

UNFAIR COMMERCIAL PRACTICES AND FAIR COMPETITION

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OUTLINE

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- B2C Unfair Commercial Practices
- Ethical Rules
- B2C Unfair Contract Terms
- B2B Unfair Trading Practices
- Bringing this all together – competition law?

UNFAIR COMPETITION LAW

- Paris Union Convention- 1900 Revision: related to I.P.-law: “*actes contraires aux usages honnêtes en matière commerciale et industrielle*” (bonos mores)
- German UWG 1909: “*gute Sitten*” (followed by other MS): evolution in case law: the interests of consumers and the general interest are taken into account
- EU: minimum harmonisation misleading advertising only (D 84/450), later full harmonisation comparative advertising (D. 97/55)

B2C UNFAIR COMMERCIAL PRACTICES (D. 2005/29: UCPD)

- 3 levels: general clause/prohibition of misleading and aggressive practices/black list
- general clause: a commercial practice is unfair where it is (a) contrary to the **requirements of professional diligence** and (b) is likely to materially distort the economic behaviour of the average targeted consumer
- 'professional diligence: the **standard of special skill and care** which a trader may reasonably be expected to exercise towards consumers, commensurate with **honest business practices and/or the general principle of good faith** in the trader's field of activity

C-310/15 *Deroo-Blanquart*

- Preliminary reference by Cour de Cassation (FR)
- the sale of a computer equipped with pre-installed software without any option for the consumer to purchase the same model of computer not equipped with pre-installed software does not in itself constitute an unfair commercial practice
- The consumer having been duly informed and given the option to cancel the sale the trader demonstrated the required care towards the consumer
- If the practice is widespread there may be a consumer choice issue and possibly a competition issue (which, in the absence of a dominant position or collusion cannot be resolved with the instruments of competition law)

Ethical Rules

- Standards of modern laws on commercial practices (and unfair competition) cannot be reduced to ethical rules
- Ethical rules are enforced through Codes of Conduct and self-regulation
- The violation of an ethical rule is in itself not a violation of the legal standard of “professional diligence”

B2C UNFAIR CONTRACT TERMS

- Directive 93/13 Unfair Contract Terms in Consumer Contracts (UCTD)
- Art. 3: A contractual term in a consumer contract which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a **significant imbalance in the parties' rights and obligations** arising under the contract, to the detriment of the consumer
- CJEU standing case law: the consumer is in a weak position vis-à-vis the seller, as regards both **bargaining power and level of knowledge**

B2B UNFAIR TRADING PRACTICES (UTPs)

- Commission Communication 2014 UTPs in the B2B food supply chain and Commission Report 2016
- At EU level no legislation, but soft law: “EU Supply Chain Initiative”
- Legislation in 20 MS (in others, such as BE and NL, only self-regulation)
- Subject matter: unfair contractual terms in B2B supply contracts

UTPs 2

- Commission Report 2016: four key categories of UTPs:
 - Unduly shifting risks on other party
 - Asking advantages without performing a service related to it
 - Unilateral or retroactive changes of a contract
 - Unfair termination of contract
- Concepts and enforcement from antitrust law (but often NCAs also deal with B2C unfair commercial practices)

UTPs 3 (Example France)

- France: Art. L 420-1(2) Code Com.: prohibition of abuse, by an undertaking or a group of undertakings, of the state of **economic dependence** in which a client or supplier finds itself towards them, where it is **likely to affect the functioning of the structure of competition**
- Art. 442-6 Code com.: black list
- Enforcement: *Autorité*, criminal and civil courts
- Comparable provisions in other MS (Germany, UK ..)
- Different thresholds (SME, grossly deviate...)

Interim conclusion

- The laws mentioned only deal with fairness in vertical relations (B2C and B2B)
- Art. 3(2) and (3) Regulation 1/2003: neutrality of competition law vis-a-vis national laws on UTPs and unfair competition law

THE BROADER PICTURE: FAIRNESS IN COMMERCIAL RELATIONS

- Should the law take care of economic dependence and intervene to protect the weaker business partner?
- To fill the gap left by competition law?
- But if no effect on competition in the market probably not
- **Significant imbalance in the rights and obligations of the parties as the main test**, but supplemented by a kind of a “*de minimis*” effect on competition test

SOME FURTHER THOUGHTS

- Unfair competition as an oxymoron or a tautology
- The law of unfair commercial practices and unfair trading practices can supplement competition law but also negatively influence its application
- The latter risk can be diminished if guaranteeing effective competition is also an objective of the law of unfair commercial practices and unfair trading practices

CONCLUDING REMARKS

- The development of the law on (unfair commercial practices and) unfair trading practices may alleviate the recent pressure on competition law to take into account fairness
- There is no need for an increased importance of fairness in competition law
- There is an inherent tension between competition law and unfair competition law
- Coordination of enforcement is desirable