States and can thus present a challenge to their legal

---

[1136] See above Ch. 7..3.2.3 above.
[1137] Directive 90/314/EEC, OJ 1990 L 158/59.
[1138] Dirctive 97/7/EC, L OJ 1997 L144/19.
[1139] Directive 98/6/EC, OJ 1998 L 80/27.
[1140] Case C-68/88 *Commission v.Greece* [1989] ECR 2965; see COM (2003) 356 final, Explanatory memorandum, para 78.
[1141] The case concerned a very specific instance of fraud on the part of Greek civil servants. The Court elaborated on the basis of Art. 5 EC Treaty two principles of remedies for non-compliance with Community law: the principle of equivalence (i.e. that infringements of Community law should be penalized in the same way as infringements of national law, para 22) and the principle of effectiveness (i.e. that in the absence of national remedies, Member States have to provide for effective, proportional and dissuasive penalty, para 23-24). See Ward (2000), 17 ff. On the difficulty of constructing a theory of remedies for non-compliance with Community law applying for all areas of Community regulation see Kilpatrick (2000), 14.

systems It is likely to unleash a negative reaction among stakeholders and governments. The question is whether the Commission really intended to embark on such controversial initiatives.

8.2.2 The Regulation on Consumer Protection Cooperation

The relatively undemanding approach to enforcement in the Draft Directive on Unfair Commercial Practices is explained by the intentions of the Commission to treat enforcement in a separate Community document, indicated already in the Green Paper.[1142] Only a month after publishing the Draft Framework Directive a proposal for a Regulation on Consumer Protection Cooperation has been submitted.[1143] The proposal is remarkable in that it is exclusively devoted to public law enforcement of consumer protection laws. The Draft Regulation purports to establish a network of public consumer protection authorities in the Community Member States. These authorities are to be identified, clearly listed and obliged to offer information and mutual assistance.

The justification cited for this intervention at the Community level is the need to effectively combat cross-border infringements of consumer laws and illicit activities by rogue traders in intra-Community commerce, a problem that has become particularly soaring with the advance of new media, notably the Internet. Indeed, many stakeholders and experts in the course of elaboration of the Distance Selling Directive and the Electronic Commerce Directive pointed out that the real threat lay in the possibilities for evasion of enforcement and sanctions, practically inherent in the ubiquitous character of electronic media. Setting a high level of consumer protection in harmonised Community law could make commerce more expensive and cumbersome for law-abiding enterprises, but at the same time have little effect on rogue traders. The new initiative thus aspires to tackle one of the major problems of consumer confidence in electronic commerce.[1144]

It is interesting to note the language in the Regulation's preamble. The thesis of the indispensability of public authorities for the proper enforcement of consumer protection laws is advanced with remarkable vigour. The Commission defends the advantages of public intervention, using two lines of argument which reflect the dual logic of European legal integration. The first line of argument follows the 'internal' logic of consumer law enforcement. The advantages of public intervention are analysed in substance from the point of view of effective enforcement of consumer law. In the opinion of the Commission there are several points that make public authorities attractive in comparison with private enforcement entities, notably consumer organisations:

(i) sufficient investigation powers;
(ii) sufficient guarantee of confidentiality and professional secrecy;

[1142] COM (2001) 531 final, 16 ff.
[1143] Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation"), COM (2003) 443 final.
[1144] See among others Hultmark, 'Konsumentskydd på Internet - rättsekonomiska synpunkter' (1998-99) *JT*, 80 ff.

(iii)proven efficiency and effectiveness of a public dimension to enforcement in the Member States where such exist;
(iv) impartiality and accountability. [1145]

The second line of argument (and justification) follows the 'external' logic of European integration and is concerned with demonstrating the positive effects of the proposal for the Internal Market. In this vein the main advantage is described as overcoming the reluctance of Member States to accept maximum harmonisation and mutual recognition in the field ofconsumer protection. Provided that the regulation would guarantee reciprocal rights and obligations of mutual assistance between public authorities, Member States will be reassured that they (or rather their consumers) will not lower thresholds of protection due to ineffective enforcement in the country of origin.[1146]

Although the Commission underlines the "valuable role" to be played by consumer organisations in the process of enforcement, it does not appear ready to sustain the "privileged position" provided to these organisations by Community law and especially by the Injuctions Directive.[1147] Ostensibly, for the first time in Community documents some drawbacks of consumer organisations are brough to the fore. Thus the accountability of consumer associations is openly put into question.[1148] Deficiencies are also found in the investigation powers of consumer associations, in their potential to act speedily and efficiently, in their prime concern for the interests of their members and the ensuing confine within national limits. On the basis of these assessments the Commission appears uncompromising in its resolve to require that Member States assign mutual assistance rights and obligations exclusively to public authorities.[1149] It probably seeks to preempt claims by national governments, notably by the German government, that national consumer organisations perform with comparable (or greater) efficiency than public authorities.

The general direction and underlying philosophy of the harmonisation endevours outlined above have prompted a number of scholars and stakeholders to speak of a 'swedisation' of Community consumer policy[1150] and a Scandinavian imprint on recent Community proposals in the field of fair trading law.[1151] Indeed, the Draft Directive and Regulation in important respects represent a recapitulation of the Swedish system of marketing practices law. The orientation towards collective consumer interests and the central place accorded to public enforcement are two core elements in the proposals which appear to draw heavily on the Swedish experience. The praise of the advantages of public intervention in the area of marketing practices in the proposed Regulation recalls the flavour of the *travaux préparatoires* to the 1970 Swedish MFL.

[1145] See COM (2003) 443 final, Explanatory memorandum, para 34.
[1146] See COM (2003) 443 final, Explanatory memorandum, paras 21-23.
[1147] See COM (2003) 443 final, Explanatory memorandum, para 32.
[1148] Private bodies are said to be "not so accountable". COM (2003) 443 final, para 34.
[1149] COM (2003) 443 final, Explanatory memorandum, para 34.
[1150] See interview with Jim Murry, Director of BEUC, KonsumentMakt, Nyhetsbev från Sveriges Konsumentråd, Nr. 2 April 2003, 4 referring to
[1151] Micklitz/Keßler (2002), 885 ff., at 891.

The question is to what extent the trust in public enforcement is shared by all (or by the majority) of the Community Member States and how much adjustment the proposed regime will demand. Despite assurances by the Commission that the envisaged cooperation duties will only apply to intra-Community infringements and that new public authorities will not be "necessarily required", the Draft Regulation would if turned into Community law exert considerable adaptation pressure on Member States currently lacking such authorities. The proposal is very specific about the minimum enforcement powers which have to be entertained by the competent national authorities. These powers shall encompass, among other things, unconditional rights of access to documents and opportunities to carry out on-site inspections, the right to obtain from the infringer a binding commitment to cease and desist from intra-Community infringement (including the right to publish the commitment), the right to obtain judicial cease and desist orders and the right to enforce such orders in the event of non-compliance by seeking judicial order for payments into the public purse.[1152] This is a steep agenda, which can hardly be met by an *ad hoc*, inexperienced and inadequately financed body. The Commission therefore explicitely envisages a duty for Member States to provide sufficient resources at the disposal of such public authorities.

Once these effective, well-equipped and competent bodies are identified and empowered to act in cross-border cases it may be close to mind to vest them with prerogatives to defend the interests of consumers also in purely internal situations. So, if adopted the Regulation may be expected to have certain 'spill-over' effect in the general system of enforcement of national consumer protection law beyond the scope of intra-Community infringements.

8.3 Reactions of Governments and stake-holders

It is early to make any predictions about the fate of the two proposals. Many of the specific provisons and formulations will presumably undergo multiple changes in the course of the debate. More important is whether the main features of the advanced harmonization approach will summon the necessary support to result in binding legislation. A survey of the reactions to the Commission Green Paper and the Follow-up Communication by German and Swedish stakeholders and governments reveals few, if any, surprises. The national stakeholders and governments seem to cling to their own, national models of regulation. The proposal, however, clearly exerts greater pressure for adaptation on the German institutional framework than on the Swedish one. This is confirmed by an extensive *ex ante* study for the Commission on the expected impact of the various options outlined in the Green Paper on national legislatures. In the study the Scandinavian countries stand out as those that would most easily adapt to the mixed approach advanced by the Commission.[1153] These countries are among the few having experience with most of the proposed substantive provisions, including information disclosure requirements.

A point on which both German and Swedish stakeholders express reservations is the one-sided approach which leaves business to business relations outside the scope of the Draft Directive. Avoiding the controversies related to possible harmonization of

[1152] See COM (2003) 443 final, Art. 4 (3) Proposal for a Reglation.
[1153] *Ibid.*, 24 ff.

unfair competition, which would require to tackle practices such as slavish imitation and trade secrets (and due to division of competences between Commission directorates), the draft focuses on the consumer protection aspect of fair trading. This splitting may cause doctrinal and practical confusion in both countries.

In fact, the acceptance of a broad application of the internal market principle is questioned by the Swedish Government. Preference is voiced for control at the country of destination.[1154]

8.3.1 The national institutional actors

A survey of the responses of stakeholders demonstrates that German economic actors are among the most actively represented in the deliberation process. Not surprisingly, the same powerful interest groups which have shaped and have been shaped by the institutional framework of German unfair competition law show a strong interest in the future European directive.

The *Wettbewerbszentrale* has submitted position papers both on the Green paper and the Follow-up Communication by the Commission. On all important points the *Wettbewerbszentrale* comes out as an ardent advocate of the German institutional model, wishing to see this model transposed to the Community level. Substantively, the *Wettbewerbszentrale* therefore strongly opposes the consumer protection stance in the Commission's proposal.[1155] It seeks an integrated approach where business interests are considered at least on an equal footing with those of consumers. The *Wettbewerbszentrale* reports on its own experience of the allegedly positive cross-fertilisation effects between the protection of competitors' interests and those of consumers.[1156] While it endorses the harmonization endevours of the Commission, it wishes to see a comprehensive regulative framework of unfair competition practices. The unexhaustive catalogue of unfair practices to be attached to the general clause should according to the *Wettbewerbszentrale* contain the following factual situations:

> Wertreklame, Verkaufsförderung, Gewinnspiele, Preisausschreiben, Schutz vor belästigende Werbung, Irreführungsschutz, Verbot der Tarnung von Werbung, Ausnutzung der Unerfahrenheit und des Vertrauens bestimmter Verbraucherkreise, Behinderngswettbewerb, Nachahmen fremder Leistung, unzulässiger Vorsprung durch Verletzung von Rechtsnormen, Sicherung des Lesistungswettbewerbs der Unternehemen untereinander.[1157]

The catalogue closely follows the established categories of situations falling under the UWG as a result of long-standing case law. Thus the proposal purports to conserve, to

---

[1154] Swedish Ministry of Justice, Comments on the Follow-up Communication, 30. 9.2002.

[1155] "Allerdings geht das Grünbuch bisher ausschliesslich von einem rein verbraucherschützenden Ansatz aus, lässt damit den Schutz der Wettbewerber und der Allgemeinheit ausser Betracht. Alle drei Schutzzwecke gehören im Bereich der Lauterkeit des Geschäftsverkehrs aber untrennbar zusammen und werden überwiegend in Europa im Zusammenhang mit lauterkeitsrechtlichen Schutzvorkehrungen allgemein anerkannt. Insoweit greift das Grünbuch nach unserer Auffassung deutlich zu kurz.", Zentrale zur Bekämpfung des unlauteren Wettbewerbs, Stellungnahme zum Grünbuch der Kommission zum Verbraucherschutz in der Europäischen Union, February 2002, 2.

[1156] Zentrale zur Bekämpfung des unlauteren Wettbewerbs, Stellungnahme zum Grünbuch, 2.

[1157] *Ibid.*, 6.

the maximum degree possible, the institutional environment well-familiar to the organization.

Particularly vehement is the plea of the *Wettbewerbszentrale* for adopting the German model of civil law enforcement also at the Community level. Efficient and intensive enforcement also in cross-border disputes is described as the core of any sound harmonization initiative.[1158] The way to achieve such an enforcement, however, is unequivocally seen to coincide with the German civil law model and its reliance on the private initiative of individual economic operators, of business and consumer associations:

> Als effektivster und kostengünstigster Weg hat sich die Klagebefugnis von Verbraucherverbänden und Verbänden der Wirtschaft herausgestellt. Entsprechend der modernen Aufgabenteilung zwischen Staat und Gesellschaft ist gerade die wirtschaftliche Selbstkontrolle durch Verbände mit entsprechender Klagebefugnis zum Einschreiten gegen unlauteren Wettbewerbs jeder Lösung vorzuziehen, die neue, kaum zu finanzierende Behörden notwendig macht. Jedenfalls sollten die in den verschiedenen europäischen Staaten vorhandenen Möglichkeiten der Verbandsklage sowohl für die Verbraucher wie auch für die Wirtschaft unbedingt beibehalten werden.[1159]

The already familiar German view of the distinction between private and public sphere and the subsidiarity principle is here advanced by the *Zentrale* as the 'modern' conception of the division of competencies between state and society. The private law model of enforcement is defended, respectively, as the only one corresponding to this conception. The main source of efficient enforcement in this model, in the view of the *Wettbewerbszentrale*, is the self-interest of competitors to preserve their competitive positions.

> In diesem Zusammenhang zeigt unsere praktische Erfahrung folgende wichtige Erkenntnis: Es sind gerade und in weitaus überwiegendem Masse die Wettbewerber, die – durch ständige mit fachlicher Kenntnis vorgenommene Beobachtung der Konkurrenz – unlauteres Geschäftsgebaren gegenüber dem Verbraucher ... sofort erkennen und gegenüber der Wettbewerbszentrale zur Anzeige bringen.[1160]

At no point in the position paper is there any consideration of a possible conflict of interests between consumers and competitors, or adverse effects for competition (and consumers) as a result of excessive enforcement.

On the question of choice of enforcement mechanism and remedies, the *Wettbewerbszentrale* is clearly an actor with a vested interest. Any enforcement alternative threatens to undermine the position of the *Wettbewerbszentrale* by

---

[1158] „Vor diesem Hintergrund ist es unabdingbar, den für die Einhaltung der Wettbewerbsvorschriften zuständigen Organisation im Falle der Missachtung durchsetzungsfähige Sanktionsmassnahmen an die Hand zu geben, um faires Marktverhalten unverzüglich unterbinden zu können." *Ibid*, 7.

[1159] *Ibid.*, 7.

[1160] *Ibid.*, 4.

depriving it of its *raison d'être*. This explains the profoundly negative attitude of the organization to proposals for self-regulation. Self-regulation would *prima facie* be in line with the liberal and non-interventionist logic presented by the *Zentrale* in support of moves towards self-regulation. The tone in the position paper, however, is rather hostile:

> Selbstregulierung allein kann staatliche und verbindliche Rahmenbedingungen im Bereich des Wettbewerbs- und Verbraucherschutzes vor unlauteren Geschäftsgebaren nicht ersetzen. Die Ausfüllung einer Generalklausel ist unbedingte Aufgabe der Rechtsprechung. Daneben kann zusätzlich über selbstverpflichtende Massnahmen der Wirtschaft nachgedacht werden, die dann allerdings Freiwillgkeitscharakter haben sollten.[1161]

A similar criticism is directed at ideas of soft corporatist arrangements building on informal cooperation and participation of stakeholders in the decision-making process:

> Nichtbindende praktische Leitlinien erfüllen keinen sinnvollen Zweck, führen aufgrund des nichtbindenden Charakters auch nicht zur erwünschten Rechtssicherheit. Zeitführender ist die Festlegung von Regelbeispielen oder Sondertatbeständen in der Rahmenrichtlinie selbst. Die Auslegung und Sondertatbestände ist der Rechtsprechung zu überlassen.[1162]

Albeit in a less emotional tone, support for the German model of private enforcement is also expressed in the opinion of the German GRUR Association.[1163] The Association suggests that emphasis should be placed on substantive harmonisation. The objective of uniform interpretation should according to the Association be pursued through non-biding guidelines and informal exchange of information between Member States, rather than by cooperation between public authorities.[1164]

Another actor in the German debate, namely the *Zentrale Ausschuss der Werbewirtschaft* (ZAW), has been a vocal participant in the debate. The position of ZAW has some fundamental similarities with that of the *Wettbwerbszentrale*, but differs in certain respects. Most importantly, ZAW stands out as a firm opponent to harmonisation. In ZAW's view the Commission has not demonstrated the existence of serious obstacles to trade in the present state of partial harmonization, and has not made a convincing case for comprehensive harmonisation. To sum up, organized German industry speak in one voice against public regulation and cooperation between authorities, and in support of the decentralised private model of enforcement.[1165]

Different is the tone of German consumer organizations. The Federation of Consumer Organizations openly criticizes the existing institutional legacies of German unfair

---

[1161] *Ibid.*, 6.
[1162] *Ibid.*, 6.
[1163] Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht, Comments, 28.2.2002, 11.
[1164] See also the comments of the Markenverband, 24.1.2002.
[1165] ZAW, Position der deutschen Werbewirrtschaft zum Grünbuch der kommission zum Verbraucherschutz in der EU, 24.1.2002.

competition law, in particular the absence of a firm anchoring of consumer protection in the pronounced objectives of the UWG. The Federation seeks to influence Community proposals aimed at enhancing the overall positions of consumer associations in the process of enforcement. Notably, consumer associations are mentioned among the prosecution bodies in the context of consumer protection.[1166]

For the Swedish part the KOV shows similar confidence in the advantages of the national institutional model. The main reaction of the Agency is in the sphere of enforcement, endorsing the Commission's proposal on enforcement cooperation between public authorities, yet making some disclaimers as to the need to avoid conflict with "basic national administrative provisions." KOV insists that Member States themselves should be able to set priorities in terms of national enforcement measures. The Agency also invites the Commission to earmark resources for such cooperation, thus reminding of the budgetary constraints of public bodies.

The Swedish Consumers' Association is likewise supportive of the Commission proposal and especially the emphasis on public regulation. By contrast, ideas of expanded self-regulation are met with skepticism.

8.3.2 Governments

The success of harmonization initiatives will to a great extent depend on the pressure exerted over national institutional tradition and the degree of identification of national authorities (Governments) with this tradition. The signs so far are of firm resistance on the part of Germany against any coupling of administrative authorities to the process of monitoring and enforcement. In the words of the German Government:

> Bei der angestrebten Verbesserung der Durchsetzung von Verbraucherrechten bei grenzüberschreitenden Sachverhalten innerhalb des Binnenmarkt wird sich die Bundesregierung auf Gemeinschaftsebene für eine intensivere Zusammenarbeit zwischen justiziellen Behörden und eine Erleichterung der Vollstreckung von Entscheidungen einsetzen.[1167]

This promise to resist any pressure toward 'bureaucratisation' is indeed kept in the response submitted by the Government to the Green Paper on Consumer Protection. There the Government praises the German model of civil law enforcement:

> On the basis of its good experience with the industry and consumer associations' self-regulation system, the Federal Government feels that the enforcement of consumer protection law relating to unfair trading should be left to enforcement under civil law in Germany and does not need be subject to official or administrative procedures. ... In Germany a very efficient system of monitoring and penalising practices that prejudice consumer rights or are otherwise unfair has developed on the basis of civil law injunctions and compensation claims.[1168]

[1166] See Statement of the Federation of German Consumer Organisations (vzbv), 21 .1.2002.
[1167] BT-Drs. 323/03, 17.
[1168] Position of the Federal Government, 28.2.2002.

To an extent, we can observe a double-tongued policy. To external observers, the model is defended as efficient and superior to alternative models. Inwards, the faults of the model are acknowledged and substantial efforts are made to revise the system of enforcement and curb perceived inefficiencies. The position is reiterated in the subsequent comments on the Follow-up Communication.[1169]

Not surprisingly, the Swedish Government wholeheartedly supports the main lines of development projected by the Commission. The general clause, the catalogue rules, the combination of judicial enforcement with public supervision and cooperation – all these elements were part and parcel of the Swedish institutional tradition in marketing practices law. The Government in particular speaks in favour of a system of administrative cooperation:

> The Green Paper quite rightly makes the point that legislation has a chance of achieving the desired effect only if it is accompanied by effective market surveillance and extensive administrative cooperation between Member States.[1170]

At the same time, the Government takes a critical stand in general on the application of the principle of mutual recognition to the area of marketing practices. The Government observes that this principle is most opportune in areas which affect product design and marking, and this finds expression in EU regulations. Conversely, in the field of consumers' legal and economic interests this principle does not find expression in the same way at all, since "there is often a large element of discretionary judgement" in such regulation.[1171]

8.4 Diversity and unity in a multilevel system of governance

Does the Community really need a common set of rules governing fair trading? Has the Commission discharged its burden of proof when it comes to demonstrating the added value of a general legislative framework in an Internal Market?[1172] Probably the most serious argument in favour of further efforts at harmonisation is the onus posed on intra-Community trade by German unfair competition law. In a sense, the Directive may be seen as one collective attempt to shake the UWG at its foundations.

The excessive restrictiveness of German law has evidently prompted the introduction of clarifications regarding the requirement of relevance of a commercial practice for consumer behaviour and the notion of the average consumer. In the Explanatory Memorandum the Commission refers to 'some' Member States, which instead of applying the test of the average consumer examine the effect of a given commercial practice on a small number of consumers (10-15 percent). Likewise, the Commission mentions a state practice prohibiting any inaccuracy in advertising even if it has no bearing on consumer decisions.[1173] These two examples, obviously targeting Germany,

---

[1169] Stelungnahme der Bundesregierung, 25.9.2002.
[1170] Comments, Swedish Ministry of Justice, 1.2. 2002.
[1171] Ibid.
[1172] For the negative response to this question on the part of business associations see COM (2002) 289 final, 4.
[1173] See Explanatory memorandum, para 21.

are offered as major sources of divergence of fair trading standards in Europe. The elimination of such divergence is among the main objectives of the Directive.

The pitfalls of European legal integration may actually lie in the vision of achieving comprehensive harmonisation. As the experience from the Comparative Advertising Directive demonstrates, raising the ambition of harmonisation unleashes a process of regulatory competition. Member States align along institutional tradition and seek to bend European legislation in direction closer to their respective institutional model. This may in turn lead to regulatory overstretch, with an unnecessarily dense net of rules and regulations. The ongoing deliberations around the proposed Framework Directive confirm this tendency. Member States, even when having doubts about the efficiency of their own institutional tradition, tend to promote the familiar national solution at the European level on grounds of prestige and in order to diminish the pressure for adaptation that a new European regime may require.

From a different perspective, hopes of genuine harmony of fair trading standards across the Community are likely to be dashed. Given the tenacity of national legacies and traditions showed by this study, there are clear limitations as to what can be achieved by common rules. Indeed the European political and legislative process promise to level out the most apparent regulative differences and to compensate the heaviest instances of representative malfunction that distort the process of economic integration. The European institutional framework sets out to accommodate a plurality of interests and institutional habits formed under different institutional environment. In the interaction between the European and the national level the influence of institutional actors that dominate in the national political process may diminish. However, the Community legislative process is slow and cumbersome and can only lead to incomplete harmonisation. Moreover, in a multilevel system of governance Community legislation does not replace but forms only another layer of regulation, parallel to persisting Member States' regulatory models. The need for coordination is thus continuous and the role of the European Court of Justice is likely to remain central also in the future.

There are other institutional themes, which deserve mentioning when pondering the advanced proposals. The first theme is associated with the ongoing process of enlargement and the associated extension of Community law to the candidate countries of Central and Eastern Europe. The EU will soon consist of twenty-five Member States and the growing number of members implies a greater institutional diversity. By virtue of the so-called Association Agreements and more importantly as a precondition for full-fledged membership in the Community, the Candidate countries have committed themselves to bringing their legislation into conformity with the *'acquis communautaire'*. In stark contrast to processes of harmonisation in established market democracies, in the Central and East European countries harmonisation is often not only about adaptation of pre-existing national standards to those of the Community. In many respects harmonisation runs parallel to a complex, simultaneous process of market-, institution-, and civil-society-building.[1174] Community law meets a relatively fragile framework of basic civil and economic law, weak institutional structures and an

[1174] Micklitz, 'Divergente Ausgangsbedingungen des Verbraucherschutzes in West und Ost' in: *Rechtseinheit oder Rechtsvielfalt in Europa?* (1996), 3 ff.

insufficiently institutionalised civil society. Thus the *acquis* is often assigned a highly uncharacteristic task of serving as a model for conceiving of whole branches of national regulation. Within this process European Community law is suddenly laden with authoritative power and expectations hardly corresponding to its normative quality and original ambitions.

In the specific context of fair trading law, Community law has exerted palpable impact on the institutional framework in these countries. Whereas a first generation of fair trading acts reflected either an approach modelled on the German UWG, or a consolidated approach treating fair trading jointly with antitrust practice, new layers of regulations have recently been added, mainly as a result of adaptation to the Community *acquis*. Thus, in a massive effort to raise consumer protection standards in the Central and East European Countries, ambitious and comprehensive consumer protection acts were introduced in many of the applicant states. Since regulation of misleading advertising in Community law falls under the heading of consumer protection policy, many of the applicant states have felt obliged to incorporate provisions on advertising and marketing practices in the new consumer acts, despite the existence of similar rules in the (unfair) competition acts. The ambition has been to accurately transpose the Misleading Advertising Directive and the Television Directive, but the rules often go far beyond the scope of these Community acts.[1175]

In terms of institutional and enforcement techniques, however, the import of substantive rules has not been accompanied by much Community guidance. Moreover, whereas the CEE states are required to harmonise their legislation with the Community *acquis*, they have so far not become part of the sophisticated multi-level dialogue between Community and Member States institutions. One common characteristic is the strong involvement of public agencies in the process of enforcement of fair trading rules. This tendency probably ensues from the linkage of fair trade practices regulation with antitrust law and with consumer law, respectively. It has its roots in regulative tradition and in 'ingrained habits' from the time of the dominance of state bureaucracy.

The lessons for future harmonisation endeavours consequently point to a need to enhance sensitivity for the specific effects, which new initiatives may have in the context of emerging markets. Whereas for instance dividing up the regime of fair trading practices into business–to-business and business-to-consumer sub-fields may be practicable and cause no problems in the present Community Member States, it may create distortions in the institutional framework in some Central and East European countries and bias public regulation at the expense of decentralised private enforcement.

The Commission makes recourse to enlargement only to draw additional support for its preferred emphasis on enforcement by public authorities. The availability of public authorities for the enforcement of fair trading standards in CEE is used to bolster the potential of the advanced Regulation to achieve a uniform and adequate enforcement across a wider Community.[1176] Thus Bourgoignie's prophecy may be fulfilled, in that

[1175] See Bakardjieva Engelbrekt, 'International Treaty Obligations and Legal Developments in Central and Eastern Europe' in: *Towards a Harmonised View of Fair Trading in Europe*, Report of the Conference held in Stockholm 9-10 March 2001.

[1176] See Explanatory memorandum, 34.

the massive assistance to expand consumer protection in CEE could have the (in his view positive) boomerang effect of raising the standards at the Community level.[1177]

The second theme, which has impact on the debate on appropriate forms of enforcement of fair trading law, is the process of globalisation and ubiquitous commercial communication via new media. Globalisation presents new challenges to the enforcement of national or harmonised fair trading law. Consumers are increasingly purchasing internationally. And, conversely, goods circulate beyond national borders promoted by global marketing campaigns. More specifically, the ubiquity of electronic communications and global e-commerce makes cross-border infringements of fair trading standards a daily reality. Since setting uniform substantive standards in this heterogeneous and borderless environment appears unrealistic, the solution is increasingly seen in new and flexible forms of institutional co-operation between national regulatory agencies and consumer protection entities. In this sense the proposal for enforcement cooperation and the Framework Directive are additional European evidences of the search for new and creative ways of international institutional co-operation and co-ordination.

Finally, what remains unobserved in the legal discussion is that the ever-deepening integration of the Internal Market implies that the market as a decision-making process may be in a better position to cope with regulative divergences without each such situation necessarily demanding judicial or legislative intervention.[1178] The maturity of the market may speak in favour of more intense recourse to the mutual recognition principle.[1179]

[1177] Bourgoinie, 'The Approximation Process of Consumer Laws of Central and Eastern European Countries to EU Legislation: A Favourable Context but an Urgent Need for Clarification', in Micklitz, *Rechtseinheit oder Rechtsvielfalt in Europa?* (1996), 91 ff.

[1178] See in this sense NDM, Comments on the Follow-up Communication, underlining that "not every perceived as real or potential problem in the marketplace should be met by regulatory measures. On the contrary an open mind in the selection of means and methods is essential, including leaving the perceived problem to be sorted out by the market itself.", 30.9.2002.

[1179] See Maduro (1998).

IV SUMMARY OF FINDINGS

The present study began with the posing of three specific research goals. The **first goal** of this research was to provide a detailed and in-depth account of the evolution of fair trading institutions in two countries of the European Community (Germany and Sweden), highlighting different institutional choices and the effects of path dependence and instances of institutional lock-in. This objective was chiefly pursued in Chapters 4 and 5, which account for a long-term historical perspective. In turn, Chapter 7 explores recent institutional developments in the two legal systems. In the following a short recapitulation of the key findings and conclusions will be provided.

With roots dating back to the mercantilist era, the legal institutions of fair trading (or unfair competition) were originally conceived with regard to the interests of established traders and industry sectors. However, the extent to which legal institutions accorded the desired protection differed substantially in Germany and Sweden. In the former country the judicial process was designed to be highly responsive to claims for increased protection of the *status quo*. Corporate actors were generously admitted to the courtroom and were endowed with broad opportunities to influence the standards of fairness through litigation. In Sweden a controlled model of enforcement was introduced with limited attractiveness for the affected actors.

The reasons for these variations in institutional choice are seen to lie in a number of factors, but foremost in diverging economic outlooks, constitutional principles and prevailing understandings of the divide between private and public law. In Germany the mercantilist legacy was alive and helped legitimise an interventionist approach in defence of the *Mittelstand*, including regulation through a plurality of organisations. In Sweden a liberal economic outlook less susceptible to open corporatist influences was dominant. In Germany constitutional tradition accorded a strong position to the courts as decision making institutions, while in Sweden a constitutional legacy of central government and a longer experience of parliamentary politics rendered excessive reliance on decentralised judiciary (for interpreting broad general clauses) unfeasible. The primacy of private law ensured that German unfair competition law was conceptualised as a private law discipline, whereas in Sweden the scanty provisions against unfair trading were (weakly) anchored in criminal law. Importantly, the institutional framework of fair trading law in Germany produced its institutional enterpreneurs – professional organisations assisted by specialised lawyers who saw as their chief task to enforce and shape the standards of fairness. In Sweden competitors' grievances were directed towards self-regulation.

The 1950s and 60s were associated with the growing emancipation of consumers, and a heigthened awareness of their particular interests in fair trading. Demands were raised that consumers be admitted to the institutional framework of fair trading and allowed to participate in the shaping of the standards of fairness. These demands were accommodated differently by the institutions in the two countries. In Germany the setting up of consumer organisations was supported by the state. Consumer organisations were then referred to the established mechanisms of private enforcement under the UWG. In Sweden consumerism brought about a dramatic overhaul of the

institutional framework. New public agencies charged with the task of identifying and representing the collective interests of consumers were established.

An explanation for these divergent developments was found in the intricate mix of macro-institutional factors discussed above, but also in the constraining effect of institutional trajectories already entered into. In Germany sectoral protectionism continued to be an accepted economic policy, which accounted for the preserved influence of the *Mittelstand.* In Sweden an expanding welfare state built on an export-oriented economy and tolerated a non-intervention approach. Active consumer policy was in harmony with an economic outlook emphasising aggregate welfare. Constitutionally, in Germany individualist values permeated the 1949 GG. The position of the courts as guardians of the *Rechtsstaat* and of individual autonomy against public intervention was bolstered. The choice for the judicial process in fair trading law fitted well into this outlook. In Sweden a concern for the aggregate interest of the majority prevailed in constitutional thinking and the preference was for 'controlled' enforcement, assigning an important role to centralised and expert institutions of public administration. Finally, the strict division between private and public law continued to dominate German legal thought, whereas in Sweden a functional approach reduced the importance of conceptual classifications and opened the way for innovation.

Hardly surprising, the constraining influence of institutional trajectories was more strongly felt in Germany. The elaborate, finely woven texture of German unfair competition law and the broad network of organisations dependent on the available opportunies impeded institutional change. A bias for preserving the existing institutional arrangements could be observed in all instances of legislative reform, but also in judicial case law and in doctrinal interpretations. In Sweden the changes of the 1970s were to a great extent facilitated by the rudimentary status of the institutional framework of fair trading. The modest provisions of early fair trading statutes were scarcely used by the affected actors and there were no organisations which relied on the framework's continued existence (apart from weak self-regulatory bodies). Therefore it can be submitted that although an institutional trajectory in Swedish fair trading law can be traced back to the 19th century, true path dependency can only be discerned since the 1970s. Only then did the institutional framework produce its 'users', namely the KO with the KO. The dominant ideology embraced by these actors was the protection of the interests of consumer majorities.

Recent developments in the field of fair trading law in both countries have not questioned or reversed the basic institutional choices made in the past, but have significantly modified the design of the respective enforcement processes. In Germany, the access of competitors and professional litigious associations to the courts is being successively curbed, whereas the position of consumer associations has been bolstered. In Sweden the influence of public agencies has been reduced, while the litigious opportunities for individual traders have been enhanced. Corporativist arrangements have been diluted at the expense of a strengthened role for adjudication.

The **second goal** of the study was to give a tentative evaluation of alternative institutional choices for dealing with problems of fair trading and, more specifically, of the relative advantages and disadvantages of private ordering vs. public intervention.

Also from this vantage point Germany and Sweden are exponents of alternative approaches to fair trading and therefore good cases for a comparison. The admittedly precarious objective of evaluating institutional choice was pursued with the help of a participation-centered approach. Inherent in the participation-centered approach is a conceptualisation of the market, the political process and the courts as alternative institutional processes for solving specific law and public policy issues. Decision-making is consequently considered to be best dealt with by the institution ensuring optimal representation of all the interests affected in terms of costs and benefits of participation. The main virtues of the participation-centered approach is that it introduces a way of thinking about the market, politics, and the courts as mutually related institutional processes and that is subjects all of them to analysis in a joint framework.

Following the comparative institutional approach, in Chapter 3 the basic problem of fair trading was identified as one of information and communication. Information asymmetries and public good properties of information have in the economic literature been identified as major sources of transaction costs in the market. In addition, the typically small-stake interests of consumers set limits on their desire to search product-related information and, respectively, on the incentives of sellers or third parties to provide such information. The ensuing undersupply of product information and opportunistic behaviour are among the most common failures in consumer markets leading to suboptimal satisfaction of individual consumer preferences through the market.

At the same time, whereas information market failures are generally recognised, more complex views on how information functions in the marketplace have been elaborated in social sciences. This has produced, on the one hand, a stronger reliance on the potential of market forces to cope endogeneously with information market failures. Subtle mechanisms, such as the growth of department stores, investment in trademark, in reputation and for that matter in advertising, have been identified as performing an important information function and compensating for information constraints. On the other hand, new insights have been gained about costs of information and organisation as factors affecting the efficient functioning of adjudication and governmental regulation. These findings have challenged simplistic attitudes concerning how public policy goals can be attained in general, and in the field of fair trading in particular. They also underscore the difficulty, as well as the importance, of institutional choice.

In analysing the performance of the political process on issues of fair trading, the German experience demonstrated a widely acknowledged source of inefficiency associated with a minoritarian bias. Small and dispersed stakes and information asymmetries explain the low probability for consumers to recognize (let alone defend) their interests. The political debate is thus easily dominated by organized industry and can result in inefficient legislative arrangements disregarding the interests of consumer majorities. The legislative endevours in Germany in the 1970s are pertinent examples in point.

Yet minoritarian bias is not the only possible source of institutional inefficiency in fair trading. The Swedish experience, and in particular the developments in marketing practices law in the 1970s, reveal that the political process can occasionally produce

the reverse, majoritarian bias. Well-organised catalytic subgroups or entrepreneurs can threaten to mobilize the dormant majority, in particular if they manage to identify a simple and commanding issue around which the majority can easily unite. Such active catalytic subgroups may then press for legislative measures that overemphasise the interest of the diffuse majority at the expense of legitimate minority interests. At the same time the survey of legislative developments and case law suggests that a majoritarian bias is more difficult to sustain in the long run. If the disadvantages are concentrated in a small and powerful minority, then the balance will at some point probably be restored.

Turning to the issue of enforcement, the major advantage of private ordering, as demonstrated by the German example, is that it provides powerful incentives for competitors themselves to address information failures in the market. A decentralised process of enforcement evidently mirrors the dispersed character of the market. Traders are daily in contact with the marketplace and receive, without making any special efforts, information about the products, conduct and marketing strategies of their competitors. In instances where interests of competitor and consumer are compatible, there is a strong case for allowing competitors to participate in the decision-making process by lowering access barriers to litigation.

The most severe difficulty of dealing with fair trading within a private law model of enforcement, as illustrated by the German experience, seems to be to ensure adequate representation of group and of diffuse consumer interests. A particularly tangible risk is that of distorted incentives for litigation by competitors and their associations. If allowed to act beyond their immediate individual interest as protagonists of the broad consumer and public interest, they may exaggerate the danger of consumer detriment and thus push decision-making towards excessively rigid standards of fairness. In Germany the institutional design derived from the 1909 UWG indeed seems to have created fertile soil for such distortions. Generous access to the judicial process for corporate actors has generated overrepresentation of minoritarian interests in enforcement. This has inevitably shaped the expectations and value-systems of judges, who are exposed to one-sided information and interpretation. Even though the courts in other respects are insulated from political influence, a minioritarian bias in the political process has thus been extended to judicial enforcement. Moreover, the minoritarian bias persists because prospects are poor that the diffuse majority will identify the disadvantages and mobilize to eliminate them.

It could be objected that if substantive values are well defined in law, a system of private enforcement could transform private vice into public virtue. Yet even clear substantive standards yield to different interpretations, and the perceptions of litigants might still colour interpretation of courts. One of the typical institutional characteristics of the courts is that they do not control the cases brought before them. In choosing the judiciary as a main decision-making institution, the selection is consequently left to the litigants. It is their perceptions of violations of fair trading standards that will shape the case law and the standard of fairness. Moreover, the courts working in a private law setting are ill-equipped to set limitations to the exercise of private rights. They apply the formal logic of private law in an area where public choices have to be made.

One way of avoiding judicial bias is to supplement litigation by competitors with possibilities for collective and public interest litigation of diffuse interests. This brings us to the issue of consumer representation before the courts. In the German enforcement design, the recognition of standing for consumer organisations aims at overcoming the problem of collective representation of diffuse interests (highly dispersed low stakes distribution). The advantages of such an approach primarily lie at the level of decentralised enforcement. Provided that a dense network of consumer organisations exists, the processing of complaints can be made effective. This solution appears attractive from both a financial (budgetary) and a democratic point of view. At least theoretically, private organisations should not burden the state budget and ought to provide flexible and adequate interest representation for consumers. In fact, the growth of the network of consumer organizations in Germany during the past decades, and their active involvement in consumer affairs at both national and Community level, would seem to be a success story.

The empirical analysis of the litigious activity of the consumer associations in Germany under the German UWG reported above, however, suggests a number of serious flaws in how collective consumer interests are treated in a private law setting. The mere summoning and organising of consumers into consumer associations is linked to classical collective action problems. As the German experience shows, the individual membership of consumer organisations is shifting and unstable. There are practically no consumer organisations based exclusively on individual membership. In reality, the most efficient network of consumer associations in Germany is maintained on the basis of collective membership of non-governmental organisations pursuing purposes more closely or more distantly related to consumer protection. The setting up of this network was (and still is) strongly promoted by the state. Thus the idealised portrayal of the consumer associations as a spontaneous 'grass roots' movement is exaggerated.

Closely connected to the disadvantages of an unstable membership is the soaring problem of funding. Financial contributions of individual members are almost insignificant. None of the associations that are the most active in the consumer protection area primarily depend on private membership fees. To the contrary, the decisive part of the funding consists of public contributions (in the German case from central or *Länder* government). In terms of direct public expenses, a comparison between the budgetary expenditure on the KOV in Sweden and the aggregated public contributions to the consumer associations in Germany seem to be roughly comparable, taking due account of the differences in population size.

In both countries, the detachment from individual membership and the reliance on public funding undermine the assumption of political and economic independence of the consumer movement. From a participation-centered perspective the associations thus only partially compensate for problems of collective action and representation of diffuse interests. The proper definition of the collective consumer interest remains a concern. Consumer interests are notoriously diffuse whereby different groups of consumers tend to reveal different preferences. Claims to represent the collective

interest of consumers thus per definition suffer from legitimacy problems.[1] Given the weak individual membership, consumer associations derive legitimacy partly from the interest shown by individual consumers (through complaints and advice) and partly from government support.

In the context of globalisation and European integration, the activity of consumer associations cannot be evaluated unequivocally. On the one hand European integration tends, as a matter of general policy, to promote the representation of private actors in Community rule-making and decision-making processes. The involvement of consumer associations is thus quasi-institutionalised at the Community level, which has strongly promoted the activity of these organisations even at the national level. On the other hand integration processes often call for representation of 'national' interests, and for co-ordination between national consumer protection entities in the implementation of Community law. This has brought about a degree of bureaucratisation of consumer associations. In addition, the problems of democratic legitimacy and accountability might be even greater with international representation. Nevertheless, compared to governmental agencies consumer organisations presumably face comparative disadvantages in representing consumers in cross-border litigation.

Proponents of the German model have loudly claimed the superiority of the model because of its alleged greater conformity with the market mechanism. The major virtue of the approach has been seen in the avoidance of public intervention.[2] Behind this argument one can identify the influence of the single institutional approach advanced by the classical law and economics school. The disadvantages of public intervention are emphasised without at the same time critically analysing the drawbacks of private ordering. Consumer organizations indeed represent a major mode of mobilizing and aggregating the individual consumer interests in order to overcome information and organizational failures. Nevertheless, in the particular case of fair trading and in the area of litigious activity their performance is highly imperfect. As noted by other commentators, "a wide range of social issues, roughly described as "public good" issues, will rarely be adjudicated since they involve a uniform low (highly dispersed) distribution of stakes. Such issues reach the courts mainly when the political process has already shouldered most of the decision making responsibility and, by its presence, converts the diffuse small stake interests into a concentrated interest.[3]

Exactly this type of "shouldering" of decision-making has been attempted by different forms of governmental intervention in the area of fair trading. As we saw in the example of Sweden, special agencies have been set up to ensure representation of diffuse consumer interest as well as to and meet the problem of asymmetry in market information and the inherent risks of deception and unfairness. The Swedish example reveals a number of organizational and information advantages of this approach. The agency is a central public institution that is arguably perceived as more visible and reliable (in the sense that a positive outcome is expected with greater probability) the affected consumers. A governmental agency is staffed and steered by a democratically

[1] One example of the problems with representation of the consumer interest by consumer organisations is their long-standing resistance to liberalisation of the restrictive regime on disounts. This position was abandoned only in 2001. See Drexl (2002), 557 ff., at 578.
[2] Basedow/Hopt/Kötz/Baetge (1999), 7.
[3] Komesar (1994), 136.

elected government, so basic legitimacy concerns with consumer organizations are eliminated. In contrast to consumer organizations that mainly react to individual complaints, the more predictable and generous funding awarded to the Agency provides it with an opportunity to act on the basis of a long term policy and well-reasoned strategy for action, including litigious activity. A public agency has the advantage of a comprehensive 'bird-eye's' view on the market process, of concentrated expertise and resources and of improved access to information. And finally, the litigious activity of a governmental agency is not so sensitive to litigation costs, which allows it, in contrast to consumer organisations to embark on difficult cases involving substantial pecuniary interest and uncertain outcomes.

However, also here one can identify risks and failures. Significantly, the control of agency action by the diffuse interests it is set out to represent is weak. Priorities are thus often defined proceeding from vague political agendas and the interests of the agency as such. We have not been able to establish instances of agency capture, but in many respects action has been soft and probably overly sensitive to the interests of the industry concerned. The system generally displays a bias towards aggregate society interests. Individual or minority consumer concerns remain poorly served.As a general observation, a clear strategy of priorities is needed. In this respect economics of information theory can provide a useful instrument for fine-tuning public policy. The need to consider product characteristics, durability and market structure may be a good general orientation.

One adverse effect of public intervention is its tendency to stifle alternative private initiatives. In the case of Sweden, commentators and affected actors nowadays agree that the privileged position originally granted to the KO as the chief litigant in marketing practices matters under the MFL makes private litigation inefficient and unattractive to competitors and their associations. Moreover, the introduction of the institutions of the KO and the KOV has suppressed self-regulation and the establishment of private consumer associations.

It can safely be concluded that with the acknowledgment of the consumer protection function of fair trading law the germ of public policy has entered this field, even as it remains designed along the lines of traditional individualist unfair competition law. The public good properties of market information are ubiquitous and account for an element of collective (public) choice inherent in most decision-making concerning marketing and advertising. Contemporary forms of commercial communication typically consist of distribution of information over broad consumer audiences. An administrative or judicial decision regarding a particular information campaign inevitably affects all potential consumers as well as competitors active in the same market. The decision-making process consequently involves an intricate balancing between individual, group and public interests. The adequate expression and representation of these interests in the decision-making process is therefore crucial for arriving at socially efficient solutions. Whereas representation of concentrated individual and group interests is hardly a concern, the problem of small and dispersed consumer stakes persists in all settings. This corroborates an assumption in comparative institutional analysis that institutions 'move together' and that institutional choice is always associated with choosing between imperfect alternatives.

The **third goal** of this study was to explore the ways in which European Community law and policy influence national institutional choices and institutional frameworks in the Member States. In Chapter 6 an inventory of the most relevant European legislation and case law in the area of fair trading was provided. Chapter 7 was devoted to the impact of European integration, and especially European consumer law and policy, on national fair trading law. Fair trading was never firmly anchored in the founding Treaties. Gradually, however, it is evolving into a legal field in its own right which, in turn, sometimes requires substantial transformations in national fair trading laws. The evidence mustered in this study has identified European influences at the level of formal rules, but also in shifting patterns of enforcement and in altering standards of fairness.

At the same time, the depth and direction of European influences in Germany and Sweden have been strikingly different. In Sweden, Europeanisation has undermined the presence of corporatist decision-making entities and reinforced the position of individual entrepreneurs. Similarly, a shift towards classical forms of adjudication has been noticed. On the level of standards of fairness, paternalist attitudes have been challenged. Meanwhile in Germany, European influences have triggered a process of rethinking the foundations of unfair competition law and thereby generated demands that unfair competition law be reconstructed on a consumer-friendly basis. While the dominance of competitive associations operating in a private law framework has receded, the presence of consumer organisations in the debate has been bolstered.

As suggested at the outset of this study, the metaphor of 'refraction' borrowed from modern physics may illustrate the complex relationship between Community law and national institutional environment. It would appear that when 'refracted' through the prism of a particular national, institutional legacy, European influences split into an array of varied repercussions, sometimes desired and sometimes wholly unintended. For instance in the case of fair trading regulations, the prescriptions inherent in EU directives are 'bent' under different angles depending on the institutional setup of the respective Member State. The institutional environment similarly influences at which rate of transmission the said prescriptions are refracted, and for instance become incorporated and enforced in domestic legal systems. Domestic demands for (or resistance to) reform may slow down or speed up adaptation to European requirements.

The most important common denominator in these differential influences is an increased pluralism in law-making and enforcement, along with an enhanced sensitivity to the dangers of institutional symbiosis and lock-ins. In this sense one can argue that Europeanisation has pushed open institutions of enforcement and forced them to accommodate new interests. The Swedish public agency may have played a useful role in important respects, but it has also halted innovation and private initiative. Conversely, decentralised private enforcement in Germany has demonstrated flexibility but remained hostage to a value-system maintained by repeat litigants with obvious vested interests. In both countries Europeanisation has multiplied the avenues for interest representation and created new possibilities for institutional innovation.

On a doctrinal level, the analysis of the area of fair trading law adds to the already available evidence of the disintegrative effects of positive European integration on

legal disciplines that have evolved in a predominantly national context. Both German and Swedish lawyers have been forced to revise their conventional frames of reference. Established distinctions and classifications have been challenged. The private law conceptualisation of German unfair competition law has come at odds with the functional logic of European integration, as demonstrated by the implementation of the E-Commerce Directive. In Sweden, accepted classifications of marketing practices law in the domain of public law have been questioned. Paradoxically, these processes of a seeming erosion of doctrinal cohesion are not a result of adjustment to a conceptually coherent and consistent Community approach in this area. Quite to the contrary, Community activity with relevance to fair trading has been eclectic and has proceeded in a piecemeal fashion. The changes thus appear to reflect a process of coordination and communication, seeking to accommodate institutional diversities in a system of multiple, co-existing levels.

Beyond the frustrating aspects of lost doctrinal coherence, this study demonstrates an ongoing dialogue between national and Community authorities, legislatures and courts. More than just about issues of fair trading law, this dialogue has involved wider questions of delineating the spheres of national regulatory autonomy and Community law. The twists and turns in this dialogue could and should not be seen exclusively as reflections of conflicting concepts of fair trading law, but rather as a process of "sensitive co-operation" between national and Community judiciary in a multi-level governance system.[4] In this process national courts have been active and engaged participants. In a similar fashion the ECJ has increasingly shown attentiveness to national normative concerns, walking a fine line between keeping the pace of European integration and allowing a reasonable margin of regulatory freedom.

In the communication and interaction between different institutional environments and regulatory levels, the law of fair trading is being gradually cut loose from its links to mercantilist legacies and paternalising brands of consumerism. The challenge for the future, it is submitted, is to find the appropriate forms for sustaining this dialogue and ensuring all-sided participation. A key concern would be to avoid repeating the mistake of firmly embedding a particular (majoritarian as well as minoritarian) bias within an emerging set of fair trading institutions at the European level. The risk of entrapment in new 'lock-ins' may be even greater due to the partly supranational character of EU decisionmaking processes, more evasive to public control and democratic accountability.

[4] Joerges (1997), 394.

BIBILIOGRAPHY

BOOKS, MONOGRAPHS AND ARTICLES

Abrahamsson, O., 'Domstolsväsendets anpassning till EES och EG' (1993) *SvJT,* 805 ff.
Ahrens, H.-J., 'Das Herkunftslandprinzip in der E-Commerce-Richtlinie' (2000) *CR,* 835 ff.
Akerlof, G., 'The Market for "Lemons": Quality Uncertainty and Market Mechanism', in: Akerlof, G. *An Economic Theorist's Book of Tales* (Cambridge, 1984), 7 ff. = Akerlof, G. (1970) 84 *Quarterly Journal of Economics*, 488 ff.
Ackermann, B., 'Die deutsche Umweltrechtsprechung auf dem Weg zum Leitbild des verständigen Verbrauches?' (1996) *WRP* 502 ff.
Alchian, A., 'Uncertainty, Evolution and Economic Theory' (1950) 58 *Journal of Political Economy*, 211 ff.
André, M., *Marknadsföringsansvar* (Stockholm: Norstedts, 1984).
Andreev, M., *Rimsko častno pravo* (Sofia: Nauka i izkustvo, 1975).
Arrow, K., 'Rationality of Self and Others in an Economic System' in: Hogarth and Reder (eds.), *Rational Choice* (University of Chicago Press: 1987).
Arrow, K., *Social Choice and Public Values* (New York: John Wiley & Sons Inc., 1951).
Arrow, K., *Social Choice and Public Values* (New York: John Wiley & Sons, 1951).
Arrow, K., 'Information and Economic Behaviour' in: Arrow, *The Economics of Information. Selected Essays* (Oxford: Blackwell, 1984), 136 ff.
Assmann, H.-D./Brüggemeier, G./Hart, D./Joerges, C., *Wirtschaftsrecht als Kritik des Privatrechts* (Königstein: Athenäum, 1980).
Assmann, H.-D./Kübler, F. *Verbraucherinformation im Ordnungsgefüge des Privatrechts* (Königstein: Athenäum 1981).
Assmann, H.-D., *Prospekthaftung* (Köln: 1985).

Baetge, D., 'Das Recht der Verbandsklage auf neuen Wegen' (1999) *ZZP*, 329 ff.
Bakardjieva Engelbrekt, A., 'Unfair Competition Law After TRIPs: Yet Another Challenge to Doctrinal Cohesion' (1998) *NIR*, 371 ff.
Bakardjieva Engelbrekt, 'International Treaty Obligations and Legal Developments in Central and Eastern Europe' in: Towards a Harmonised View of Fair Trading in Europe, Report of the Conference held in Stockholm 9-10 March 2001.
Ballman, J., *Der Machtaspekt im UWG. Die Bedeutung der Macht eines Wettbewerbers für die Anwendung des § 1 UWG* (Frankfurt am Main: Peter Lang, 1990).
Basedow, 'Der kollissionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis' (1995) 59 *RabelsZ*, 1 ff.
Basedow, J./Hopt, K./Kötz, H./Baetge, D., *Die Bündelung gleichgerichteter Interessen im Prozess* (Tübingen: Mohr Siebeck, 1999).
Basedow, J., 'A Common Contract Law for the Common Market' (1996) *CMLRev.*, 1169 ff.
Bastian, E.-M., 'Recht der Werbung in Italien' in: Schricker, G. (ed.), *Recht der Werbung in Europa* (Baden-Baden: Nomos, 1996).

Bastian, E.-M., 'Sanktionensysteme im Recht des unlauteren Wettebewerbs' in: Schricker, G./Henning-Bodewig, F. (eds.), *Neuordnung des Wettbewerbsrecht* (Baden-Baden: Nomos, 1998/99), 199 ff.
Bastian, E.-M., 'Comparative Advertising in Germany – Present Situation and Implementation of the EC Directive' (2000) 31 *IIC*, 151 ff.
Baumbach, A./Hefermehl, W., *UWG Kommentar, 14th ed.* (München: Beck, 1983).
Baumbach, A./Hefermehl, W., *UWG Kommentar, 16th ed.* (München: Beck, 1990).
Baumbach, A./Hefermehl, W., *UWG Kommentar, 20th ed.* (München: Beck, 1998).
Baumbach, A./Hefermehl, W., *UWG Kommentar, 22nd ed.* (München: Beck, 2001).
Beales, H./Craswell, R./Salop, S., 'The Efficient Regulation of Consumer Information' (1981) *JLE*, 491 ff.
Beater, A., 'Zur Deregulierung des Wettbewerbsrechts' (1995) *ZHR*, 217 ff.
Beater, A., *Verbraucherschutz und Schutzzweckdenken im Wettbewerbsrecht* (Tübingen: Mohr Siebeck, 2000a).
Beater, A., 'Zum Verhältnis von europäischem und nationalem Wettbewerbsrecht' (2000b) *GRUR Int.*, 963 ff.
Bebchuk, L. A., 'Suing Only to Extract Settlement Offers' (1988) 17 *JLS*, 437 ff.
Beier, F.-K., 'Entwicklung und gegenwärtiger Stand des Wettbewerbsrechts in der Europäischen Wirtschaftsgemeinschaft'(1984) *GRUR Int.*, 61 ff.
Beier, F.-K., 'The Law of Unfair Competition in the European Community – Its Development and Present Status' (1985) 16 *IIC*, 139 ff.
Beier, F.-K., /Schricker, G./Fikentscher, W., *German Industrial Property, Copyright and Antitrust Laws, IIC* Studies (Munich: Verlag Chemie, 1989).
Beier, F.-K., 'Industrial Property and the Free Movement of Goods in the Internal European Market' (1990) *IIC*, 131 ff.
Beier F.-K./Bastian, E.-M./Kur, A. (eds.) *Wettbewerbsrecht und Verbraucherschutz in Mittel- und Osteuropa* (Köln: Carl Heymanns Verlag, 1992).
Bejstam, L., 'Föreskrift och föreskriftsprövning enligt 1974 års Regeringsform. En Bokanmälan' (2000) *FT*, 23 ff.
Bender, R./Strecker, C., 'Access to Justice in the Federal Republic of Germany' in: Cappelletti, M./Garth, B., *Access to Justice*, Vol. I (Alphen aan den Rijn; Sijthoff and Noordhoff, 1978), 520 ff.
Berle, A./Means, G., *The Modern Corporation and Private Property* (New York: Macmillan, 1933).
Bernard, N., 'The Future of European Economic Law in the Light of the Principle of Subsidiarity' (1996) 33 *CMLRev.*, 633 ff.
Bernard, N., 'Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware' (2000) 25 *ELRev.*, 57 ff.
Bernitz, U., *Marknadsrätt* (Stockholm: Jurist och Samhällsvetareförbundets Förlags AB, 1969).
Bernitz, U., 'Consumer Protection: Aims, Methods and Trends in Swedish Consumer Law' (1976) *SSL*, 13 ff.
Bernitz, U., 'Market Law as a Legal Discipline'(1979) *SSL*, 55 ff.
Bernitz., U., 'Brand Differentiation Between Identical Products. An Analysis from a Consumer Law Viewpoint' (1981) *JCP*, 21 ff.
Bernitz, U., 'Otillbörlig konkurrens: det glömda rättsområdet' in: *Festskrift Jan Hellner*, (Stockholm: Norstedts, 1984), 115 ff.
Bernitz, U./Draper, J., *Consumer Protection in Sweden*, 2nd ed. (Stockholm: IFIM Series, No.12, 1986).

Bernitz, U., *Marknadsrättslig kontroll av reklam-TV*, No. 76 (Nordisk Ministerråd NORD, 1988).
Bernitz, U., 'Marknadsdomstolen och Langborgerdomen' (1989-90) *JT*, 396 ff.
Bernitz, U., *Svensk marknadsrätt*, 3rd ed. (Stockholm: Juristförlaget, 1991).
Bernitz, U., 'Inför europeiseringen av svensk rätt' (1991-92) *JT*, 29 ff.
Bernitz, U., *Otillbörlig konkurrens mellan näringsidkare* (Stockholm: Norstedts, 1993).
Bernitz, U., 'Europakonventionens införlivande med svensk rätt – en halvmesyr' (1994-95) *JT*, 259 ff.
Bernitz, U. (ed.), *Finna rätt* (Stockholm: Juristförlaget, 1995).
Bernitz, U., *Marknadsföringslagen* (Stockholm: Juristförlaget, 1997).
Bernitz, U. 'TV-reklam och räckvidden av svensk marknadsrätt' (1997-98) *JT*, 479 ff.
Bernitz, U., 'Gourmet-målet – kan det diskriminerande svenska förbudet mot alkoholreklam godtas av folkhälsoskäl?' (2001a) *ERT*, 402 ff.
Bernitz, U., 'The EC Directive on Comparative Advertising and its Implementation in the Nordic Countries: Especially in Relation to Intellectual Property' (2002a) 42 *SSL*, 11 ff.
Bernitz, U., *European Law in Sweden – Its Implementation and Role in Market and Consumer Law*, Juridiska fakulteten, Skriftserien Nr. 70 (Stockholm University: 2002b).
Bernitz, U./Kjellgren, A., *Europarättens grunder* (Stockholm: Norstedts, 1999).
Bernitz, U./Modig, J./Malmén, A., *Otillbörlig marknadsföring* (Stockholm, 1970).
Bernstein, M., *Regulating Business by Independent Commission* (Princeton: Princeton Univ. Press, 1955).
Bernstein, H./Drobnig, H./Kötz, H. (eds.) *Festschrift Zweigert* (Tübingen: Mohr, 1981), 537 ff.
Bhaskar, R. *Reclaiming Reality: A Critical Introduction to Contemporary Philosophy* (London: Verso, 1992).
Biervert, B./Fisher-Winkelmann, W./Rock, R., *Verbraucherpolitik in der Marktwirtschaft* (Rowohlt, 1978).
Bodewig, T., 'Elektronischer Geschäftsverkehr und Unlauterer Wettbewerb' (2000) *GRUR Int.*, 475 ff.
Bogdan, M., *Comparative Law* (Deventer: Kluwer, 1994a).
Bogdan, M., 'Marknadsföringslagens tillämplighet i EES-rättslig belysning' (1994b) *SvJT*, 277 ff.
Bogdan, M., 'Kollektiva konsumentintressen i den internationella processrätten' (1994/95) *JT*, 905.
Bogdan, M., 'EU Direktivet om förbudsföreläggande för att skydda konsumenternas intressen' (1998a) *SvJT*, 532 ff.
Bogdan, M., 'Some Reflections regarding the new EU Directive on Injunctions for the Protection of Consumers' Interests' (1998b) *CLJ*, 369 ff.
Bogdan, M. (ed.), *Swedish Law in the New Millennium* (Stockholm: Norstedts Juridik, 2000).
Bogdan, M., 'Om Bryssel/Luganoreglernas tillämpning i marknadsrättsliga mål' (2002-03) *JT*, 410 ff.
Bolding, P.O., 'Access to Justice in Sweden' in: Cappelletti/Garth, *Access to Justice*, Vol. I , Book 2 (Alphen aan den Rijn: Sijthoff and Noordhoff, 1978), 891 ff.

Borck, H.-G., 'Erstreckung der Klagebefugnis aus §13 *UWG* auf Vebraucherverbände?' (1964a) *WRP*, 217 ff.
Borck, H.-G., 'Nochmals: Aktivlegitimation für Verbraucherverbände und Wettbewerbsarmen-recht' (1964b) *WRP*, 398 ff.
Borck, H.-G., 'Erste Erfahrungen im Umgang mit der Aktivlegitimation für Verbraucherverbände' (1968) *WRP*, 1 ff.
Borck, H.-G., 'Fälle entgültig abgeschlossen' (1970) *Verbraucher Rundschau*, 2 ff.
Borck, H.-G., 'Zuckerbrot und Peitsche für Verbände?' (1978) *WRP*, 161 ff.
Borck, H.-G., 'Ansichten und Argumente zur Erstattung der Abmahnkosten' (1981) *WRP*, 438 ff.
Borck, H.-G., 'Bauchlandung der fliegenden Gerichtsbarkeit'(1994) *WRP*, 350 ff.
Bourgoignie, 'Consumer Law and the European Community: Issues and Prospects' in: Bourgoignie, T./Trubek, D./Trubek, L., *Consumer Law and Federalism* (Berlin: de Gruyter, 1987).
Bourgoignie, T., 'Comparative Advertising and the Protection of Consumer Interests in Europe: Reconcile the Irreconcilable?' (1992) *European Consumer Law Journal*, 3 ff.
Bourgoignie, T., 'European Community Consumer Law and Policy: from Rome to Amsterdam' (1998) *CLJ*, 443 ff.
Brinkmann, W., Die Verbraucherorganisationen in der Bundesrepublik Detschland und ihre Tätigkeit bei der überbetrieblichen technischen Normung (Köln: Carl Heymanns, 1976).
Brüggemeier, G., 'Probleme einer Theorie des Wirtschaftsrechts' in: Assmann, H.-D./ Brüggemeier, G./ Hart, D./Joerges, C., *Wirtschaftsrecht als Kritik des Privatrechts* (Athenäum, 1980).
Brönneke, T. (ed.), *Kollektiver Rechtsschutz im Zivilprozess* (Baden-Baden: Nomos, 2001).
Buchanan, J./Tollison, R./Tullock, G. (eds.), *Towards the Theory of the Rent-Seeking Society* (College Station, TX: A&M University Press, 1980).
Buchanan, J./Tullock, G., *The Calculus of Consent. Logical Foundations of Constitutional* Democracy, 2nd pr. (Ann Arbor, MI: The University of Michigan Press, 1967).
Busani, M., 'Integrative Comparative Law Enterprises and the Inner Stratification of Legal Systems' (2000) *ERPL*, 85 ff.
Busani, M./Mattei, U., 'The Common Core Approach to European Private Law' (2002), http://www.jus.unitn.it/cardozo/home.html.
Busche, J., 'Werbung per electronic mail: Eine neue Herausforderung für das Wettbewerbsrecht?' (1998) *WRP*, 1142 ff.;
Buxbaum, R., 'Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft' (1996) *RabelsZ*, 201 ff.
Buxbaum, R., 'Federal Aspects of Corporate Law and Economic Theory' in: Daintith, T./Teubner, G. (eds.), *Contract and Organisation* (Berlin: de Gruyter, 1986).
Buzbee, W., 'Sprawl's Dynamics: A Comparative Institutional Analysis Critique' (2000) 35 *Wake Forest Law Review*, 509 ff.
Byström, M., 'Precisering av EGs kompetens: formulering av problem utan lösning i sikte?' (2001) *ERT*, 92 ff.
Böhm, E., 'Die Beweiswürdigung demoskopischer Gutachten im rahmen von § 3 UWG' (1986) *GRUR*, 290 ff.

Börzel, T., 'What can Federalism Teach Us About the European Union. The German Experience' *The Federal Trust*, May 2003.

Calabresi, G. /Melamed, D., 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review*, 1089 ff.
Calabresi, G., *The Costs of Accidents* (New Haven and London:Yale University Press, 1970).
Callmann, R., *Der unlautere Wettbewerb*, 2 Aufl. (Mannheim: J. Bensheimer, 1929).
Cappelletti, M./Garth, B., *Access to Justice*, Vol. I (Alphen aan den Rijn: Sijthoff and Noordhoff, 1978).
Cappelletti, M./Garth, B., *Access to Justice*, Vol. II and III (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979).
Caruso, D. 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) *ELJ*, 3 ff.
Circus, P.J., *Towards a General Rule to Trade Fairly?* (Essex: 1988).
Clark, J. M., *Competition as a Dynamic Process* (Washington D.C.: The Brookings Institution, 1961).
Coase, R., 'The Nature of the Firm' (1937) 4 *Econometrica*, 386 ff.
Coase, R., 'The Problem of Social Cost' (1960) 3 *JLE*, 1 ff.
Coase, R., *The Firm, the Market and the Law* (Chicago: University of Chicago Press, 1988).
Collins, H., 'European Private Law and the Cultural Identity of the States' (1995) *European Review of Private Law*, 353 ff.
Collins, H., 'Formalism and Efficiency: Designing European Commercial Contract Law' (2000) *ERPL*, 211 ff.
Comanor, W./Wilson, T., *Advertising and Market Power* (Cambridge, MA: Harvard University Press, 1974).
Commons, J., *Institutional Economics* (New Brunswick, N.J.: Transaction Publisher, 1934/1990).
Constantinesco, L.-J., *Rechtsvergleichung, Band II Die Rechtsvergleichende Methode* (Köln, Carl Heymanns, 1972).
Cranston, R., *Regulating Business. Law and Consumer Agencies* (London: Macmillan Press, 1979).
Czerwonka, C./Schöppe, G., 'Verbraucherinformationspolitik und Funktionsfähigkeit des Wettbewerbs' (1981) *WuW*, 165 ff.

Dahl, R. A., Pluralistic Democray in the United States: Conflict and Consent (Chicago: Rand McNally & Co., 1967).
Dahl, R. A., *After the Revolution. Democracy in a Good Society* (New Haven and London: Yale University Press, 1970).
Dahlman, C., 'The Problem of Externality' (1979) 22 *JLE*, 141 ff.
Damaska, M., *The Faces of Justice and State Authority a Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986).
Daintith, T./Teubner, G. (eds.), *Contract and Organisation* (Berlin: de Gruyter, 1986), 132 ff.
Damm, R., 'Verbraucherrechtliche Sondergesetzgebung und Privatrechtsystem' (1978) *JZ*, 173 ff.
Danelius, H., *Mänskliga rättigheter*, 4th ed. (Stockholm: Norstedts, 1989).

Darby, M./Karni, E., 'Free Competition and the Optimal Amount of Fraud' (1973) *JLE*, 67 ff.
Dauner-Lieb, B., *Verbraucherschutzrecht durch Ausbildung eines Sonderprivatrechts für Verbraucher* (Berlin: Duncker & Humblot, 1983).
de Búrca, G./Ryall, Á., 'The ECJ and Judicial Review of National Administrative Procedure in the Field of EIA' in: Ladeur, K.-H. (ed), *Europeanisation of Administrative Law. Transforming National Decision-Making Procedures* (Aldershot: Ashgate, 2002).
de Cruz, P., *Comparative Law in a Changing World* (London: Cavendish Publishing, 1999).
Dean, M., 'Unfair Contract Terms: the European Appproach' (1993) 56 *MLR*, 581 ff.
De Búrca/Ryall, 'The ECJ and Judicial Review of National Administrative Procedure in the Field of EIA' in: Ladeur (ed.), *Europeanisation of Administrative Law. Transforming National Decision-Making Procedures* (Aldershot: Ashgate, 2002).
Dehousse, R., 'Comparing National and EC Law: The Problem of the Level of Analysis' (1994) *AJCL*, 761 ff.
Demsetz, H., 'Information and Efficiency. Another Viewpoint' (1969) 12 *JLE*, 1 ff.
Dethloff, N., 'Marketing im Internet und Internationales Wettbewerbsrecht' (1998) *NJW*, 1596 ff.
Dethloff, N., 'European Conflict-of-Law Provisions Governing Unfair Competition' (1999) *Commercial Communications*, 2 ff.
Dethloff, N., 'Europäisches Kollissionsrecht des Unlauteren Wettbewerbs' (2000) *JZ*, 179 ff.
Dethloff, N., *Europäisierung des Wettbewerbsrechts* (Tübingen: Mohr Siebeck, 2001).
Deutsch, V., 'Der Einfluß des europäischen Rechts auf den Irreführungstatbestand des § 3 *UWG'* (1996) *GRUR*, 541 ff.
Dickie, J., 'Consumer Confidence and the EC Directive on Distance Contracts' (1998) 21 *JCP*, 217 ff.
DiMaggio, P./Powell W. (eds.), *The New Institutionalism in Organizational Analysis* (Chicago and London: University of Chicago Press, 1991).
Doepner, U., 'Verbraucherleitbilder zur Auslegung des wettbewerbsrechtlichen Irreführungsverbots' (1997) *WRP*, 999 ff.
Doepner, U./Hufnagel, F.-E., 'Towards a European Consumer? Protection Against Misleading Advertising in Europe' (1998) 88 *The Trademark Reporter,* 177 ff.
Dougan, M., 'Minimum Harmonizaion and the Internal Market' (2000) 37 *CML Rev.*, 853 ff.
Downs, A., *An Economic Theory of Democracy* (New York: Harper & Row Publishers, 1957).
Drexl, J., *Die wirtschaftliche Selbstbestimmung des Verbrauchers* (Tübingen: Mohr Siebeck, 1998).
Drexl, J., 'Community Legislation Continued: Complete Harmonisation, Framework Legislation or Non-Binding Measures – Alternative Approaches to European Contract Law, Consumer Protection and Unfair Trade Practices?' (2002) *EBLR*, 557 ff.
Dyson, *The State Tradition in Western Europe. A Study of an Idea and Institution* (Oxford: Martin Robertson, 1980).
Dölling, A., 'Jämförande Reklam – Sverige och EU' (Stockholm: IFIM Series Nr. 84, 1996).

Eberstein, G., 'Generalklausulen mot illojal konkurrens' (1951a) *SvJT*, 1 ff.

Eberstein, G., 'Generalklausulen mot illojal konkurrens och Pariskonventionen' (1951b) *NIR*, 1 ff.
Editorial comments, 'On the Way to a European Consumer Sales Law?' (1997) 34 *CMLRev.*, 207 ff.
Eggertsson, T., *Economic Behaviour and Institutions* (Cambridge University Press, 1990).
Ehrlich, I./Fisher, L., 'The Derived Demand for Advertising. Theoretical and Empirical Investigation' (1982) *The American Economic Review*, 366 ff.
Eisenhardt, A., 'Werbung gegenüber Kinder' (1997) *WRP*, 283 ff.
Eisenhardt, *U., Deutsche Rechtsgeschichte* (München, Beck, 1999).
Ekelöf, P.-O./Bylund, T./Boman, R., *Rättegång*, III, 7th ed. (Stockholm: Norstedts Juridik, 1994).
Eklund, P. 'The Effect of the EEA Agreement on Consumer Protection Interests in Sweden' (1994) *JCP*, 123 ff.
Elster, J., *Ulysses and the Sirens* (Cambridge: Cambridge University Press, 1984).
Emmerich, V., *Das Recht des unlauteren Wettbewerbs*, 3 ed. (München: Beck, 1990).
Engel, C., 'Regulierung durch Organisation und Verfahren' in: Immenga, /Möschel, W./Reuter, D., *Festschrift für Mestmäcker* (Baden-Baden: Nomos, 1996), 119 ff.
Engels, S., 'Wettbewerbsrechtliche Grenzen der Fernsehewerbung für Kinder' (1997) *WRP*, 6 ff.,
Esser, J., *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* (Tübingen: Mohr, 1990).
Eucken, W., *Grundsatze der Wirtschaftspolitik* (Bern: A. Francke, 1952).
Ewald, W., 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995a) 43 *AJCL*, 489 ff.
Ewald, W., 'Comparative Jurisprudence: What Is It To Try a Rat' (1995b) 143 *University of Pennsylvania Law Review*, 1889 ff.
Everling, U., 'Zur Bedeutung der Rechtsprechung des Europäischen Gerichtshofes für die Werbung in Europa' in: ZAW (ed.), *Irreführende Werbung in Europa – Maßstäbe und Perspektiven* (Bonn, 1990), 43 ff.
Everling, U., *Die Einwirkung der Grundfreiheiten des EWG-Vertrages auf das Werberecht der Mitgliedstaaten*, Referat im Rahmen der Tagung 'Werbung in Europa' (Bonn, 1992).

Fahlbeck, R., 'Pleasures and Torments of Comparative Legal Research' in: *Festskrift till G. Karnell* (Stockholm: Carlsson Law Network, 1999), 161 ff.
Falkenstein, R. v., *Die Bekämpfung unlauterer Geschäftspraktiken durch Verbraucherverbände* (Köln: Bundesanzeiger Verlag, 1977).
Falkenstein, R. v., *Schäden der Verbraucher durch unlauteren Wettbewerb* (Köln: Bundesanzeiger Verlag, 1978).
Favoreu, L., 'Constitutional Review in Europe' in: Henkin, L./Rosenthal, A. (eds.), *Constitutionalism and Rights* (New York: Columbia University Press, 1990), 38 ff.
Feiden, S., 'Europeanisation of European Law Adjudication. A Comment' (2000) *ERPL*, 17 ff.
Fezer, K.-H., 'Umweltwerbung mit unternehmerischen Investitionen in den Nahverkehr' (1992) *JZ*, 443.
Fezer, K.-H., 'Europäisierung des Wettbewerbsrechts' (1994) *JZ*, 317 ff.

Fezer, K. –H./Koos, S., 'Das gemeinschaftsrechtliche Herkunftslandprinzip und die E-commerce –Richtlinie' (2000) *IPRax*, 349 ff.
Fezer, K.-H., 'Modernisierung des deutschen Rechts gegen den unlauteren Wettbewerb auf der Grundlage einer Europäisierung des Wettbewerbsrechts (2001) *WRP*, 989 ff.
Fikentscher, W., *Wettbewerb und gewerblicher Rechtsschutz* (München: Beck, 1958).
Fikentscher, W., 'Das Verhältnis von Kartellrecht und Recht des unlauteren Wettbewerbs im deutschen und europäischen Recht' in: *Festschrift Hallstein* (Frankfurt am Main: Vittorio Klostermann, 1966), 127 ff.
Fikentscher, *Wirtschaftsrecht*, Bd. 1 (München: Beck, 1983).
Fjellström, P./Ring, B., *Rödluvan behöver inga råd, sa vargen. En orättvis betraktelse över konsumentpolitiken* (Stockholm: Prisma, 1982),
Franck, J./Goyens, M., 'L'action en cessation des organisations de consommateurs à l'épreuve du Marché Unique' (1995) *REDC*, 27 ff.
Frankenberg, G., 'Critical Comparison: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal*, 411 ff.
Fukuyama, F., *Trust* (Penguin Books, 1995).

Gaedertz, A.-C., 'Ist eine *UWG*-Novelle erforderlich?' (1977) *WRP*, 681 ff.
Galbraith J., *The Affluent Society* (London: Hamish Hamilton, 1958).
Galbraith J., *The New Industrial State* (London: Hamish Hamilton, 1968).
Gamerith, H., 'Neue Herausforderungen für ein europäisches Lauterkeitsrecht' (2003) *WRP*, 143 ff.
Gerber, D., 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 *AJCL*, 25 ff.
Geyer, R., *Der Gedanke des Verbraucherschutzes im Reichsrecht des Kaiserreichs und der Weimar Republik (1871-1933)* (Frankfurt am Main: Peter Lang, 2001).
Gierke, O. v., 'Der Rechtsgrund des Schutzes gegen unlauteren Wettbewerb' (1895) *Zeitschrift für gewerblichen Rechtsschutz*, 109 ff.
Glenn, P., *Legal Traditions of the World* (Oxford University Press, 2000).
Gloy, W., *Handbuch des Wettbewerbsrechts* (München: Beck, 1994).
Gloy, W., 'Hat die Einschränkung der Klagebefugnis gewerblicher Verbände sich bewährt?' (1999) *WRP*, 34 ff.
Gormley, L., 'Actually or Potentially, Directly or Indirectly? Obstacles to the Free Movement of Goods' (1989) *Yearbook of European Law*, 196 ff.
Greaves, R., 'Advertising Restrictions and the Free Movement of Goods and Services' (1998) *ELRev.*, 305 ff.
Greger, R., 'Verbandsklage und Prozessrechtsdogmatik: Neue Entwicklungen in einer schwierigen Beziehung' (2000) 113 *ZZP*, 399 ff.
Grimes, D., 'Control of Advertising in the United States and Germany, Volkswagen Has a Better Idea' (1971) 84 *Harvard Law Review*, 1769.
Gröning, J., 'Notwendigkeit und Spielräume einer Reform von §1 UWG' (1996), *WRP*, 1135 ff.
Gunnerstad, A./Ingvarsson, T., 'Den komparativa rätten –värd en omväg?' (1996) *SvJT*, 152 ff.
Halfmeier, A., 'Der Anspruch der Verbraucherverbände auf Kostenerstattung anlässlich der Durchsetzung von Unterlassungsansprüchen nach *UWG* und AGB-Gesetz' in: Brönneke, T. (ed.), *Kollektiver Rechtsschutz im Zivilprozess* (Baden-Baden: Nomos, 2001).

Hallberg, P./Lernestedt, C., *Svenska värderingar* (Stockholm: Carlssons, 2002).
Hallberg, P., *The Age of Liberty* (Stockholm: Statsvetenskapliga institutionen, 2003).

Hart, D./Joerges, C., 'Verbraucherrecht und Marktökonomik: Eine Kritik ordnungstheoretischer Eingrenzungen der Verbraucherpolitik' in: Assmann/Brüggemeier/Hart/Joerges, *Wirtschaftsrecht als Kritik des Privatrechts* (Königstein: Taunus, 1980), 87 ff.
Hart, H.L.A., *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983).
Hartley, T., *The Foundations of European Community Law* (Oxford: Oxford University Press, 1998).
Hatzopolous, V., 'Recent Developments of the Case Law of the ECJ in the Field of Services' 37 (2000) *CMLRev.*, 43 ff.
Hauschka, C.E., 'Lauterkeitsrecht und Verbraucherschutz zwischen nationalem Regelungsanspruch und der Rechtsprechung des EuGH' (1990) *ZVergl.RW*, 166
Hayek, F. A., *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).
Heady, F., *Public Administration. A Comparative Perspective* (New York: Marcel Decker, 1979).
Hedenius, I., *Om rätt och moral* (Stockholm: Tidens Förlag, 1941).
Heermann, P., 'Auswirkungen der Europäischen Rechtsentwicklung auf das deutsche Wettbewerbsrecht' (1993) *WRP*, 578 ff.
Heermann, P., 'Artikel 30 EGV im Lichte der „Keck"-Rechtsprechung: Anerkennung sonstiger Verkaufsmodalitäten und Einführung eines einheitlichen Rechtfertigungstatbestands?' (1999) *GRUR Int.*, 578 ff.
Helgesson, C., *Affärshemligheter i samtid och framtid* (Stockholms Universitet, 2001).
Hellner, J., 'The Consumer's Access to Justice in Sweden' (1976) *RabelsZ*, 727 ff.
Hellstern, G.-M., 'When Courts Intervene: Judicial Control in a Comparative Institutional Perspective' in: F.-X. Kaufmann, /G. Majone/V. Ostrom, *Guidance, Control and Evaluation in the Public Sector* (Berlin: de Gruyter, 1986) 663 ff.
Henning-Bodewig, F./Kur, A., *Marke und Verbraucher*, Band I (Weinheim:VCH, 1988).
Henning-Bodewig, F., 'Die EG Fernsehrichtlinie von 1989' in: Schricker, G./Henning-Bodewig, F., *Neuordnung des Wettbewerbsrecht* (Baden-Baden: Nomos, 1998/1999), 81 ff.
Henning-Bodewig, F., 'Vergleichende Werbung – Liberalisierung des deutschen Rechts?' (1999) *GRUR Int.*, 385 ff.
Henning-Bodewig, F., 'E-Commerce und irreführende Werbung' (2001) *WRP*, 771 ff.
Héritier, A./Mingers, S./Knill, C./Becka, M., *Die Veränderung von Staatlichkeit in Europa: Ein regulativer Wettbewerb* (Opladen: Leske und Budrich, 1994).
Herlitz, N., *Grunddragen i det svenska statskickets historia*, 6th ed. (Stockholm: Norstedts, 1964).
Herlitz, N., *Svensk självstyrelse* (Stockholm: Gebers 1933).
Hermansson, J., *Politik som intressekamp. Parlamentariskt beslutsfattande och organiserade intressen i Sverige* (Stockholm: Nordstedts juridik, 1993).
Heuman, L., *Målsägande* (Stockholm: Norstedts, 1973).

Heuman, L., *Process och straffrätt för juridisk översiktskurs* (Lund: Juridiska föreningen i Lund, 1974).
Heydebrand u.d. Lasa, H.-C. v., 'Free Movement of Foodstuffs, Consumer Protection and Food Standards in the EC: Has the Court of Justice Got it Wrong?', (1991) *ELRev.*, 391 ff.
Hippel, E. v., 'Verbraucherschutz' (1976) 40 *RabelsZ*, 513 ff.
Hippel, E. v., *Verbraucherschutz*, 2nd ed. (Tübingen: Mohr, 1979).
Hirschmann, A., *Exit, Voice and Loyalty. Responses to the Decline in Firms, Organizations and States* (Cambridge, MA: Harvard University Press, 1970).
Hoeren, T., 'Vorschlag für eine EU-Richtlinie über E-Commerce. Eine erste kritische Analyse' (1999), *MMR*, 192 ff.
Hoffmann, H., 'EGG – Eine Reihe von Problemen des elektronischen Rechtsverkehrs ungelöst' (2002) *MMR*, 65 ff.
Howells, G./Wilhelmsson, T., *EC Consumer Law* (Aldershot: Ashgate, 1997).
Hösl, F., *Interesseabwägung und rechtliche Erheblichkeit bei §3 UWG* (Köln: Carl Heymanns, 1986).
Hultmark, C., 'Konsumentskydd på Internet - rättsekonomiska synpunkter' (1998-99) *JT*, 80 ff.

Immergut, E., 'The rules of the game: The logic of health policy-making in France, Switzerland and Sweden' in: Steinmo, S./Thelen, K./Longstreth, F., *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992), 57 ff.
Inger, G., *Svensk rättshistoria* (Stockholm: Liber, 1997).
Ippolito, P., 'Consumer Protection Economics, A Selective Survey' in: Ippolito, P./Scheffman, D., (eds.), *Empirical Approaches to Consumer Protection Economics* (Washington DC: FTC, 1986), 1 ff.

Jacobsson, B./Laegreid, P./Pedersen, O., 'Transforming States' (2001) *SCORE Rapportserie*, No. 4.
Jakobs, R./Lindacher, W. F./Teplitzky, O. (eds.), *Handbuch des Wettbewerbs* (Berlin: de Gruyter, 1994).
Jans, J. H./de Jong, M., 'Between Direct Effect and Rewe/Comet: Remarks on Dutch Administrative Law, Procedural Defects and the EIA Directive' in: K.-H. Ladeur (ed.), *The Europeanisation of Administrative Law* (Dartmouth: Ashgate, 2002).
Jaschick, J., 'Verbraucherpolitik in eigener Verantwortung' (1974) *MA*, 242 ff.
Joerges, C., 'Die klassische Konzeption des internationalen Privatrechts und das Recht des unlauteren Wettbewerbs' (1972) 36 *RabelsZ*, 421 ff.
Joerges, C., *Verbraucherschutz als Rechtsproblem* (Heidelberg: Recht und Wirtschaft, 1981).
Joerges, C., 'Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples' in: Daintith, T./Teubner, G. (eds.), *Contract and Organisation* (Berlin: de Gruyter, 1986), 132 ff.
Joerges, C., 'European Economic Law, the Nation-State and the Maastricht Treaty' in: Dehousse, R., *Europe After Maasstricht. An Ever Closer Union?* (München: Law Books in Europe, 1994), 29 ff.
Joerges, C., 'The Europeanisation of Private Law as a Rationalization Process and as a Contest of Disciplines – An Analysis of the Directive on Unfair Terms of Consumer Contracts' (1994/1995) *EUI Working Papers in Law*, No. 2.

Joerges, C., 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 *ELJ*, 378 ff.
Joerges, C., 'Interactive Adjudication in the Europeanisation Process: A Demanding Perspective and a Modest Example' (2000) *ERPL*, 1 ff.
Joerges, C. 'Guest Editorial: The Commission's White Paper on governance in the EU – A Symtom of Crisis?' (2002) 39 *CMLRev.*, 441 ff.
Joerges, C./Brüggemeier, G., 'Europäisierung des Vertrags- und Haftungsrechts' in: Müller-Graff, P.-C. (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1993).
Johansson, S., *Rättegången i marknadsdomstolen* (Uppsala: Justus Förlag, 1986).
Joliet, R., 'Das Recht des unlauteren Wettbewerbs und der freie Warenverkehr' (1994) *GRUR Int.*, 1 ff.
Jordan, E./Rubin, P., 'An Economic Analysis of the Law of False Advertising' (1979) 8 *Journal of Legal Studies,* 527 ff.

Kahn-Freund, O., 'On Uses and Misuses of Comparative Law' (1974) 37 *MLR*, 1 ff.
Kallersand, E., *TV-reklam riktad till barn – regler och attityder* (Stockholm: IFIM series, Nr. 96, 1998).
Kamperman Sanders, A., *Unfair Competition. The Protection of Intellectual and Industrial Creativity* (Oxford: Clarendon Press, 1997).
Kantzenbach, E., 'Zur wirtschaftspolitischen Beurteilung der Werbung' (1984) *WuW*, 297 ff.
Keilholz, K., 'Die misslungene Harmonisierung des Verbots der irreführenden Werbung in der EG und ihre Konsequenzen für die deutsche Rechtsprechung' (1987) *GRUR*, 390 ff.
Keßler, J., 'Die umweltbezogene Aussage in der Produktwerbung-dogmatische und wettbewerbstheoretische Aspekte des Irreführungverbotes' (1988) *WRP*, 74 ff.
Keßler, J., 'Wettbewerbstheoretische Aspekte des Irreführungsverbotes - eine ökonomische und dogmentheoretische Analyse' (1990) *WRP*, 73 ff.
Kilpatrick, C., 'Introduction' in: Kilpatrick, C./Novitz, T./Skidmore, P., *The Future of Remedies in Europe* (Oxford: Hart Publishing, 2000).
Kisseler, M., 'Das Klagerecht der Verbände in der Bewährungsprobe' (1977) *WRP*, 151 ff.
Kisseler, M., 'Verfahren der Wettbewerbszentrale vor dem Bundesgerichtshof' in: *75 Jahre Zentrale zur Bekämpfung unlauteren Wettbewerbs* (Bad Homburg, 1987), 131 ff.
Kisseler, M., 'Das deutsche Wettbewerbsrecht im Binnenmarkt' (1994) *WRP*, 1 ff.
Kisseler, M., 'Ein Meilenstein für den Verbraucherschutz' (1997) *WRP*, 625 ff.
Kitschelt, H./Lange, P./Marks, G./Stephens, J. D. (eds.), *Continuity and Change in Contemporary Capitalism* (Cambridge, Cambridge University Press, 1999).
Klauer, I., 'General Clauses in European Private Law and 'Stricter' National Standards: The Unfair Terms Directive' (2000) *ERPL*, 187 ff.
Kleineman, J., *Ren förmögenhetsskada* (Stockholm: Juristförlaget, 1987).
Knill, C., *The Europeanisation of National Administrations* (Cambridge University Press, 2001).
Knöpfle, R., *Die machtbezogene Unlauterkeit* (Tübingen: Mohr, 1983).

Koch, H., Verbraucherprozessrecht verfahrensrechtliche Gewährleistung des Verbraucherschutzes (Heidelberg: Müller Verlag, 1990).
Koch, H., 'Comment' (1995) *Verbraucher und Recht*, 292
Koch, H., 'Der Verbandsklage in Europa' (2000) *ZZP*, 413 ff.
Kohler, J., *Das Recht des Markenschutzes* (Würzburg, 1884).
Kohler, J., *Der unlautere Wettbewerb* (Berlin und Leipzig: Dr. Walter Rotschild Verlag, 1914).
Kohler, J. (ed.), *Enzyklopädie der Rechtswissenschaft in systematischer Bearbeitung* (München: 1913-1915).
Komesar, N., 'In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative' (1981) 79 *Michigan Law Review,* 1350 ff.
Komesar, N., 'A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society' (1988) 86 *Michigan Law Review*, 657 ff.
Komesar, N., *Imperfect Alternatives, Choosing Institutions in Law, Economics and Public Policy* (Chicago: The University of Chicago Press, 1994).
Koopmans, 'The Birth of European Law At the Crossroad of Legal Traditions' (1991) *AJCL*, 495 ff.
Krieger, A., 'Die Bestrebungen zur Änderung des Gesetzes gegen den unlauteren Wettbewerb' (1968) *GRUR*, 511.
Krieger, A., 'Möglichkeiten einer Verstärkung des Schutzes gegen unlauteren Wettbewerb' (1978) *WRP*, 1 ff.
Kronman, A., 'Mistake, Disclosure, Information and the Law of Contract' (1978) 7 *The Journal of Legal Studies*, 1 ff.
Krämer, L., *EEC Consumer Law* (Brussels: Story Scientia, 1986).
Kur, A., 'Neuere Entwicklungen im Verbraucherschutzrecht der skandinavischen Länder' (1979) *GRUR Int.*, 510 ff.
Kur, A., Streitwert und Kosten in Verfahren wegen unlauteren Wettbewerbs (Köln: Bundesanzeigerverlag, 1980).
Kur A., 'Der Mißbrauch der Verbandsklagebefugnis' (1981) *GRUR*, 558 ff.
Kur, A. 'Die vergleichende Werbung in Europa: Kurz vor dem Pyrrhussieg?' in: Levin, M. (ed.) *Vennebog till Mogens Kokvedgaard* (Stockholm: Nerenius & Santérus, 1993), 436 ff.
Kur, A., 'Das Herkunftslandprinzip der E-Commerce-Richtlinie: Chancen und Risiken' in: *Festschrift für Willie Erdmann* (Köln: Carl Heymann, 2002).
Kübler, F., 'Schlusswort: Vergleichende Überlegungen zur rechtspraktischen Bedeutung der ökonomischen Analyse' in: Ott, C./Schäfer, H.-D., *Allokationseffizienz in der Rechtsordnung* (Berlin: Springer-Verlag, 1989), 293 ff.
Källström, S., 'Riddaren av den moderna' in: Hallberg, P./Lernerstedt, C., *Svenska värderingar* (Stockholm: Carlssons Bokförlag, 2002), 21 ff.
Köhler, H., 'Irreführungsrichtlinie und deutsches Wettbewerbsrecht' (1994) *GRUR Int.*, 396 ff.
Köhler, H., 'Einführung' in: *BGB*, 51st., ed., (München: Beck's Texte im dtv, 2002).
Köhler, H., '*UWG*-Reform und Verbraucherschutz' (2003) *GRUR*, 265 ff.
Köhler, H./Bornkamm, J./Henning-Bodewig, F., 'Vorschlag für eine Richtlinie zum Lauterkeitsrecht und eine UWG-Reform'(2002) *WRP*, 1317 ff.
Köhler, H./Piper, H., *UWG Kommentar*, 3rd ed. (München: Beck, 2002).
Körner, L., 'God affärssed och illojal konkurrens' (1954) *NIR* , 81 ff

Ladas, S., *Patents, Trademarks and Related Rights*, Vol. 3 (Cambridge, MA: Harvard University Press, 1975), 1676 ff.
Ladeur, K.-H (ed.), *Europeanisation of Administrative Law. Transforming National Decision-Making Procedures* (Aldershot: Ashgate, 2002).
Landes, W./Posner, R., 'Trademark Law: An Economic Perspective' (1987) 30 *JLE*, 265 ff.
Lando, O., 'Principles of European Contract Law' (1992) *RabelsZ*, 261 ff.
Lans, J., *Jurisdiktion över TV sändningar i EU* (Stockholm: Juristförlaget, 1996).
Larenz, K., *Methodenlehre der Rechtswissenschaft* (Berlin: Springer Verlag, 1979).
Legrand, P., 'European Legal Systems are not Converging' (1996) 45 *ICLQ*, 52 ff.
Legrand, P., 'Uniformity, Tradition and the Law's Limits' (1996-97) *JT*, 306 ff.
Lehmann, M., 'Wettbewerbsrecht, Strukturpolitik und Mittelstandsschutz' (1977) *GRUR*, 580 ff.
Lehmann, M., 'Die UWG-Neuregelungen 1987 – Erläuterungen und Kritik' (1987) *GRUR*, 199 ff.
Lehmann, M., 'Zur Notwendigkeit einer massvollen Liberalisierung des deutschen Wettbewerbsrechts' (1995) *GRUR*, 380 ff.
Lehmann, M., 'Rechtsgeschäfte und Verantwortlichkeit im Netz – Der Richtlinienvorschlag der EU-Kommission' (1999) *ZUM*, 180 ff.
Lehmann, M. (ed.), *Electronic Business in Europa* (München: Beck, 2002).
Leible, S., 'Abschied von 'flüchtigen Verbraucher? ' (1994) *DWiR*, 177 ff.
Liedl, G., *Rechtsprechung des Reichsgerichts in UWG Sachen* (Verlag Gisela Liedl, 1968).
Leistner, M., 'Werbung, Commercial Communication und E-Commerce' in: Lehmann (ed.) *Electronic Business in Europa* (München: Beck, 2002), 275 ff.
Lejonhuvud, M., 'Förarbeten' in: Bernitz (ed.), *Finna rätt* (Stockholm: Juristförlaget, 1995).
Leupold, A., 'Die massenweise Versendung von Werbe e-Mails: Innovatives Direktmarketing oder unzumutbare Belästigung des Empfängers?' (1998) *WRP*, 270 ff.
Levin, B., *Lag med vissa bestämmelser mot illojal konkurrens. Lagtext och kommentar* (Lund: C.W.K Gleerups Förlag, 1944).
Levin, M., 'Werbung und Informationsfreiheit' (1987a) *GRUR Int.*, 207.
Levin, M., *Satellitreklam och konsumentskydd* (Stockholm: Norstedts, 1987b).
Levin, M. (ed.), *Vennebog till Mogens Kokvedgaard* (Stockholm: Nerenius & Santérus, 1993).
Lewin, L., *Samhället och de organiserade intressena* (Stockholm: Nordstedts, 1992).
Lewis, A., 'Common Law Fortress Under Attack; is English law being Europeanised?' (1995/96) 2 *Columbia Journal of European Law*, 1 ff.
Lidbom, C., 'Konsumentpolitik och lagstiftning' (1971) *SvJT*, 81 ff.
Lidbom, C., 'Den nordiska rättenhetens problem i dag' (1973) *SvJT*, 273 ff.
Lidbom, C., 'Lagstiftningsmaktens gränser' (1993) *JT*, 283 ff.
Lindblom, P.-H., *Konsumentmål* (Stockholm:Norstedts,1985).
Lindblom, P.-H., *Grupptalan. Det anglo-amerikanska class action institutet ur ett svenskt perspektiv* (Stockholm: Norstedts, 1989).
Lindblom, P.-H., 'Grupptryck mot grupptalan'(1996) *SvJT*, 85 ff.
Lindblom, P.-H., *Progressiv process. Spridda uppsatser om domstolsprocessen och samhällsutvecklingen* (Uppsala: Iustus, 2000a).

Lindblom, P.H., 'Civil and Criminal Procedure' in: Bogdan, *Swedish Law in the New Millennium* (Stockholm: Norstedts Juridik, (2000b), 201 ff.
Lindow, E. W., '75 Jahre Zentrale zur Bekämpfung unlauteren Wettbewerbs' in: *75 Jahre Zentrale zur Bekämpfung unlauteren Wettbewerbs* (Bad Homburg: 1987), 15 ff.
Lobe, A., *Die Bekämpfung des unlauteren Wettbewerbs*, Vol. I-III (Leipzig: Dieterische Verlagsbuchhandlung, Theodor Weicher, 1907).
Loewenhein, U., 'Die Erstattung von Abmahnkosten der Verbände in der neueren Rechtsentwicklung' (1987) *WRP*, 286 ff.

MacCormick, N., 'Law as Institutional Fact' in: MacCormick, N./Weinberger, O., *An Institutional Theory of Law* (Dordrecht: Reidel, 1986).
MacKaay, E., *Economics of Information and the Law* (Boston: Kluwer Nijhoff Publishing, 1982).
Madsen, B. P., *Markedsret*, Band I (Copenhagen: Jurist- og Økonomforb.:s Forl., 1990).
Maduro, M. P., 'Keck: The End? The Beginning of the End? Or Just the End of the Beginning?' (1994) 1 *Irish Journal of European Law*, 30 ff.
Maduro, M. P., 'Reforming the Market or the State? Article 30 and the European Constitution; Economic Freedom and Political Rights' (1997) 3 *ELJ*, 55 ff.
Maduro, M. P., *We, The Court. The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998a).
Maduro, M. P., 'The Saga of Article 30 EC Treaty: To Be Continued' (1998b) 5 *Maastricht Journal*, 298 ff.
Maduro, M. P., 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in: Kilpatrick, C./Novik, T./Skidmore, P., *The Future of Remedies in Europe* (Oxford: Hart Publishing, 2000), 117 ff.
Maennel, F., 'Elektronischer Geschäftsverkehr ohne Grenzen – die Richtlinienvorschlag der Europäischen Kommission' (1999) *MMR*, 187 ff.
Maier, L., *EU, arbetsrätten och normgivningsmakten* (Stockholm: Stockholms Universitet, 2000).
Majone, G., *Regulating Europe* (London: Routledge, 1996).
Mankowski, P., 'Das Internet im Internationalen Vertrags- und Deliktsrecht' (1999a) *RabelsZ*, 256 ff.
Mankowski, P., 'Internet und internationales Wettbewerbsrecht' (1999b) *GRUR Int.*, 909 ff.
Mankowski, P. 'Wettbewerbsrechtliche Gerichtspflichtigkeits- und Rechts-anwendungsrisiko bei Werbung über Webseits' (2000) *CR*, 763 ff.
Mankowski, P., 'Das Herkunftslandprinzip als Internationales Privatrecht der E-Commerce-Richtlinie' (2001) 100 *ZvglRWiss*, 175 ff.
March, J./Olsen, J. P., *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989).
Marenco, G., 'Pour une interprétation traditionelle de la notion de mesure d'effet équivalent à une restriction quantitative' (1984) *CDE*, 291 ff.
Marks, G./Hooghe, L./Blank, K., 'Integration Theory, Subsidiarity and Internationalisation of Issues: The Implications for Legitimacy' (1995) *EUI Working Papers*, RSC No. 7.
Mattei, U., *Comparative Law and Economics* (Ann Arbor, MI: University of Michigan Press, 1997).

Melullis, K.-J./Eheckelmann, 'Beibehaltung der Kostenpauschale – ja oder nein?' (1982) *WRP*, 560 ff.
Melullis, K.-J., 'Zum Unkostenerstattungsanspruch bei der Verwarnung durch Verbände im gewerblichen Rechtsschutz' (1992) *WRP*, 1 ff.
Melullis, K.-J., *Handbuch des Wettbewerbsprozesses,* 2 Auflage (Köln: Dr. Otto Schmidt Verlag, 1995).
Mertens, H.-J., 'Kollektivrechtlicher Schadensersatz als Mittel des Verbraucherschutzes' (1975) *ZHR*, 438 ff.
Meyer, A., 'Das Verbraucherleitbild des Europäischen Gerichtshofs – Abkehr vom „fluchtigen Verbraucher"' (1993) *WRP*, 215 ff.
Meyer, J., 'Rabatt- und Zugabe-Regulierung auf dem Prüfstand' (2001) *GRUR*, 98 ff.
Michels, R., *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Glencoe, IL: Free Press, 1915/ 1962).
Micklitz, H.-W., 'Cross-border Consumer Conflicts - A French-German Experience' (1993) 16 *JCP*, 411 ff.
Micklitz, H.-W., 'Grenzüberschreitende Verbraucherstreitigkeiten' (1994) *Verbraucher und Recht*, 36 ff.
Micklitz, 'Divergente Ausgangsbedingungen des Verbraucherschutzes in West und Ost' in: Rechtseinheit oder Rechtsvielfalt in Europa? (1996), 3 ff.
Micklitz, H.-W., 'Verbandsklage und die EG-Richtlinie über missbräuchliche Klausulen' (1998a) 19 *Zeitschrift für Wirtschaftsrecht*, 937 ff.
Micklitz, H.-W., 'Perspektiven eines Europäischen Privatrechts' (1998b) *ZEuP* 253 ff.
Micklitz, H.-W., 'Umsetzung der EG-Fernabsatzrichtlinie' (1999) 54 *BB*, 2093 ff.
Micklitz, H.-W. et al., *Study on the Feasibility of a General Legislative Framework on Fair Trading*, Volumes I-II, Institut für Europäisches Wirtschafts- und Verbraucherrecht e.V., November 2000. Retrievable from the webpage of DG SANCO:
http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/sur21_sum_en.pdf
Micklitz, H.-W., 'Richtlinie 97/7/EG des Europäischen Parlaments und des Rats über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz (Fernabsatzlinie)' in: Grabitz, E./Hilf, M. (eds.), *Das Recht der Europäischen Union*, Vol.4 A.3 (Munich: Beck, 2000).
Micklitz, H.-W., 'Die Rechtsbruchklage nach § 22 AGBG' in: Brönneke, T. (ed.), *Kollektiver Rechtsschutz im Zivilprozess* (Baden-Baden: Nomos, 2001), 87 ff.
Micklitz, H.-W./Keßler, J, 'Europäisches Lauterkeitsrecht. Dogmatische und ökonomische Aspekte einer Harmonisierung des Wettbewerbsverhaltens im europäischen Binnenmarkt' (2002) *GRUR Int.*, 885 ff.
Micklitz, H.-W./Keßler, J, 'Funktionswandel des *UWG* (2003)' *WRP*, 919 ff.
Micklitz, H.-W./Stadler, A., 'Der Reformvorschlag der *UWG*-Novell für eine Verandsklage auf Gewinnabschöpfung' (2003) *WRP*, 559 ff.
Miracle, G./Navett, T., *Voluntary Regulation of Advertising. A Comparative Analysis of the UK and US* (Toronto: Lexington, 1987).
Mnookin, R./Kornhauser, L., 'Bargaining in the Shadow of the Law: The Case of Divorce' (1978-79) 88 *Yale Law Journal*, 950 ff.
Molle, W., *The Economics of European Integration. Theory, Practice and Policy* (Aldershot and Brookfield: Dartmouth Publishing, 1990).

Müller-Graff, P.-C., 'Ordnungspolitische Divergenzen und wettbewerbliche Lauterkeit in der Verfasung des Gemeinsamen Marktes' in *Festschrift Carstens* (Köln, Berlin: 1984), 209 ff.
Möllering, J., 'Das Recht des unlauteren Wettbewerbs in Europa: Eine neue Dimension' (1990) *WRP*, 1 ff.

Nader, R., *Unsafe at Any Speed: The Designed-in Dangers of the American Automobile* (New York: Grossman, 1965).
Nelken, D., *Comparing Legal Cultures* (Aldershot: Dartmouth, 1996).
Nelson, P., 'Information and Consumer Behaviour' (1970) 78 *JPE*, 311 ff.
Nelson, P., 'Advertising as Information' (1974) 81 *JPE*, 729 ff.
Nergelius, J., 'Constitutional Law' in: Bogdan, M., *Swedish Law in the New Millennium* (Stockholm: Norstedts Juridik, 2000), 65 ff.
Nerreter, *Allgemeine Grundlagen eines deutschen Wettbewerbsrechts* (Berlin, 1936).
Nickels, S., 'Neues Bundesrecht für den E-Commerce' (2001) *DB*, 1919 ff.
Nicolaysen, G., 'Inländerdiskriminierung im Warenverkehr' (1991) *Europarecht*, 95 ff.
Nielsen, R., 'Nordic Sources of Law in a European Environment' in: Cameron, I./Simoni, A. (eds.), *Dealing with Integration*, Vol. I (Uppsala: Iustus, 1996), 15 ff.
Nilsson, J.-E., *Sverige i förnyelsens Europa* (Malmö: Liber-Hermods, 1995).
Norberg, S., 'Reflexioner över svenska rättstraditioner i en europeisk rättsmiljö' (1994-95) *JT*, 369 ff.
Nordell, P.-J., *Marknadsrätten. En introduktion* (Stockholm: Norstedts Juridik, 2002).
Nordell, P. J., *Marknadsrättens goodwillskydd* (Stockholm, Media Mercur, 2003a).
Nordell, P.-J., 'Champagnesmak! Kommentar till MD 2002:20' (2003b) *NIR*, 94 ff.
North, D., *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990).
North, D., 'Institutions' (1991) 5 *Journal of Economic Perspectives*, 97 ff.
North, D., 'Institutional Change: A Framework of Analysis' in: S.-E. Sjöstrand (ed.), *Institutional Change. Theory and Empirical Findings* (Armonk, New York: M.E. Sharpe, 1993), 35 ff.
North, D, 'Economic Performance Through Time' (1994) 84 *The American Economic Review*, 359 ff.
Nyman, O., *Svensk parlamentarism 1932-196. Från Minoritetsparlamentarism till majoritetskoalition*, unpublished dissertation, Skrifter utgivna av Statsvetenskapliga Föreningen i Uppsala genom Axel Brusewitz, No. 27 (Uppsala: Almqvist & Wicksell, 1947).

Offe, C., *Modernity and the State: East, West* (Cambridge, MA: MIT Press, 1996).
Ogus, A., *Regulation. Legal Form and Economic Theory* (Oxford: Clarendon Press, 1994).
Ogus, A., 'Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48 *ICLQ*, 404.
Ohly, A., *Richterrecht und Generalklausel im Recht des unlauteren Wettbewerbs* (Köln: Carl Heymanns, 1997).
Ohly, A., 'Die Bemühungen um eine Rechtsvereinheitlichung auf EU-Ebene von den Anfängen bis zur Richtlinie über irreführende Werbung von 1984' in: Schricker, G./Henning-Bodewig, F. (eds.), *Neuordnung des Wettbewerbsrecht* (Baden-Baden: Nomos,1998/99), 69 ff.

Ohly, A., 'Das Herkunftslandprinzip und Kollisionsrecht' (2001) *GRUR Int.*, 899.
Ohly A./Spence, M., 'Vergleichende Werbung: Die Auslegung der Richtlinie 97/55/EG in Deutschland und Großbritannien' (1999) *GRUR Int.*, 681 ff.
Olivecrona, K., *Law as Fact* (Copenhagen: E. Munksgaard, 1939).
Oliver, P., *Free Movement of Goods in the EEC,* 3rd ed. (London: Sweet and Maxwell, 1996).
Olsen, L., 'Mot en ny konsumtionsrätt?' (2000-01) *JT*, 304 ff.
Olsen, L., 'Det konsumtionsrättsliga regelverket – en överblick över ett dynamiskt rättsområde' (2001-02) *JT*, 815 ff.
Olson, M., *The Logic of Collective Action. Public Goods and the Theory of the Group* (New York: Schocken Books, 1965).
Ott, C., 'Systemwandel im Wettbewerbsrecht' in: Bauer, F./Esser, J./Kübler, F./Steindorff, E., *Funktionswandel der Privatrechtsinstitutionen.Festschrift für L. Raiser* (Tübingen: Mohr, 1974), 403 ff.
Ott, C./Schäfer, H.-D. (eds.), *Allokationseffizienz in der Rechtsordnung* (Berlin: Springer-Verlag, 1989).

Paefgen, T., 'Psychologicher Kaufzwang – A quo venis et quo vadis?' (1991) *WRP*, 85 ff.
Pastor, W., 'Der Gesetzesentwurf zur Einführung eines „Wettbewerbsarmenrecht"' (1964) *WRP*, 182 ff.
Pastor, W., 'Die Streitwertherabsetzung nach dem Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb, des Warenzeichengesetzes und des Gebrauchsmustergesetzes vom 21.7.1965' (1965) *WRP*, 271 ff.
Pastor, W., 'Verbraucherverbände im Sinne des § 13 Abs. 1 a *UWG*' (1969) *GRUR*, 573 ff.
Pastor, W., 'Die *UWG*-Reform und der Mißbrauch der Verbandsklagebefugnis aus § 13 *UWG*' (1978) *WRP*, 245 ff.
Pastor, W., 'Kostenerstattung bei erfolgeicher Verwarnung' (1979) *WRP* 423.
Pastor, W./Ahrens, *Der Wettbewerbsprozess* (München:Beck, 2001).
Pause, H.-E., *Die Berücksichtigung der Interessen der Allgemeinheit bei der Beurteilung wettbewerblichen Handelns* (Frankfurt am Main: Peter Lang, 1984).
Peczenik, A., 'Svenska lagmotiv i Europeisk Union' (1994-95) *JT*, 305 ff.
Pehrson, L., 'EG-samarbetet och den svenska rättskälleläran' (1991-92) *JT*, 635 ff.
Pelkmans, J., 'The New Approach to Technical Harmonization and Standardization' (1987) 25 *JCMS*, 249 ff.
Persson, G., *Eklusivitetsfrågan* (Stockholm: Norstedts Juridik, 2002).
Pertschuk, M., *Revolt Against Regulation. The Rise and Pause of the Consumer Movement* (Berkley: University of California Press, 1982).
Phelan, R., 'Right to Life of the Unborn v. Promotion of Trade in Services: the ECJ and the Normative Shaping of the European Union' (1992) *MLR*, 670.
Pierce, R./Shapiro, S./Verkuil, P., *Administrative Law and Administrative Process* (Westbury, New York: The Foundation Press, 1992).
Pigou, A.C., *The Economics of Welfare* 5th ed. (London: Macmillan & Co., 1952).
Pinder, J. 'The Single Markt: a Step Towards European Union' in: Lodge, J., *The European Community and the Challenge of the Future* (London: Pinter Publishers, 1989), 94 ff.

Pitofsky, R., 'Beyond Nader: Consumer Protection and the Regulation of Advertising Regulation' (1977) 90 *Harvard Law Review*, 661 ff.
Posner, R., *Regulation of Advertising by the Federal Trade Commission* (1973).
Posner, R., *Economic Analysis of Law* (Boston: Little, Brown & Co., 1992).
Prechal, S., *Directives in European Community Law* (Oxford: Clarendon Press, 1995).
Pålsson, L., Svensk rättspraxis i internationell processrätt (Stockholm: Norstedts, 1989).

Raiser, L., 'Rechtsschutz und Institutionenschutz im Privatrecht' in: *Summum ius-summa inuria. Individualgerechtigkeit und der Schutz allgemeiner Werte im Rechtsleben* (Tübingen: Mohr, 1963), 145 ff.
Ramsay, I., *Consumer Protection* (London: Weidenfeld & Nicolson, 1989).
Reese, U., 'Das "6-Korn-Eier"-Urteil des EuGH –Leitentscheidung für ein Leitbild?' (1998) *WRP*, 1035 ff.
Reich, N., 'Allgemeiner Teil und Einleitung' in: Reich/Tonner/Wegener, *Verbraucher und Recht (*Göttingen: Verlag Otto Schwartz & Co., 1976).
Reich, N., '*UWG*-Reform und Verbraucherschutz' (1978a) *ZRP*, 100 ff.
Reich, N., 'Vergleichende Werbung und EG-Recht' (1978b) *WRP*, 75 ff.
Reich, N., *Staatliche Regulierung zwischen Marktversagen und Politikversagen* (Heidelberg: C.F. Müller Verlag, 1984).
Reich, N., *Internal Market and Diffuse Interests* (Brussels: Story-Scientia, 1990).
Reich, N., 'Competition Between Legal Orders: A New Paradigm of European Law' (1992a) *CMLRev.*, 861 ff.
Reich, N., 'Rechtsprobleme grenzüberschreitender irreführender Werbung im Binnenmarkt' (1992b) 56 *RabelsZ*, 446 ff.
Reich, N., 'The 'November Revolution' of the European Court of Justice: Keck, Meng and Audi Revisited' (1994) 31 *CMLRev.*, 459 ff.
Reich, N., *Europäisches Verbraucherschutzrecht*, 2nd ed. (Baden-Baden, Nomos, 1993).
Reich, N., 'Comment' (1998) *Verbraucher und Recht*, 171.
Reich, N./Ahrazoglu, C., 'EG-Binnenmarkts und Werberecht' (Bremen: ZERP, 1990).
Reich, N./Nordenhaus, A., *Verbraucher und Recht im elektronischen Geschäftsverkehr* (Baden-Baden: Nomos, 2000).
Reich N./Tonner, K./Wegener, H., *Verbraucher und Recht* (Göttingen: Otto Schwartz, 1976).
Reichelsdorfer, J., 'eMails zu Werbezwecken – ein Wettbewerbsverstoss?' (1997) *GRUR*, 191 ff.
Reifner, U., *Das Recht des Konsumentenkredits – Soziale Zivilrechtsauslegung im Verbraucherschutz*, Diss. jur., (Berlin: 1977).
Reitz, J., 'How to do Comparative Law' (1998) *AJCL*, 617 ff.
Reuter, A., 'Neues zu Euro-Marketing und §§6e, 7 *UWG*: Der EuGH-Entscheid zu Schlussvekauf und Preisgegenüberstellungen' (1990) *BB*, 1649 ff.
Reuter, D., 'Plädoyer für das institutionelle Rechtsdenken' in: Immenga et al. (eds.), *Festschrift für Mestmäcker* (Baden-Baden: Nomos, 1996), 271 ff.
Revesz, R., 'Specialized Courts and the Administrative Lawmaking System' (1990) 138 *University of Pennsylvania Law Review*, 1111 ff.
Rijkens, R./Miracle, G., *European Regulation of Advertising* (Amsterdam: North-Holland, 1986).

Rogge, G., 'Verbraucherklage und Streitwertsherabsetzung im gewerblichen Rechtschutz' (1964) *WRP*, 336 ff.
Rorty, R., *Contingency, Irony, and Solidarity* (New York: Cambridge University Press, 1989).
Rose, M., 'Passing-off, Unfair Competition and Community Law' (1990) *EIPR*, 123 ff.
Rose-Ackerman, S., 'Progressive Law and Economics and the New Administrative Law' (1988) 98 *Yale Law Journal*, 341.
Rose-Ackerman, S., 'Recht und Ökonomie: Paradigma, Politik oder Philosophie' in: Ott, C./Schäfer, H.-D. (eds.), *Allokationseffizienz in der Rechtsordnung* (Berlin: Springer-Verlag, 1989).
Rosenberg, D./Shavell, S., 'A Model in which Suits are Brought in for their Nuisance Value' (1985) 5 *International Review of Law and Economics*, 3 ff.
Roth, W-H., 'Der Einfluss des Europäischen Gemeinschaftsrecht auf das IPR' (1991) 55 *RabelsZ*, 623 ff.
Rott, P., 'The Protection of Consumers' Interests After the Implementation of the EC Injunctions Directive Into German and English Law' (2001) 24 *JCP*, 401 ff.
Rubin, P., 'On the Form of Special Interest Legislation' (1975) 21 *Public Choice*, 79 ff.
Rubin, P., 'The economics of regulating deception' (1991) *CATO Journal*, 667 ff.
Sack, R., 'Sittenwidrigkeit, Sozialwidrigkeit und Interessenabwägung' (1970) *GRUR* , 493 ff.

Sack, R., 'Irreführende Werbung mit wahren Angaben' (1996) *GRUR*, 461 ff.
Sack, R., 'Die Bedeutung der EG-Richtlinie 84/450 und 97/55/EG über irreführende und vergleichende Werbung für das deutsche Wettbewerbsrecht' (1998a) *GRUR Int.*, 263 ff.
Sack, R., 'Die Berücksichtigung der Richtlinie 97/55/EG über irreführende und vergleichende Werbung bei der Anwendung der §§ 1 und 3 *UWG*' (1998b) *WRP*, 241 ff.
Sack, R., 'Auswirkungen der Art. 30, 36 und 59 ff. EG-Vertrag auf das Recht gegen den unlauteren Wettbewerb' in: Schricker/Bodewig (1998/99), 139 ff.
Sack, 'Die Beurteilung irreführender Webung für Importfahrzeuge aus EG-Staaten nach EG Recht' (2000) WRP, 23 ff.
Sack, R., 'Das internationale Wettbewerbsrecht nach der E-Commerce-Richtlinie (ECRL) und dem EGG-/TDG-Entwurf' (2001) *WRP*, 1408 ff.
Sandgren, C., 'En social avtalsrätt?' I-II (1992-93) *JT*, 456 ff.
Sandeberg, C. af, *Prospektansvaret* (Uppsala: Iustus Förlag, 2001).
Savigny, F.-C. v., *System des heutigen römischen Rechts I* (Würzburg: 1840).
Savigny, F.-C. v., 'Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft' (Hildesheim: Georg Olms, 1967 [1840]).
Scharpf, F., 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) *Public Administration*, 239 ff.
Scharpf, F., Games Real Actors Play. Actor-Centred Institutionalism in Policy Research (Boulder, CO: Westview Press, 1997).
Scharpf, F., 'Regieren im europäischen Mehrebenensystem – Ansätze zu einer Theorie' (2002) *Leviathan*, 65 ff.

Scharpf, F., 'European Governance: Common Concerns vs. the Challenge of Diversity' (2001), paper to be retrieved at: http://www.jeanmonnetprogram.org/papers/01/010701.html (8-05-2003).
Schricker, G., 'Unlauterer Wettbewerb und Verbraucherschutz' (1970a) *GRUR Int.*, 32 ff.
Schricker, G., *Gesetzesverletzung und Sittenverstoß* (München: Beck, 1970b).
Schricker, G., 'Wettbewerbsrecht und Verbraucherschutz' (1972) 36 *RabelsZ*, 315 ff.
Schricker, G., Die Arbeiten zur Angleichung des Rechts des unlauterne Wettbwerbs inden Ländern der Europäischen Wirtschaftsgemeinschaft' (1973) *GRUR Int.*, 141 ff.
Schricker, G., 'Möglichkeiten zur Verbesserung des Schutzes der Verbraucher und des funktionsfähigen Wettbewerbs im Recht des unlauteren Wettbewerbs' (1975) *ZHR*, 139 ff.
Schricker, G., 'Wettbewerbsrechtliche Aspekte des Verbraucherschutzes' (1976) 40 *RabelsZ*, 535 ff.
Schricker, G., 'Verbraucherschutz - ein neues Rechtgebiet?' (1979) *GRUR Int.*, 315 ff.
Schricker, G., 'Probleme der Angleichung des Rechts des unlauteren Wettbewerbs' in: Bernstein, H./Drobnig, H./Kötz, H. (eds.), *Festschrift Zweigert* (Tübingen: Mohr, 1981), 537 ff.
Schricker, G., 'Die Bekämpfung der irreführenden Werbung in den Mitgliedstaaten der EG' (1990) *GRUR Int.*, 112 ff.
Schricker, G., 'European Harmonisation of Unfair Competition Law – A Futile Venture?' (1991a) *IIC*, 788 ff.
Schricker, G., 'Werbeverbote in der EG. Nationale und gemeinschaftsrechtliche Initiativen' (1991b) *GRUR Int.*, 185 ff.
Schricker, G., 'Zur Werberechtspolitik der EG – Liberalisierung und Restriktion im Widerstreit' (1992a) *GRUR Int.*, 347 ff.
Schricker, G., in: Beier/Bastian/Kur (eds.), *Wettbewerbsrecht und Verbraucherschutz in Mittel- und Osteuropa* (Köln: Carl Haymann Verlag, 1992b), 10 ff.
Schricker, G., 'Deregulierung im Recht des unlauteren Wettbewerbs?' (1994a) *GRUR Int.*, 586 ff.
Schricker, G., 'Einleitung: Teil F. Internationalrechtliche Fragen' in: Jakobs, R./Lindacher, W. F./Teplitzky, O., *Handbuch des Wettbewerbs* (Berlin, New York: Walter de Gruyter, 1994b), 289 ff.
Schricker, G., 'Reformen im Recht des unlauteren Wettbewerbs' (1994c) *ZRP*, 430 ff.
Schricker, G., 'Hundert Jahre Gesetz gegen den unlauteren Wettbewerb – Licht und Schatten' (1996a) *GRUR Int.*, 473 ff.
Schricker, G., 'Einführung in das Recht der Werbung. Internationales und EWG Recht' in: Schricker (ed.), *Recht der Werbung* (Baden-Baden: Nomos, 1996b).
Schricker, G. (ed.), *Recht der Werbung in Europa* (Baden-Baden: Nomos, 1996c).
Schricker, G., 'Gratiszeitungen – eine unlautere Marktstörung?' in: *Festskrift till Ulf Bernitz. NIR* (Stockholm: Jure, 2001a), 65 ff.
Schricker, G./Henning-Bodewig, F., 'Elemente einer Harmonisierung des Rechts des unlauteren Wettbewerbsrechts' (2001b) *WRP*, 1367 ff.
Schwanhäuser, H., 'Die Zukunft der „irreführenden" Werbung (§ 3 *UWG*) ' (1988) *GRUR*, 180 ff.
Schwartz, G., 'Verfolgung unlauteren Wettbewerbs im Allgemeininteresse' (1967) *GRUR*, 333 ff.

Schäfer, H.-B., 'Die ökonomischen Grundlagen der Bündelung gleichgerichteter Interessen im Prozess' in: Basedow/Hopt/Kötz/Baetge, *Die Bündelung gleichgerichteter Interessen im Prozess* (Tübingen: Mohr Siebeck, 1999), 67 ff.
Schäfer, H.-B./Ott, C., *Ökonomische Analyse des Zivilrechtes* (Berlin: Springer, 1986).
Selznick, P., *The Moral Commonwealth: Social Power and the Promise of Community* (Berkeley, CA: University of California Press, 1992).
Sevon, L., 'Några reflexioner kring det nordiska lagstiftningssamarbetet' (1988) *TfR*, 509 ff.
Shapiro, C., 'Consumer Policy in the United States' (1983) *Zeitschrift für die gesamte Staatswissenschaft*, 527 ff.
Shepsle, K./Weingast, B., 'Political Solutions to Market Problems' (1984) 78 *American Political Science Review*, 417 ff.
Simitis, K., *Verbraucherschutz: Schlagwort oder Rechtsproblem?* (Baden-Baden: Nomos, 1976).
Simon, H., *Administrative Behavior* (New York: Macmillan, 1958).
Singer, D. J., ' The Level of Analysis Problem in International Relations' in: K. Knorr/S. Verba (eds.) *The International System: Theoretical Essays* (Princeton, NJ: Princeton University Press, 1961), 77 ff.
Sjöstrand, S.-E., 'On Institutional Thought in the Social and Economic Sciences' in: Sjöstrand, S.-E., (ed.), *Institutional Change. Theory and Empirical Findings* (Armonk, New York: M.E. Sharpe, 1993), 3 ff.
Skogh, G., 'KOV – en ulv i fårs kläder?' ' in: *Måste konsumenten gå till Verket?* (Stockholm: Industriförbundets Förlag, 1978), 33
Slaughter, A.-M./Sweet, A./Weiler, J., *The European Courts and National Courts. Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1998).
Slot, P. J., 'Harmonization' (1996) 21 *EL Rev.*, 378 ff.
Sosnitza, O., *Wettbewerbsbeschränkungen durch die Rechtsprechung* (Baden-Baden: Nomos, 1995).
Spindler, G., 'Kapitalmarktgeschäfte im Binnenmarkt. Der Einfluss der E-Commerce Richtlinie auf das Internationale Vertragsrecht' (2001) *IPRax*, 400 ff.
Spink, P./Petty, R., 'Comparative Advertising in the European Union' (1998) 47 *ICLQ*, 854 ff.
Stadler, A., 'Bündelung von Verbraucherinteressen im Zivilprozess' in: Brönneke, T. (ed.), *Kollektiver Rechtsschutz im Zivilprozess* (Baden-Baden: Nomos, 2001).
Stearns, P., *Consumerism in World History* (New York: Routledge, 2001).
Steiner, J., *Textbook on EC Law*, 4th ed (London: Blackstone, 1994).
Steiner, J., *Enforcing EC Law* (London: Blackstone, 1995).
Stewart, R/Sunstein, C., 'Public Programs and Private Rights' (1982) 95 *Harvard Law Review*, 1193 ff.
Stigler, G., 'The Economics of Information' (1961) *JPE*, 213 ff.
Stigler, G., 'The Theory of Economic Regulation' (1971) 2 *Bell J. Econ. &Mgmt Sci.*, 3 ff.
Stigler, G., 'Free Riders and Collective Action: An Appendix to the Theories of Economic Regulation' (1974) *5 Bell J. Econ. &Mgmt Sci.*, 359 ff.
Stjernquist, H., 'Riktlinjer i svensk offentlig rätt' (1992) 15 *FT*, 233 ff.
Stone Sweet, A./Brunell, T., 'The European Court, National Judges and Legal Integration: A Researcher's Guide to the Data Set on Preliminary References in EC Law 1958-98'(2000) *ELJ*, 117 ff.

Streinz, R., 'Gibt es eine europäische Verkehrsauffassung?' (1991) *Zeitschrift für Lebensmittelrecht*, 242 ff.
Strömberg, H., *Allmän förvaltningsrätt* (Lund: Gleerup, 1974).
Strömberg, H., *Allmän förvaltningsrätt* (Malmö: Liber-Hermods, 1995).
Strömberg, H., *Sveriges författning* (Stockholm: Studentlitteratur, 1999).
Strömholm, S., *Le droit moral de l'auteur, I* (Stockholm: Norstedt & söner, 1966).
Strömholm, S., 'Public Rule-Making and Private: The Swedish Experience' (1971) 15 *SSL*, 219 ff.
Strömholm, S., 'Har den komparativa rätten en metod?' (1972) *SvJT*, 456 ff.
Strömholm, S., 'Equity in Swedish law' in: Newman, R. (ed.), *Equity in the World's Legal System* (Brussels: Bruyant, 1973), 443 ff.
Strömholm, S., 'Nordiskt samarbete – utvecklingslinjer och argument' in: *Festskrift till W.E. v. Eyben* (København: Juristforb:s forl., 1982), 173 ff.
Strömholm, S., 'Comparative Legal Science – Risks and Possibilities' in: Suksi, M., *Law under Exogenous Influences* (Åbo: Turku Law School, 1994), 5 ff.
Strömholm, S., 'General Features of Swedish Law' in: Bogdan: (ed.), *Swedish Law in the New Millennium* (Stockholm: Norstedts Juridik, 2000), 31 ff.
Strömholm, S., 'Skall lagreglerna spegla eller påverka den allmänna rättsuppfattningen' (2001) *SvJT*, 101 ff.
Stuyck, J., 'Comment' (1997) 33 *CMLRev.*, ff.
Stuyck, J., 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?' (2000) 37 *CMLRev.*, 367 ff.
Sun, J.-M./Pelkmans, J., 'Regulatory competition in the Single Market' (1995) 33 *JCMS*, 67 ff.
Sundell, J.-O., *Tysk påverkan på svensk civilrättsdoktrin 1870-1914* (Stockholm: Nordiska bokhandeln, 1987).
Sunstein, C., 'Participation, Public Law and Venue Reform' (1982) 49 *U. Chi. L.Rev.*, 976 ff.
Sunstein, C., 'Legal Interference with Private Preferences' (1986) 53 *U. Chi. L.Rev*, 1129 ff.
Svensson, C./Stenlund, A./Brink, T./Ström, L.-E., *Praktisk marknadsrätt*, 7th ed. (Stockholm: Norstedts Juridik, 1996).
Söderlind, D./Petersson, O., *Svensk förvaltningspolitik* (Uppsala: Diskurs, 1986).

Tarschys, D., 'Hur mycket konsumentpolitik?' in: *Måste konsumenten gå till Verket?* (Stockholm: Industriförbundets Förlag, 1978).
Tengelin, S., 'Den illojala konkurrensen i blickpunkten' (1957) *NIR*, 137 ff.
Tengelin, S., 'Illojal reklam och annan illojal marknadsföring' (1959) *NIR*, 93 ff.
Tengelin, S., 'Självsanering på marknadsföringsområdet' (1970) *NIR*, 111 ff.
Teubner, G., 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' in: Snyder, F. (ed.), *The Europeanisation of Law* (Oxford: Hart Publishing, 2000), 243 ff.
Teubner, G., *Standards und Direktiven in Generalklausulen* (Frankfurt: Athenäum, 1971).
Teubner, G., *Dilemmas of Law in the Welfare State* (Berlin: de Gruyter, 1986).
Teubner, G., *Juridification of Social Spheres* (Berlin: de Gruyter, 1987).
Teubner, G., *Recht als autopoietisches System* (Suhrkamp, 1989).
Teubner, G., *Law as an Autopoietic System* (Oxford: Blackwell, 1993).
Thompson, E.P., *The Poverty of Theory and Other Essays* (London: Merlin P., 1978).

Thorelli, H./Thorelli, S., *Consumer Information Systems and Consumer Policy* (Cambridge, MA: Ballinger Publishing Company, 1977).
Thünken, A., 'Die EG-Richtlinie über den elektronischen Geschäftsverkehr und das internationale Privatrecht des unlauter Wettbewerbs' (2001) *IPRax*, 15 ff.
Thünken, A., 'Multi-State Advertising over the Internet and the Private International Law of Unfair Competition' (2002) 51 *ICLQ*, 909 ff.
Tilmann, W., 'Das Haftungsrisiko der Verbraucherverbände' (1975) *NJW*, 913 ff.
Tilmann, W., 'Irreführende Werbeangaben und täuschende Werbung' (1976) *GRUR*, 545 ff.
Tilmann, W., 'Zur Rechtsstellung des Verbrauchers bei Wettbewerbsdelikten' (1977) *ZHR*, 32 ff.
Tilmann, W., 'Die Verkehrsauffassung im Wettbewerbs- und Warenzeichenrecht – Möglichkeiten und Grenzen der demoskopischen Wahrheitsfindung im Prozess' (1984) *GRUR*, 716 ff.
Tilmann, W., 'Anwendungsbereich und Bindungswirkung der Richtlinie Vergleichende Werbung (1999) *GRUR*, 546 ff.
Tonner, K., 'Verbraucherschutz im *UWG* und die *UWG*-Reform von 1986' (1987) *NJW*, 1917 ff.
Treis, M., '1986 års revision av tyska UWG – konsumentskydd eller strukturpolitik?' (1988) *NIR*, 165 ff.
Treis, M., *Recht des unlauteren Wettbewerbs und Marktvertriebsrecht in Schweden* (Köln: Carl Heymanns, 1991).
Trubek, D., 'Environmental Defence' in: Weisbrod/Handler/Komesar (eds.), *Public Interest Law: An Economic Analysis of Institutional Innovation* (Berkeley, CA: University of California Press, 1978).
Trubek, D., 'Public Advocacy: Administrative Government and the Representation of Diffuse Interests' in: Cappelletti, M. / Garth, B., *Access to Justice,* Vol. III (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979).

Ulmer, E., *Warenzeichen und Unlauter Wettbewerb in ihrer Fortbildung durch die Rechtsprechung* (Berlin: Julius Springer Verlag, 1929).
Ulmer, E., *Sinnzusammenhänge im Recht des unlauteren Wettbewerbs* (Berlin: Julius Springer, 1932).
Ulmer, E., 'Wandlungen und Aufgaben im Wettbewerbsrecht' (1937) *GRUR*, 769 ff.
Ulmer, E., *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der EWG. Band I. Vergleichende Darstellung* (München: Beck, 1965).
Ulmer, E., 'Die Bekämpfung des unlauteren Wettbewerbs im gemeinsamen Markt' (1973) *GRUR Int.*, 135 ff.
Ulmer, E./Reimer, D., Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der EWG, Band I, Deutschland (München: Beck, 1965).
Ulmer, P., 'Der Begriff "Leistungswettbewerb" und seine Bedeutung für die Anwendung von GWB und *UWG* Tatbestände' (1977) *GRUR*, 565 ff.
Ulrich, G.-A., 'Die UWG-novelle 1994 und der Streitwert in Wettbewerbssachen' (1995) *WRP*, 362 ff.
Usher, J., 'Comments on the Case C-376/98' (2001) *CMLRev.*, 1519 ff.

Van den Bergh, R., 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law' (1998) 5 *Maastricht Jorurnal*, 129 ff.

Van den Bergh, R./Lehmann, M., 'Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht' (1992) *GRUR Int.*, 588.
Van Hoecke, M./Warrington, M., 'Legal Culture, Legal Paradigm and Legal Doctrine: Toward a New Model for Comparative Law' (1998) 47 *ICLQ*, 495 ff.
Vultejus, U., 'Die Kostenstruktur der Gerichte' (1994) *ZRP*, 150 ff.

Waelde, T./Gunderson, J., 'Legislative Reform in Transition Economies: Western Transplants - A Shortcut to Social Market Economy Status?', (1994) 43 *ICLQ*, 347 ff.
Ward, A., *Judicial Review and the Rights of Private Parties in EC Law* (Oxford: Oxford University Press, 2000).
Warnling-Nerep, W., 'När svenska alkoholrestriktioner möter europeiska dryckestraditioner' (2002-03) *JT*, 991 ff.
Watson, A., *Legal Transplants. An Approach to Comparative Law* (Edinburgh: 1974).
Watson, A. 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review*, 79 ff.
Watson, A., *The Evolution of Law* (Baltimore, MD: Johns Hopkins University Press, 1985).
Watson, A., *Legal Origins and Legal Change* (London: Humbeldon, 1991).
Watson, A., *Law Out of Context* (Athens, GA: University of Georgia Press, 2000).
Weatherill, S., 'The Evolution of European Consumer Law and Policy: From Well Informed Consumer to Confident Consumer' in: Micklitz, H.-W. (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa?* (Baden-Baden: Nomos, 1996a), 423 ff.
Weatherill, S., 'After Keck: Some Thoughts on How to Clarify the Clarification' (1996b) *CMLRev.*, 885 ff.
Weatherill, S., 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontier of Market Deregulation' (1999) 36 *CMLRev.*, 51 ff.
Weatherill, S./Beaumont, P., *EU Law*, 3rd ed. (London: Penguin Books, 1999).
Weatherill, S., 'Addressing Problems of Imbalanced Implementation in EC Law: Remedies in an Institutional Perspective' in: Kilpatrick, C./Novik, T./Skidmore, P., *The Future of Remedies in Europe* (Oxford: Hart Publishing, 2000), 87 ff.
Weatherill, S., 'The Commission's Option for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis' (2002) *EBLR*, 497 ff.
Weatherill, S./Micklitz, H.-W., 'Consumer Policy in the European Community: Before and After Maastricht' (1993) *JCP*, 285 ff.
Weiler, J., 'The Transformation of Europe' in: Weiler, J., *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 10 ff.
Weinberger, O., 'Einleitung' in: MacCormick, N./Weinberger, O., *Grundlagen des Institutionalistischen Rechtspositivismus* (Berlin: Duncker & Humblot, 1985).
Weinberger, O., 'The Norm as Thought and as Reality' in: MacCormick/Weinberger, *Grundlagen des Institutionalistischen Rechtspositivismus* (Berlin: Duncker & Humblot, 1985), 31 ff.
Westerlind P., 'Marknadsdomstolen i nuet och inför framtiden' (1976) *SvJT*, 417-435, 423.
White, E., 'In Search of the Limits to Article 30 of the EEC Treaty' (1989) 26 *CMLRev.*, 235 ff.
Wieacker, F., 'Historical Models for the Unification of European Law' in: Krawietz, W./MacCormick, N./von Wright, G. H., (eds.), *Prescriptive Formality and Normative Rationality in Modern Legal Systems. Festschrift for Robert Summers* (Berlin: Duncker & Humblot, 1994).

Wieacker, F., *History of Private Law in Europe* (Oxford: Clarendon Press, 1995).
Wilhelmsson, T., 'Den nordiska rättsgemenskapen och rättskälleläran' (1985) *TfR*, 181 ff.
Wilhelmsson, T., 'En social avtalsrätt - Några kommentarer' (1993-94) *JT*, 499 ff.
Wilhelmsson, T., 'Consumer Protection and the Rules and Principles of General Contract Law' in: T. Wilhelmsson, *Twelve Essays on Consumer Protection* (Helsinki: University of Helsinki, 1996a), 120 ff.
Wilhelmsson, T., 'Administrative Procedures for the Control of Marketing Practices – Theoretical Rationale and Perspectives' in: Wilhelmsson, *Twelve Essays on Consumer Protection* (1996b), 142 ff.
Wilhelmsson, T., 'Consumer Images in East and West' in: Micklitz, H.-W. (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa?* (Baden-Baden: Nomos, 1996c), 53 ff.
Wilke, D., 'Über den Unsinn einer Reform der §§ 13 und 23a *UWG*' (1978) *WRP*, 581 ff.
Williamson, O., *The Economic Institutions of Capitalism* (New York: Free Press, 1985).
Williamson, O., *The Mechanisms of Governance* (New York: Oxford University Press, 1996).
Wilson, J. (ed.), *The Politics of Regulation* (New York: Basic Books, 1980).
Winroth, A., *Om Skadestånd, Strödda uppsatser IV*, 2nd ed. (Uppsala: 1907).
Vogel, H.-H., 'Sources of Swedish Law' in: Bogdan, M. (ed.), *Swedish Law in the New Millennium* (Stockholm: Norstedts Juridik, 2000), 48 ff.
Wolf, M., 'Zur Zulässigkeit der Verbandsklage' (1971) *BB*, 1293 ff.
Wolff, E., *Grosse Rechtsdenker der deutschen Geschichte* (Tübingen: Mohr Siebeck, 1963).
Woodridge, F., 'Article 30 and TV Advertising; the ECJ Judgment in Leclerc-Siplec' (1996) *EBLR*, 3 ff.

Zweigert, K./Kroppholler, J., *Sources of International Uniform Law*, Vol. 3 (Leiden: A.W.Sijthoff, 1973), 129 ff.
Zweigert, K./Kötz, H., *Introduction to Comparative Law*, 3rd ed.(Oxford: Clarendon, 1998).

Åkerman, R./Thunman, Å., 'Jurisdiktions- och lagvalsproblem på Internet' (1997-98) *JT*, 432 ff.

OFFICIAL DOCUMENTS

EUROPEAN UNION

Directive 84/450/EEC, OJ 1984 L 250/17 (Misleading Advertising Directive)
Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises OJ 1985 L 372/31 (Doorstep Selling Directive)
Directive 87/102/EEC concerning consumer credit agreements, OJ 1987 L 42/48 (Consumer Credit Directive), last amended by Directive 98/7/EC, OJ 1998 L 101/17
Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks, OJ 1989 L 40/1 (Trademark Directive)
Directive 89/552/EEC concerning the pursuit of television broadcasting activities, OJ 1989 L 298/23, amended by Directive 97/36/EC, OJ 1997 L 202/60 (Television Directive)
Directive 90/314/EEC on package travel, package holidays and package tours, OJ 1990 L 158/59 (Package Travel Directive)
Directive 90/496/EEC on nutrition labelling for foodstuffs, OJ 1990 L 276/40
Directive 92/28/EEC on advertising of medicinal products for human use
Directive 93/13/EEC on unfair terms in consumer contracts, OJ 1993 L 95/29 (Unfair Contract Terms Directive)
Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L 280/83 (Time Share Directive)
Directive 97/7/EC on the protection of consumers in respect of distance contracts, OJ 1997 L144/19 (Distance Selling Directive)
Directive 97/55/EC amending Directive 84/450/EEC so as to include comparative advertising, OJ 1997 L 290/18 (Comparative Advertising Directive)
Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunication sector, OJ 1998 L 24/1
Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27
Directive 98/27/EC on injunctions for the protection of consumers' interests, OJ 1998 L 166/51 (Injunctions Directive)
Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 204/37 as amended by Directive 98/48/EC, OJ 1998 L 217/18
Directive 98/43/EC on the advertising and sponsorship of tobacco products, OJ L 213
Directive 1999/45/EC concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations, OJ 1999 L 200/1
Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ 2000 L 109/29
Directive 2000/31/EC, OJ 2000 L 178/1 (Electronic Commerce Directive)
Directive 2001/83/EC on the Community code relating to medicinal products for human use, OJ 2001 L 311/67

Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ 2003 L 152/16
Commission Directive 70/50/EEC, OJ 1970 L1/29

Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ 1975 C 92/1
Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ 1981 C 133/1
White Paper from the Commisson, Completing the Internal Market, COM (85) 310 final
White Paper on Access to Justice in Consumer Affairs, COM (93) 576
Green Paper on Commercial Communication in the Internal Market, COM (96) 192 final
Follow-up to the Green paper on Commercial Communications in the Internal Market. Communication from the Commission, COM (98) 121 final
Communication from the Commission, Proposal for a European Parliament and Council Regulation Concerning Sales Promotions in the Internal Market, COM (2001) 546 final
Green Paper on European Union Consumer Protection, COM (2001) 531 final
White Paper from the Commission on European Governance COM (2001) 428 final
Follow-up Communication to the Green Paper on EU Consumer Protection, COM (2002) 289 final
Amended proposal for a Regulation Concerning Sales Promotions in the Internal Market, COM (2002) 585 final
Ex-ante Impact Assessment of the options outlined in the Green Paper on EU Consumer Protection, GFA Management, 29.11.2002, retrievable at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/gfa_report_en.pdf
Proposal for a Directive Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM (2003) 356 final
Proposal for a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws "the regulation on consumer protection cooperation"), COM (2003) 443 final
Commission Communication concerning Article 4(3) of Directive 98/27/EC on injunctions for the protection of consumers' interests, concerning entities qualified to bring an action under Article 2 of this Directive, OJ 2003 C 159/2

GERMANY
BT-Drs. IV/2217 Entwuf eines Gesetzes zur Änderung des Gesetze gegen den unlauteren Wettbewerb, des Warenzeichengesetzes und des Gebrauchmustergesetzes
BT-Drs. IV/2236, Entwurf eines Gesetzes zur Errichtung eines Warentestinstituts
BT-Drs. IV/2724 Erster Bericht der Bundesregierung zur Verbraucherpolitik
BT-Drs. V/4035 Bericht des Rechtsausschusses, 2
BT-Drs. 7/2049 Entwurf eines neuntes Gesetzes zur Änderung des UWG

BT-Drs. 7/4181 Zweiter Bericht der Bundesregiernung zur Verbraucherpolitik
BT-Drs. 8/1670 Entwurf des CDU/CSU Bundestagsfraktion
BT-Ds 8/2145 Regierungsentwurf eines Gesetzes zur Änderung des UWG
BT-Drs. 10/4741 Gesetzesentwurf der Fraktion der CDU/CSU und FDP zur Änderung des UWG
BT-Drs. 12/5620 Bericht der Bundesregierung zur Zukunftssicherung des Standorts Deutschland
BT-Drs. 12/6722 Entwurf eines Gesetzes zur Aufhebung des Rabattgesetzes
BT-Drs. 12/6723 Entwurf eines Gesetzes zur Aufhebung der Zugabe-verordnung
BT-Drs. 12/7345 Gesetzentwurf der Fraktion der CDU/CSU und FDP zur Änderung des UWG
BT-Drs. 12/7911 Beschlussempfehlung und Bericht des Rechtssausschusses,
BT-Drs. 12/8089 Beschlussempfehlung des Rechtsausschusses Entwurf eines Gesetzes zur Änderung des UWG
BT-Drs. 14/2658 Regierungsentwurf über Fernabsatzverträge und andere Fragen des Verbraucherrechts sowie zur Umstellung von Vorschriften auf Euro
BT-Drs. 14/2959 Gesetzesentwurf der Bundesregierung zur vergleichende Werbung und zur Änderng wettbewerbsrechtlicher Vorschriften
BT-Drs. 14/5441, Entwurf eines Gesetzes zur Aufhebung des Rabattgesetzes und zur Anpassung anderer Rechtsvorschirften
BT-Drs. 14/5594 Regierungsentwurf eines Gesetzes zur Aufhebung der Zugabeverordnung und zur Anpassung anderer Rechtsvorschirften
BT-Drs.14/6040 Entwurf eines Gesetzes zur Modernisierung des Schuldrechts
BT-Drs. 14/6098 Entwurf eines Gesetzes über rechtliche Rahmenbedingungen für elektronischen Geschäftsverkehr (Elektornischer GeschäftsverkehrGesetz – EGG)
BT-Drs. 14/7345 Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Technologie
BR-Drs. 301/03 Regierungsentwurf zur Änderung des UWG
BR-Drs. 323/03, Bericht der Bundesregierung – Aktionsplan Verbraucherschutz
BR-Drs. 459/91
BR-Drs. 602/94

SWEDEN
Prop. 1970:57 Marknadsföringslag
Prop. 1972:33 Riktlinjer och organisation av samhällets konsumentpolitik
Prop. 1975/76:34 Proposition med förslag till marknadsföringslag
Prop. 1975/76:159 Proposition med förslag till organisation av och anslag för det nya konsumentverket
Prop. 1976/77:123 Proposition med förslag till konsumentkreditlag mm.
Prop. 1985/86: Inriktningen av konsumentpolitiken
Prop. 1990/91:98 Om bostadsdomstolens och hyresnämndernas sammansättning i vissa fall, m.m
Prop. 1994/95:16 Den framtida konsumentpolitiken
Prop. 1994/95:123 Ny marknadsföringslag
Prop. 1994/95:140 Aktiv konsumentpolitik
Prop. 1998/99:134 Vissa alkoholfrågor m.m.
Prop. 1999/2000:40 Obeställd reklam m.m.
Prop. 2000/2001:34 Talerätt för vissa utländska konsumentmyndigheter och konsumentorganisationer

Prop. 2000/01:135 Handlingsplan för konsumentpolitiken
Prop. 2001/02:150 Lag om elektronisk handel och andra informationssamhällets tjänster, m.m.
Prop. 2002/03:87 Vissa alkohol- och tobaksfrågor

Ds 1982:11 Större klarhet i fråga om olika reglers rättsliga karaktär och syfte
Ds 1993:34 Specialdomstolarna i framtiden
Ds 1999:35 Ändringar i Marknadsföringslagen (1994:450)
Ds 2001:13 E-handelsdirektivet

Förslag till lag mot illojal konkurrens, Patentlagstiftningskommitténs betänkanden, band IV, Stockholm 1915 (Betänkande)
SOU 1966:48 Prissamverkan och konkurrens
SOU 1966:71 Otillbörlig konkurrens
SOU 1968:58 Konsumentupplysning
SOU 1971:37 Konsumentpolitik, riktlinjer och organisation
SOU 1972:7 Reklam II, beskrivning och analys
SOU 1973:20 Varudeklaration, ett medel i konsumentpolitiken
SOU 1974:23 Reklam V, Information i reklamen
SOU 1976:63 Reklamen för alkohol och tobak
SOU 1979:5 Konsumentinflytande genom insyn?
SOU 1983:40 Konsumentpolitiska styrmedel
SOU 1985:40 Regeringen, myndigheterna och myndigheternas ledning, Huvudbetänkande från Verkledningskommittén.
SOU 1991:59 I Konkurrens för ökad välfärd
SOU 1992:49 EES-anpassning av marknadsföringslagstiftningen, Delbetänkande av Marknadsföringsutredningen, Stockholm 1992
SOU 1993:59 Ny marknadsföringslag
SOU 1994:14 Konsumentpolitik i en ny tid
SOU 1998:8 Alkoholreklam
SOU 1999:121 Avkorporativisering och lobbyism – konturerna till en ny politisk model
SOU 2000:29 Starka konsumenter i en gränslös värld

KO Rapport 2000:21 Spärregister för e-postreklam
Kombinationserbjudanden (KOV, 1984)

TABLE OF CASES

ECJ

Case C-26/62 *Van Gend and Loos* [1963] ECR 1
Case C-6/64 *Costa v. Enel* [1964] ECR 585
Case C-155/73 *Sacchi* [1974] ECR 409
Case C-8/74 *Dassonville* [1974] ECR 837
Case C-12/74 *Commission v. Germany (Sekt/Weinbrand)* [1975] ECR 181
Case C-33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging* [1974] ECR 1299
Case C- 21/76 *Handelskwekerij Bier BV v. Mines de Potasse d'Alsace* [1976] ECR 1735
Case C-106/77 *Simmenthal* [1978] ECR 640
Case C-120/78 *REWE v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649
Case C-152/78 *Commission v France* [1980] ECR 2299
Case C-52/79 *Procureur du Roi v. Debauve* [1980] ECR 33
Case C-130/79 *Express Dairy Foods* [1980] ECR 1887
Case C-58/80 *Dansk Supermarked* [1981] ECR 1811
Case C-113/80 *Commission v. Ireland (Irish Souvenirs Case)* [1981] ECR 1625
Case C-155/80 *Oebel* [1981] ECR 1993
Case C-6/81 *Beele* [1982] ECR 707
Case C-261/81 *Walther Rau* [1982] ECR 3961
Case C-268/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575
Case C-16/83 *Criminal Proceedings against Karl Prantl* [1984] ECR 1299
Case C-14/83 *Von Colson and Kamann v. Land Northrein-Westfalen* [1984] ECR 1891
Case C-177/83 *Kohl v Ringelhan & Rennett (r+r)* [1984] ECR 3651
Case C-178/84 *Commission v. Germany (beer purity)* [1987] ECR 1227
Case C-222/84 *Johnston* [1986] ECR 1651
Case C-179/85 *Commission v. Germany ('pétillant de raisin')* [1986] ECR 3879.
Case C-352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2085
Case C_382/87 *Buet v. Ministère Public* [1989] ECR 1233
Case C-68/88 *Commission v. Greece* [1989] ECR 2965
Case C-145/88 *Torfaen Borogh Council v. B&Q* [1989] ECR 3851
Case C-329/88 *Commission v Hellenic Republic* [1989] ECR 4159
Case C-360/88 *Commission v Kingdom of Belgium* [1989] ECR 3803
Case C-362/88 *GB-INNO-BM v Confederation du commerce luxembourgeois ASBL* [1990] ECR I-667
Case C-106/89 *Marleasing* [1990] ECR I- 4135
Case C-189/89 *Gourmetterie Van den Burg* [1990] ECR I-2143
Case C-241/89 *SARPP* [1990] ECR I-4695
Case C-283/89 *Pall* [1990] ECR I-4827
Case C-159/90 *SPUC v. Grogan* [1991] ECR I-4675
Case C-373/90 *Criminal Proceedings against X (Nissan)* [1992] ECR 131
Case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher* [1993] ECR I-2361
Case C-141/91 *Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487

Case C-169/91 *Stoke-on-Trent* [1992] ECR I-2361
Joined Cases C-267 & C-268/91 *Keck and Mithouard* [1993] ECR I-6097
Case C-91/92 *Faccini Dori* [1994] ECR I-3325
Case C-275/92 *Schindler & Schindler* [1994] ECR I-1039
Case C-292/92 *Hünermund* [1993] ECR I-6787
Case C-315/92 *Verband Sozialer Wettbewerb v. Clinique Laboratories and Estee Lauder* [1994] ECR I-317
Case C-23/93 *TV 10 v. Commissariaat voor de Media* [1994] ECR I-4795
Case C-192/93 *El Corte Ingles* [1996] ECR I-1281
Case C-68/93 *Sheville v. Presse Alliance S.A.* [1995] ECR I-415
Case C-384/93 *Alpine Investments* [1995] ECR I-1141
Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179
Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH* [1995] I-1923
Case C-51/94 *Commission v. Germany (pétillant de raisin)* [1995] ECR I-3599
Case C-222/94 *Commission v. United Kingdom* [1996] ECR I-4025
Joined Cases C-34/95 *Konsumentombudsmannen v De Agostini,* and *C*-35 & C-36 *TV Shop* [1997] ECR I-3843
Case C-189/95 *Franzén* [1997] ECR I-5909
Case C- 368/95 *Vereinigte Familiapress v. Heinrich Bauer Verlag* [1997] ECR I-3689
Case C-39/96 *Aher-Waggon* [1998] ECR I-4473
Case C-45/96 *Bayerische Hypotheken- und Wechselbank AG v Edgard Dietzinger* [1998] ECR I-01199
Case C-210/96 *Gut Springheide* [1999] ECR I-4657
Case C-220/98 *Estee Lauder Cosmetics GmbH v. Lancaster Group GmbH ('lifting')* [2000] ECR I-117
Case C-376/98 *Germany v. European Parliament and Council (tobacco advertising)* [2000] ECR I-8419
Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products (GIP)* [2001] ECR I-1795
Case C-465/98 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v. Adolf Darbo AG* [2000] ECR I-2297
Case C-112/99 Toshiba [2001] ECR I-7945
Case C-167/00 *Verein für Konsumentinformation v. Henkel* [2000] ECR I-8111
Case C-44/01 *Pippig Augenoptik GmbH & Co KG v. Hartlauer Handelsgesellschaft mbH,* judgment of the Court of 8 April 2003, nyr

Joined Cases E-8/94 and E-9/94 *Forbrukerombudet vs. 1. Mattel Scandinavia A/S and 2. Lego Norge A/S,* OJ C 239, 14/09/1995, 6

GERMANY

Bundesverfassungsgericht (Federal Constitutional Court)
BVerfG WRP 2001, 1160 („Therapäutische Equivalenz")
BVerfG WRP 2001, 1162
BVerfGE 102, 347 („Benetton-Werbung")

Reichsgericht (Imperial Court)

RG GRUR 1927, 486, 488
RG GRUR 1930, 1204
RG GRUR 1931, 1299 („Hellegold")
RG GRUR 1936, 810 („Diamantine")
RG GRUR 1938, 207 („Persil")
RG GRUR 1938, 849 („Eierbrikett")
RG GRUR 1939, 862 („Lockenwickler")

RGZ 28, 238 („Börsenverein der deutschen Buchhändler")
RGZ 38, 155
RGZ 48, 114
RGZ 56, 271 („Verein deutschen Buchhändler")
RGZ 77, 217
RGZ 79, 326
RGZ 88, 9
RGZ 105, 375
RGZ 115, 319
RGZ 117, 16
RGZ 120, 47 („Markenschutzverband")
RGZ 128, 339
RGZ 166, 315

Bundesgerichtshof (Federal Supreme Court)
BGH GRUR 1955, 541 („Bestattungswerbung")
BGH GRUR 1956, 223 („Anzeigenblatt")
BGH GRUR 1956, 279 („Olivin")
BGH GRUR 1957, 23 („Bündener Glas")
BGH GRUR 1957, 353 („Pertussin II")
BGH GRUR 1957, 365 („SUWA")
BGH GRUR 1957, 606 („Heilmittelvertrieb")
BGH GRUR 1958, 32 („Haferschleim")
BGH GRUR 1958, 557 („Direktverkaüfe")
BGH GRUR 1959, 31 („Feuerzeug als Werbeschenk")
BGH GRUR 1959, 143 („Blindenseife")
BGH GRUR 1959, 277 („Künstlerpostkarten")
BGH GRUR 1960, 379 („Zentrale")
BGH GRUR 1962, 45 („Betonzusatzmittel")
BGH GRUR 1962, 310 („Gründerbildnis")
BGH GRUR 1963, 270 („Bärenfang")
BGH GRUR 1964, 567 („Lavamat")
BGH GRUR 1965, 315 („Werbewagen")
BGH GRUR 1965, 489 („Kleenex")
BGH GRUR 1966, 45 („Markenbenzin")
BGH GRUR 1966, 267 („White Horse")
BGH GRUR 1967, 202 („Gratisverlosung")
BGH GRUR 1967, 596 („Kuppelmuffenverbindung")
BGH GRUR 1968, 106 („Ratiomarkt")
BGH GRUR 1968, 443 („40% können Sie sparen")

BGH GRUR 1969, 295 („Goldener Oktober")
BGH GRUR 1970, 189 („Fotowettbewerb")
BGH GRUR 1970, 422 („Tauchkühler")
BGH GRUR 1971, 162 („Diagnose-Center")
BGH GRUR 1971, 313 („Bockbeutelsflasche")
BGH GRUR 1971, 322 („Lichdi-Center")
BGH BB 1971, 1297 („Spezialklinik")
BGH GRUR 1972, 40 („Feld und Wald")
BGH GRUR 1972, 364 („Mehrwertfahrten")
BGH GRUR 1972, 603 („Kundeneinzelbeförderung")
BGH GRUR 1973, 78 („Verbraucherverband")
BGH GRUR 1974, 156 („Geld-Gewinnspiel")
BGH GRUR 1974, 666 („Reparaturversicherung")
BGH WRP 1974, 264 („Intermarkt")
BGH GRUR 1976, 308 („UNICEF-Grüsskarten")
BGH GRUR 1976, 637 („Rustikale Brettchen")
BGH GRUR 1977, 110 („Kochbuch")
BGH WRP 1979, 300 („Verkauf unter Einstandspreis")
BGH GRUR 1981, 746 („Ein-Groschen-Werbeaktion")
BGH GRUR 1983, 374 („Spendenbitte")
BGH WRP 1984, 399 („Werbung in Schulen")
BGH GRUR 1986, 618 („Vorsatz-Fensterflügel")
BGH GRUR 1986, 472 („Bioäquivalenz-Werbung")
BGH GRUR 1987, 49 („Cola-Test")
BGH GRUR 1987, 534 („McHappy-Tag")
BGH GRUR 1989, 688 („Generikumpreisvergleich")
BGH GRUR 1989, 753 („Telefonwerbung II")
BGH GRUR 1991, 542 ("Biowerbung mit Fahrpreiserstattung")
BGH GRUR 1992, 61 („Preisvergleichsliste")
BGH GRUR 1993, 679 („PS-Werbung I")
BGH GRUR Int. 1994, 245 („Yves Rocher")
BGH GRUR 1994, 220 („PS Werbung II")
BGH GRUR 1996, 983 („Preisvergleich")
BGH GRUR 1997, 537 („Lifting")
BGH GRUR Int. 1998, 891 („Testpreis-Angebot")
BGH GRUR Int. 1999, 69 („Preisvergleichsliste II")
BGH GRUR 1999, 75 („Güllepumpen")
BGH GRUR Int. 1999, 453 („Vergleichen Sie")
BGH GRUR 1999, 1122 („EG-Neuwagen I")
BGH GRUR 1999, 1125 („Neu-Wagen II")
BGH GRUR 2000, 619 („Orient-Teppichmuster")

Appeal Courts
OLG Köln, *GRUR* 1969, 484 („Verbraucherverband I")
OLG Frankfurt, *GRUR* 1974, 228 („Verbraucherschtzverband III")
OLG Düsseldorf WRP 1990, 177 ff., at 179 („Preisvergleich Ginkgo biloba")

Sweden

Högsta Domstolen (The Swedish Supreme Court)
NJA 1906, 509
NJA 1935, 593
NJA 1935, 686
NJA 1937, 154
NJA 1938, 193
NJA 1940, 145 ("Centrum radio")
NJA 1941, 580 ("Svensk uppslagsbok")
NJA 1948, 642 ("Bönan lyx")
NJA 1950, 365
NJA 1956, 664 ("A-bilskola")
NJA 1954, 113
NJA 1957, 188
NJA 1975, 589 ("Helg-Extra")
NJA 1977, 751 ("Vivo-Favör")
NJA 1975, 461 ("Scientologikyrkan i Sverige")
NJA 1991, 580

Marknadsdomstolen (Market Court)
MD 1972:9 ("Astra Home Products")
MD 1972:13 ("Williams förlag")
MD 1973:18 ("Reader's Digest")
MD 1973:25 ("Positiv Fritid")
MD 1973:26 ("NK")
MD 1973:32 ("Monark Crescent")
MD 1974:15 ("De Handikappades Riksförbund")
MD 1974:16 ("Linnéa")
MD 1974:23 ("Helg-Extra")
MD 1975:20 ("Philips")
MD 1976:6 ("Scientologikyrkan i Sverige")
MD 1976:20 ("Radiohjälpen")
MD 1977:1 ("Vivo-Favör")
MD 1977:8 ("Expressen")
MD 1977:13 ("BP")
MD 1977:22 ("Alcro")
MD 1979:24 ("DonGeorge AB")
MD 1980:4 ("Philip Morris")
MD 1980:5 ("Goodyear-I")
MD 1980:18 ("Tegnér")
MD 1980:19 ("Verdexa")
MD 1980:23 ("Philip Morris")
MD 1980:24 ("Jönssons Livsmedel")
MD 1981:4 ("Electrolux")
MD 1981:9 ("Svebe-Fasad")
MD 1981:20 ("SAAB")
MD 1981:21 ("Ford Company")
MD 1981:22 ("Svenska Renault AB")

MD 1982:11 (“Bästa bankboken”)
MD 1982:14 (“Lasses Färg”)
MD 1983:5 (”Comvik”)
MD 1983:6 (”Nordvästra Skånes tidningar”)
MD 1983:16 (“Skadinavisk Press”)
MD 1984:22 (”Goodyear II”)
MD 1985:24 (”AG Favör”)
MD 1985:234 (“Marabou”)
MD 1986:3 (”Pripps I”)
MD 1988:2 (“Önskebutikerna”)
MD 1988:9 (”Magnetic therapy”)
MD 1988:16 (”Brio”)
MD 1988:26 (”Sou Tsian-tee”)
MD 1989:12 (“Statoil”)
MD 1989:6 (“Scanorama”)
MD 1989 :11 (“Pripps II”)
MD 1990:4 (“SL”)
MD 1990:20 (“Hydro”)
MD 1990:26 (“Hedberg Guld”)
MD 1991:11 (“Opel Omega”)
MD 1999:15 (”Svenska Defence”)
MD 1991:15 (”Chromager”)
MD 1991:16 (“Reynolds”)
MD 1991:22 (”Ipren”)
MD 1992:6 (Laser center”)
MD 1992:23 (“Lever”)
MD 1992:30 (“Odinsplatsens Guld och Optik”)
MD 1992:31 (“Sveriges Optikerföretags Riksorganisation”)
MD 1994:5 (“Länstidningen”)
MD 1994:8 (“Screen Guard”)
MD1994:10 (“Ariel”)
MD 1994:17 (”Procter & Gamble”)
MD 1994:28 (”Sevedrin”)
MD 1998:7 (”Fritidsresor”)
MD 1999:6 (“Gourmet”I)
MD 2000:4 (”De Agostini”).
MD 2000:25 (“Hästens I”).
MD 2001:5 (”Buena vista”)
MD 2001:8 (”Pokémon”)
MD 2001:16 (”Hästens II”)
MD 2002:20 (“Champagne”)
MD 2002 :31 (“Hemglass”)
MD 2003:5 (“Gourmet II”)
MD 2003 :6 (“Kopparbergs Bryggeri”)
MD 2003:16 (“L O Smith”)

KOVFS 1977:1 (temporary price formations)
KOVFS 1977:2 (fuel consumption of cars)

KOVFS 1977:3 (skateboards)
KOVFS 1977:4 (dipers marketing)
KOVFS 1977:6 (potatoes marketing)
KOVFS 1977:7 (riding and skiing helmets)
KOVFS 1978:3 (automatic fire-detectors)
KOVFS 1979:11 (fuel consumption)
KOVFS 1979:5-6 and 1986:2 (alcohol and tobacco)

Others

God affärssed och illojal konkurrens, Uttalanden av Stockholms Handelskammares Opinionsnämnd 1935-38 samt Näringslivets Opinionsnämnd i Stockholm 1939-1951 (Stockholm: AB Nordiska Bokhandeln, 1953), *God affärssed.*
Otillbörlig konkurrens och god affärssed. Yttranden avgivna av näringslivets opinionsnämnd under åren 1957-58; 1959; 1960 (Stockholm: Norstedt & söner, 1963), *Otillbörlig konkurrens*, year.