Introduction

In December 2005, the European Commission published a Green Paper on Damages Actions for Breach of the EC Competition Rules. This document has provoked a discussion on the role of private actions which goes far beyond competition law. Many take the view that Europe should avoid the traps into which US law has stepped by admitting excessive litigation due to a system of class actions, punitive damages, pre-trial discovery and contingency fees. European law should not pave the way for judicial proceedings which ultimately do not serve the interests of the injured parties but rather those of their lawyers, consultants or other agents. According to the methodology of the Common Core of European Private Law project, this inquiry gives a description of the state of remedies in competition law in fifteen European countries and analyses the underlying determinants. On this basis, proposals are developed showing how the enforcement of competition law could be improved. The flaws can be fixed without running the risk of abusive litigation. To this end, it has been instructive to include two fields of law which are normally treated separately, i.e. unfair competition law and antitrust law. Although the two branches share common goals, their enforcement has taken completely different paths. Whereas in many reporting countries unfair competition law is endowed with effective private law (and in some countries also with public law) remedies, the implementation of antitrust law is in practice almost completely entrusted to administrative enforcement. This is not so much a question of legislative principles – all reporting countries provide for private remedies for violations of antitrust law – but of certain legal and factual obstacles and of a lack of incentives.

The present inquiry aims at analysing the enforcement components and the different weight given to them in both fields of law. The legal

framework on the international and European level is presented, as is the approach of US–American law. The cases are structured in groups concerning on the one hand the sanctions available and on the other hand the potential plaintiffs and defendants. Eight cases concern unfair competition law, seven are on antitrust law. All cases are solved according to the fifteen legal systems involved. After a comparative analysis, shortcomings and strengths are analysed. Reform proposals are based upon this result. It will be shown that efforts to strengthen private enforcement of antitrust law should benefit from the rich European experience in unfair competition law. The divergence between the two fields of law is not so huge that a completely different treatment is justified. Thus, a specifically European way of competition law enforcement could be developed.

PART I. REMEDIES IN UNFAIR COMPETITION AND CONSUMER PROTECTION LAW

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A. Setting the basics – the legal framework

I. Approach of this comparative study

1. *The status quo of legal harmonization in unfair competition law*

a) Lack of a 'European unfair competition law'

European integration is making progress; the European Constitution Treaty has been passed[1] and scholars are discussing a European Civil Code.[2] In the field of unfair competition law only few directives exist and one is tempted to use F. Rittner's words which he once used to describe the law of contract: European directives create only 'islands' of harmonized law[3] within each national law that exist without any connection between them.[4] Accordingly the law of unfair competition is still based on many origins and very often overlaps with the law of consumer protection, contract and intellectual property.

Nowadays all modern legal systems offer protection against unfair competition, i.e. against 'any act of competition contrary to honest

[1] Draft Treaty Establishing a Constitution for Europe, adopted by consensus by the European Convention on July 18, 2003, OJ C 169, 1. The negative referenda in France and the Netherlands led to immediate frustration again. In the following the terms of the TCE are cited in parenthesis.

[2] European Parliament of June 26, 1989, OJ C 158, 400, (1992) 56 RabelsZ 320, (1993) 3 ZEuP 613 et seq. as well as European Parliament of May 6, 1994, OJ C 205, 518, (1995) 3 ZEuP 669, (1994) 3 EuZW 612; Commission of July 11, 2001, COM (2001), 398 final, cf. europe.eu.int/comm/off/green/index_de.htm; cf. H. Schulte-Nölke, (2001) 56 JZ 917 et seq.; T. Möllers, *European Directives on Civil Law – Shaping a new German Civil Code*, (2003) 18 Tulane European & Civil Law Forum 1, (2002) 57 JZ 121; W. Wurmnest, *Ansätze zur Privatrechtsvereinheitlichung* (2003) 11 ZEuP 714 et seq. See Action Plan of the European Communities COM (2003), 68 final.

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

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

practices in industrial or commercial matters',[5] in short against 'dirty tricks'.[6] Because of the differing traditions in the Member States the enforcement of infringements of unfair competition law has only been harmonized marginally. In the different European directives courts and administrative agencies are equally named as competent for enforcement. Moreover, an additional self-control is allowed.[7] This form of harmonization leaves everything as it was before. The sanctions are numerous and as disparate as the provisions dealing with material aspects.[8]

b) Shortcomings in the enforcement against unfair advertisement

In everyday life it is common to be without protection against unfair measures: deceptive prize draws, direct marketing of bogus slimming agents, deceptive advertisements for summer resorts are only some examples. Sweepstakes that convey that the addressee has already won and only has to invest a small handling fee, wholehearted advertisement for panaceas that promise to reduce the gasoline consumption by 40 per cent or make your hair grow again are examples taken from everyday life.[9] Lately the opinion arguing that the system of remedies instituted in art. 4–6 Misleading and Comparative Advertising Directive 84/450/EEC is 'insufficient' is becoming stronger. Because of the different bodies that are competent to deal with infringements, legal scholars raised the reproach that in some Member States no sufficient legal protection is offered. This has been explicitly stated for English law because the Office of Fair Trading hardly ever brings proceeding against infringements.[10]

An example: in Germany over the last few years consumers have been flooded by unwanted fax machine messages; cold-calling is widespread

[5] For art. 10bis Paris Convention see below A.II.1(a).
[6] Z. Chaffee, *Unfair Competition* (1940) 53 Harv. L. Rev. 1289; see below for the attempts to develop a definition, A.I notes 74 et seq.
[7] See for the status quo of the European law of unfair competition A.III.
[8] A. Beater, *Unlauterer Wettbewerb* (2002), § 8 note 104.
[9] Green Paper on EU Consumer Protection of October 2, 2001, COM (2001), 531 final at 2.1; J. Glöckner, in H. Harte-Bavendamm and F. Henning-Bodewig, *UWG* (2004), Einl B note 203.
[10] G. Schricker and F. Hennig-Bodewig, *Elemente einer Harmonisierung des Rechts des unlauteren Wettbewerbs in der Europäischen Union*, comparative law research on behalf of the Ministry of Justice, July 2001 (2001) 47 WRP 1367 (1375). Unfortunately, the authors do not follow up this thesis.

and the abuse of 190-numbers is common. Even the federal government conceded when it amended the German Unfair Competition Act in 2004 that there are some minor infringements that will not be penalized.[11] German consumers' associations ascertain that they are able to record up to 80 per cent of the relevant cases;[12] this figure is likely to be too positive. This strongly opposes the widely held view that in Germany infringements of unfair competition law will always be stopped by competitors or by associations. That view is, at least in cases of nuisance or misleading advertising, not completely true.

The principle that 'An infringement of unfair competition law reaps rewards'[13] proves true. All legal harmonization remains *l'art pour l'art* if it remains 'law in the books'[14] and only pretends to harmonize this area of law. Actions for an injunction are directed towards the future.[15] This indicates that it will be worthwhile to examine whether further remedies should be introduced that sanction the first infringement. One will also have to discuss whether it is reasonable to institute an exclusive means of legal recourse, either through a public agency or the courts.

c) Creation of an internal market

This study examines the law of unfair competition in Europe (with some remarks concerning the law of the USA). To an extent it intends to pay heed to the demands of a European theory of legislation. The European Union is aiming towards the abolition of borders, an internal market as it is defined in art. 14 para. 2 EU (art. I-3 para. 2 TCE). For the purpose of harmonization it has developed different measures: either the approximation of law or mutual recognition. The principle of subsidiarity in art. 5 para. 1 EU (art. I-9 para. 3 TCE) burdens the EU with the proof that the measure is necessary for the completion of the internal market. Legal harmonization is thus no aim in itself. If the

[11] See below B.II.4(c) and Begr. RegE, UWG, BT-Drs. 15/1487, for § 10 p. 23.
[12] Statement of the Federal Association of Consumers' Assoctions (Verbraucherzentrale Bundesverband e.V.) before the Committee on Legal Affairs of February 19, 2004; See www.thomas-moellers.de/materialien.
[13] See G. Schricker (1979) 81 GRUR 1; R. Sack, *Der Gewinnabschöpfungsanspruch von Verbänden in der geplanten UWG-Novelle* (2003) 49 WRP 549, 554.
[14] R. Pound, *Law in Books and Law in Action* (1910) 44 American L. Rev. 12. The Commission also emphasizes that clear and reliable provisions have to be enforced effectively, Green Paper on EU Consumer Protection, COM (2001), 531 final at 5.
[15] Begr. RegE, UWG, BT-Drs. 15/1487, § 10 p. 23.

measure is not necessary for the completion of the internal market the competition between the different legal systems of the Member States is preferable.[16]

The euro as a common currency has deepened the internal market since it creates price transparency. The advent of e-commerce has facilitated cross-border trade. Different legal systems and different enforcement of provisions could result in the consumer abstaining from cross-border transactions since he is unable to enforce infringements of his rights.[17]

In a market economy, advertisement is of greatest importance for a company to survive competition or to enter into competition with other companies. As the ECJ has stated, advertisement fulfils an essential function in the 'opening of markets'.[18] Failing to implement European unfair competition provisions restricts competition as it has the same effect as state aid. It gives the Member State's companies an advantage over foreign companies that have to obey the implemented rules. If companies are forced to develop different marketing concepts because of varying legal requirements this results in additional costs.[19] Ultimately, differences in the legal requirements can even bar companies from entering a market altogether.[20] Consequently, small and medium-sized companies are still excluded from cross-border trading.[21]

[16] A. Ogus, *Competition Between National Legal Systems. A Contribution of Economic Analysis to Comparative Law* (1999) 48 ICLQ 405; P. Glenn, *Comparative Law & Legal Practice. On Removing the Borders* (2001) 75 Tulane L.Rev. 977; P. Neuhaus and J. Kropholler, *Rechtsvereinheitlichung – Rechtsverbesserung* (1981) 45 RabelsZ 73; H. Kötz, *Rechtsvereinheitlichung – Nutzen, Kosten, Methoden, Ziele* (1986) 50 RabelsZ 1; E.M. Kieninger, *Wettbewerb der Privatrecthsordnungen im Europäischen Binnenmarkt* (2002).

[17] Studies show that consumers are less confident when entering into cross-border transactions, see follow-up Communication to the Green paper on Consumer Protection, COM (2002), 289 final 25; Regulation (EC) No. 2006/2004, OJ L 364, 1, 2nd reason for consideration.

[18] ECJ C-34/95, C-35/95 and C-36/95, (1997) ECR I-3843 note 43, (1997) 45 GRUR Int. 912 (917) – 'De Agostini and TV-Shop'; ECJ C-405/98, (2001) ECR I-1795 note 21, (2001) 49 GRUR Int. 553 – 'Gourmet'. See also A. Wiebe, *Die 'guten Sitten'im Wettbewerb – eine europäische Regelungsaufgabe*? (2002) 48 WRP 283 (284).

[19] See e.g. ECJ C-30/89, (1990) ECR I-691 – 'GB-INNO-BM'; ECJ C-315/92, (1994) ECR I-317, (1994) 76 GRUR 303 – 'Clinique'; ECJ C-470/93, (1995) ECR I-1923, (1995) 41 WRP 677 – 'Mars'.

[20] A. Wiebe, (2002) 48 WRP 283 (284).

[21] Green Paper on EU Consumer Protection, COM (2001), 531 final at 3.1; Regulation (EC) No. 2006/2004,OJ L 364, 1, 2nd rationale.

d) Reactions to these shortcomings

The European Union has offered three new acts to harmonize the law of unfair competition.[22] Surprisingly, these new acts did not attempt to harmonize the sanctions against infringements.[23] The Directive 2005/29/EC concerning Unfair Commercial Practices does not introduce any previously unknown remedies.[24] Only the Regulation on Consumer Protection Cooperation No. 2006/2004 is more courageous in demanding an agency that is competent to sanction cross-border infringements.[25]

In recent years many member states have developed their law of unfair competition; very often blanket clauses have been introduced. And there are good reasons why Member States such as the United Kingdom,[26] Germany[27] or Portugal have amended and modernised their law of unfair competition. The German legislature amending its UWG in 2004 to make it 'fit for Europe' has also refrained from harmonizing its sanctions.[28] It even claims its legislation to be a 'model for a future European law of unfair competition'.[29] If confidence in this claim can be sustained, one will have to examine it by comparing the different legal systems.

In the last few years a couple of studies have been devoted to a comparison of the substantive provisions in the law of unfair competition.[30] The legal consequences are either excluded[31] or dealt with

[22] See Directive Proposal Concerning Unfair Commercial Practices, COM (2003), 356 final and Regulation Proposal concerning Sales Promotions, COM (2001), 546 final; amended in COM (2002), 585 final; see below A.III.2(c), 3(d) and (e).

[23] For the European law see below A.III.

[24] Directive 2005/29/EC of the European Parliament and of the Council concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and amending Directives 84/450EEC, 97/7/EC and 98/27/EC, of May 11, 2005, OJ L 149, 22.

[25] Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of October 27, 2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws (Regulation on Consumer Protection Cooperation), OJ L 364, 1; see A.III.3(g).

[26] Enterprise Act 2002 and below A.II.2(o).

[27] Amendment of the UWG in 2004 and below A.II.2(e).

[28] This is especially emphasized by H. Köhler, J. Bornkamm and F. Henning-Bodewig, *Vorschlag für eine Richtlinie zum Lauterkeitsrecht und eine UWG-Reform* (2002) 48 WRP 1317; K.H. Fezer, (2001) 47 WRP 989 and below A.III.

[29] See E. Keller, in H. Harte-Bavenkamm and F. Henning-Bodewig, *UWG* (2004), Einl. A note 11; cf. http://www.bmj.bund.de/enid/fad884c433728e8a7d340bfd7b6efd49,0/al.html.

[30] Deserving special mentioning for its unique scope are the country reports by G. Schricker (ed.), *Recht der Werbung in Europa*, vol. 2 (supplement 1995). But some parts of the book are already ten years old and some important Member States like Spain or Portugal are still missing.

[31] Remedies are completely left out by H.-W. Micklitz and and J. Keßler (eds.), *Marketing Practices Regulation and Consumer Protection in the EC Member States and the US* (2002); very

summarily.[32] In scholarly writing, proposals for the legal consequences are rare or rather short. Thus one can find the demand to introduce on the European level an action for the confiscation of unlawful gains,[33] the right to sue for consumers or associations,[34] a harmonization taking the TRIPS-Treaty as a role model[35] or in general to 'clearly define the borderline of unlawful and lawful behaviour where administrative and penal sanctions are conceivable'.[36]

e) Methodical requirements of comparative law and the European harmonization of law

The Common Core Project

This study would like to examine the different remedies in European unfair competition law on a comparative law basis and deliver answers to the above-mentioned questions. Its ultimate aim is thus to remedy the above-mentioned shortcomings.

The starting point is the law of the individual Member States. Before any proposals are made the state of the law in fifteen different states is examined. Originally, comparative law aimed at introduction of a universal law.[37] The same underlying idea can be found if one examines which provisions of another state can be introduced in one's own state.[38] The Common Core Project follows the approach of Schlesinger

short even in its most current parts F. Henning-Bodewig, in H. Harte-Bavendamm and F. Henning-Bodewig, *UWG* (2004), Einl. E.

[32] Only a short summary is offered by R. Schulze and H. Schulte-Nölke, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Precontractual Commercial Practices and the Handling of Consumer Complaints by Businesses* (2003); J. Maxeiner and P. Schotthöfer (eds.), *Advertising Law in Europe and North America* (2nd edn 1999).

[33] H. Köhler and T. Lettl, *Das geltende europäische Lauterkeitsrecht, der Vorschlag für eine EG-Richtlinie über unlautere Geschäftspraktiken und die UWG-Reform*, (2002) 48 WRP 1019 (1047).

[34] See art. 7 of the draft of H.-W. Micklitz and J. Keßler (2002) 50 GRUR Int. 885 (901).

[35] G. Schricker and F. Hennig-Bodewig, (2001) 47 WRP 1367 (1375), and H. Köhler and T. Lettl (2002) 48 WPR 1019 (1047).

[36] F. Bultmann, G. Howells, J. Keßler, H.-W. Micklitz, M. Radeideh, N. Reich, J. Stucek and D. Voigt, *The Feasibility of a General Legislative Framework on Fair Traiding, Proposal for a General Legislative Framework on Fair Trading* (2000), p. 68; H.-W. Micklitz and J. Keßler (2002) 50 GRUR Int. 885 (896 et seq.) demand European mechanisms for supervision.

[37] E. Lambert, *Opening address*, in: *Congrès international de droit comparé – Procès-verbaux des séances et documents*, vol. I, 26 (40) (1905); R. Saleilles, *Conception et objet de la science du droit comparé*, in *Congrès international de droit comparé – Procès-verbaux des séances et documents*, vol. I, 167; R. Michaels, *Im Westen nichts Neues* (2002) 66 RabelsZ 97 (101).

[38] K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* (3rd ed. 1996), p. 43, translated as *Introduction to Comparative Law* (3rd edn 1998 – translation by T. Weir).

by first analysing without any prejudice the different solutions offered in the Member States (Level 1: Operative Rule). The search for an ideal system of regulation is thus not the ultimate purpose.[39] This approach sheds light on the different legal traditions with its legal formants[40] and its cultural diversity.[41] Other comparative law scholars also emphasise the necessity to heed the mentality and the underlying decisions of what is considered fair and just.[42] In the summary the reasons for a certain solution are given (Level 2: Descriptive Formants), as well as policy considerations, economic and social factors (Level 3: Metalegal Formants).[43]

This is also aimed at refraining from the temptation to overstretch the possibilities of a common European law of unfair competition.[44] In this context it will be shown that the remedies in the law of unfair competition could not be more diverse. Though an overlap between civil law, public law, penal law and mechanisms for out-of-court settlements[45] can be found in all Member States, the details vary significantly from state to state: civil law is preferred by Germany and Austria, public law by Scandinavian countries like Sweden, Finland and Denmark, penal law by France, Ireland and earlier by Portugal and out-of-court settlements are favoured by England. Great differences can also be found in the objectives of claims and the parties to these claims.

Comparative law can thus, especially for international and supranational organizations, offer a possible mean of coordination.[46]

[39] See for this distinction (with reference to the Lando Commission), M. Bussani and U. Mattei (1997/98) 3 Colum.J.Eur.L. 339 (347).

[40] In order to know what the law is, it is necessary to analyse the entire complex relationship among the legal formants of a system, i.e. all those formative elements that make any given rule of law amidst statutes, general propositions, particular definitions, reasons, holdings, etc.; see M. Bussani and U. Mattei (1997/98) 3 Colum.J.Eur.L. 339 (344).

[41] Ibid. (346); based on R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law*, (1991) 39 Am.J.Comp.L. 1.

[42] P. Legrand, *Le droit comparé* (1999); K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* (3rd edn 1996), translated as *Introduction to Comparative Law* (3rd edn 1998 – translation by T. Weir); recently H. Kötz, *Alte und neue Aufgaben der Rechtsvergleichung* (2002) 57 JZ 257 (263).

[43] M. Bussani and U. Mattei, (1997/98) 3 Colum.J.Eur.L. 339 (354 et seq.); see below Part II A.I.3.

[44] See A.I.2(a). [45] See below Graphic 1.

[46] R. Buxbaum, *Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft* (1996) 60 RabelsZ 201 (211 et seq).