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**Anti-Unfair Competition Law and Anti-Trust Law:
A Continental Conundrum?**

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I. Introduction

1. An elusive general issue

Broad titles testify to the uncertainty of the author about the focus of his topic. The reasons are manifold. One is that, under Continental laws, rules against unfair competition relate to a wide range of trade practices. Deceptive advertising, passing off, counterfeit of non-protected product concepts and configurations, trade secret protection, interference with contractual relationships of all kinds (distribution systems, client or labor relations), disparagement of competitors, predatory practices (sales below costs, discrimination, tie-ins, boycotts etc.) are all practices may come under the heading of unfair competition. All, in one way or the other, concern free competition, the protection of which is the concern of the antitrust laws. Most but not all of these practices do have something to do with freedom of choice in competition. But again, freedom of choice might define the areas of their overlap rather than offer a general dividing line for the application of either of the two sets of rules. Another, related reason for the elusive character of the topic is that, on the Continent, the law of unfair competition has a much longer and more deeply rooted tradition than has antitrust law. In Germany, it preceded the latter by half a century or more,¹ and it developed from general tort law, of which it still forms a part, at least in some countries. In fact, in the absence of antitrust laws, rules against unfair competition have been relied upon to fight anticompetitive practices, such as group

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¹ See Act Against Unfair Competition of June 7, 1909 (UWG), as last amended by Act of July 23, 2002, BGBl I, 2850; for the new 2004 Act see *infra* n.80 ; for the historical development see A. Beater, *Unlauterer Wettbewerb*, Munich 2002, 89 et seq.; W. Schürmann, *Einleitung B. Geschichtliche Entwicklung, Rechtsquellen*, in *Großkommentar UWG*, R. Jacobs et al. (ed.), Berlin 1994, *passim*; the Act Against Restraints of Competition (GWB) of July 27, 1957 (entry into force on January 1st 1958), which has been repeatedly revised rather profoundly (see lastly Act of August 26, 1998, BGBl I 2546) is a post World War II child, see W. Möschel, *Recht der Wettbewerbsbeschränkungen*, Cologne 1983, 16 et seq.; W. Nörr, *Die Leiden des Privatrechts – Kartelle in Deutschland von der Holzstoffkartellentscheidung zum Gesetz gegen Wettbewerbsbeschränkungen*, Tübingen 1994, 139 et seq. (et *passim*); D.J. Gerber, *Law and Competition in Twentieth Century Europe - Protecting Prometheus*, Oxford 1998, 266 et seq..

boycotts² or the abusive exercise of market power, and it still remains rather unclear whether other predatory practices are unfair, anticompetitive or both.

Yet another reason for a hesitant approach to the topic is that, at least in Germany, it relates to a generation old controversy over the interdependent goals and overlapping areas of application of the rules against unfair practices in competition and the rules against practices that are restrictive of competition. To the extent that this debate turns on issues of qualifying business conduct as either anticompetitive or unfair, and of determining the relative importance of the safeguard of the freedom to compete and the proper definition of the standards of how to compete, it may be altogether fruitless. Both issues may present only particular aspects of the overall problem of "civilizing" competition by legal rules.³ The debate may also be an endless story. Competition policy, or more precisely, the orientation of the application of the antitrust laws, has changed considerably over the last decades, and it may continue to change despite our present reliance on the (welfare) economics approach of current mainstream economic and political thinking.⁴ Likewise, the interpretation of the aims and functions of the law against unfair competition has been subject to permanent change, not only in view of enhanced consumer protection, but also precisely in view of the same revision of the concept of competition which the antitrust laws are supposed to protect.⁵ The result was a certain "deregulation" of unfair competition law, which, by doing away with, *inter alia*, limitations on pricing policy,⁶ made it clear that the purpose of unfair competition law is not

² First based on general principles of tort law relating to "unethical" conduct, see Reichsgericht of June 25, 1890, RGZ 28, 238 (collective boycott to enforce resale price maintenance system in the book trade), subsequently on the basis of Section 1 UWG, see A. Baumbach, W. Hefermehl, Wettbewerbsrecht, 21st ed. Munich 1999, § 1 annot. 282 et seq. with references.

³ See for such an indeterminate in-pari-materiae approach recently Beater, loc. cit., p. 31 et seq. (also p. 718 et seq.); for a general discussion see A. Baumbach, W. Hefermehl, loc. cit., sub Allg., annot 84, 86 et seq.; W. Schünemann in Großkommentar UWG, loc. cit. Einl. E 7 et seq..

⁴ For additional objectives influencing competition policy in practice see references infra n. 23.

⁵ The evolving views on the concepts of competition and of the relevant objectives of the antitrust laws, which have been discussed broadly enough in relation to the – policy guided – implementation of the EU competition rules (see Ph. Nicolaidis, An Essay on Economics and the Competition Law of the European Community, 27 (1) Legal Iss. Eur. Integr. 7 (2000); D. Hildebrand, The European School in EC Competition Law, 25 (1) World Competition 3 (2002); R. Van den Bergh, Modern Industrial Organisation versus Old-fashioned European Competition Law, (1996) 2 Eur. Comp. L Rev. 75; E.J. Mestmäcker, Europäisches Wettbewerbsrecht, Munich 2004, 72 et seq. with references) have informed the application and the revision of the German Act Against Restraints of Competition from the very beginning, see J. Schmidt, Wettbewerbspolitik und Kartellrecht, 7th ed. Stuttgart 2001, passim, in particular 163 et seq.; H.-J. Bunte in E. Langen, H.-J. Bunte, Kommentar zum deutschen und europäischen Kartellrecht, 9th ed. Neuwied 2001, Einführung zum GWB, annot. 7 et seq; H. Ullrich, Competitor Cooperation and the Evolution of Competition Law: Issues for Research in a Perspective of Globalization, in J. Drexel (ed.), The Future of Transnational Antitrust – From Comparative to Common Competition Law, Berne 2003, 159.

⁶ Thus, statutory prohibitions and limitations of rebates and premiums, which had been hardly criticized by antitrust lawyers (see V. Emmerich, Wettbewerbsbeschränkungen durch die Rechtsprechung, Festschrift

to prescribe any form of fair competition, but to proscribe those practices, which are unfair. Whilst this conversion is important enough as a matter of principle and practice, it does not change the basic question of how to define the relative position of the rules against unfair competition and the rules of antitrust law: How is an unfair practice distinguished from a restrictive practice?

2. A specific issue under Community law

The potential for an actual realignment of the practical scope of application of the rules on unfair and on restrictive practices respectively has been dramatically enhanced by the last major piece of reform (more euphemistically called "modernization") of the application of the "Rules on Competition" of the European Union's European Community Treaty. Indeed, Council Regulation (EC) 1/2003 of December 16, 2002, "on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty",⁷ seeks to ensure full primacy of the Community's competition rules over national antitrust laws in two ways. Firstly, it provides in Article 3(1) for the concomitant application of Community law in case national competition authorities or courts examine under their national laws restrictive practices that affect interstate trade. Secondly, in Article 3(2) it provides that the application of national antitrust law to such practices may not result in their illegality, if, under the EU competition rules, they would be legal.

There are, however, two exceptions from this reinforcement of primacy of the Community's competition rules⁸ which are relevant here. First, the second sentence of Article 3(2) provides that:

Gernhuber, Tübingen 1993, 857, 874 et seq.; and generally W. Hefermehl, in A. Baumbach, W. Hefermehl, UWG, loc. cit. RabattG, annot 9), have been the subject of various bills aiming at their repeal (see Bundesregierung, Entwurf eines Gesetzes zur Aufhebung des Rabattgesetzes, Deutscher Bundestag, Drucksache 12/7271 of April 14, 1994), and finally have been repealed in 2001 (Act of July 23, 2001, BGBl I 1663, see H. Piper in H. Köhler, H. Piper, UWG, Kommentar, 3rd ed. Munich 2002, § 1 annot 239 et seq.); for a general assessment of jurisprudential liberalization of the application of the Act Against Unfair Competition, in part due to the influence of EU-principles of the free movement of goods and services see V. Emmerich, Unlauterer Wettbewerb, in A. Heldrich et al. (ed.), Festgabe 50 Jahre Bundesgerichtshof, Vol. II, Munich 2000, 627 et seq., and as regards the development of a market- or competition-oriented concept of unfairness infra sub III.2.

⁷ OJEC 2003 L 1, 1.

⁸ The previous rule, as established by CJEC of February 13, 1969, case 14/68, Wilhelm/Bundeskartellamt, Rep. 1969, 1, 4 et seq., was to the effect that Member State authorities were free to subject restrictive practices to stricter national antitrust law unless the Commission, which in that respect had exclusive jurisdiction, had exempted the practice from the application of Article 81 (1) EC-Treaty by an affirmative act (decision or regulation). Article 3 Reg. 1/2003 now excludes any application of stricter national law, i.e. both Article 81 (1) and (3) always take precedence, see E. Rebinder, Zum Verhältnis zwischen nationalem und EG-Kartellrecht

"Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings".

This exception mainly relates to national rules on competition which enjoin enterprises from abusing the relational market power which they may enjoy vis-à-vis economically dependent enterprises.⁹ Typically, such abuses would consist in refusals to deal, or in discriminatory or predatory practices, which arguably may also be outlawed by the rules against unfair competition.¹⁰ If so, we might ask why there is a need for this exception.

This question is even more justified as Article 3(3) provides for a second exception that:

"without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 (of Article 3) do not preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty".

This rule is explained by the recitals of Reg. 1/2003 in the following terms:

- (9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. Insofar as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or

nach der VO Nr. 1/2003, in Festschrift U. Immenga, Munich 2004, 303 et seq.. As regards Article 82 EC-Treaty, by contrast, Member States were always free to apply stricter national rules, because, as a matter of procedural enforcement, Commission decisions refusing to apply Article 82 are not of an affirmative (constitutive) nature, and because, as a matter of substantive law, Article 82 prohibits only abuse and, therefore, does not define or favor any forms of acceptable or desirable practices, see E. Reh binder in U. Immenga, E.-J. Mestmäcker, EG-Wettbewerbsrecht, Munich 1997; Article 3 Reg. 1/2003 maintains this principle, and, in addition, makes it clear that the limits of Article 82 are no limits for the application of national laws relating to the abuse of – some sort of – market power, see E. Reh binder, *ibid.* at 310, 311 et seq..

⁹ See recital 8 Reg. 1/2003.

¹⁰ See Sect 20 (2) (3, 2nd sent.) (4) GWB; Article L 420-2 (2) (French) Code de commerce; Article 9 (Italian) Legge No. 192 of June 18, 1998 (Gazz. uff. no. 143 of June 22, 1998) as amended by Article 11 Legge 1657 of March 5, 2001 (Gazz. uff. no. 66 of March 20, 2001); as to the application of the laws against unfair competition to such practices, see *infra* III.3.

presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

This authentic clarification of the legislative rationale of Article 3(3) certainly is less clear than the concept underlying the exception rule of Article 3(2). The latter simply is a rule attributing competence in antitrust matters: the "big" cases are to be controlled by the competition rules of the Community, the "small" cases are left to control by national competition law, as, indeed control over the exercise of relational market power mostly (though not necessarily) is intended to protect small and medium-sized enterprises.¹¹ Article 3(2) thus essentially leaves competition policy regarding small industry to Member States as a matter of some sort of a principle of subsidiarity.

Article 3(3), by contrast, establishes a line of delimitation between the antitrust laws and other rules of market regulation which is based on the objective pursued by such rules, namely not to regulate the effects of competition on the market. Moreover, with respect to unfair trading practices, the legislator specifies that control remains within the authority of Member States because (and to the extent that) it is exercised "irrespective of the actual or presumed effects of such acts on competition on the market". This is a surprising limitation of the reach of the Community's control over competition. It is correct that the antitrust laws may be identified by their objective of protecting competition on the market. However, it is difficult to believe that the Community legislature really intended to accept all national legislation, which, with a view to protecting honest trade, qualifies trade practices as unfair practices, simply because it does so irrespective of the positive or negative effects which such practices have on competition. Most likely the effect of outlawing such practices will be to distort or impair, or at least to affect competition in one way or the other. In this respect, the reservation made in favor of "the general principles and other provisions of Community law", though necessary, if not self-evident, will not suffice to prevent "protectionist" national laws. By definition, those other principles and provisions only guarantee a baseline of Community compatibility, but not compatibility with competition rules. A more plausible dividing line, therefore, might be

¹¹ Section 20 (2) (3) (4) GWB originally protected any enterprise against the abusive exercise of relational market power, but once it had fulfilled its basic function of opening distribution systems to non-specialized retail chains, was reduced to protecting only small and medium-sized enterprises, i.e. its underlying policy was readjusted, see K.-P. Schultz in Langen, Bunte, loc. cit. § 20, annot 11 et seq..

based on a test of whether, in view of the objective of national legislation, the conduct in question may be outlawed even if the result will be an alteration of competition. Such a reformulation of the rationale of Article 3(3), however, changes the nature of the exception rule. Instead of establishing a dividing line between Community competition law and national unfair competition law it becomes a rule of balancing Community interests in free competition with Member States' interests in maintaining their standards of what is honest (or at least of what is dishonest trade), i.e. with their interest in maintaining their own competition culture.

A redefinition of the Article 3(3) test appears to be all the more necessary as the examples given by the legislature, namely rules which prohibit "undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration", do not just illustrate a distinction between antitrust laws protecting competition and rules of national law safeguarding principles of equity in contractual relations. Rather, they mirror the fundamental conflict in the design or the understanding of competition law that is characterized by the catchwords of "protecting competition v. protecting competitors".¹² Thus, the definition of what constitutes the abusive exercise of purchasing power in the changing relationships between small and medium manufacturers and modern forms of distribution largely turns on this contradistinction. Therefore, if understood as a characterization of unfair competition rules, the illustration given may too easily allow a policy, which the Community legislator is unlikely to have accepted. Indeed, to the extent that the examples given are the result of discriminatory or predatory practices (which, according to Article 3(2), Member States may subject to stricter control by their antitrust laws than the Community does), it may be argued that there is no need for an additional reservation in favor of Member States. Given the Community's claim to primacy of its competition policy, and given the Member States remaining authority to exercise more extensive control over unilateral anticompetitive practices, why should they retain the power to additionally subject these very practices to their rules on unfair competition and, thus, outlaw them irrespective of their effects on the market, unless, again, this is justified by a regulatory interest that outweighs the Community's

¹² As to the catchword-distinction see M. Motta, *Competition Policy - Theory and Practice*, Cambridge 2004, 39, 52, 89; B. Sher, *The Last of the Steam Powered Trains - Modernising Article 82*, 2004 (5) *Eur. Comp. L. Rev.* 243; P. Slot, *A View from the mountain: 40 years of developments in EC competition law*, 41 *C.M.L. Rev.* 443, 462; as to the practices in questions see supra n. 10, and for a broader discussion W. Schönemann in *UWG-Großkommentar*, loc. cit., § 1 annot C42 et seq..

interest in the even operation and enforcement of its competition policy throughout the Internal Market ?

What follows will be an attempt to define some typical forms and problems of co-existence between the laws against unfair competition and the antitrust laws with a view to specify that, what Article 3(3) Reg. 1/2003 treats as a problem of division of competence or attribution of authority to control, also is a problem of substance and of primacy of values. To this effect, and in accordance with the recitals of Reg. 1/2003, both the objectives of the Community's competition rules, and the limits must first be clarified, to which the national legislature is subject by general principles of Community law when defining its rules against unfair competition.

II. Community Rules on Restrictive and on Unfair Practices of Competition

1. Community Antitrust Law

As an organization of regional economic integration, the European Community is based on a Common Market, which over the years, and as a matter of strategic policy, has become ever more akin to a genuine "Internal Market".¹³ Its development as a free-enterprise, market economy is driven by the permanent implementation and enforcement of free trade principles (Article 28 et seq.), such as free movement of goods and services, persons and capital as well as the right of free establishment. The driving forces are, on the one hand, the direct and immediate effect of such principles under Community law so that individuals and enterprises may directly rely on and invoke them in courts, and, on the other, harmonization of national laws, which, by way of exception and on specific justification, may limit or inform the application of these principles (Article 95 et seq.).¹⁴

Competition rules have been included by the fathers of the Common Market in the Treaty of Rome as a means both of safeguarding the integration process against private interests (which, instead of exploiting the integration potential, would tend to (re)segregate markets with a view to benefit from profit differentials) and of establishing and maintaining a system of undistorted competition per se. It is the latter objective which, given the completion of the Internal Market, has become the guiding concept for the implementation of the competition rules as they apply to restrictive agreements and concerted practices (Article 81), to the abuse of dominant positions on the market (Article 82), to state enterprises and enterprises vested with a public interest mission (Article 86) and to industrial concentration (Reg. 139/2004).¹⁵

¹³ See Article 2, Article 3 lit c, Article 95 (1) EC-Treaty as revised by the (Maastricht) Treaty on the European Union, OJEC 1992 C 224, 1.

¹⁴ For a recent overview of the establishment of the Internal Market on the basis of primary law see P. Oliver, W.-H. Roth, The internal market and the four freedoms, 41 C.M.L. Rev. 407 (2004); for the link to harmonisation by secondary community law P. Slot, Harmonisation, 21 Eur. L. Rev. 378 (1996).

¹⁵ Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation), OJEC 2004 L 24, 1 has replaced Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentration between undertakings, OJEC 1990 L 257, 1; for an overview of the changes and the preceding political controversies see E. Staebe, U. Denzel, Die neue Europäische Fusionskontrollverordnung, EuWiStR 2004, 194; U. Böge, Reform der Europäischen Fusionskontrolle, WuW 2004, 138; D. Dittert, Die Reform des Verfahrens in der neuen EG-Fusionskontrollverordnung, WuW 2004, 148.

a) *Restrictive agreements and concerted practices*

Leaving aside, for the purposes of this paper, the major pillar of the Community's competition policy, merger control, it is probably fair to say that the implementation and enforcement of the Community's rules on competition have developed quite differently. In one area the law now seems to be mature and relatively firmly defined, namely in the area of the application of Article 81 to restrictive agreements and concerted practices. In area of the application of Article 82 and 86 to market dominating enterprises and to "public" enterprises the development still seems to be rather open. The implementation of Article 81¹⁶ has indeed been "stabilized", as far as substance is concerned, by a reform effort undertaken since the late 1990s. It resulted, first, in a broad block exemption regulation for vertical agreements, accompanied by extensive administrative guidance in the form of interpretative or explanatory Guidelines,¹⁷ and second in two specific block exemption regulations for horizontal agreements again accompanied by – almost all encompassing – guidelines on competitor cooperation.¹⁸ Just recently, the reform has been concluded with a block

¹⁶ Article 81 EC-Treaty reads

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

¹⁷ Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81 para 3 of the Treaty to categories of vertical agreements and concerted practices, OJEC 1999 L 336, 21; Commission, Guidelines on Vertical Restraints, OJEC 2000 C 291, 1; for an overview see Whish, Regulation 2790/99: The Commission's "New Style" Block Exemption for Vertical Agreements, 37 C.M.L. Rev. 887 (2000).

¹⁸ Commission Regulation (EC) 2658/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of specialisation agreements, OJEC 2000 L 304, 1; Commission Regulation (EC) 2659/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of research and

exemption regulation on technology transfer agreements and corresponding guidelines, which, in fact, cover most of the antitrust/intellectual property field.¹⁹ The main feature of this "codification" - like reform effort of the implementation of the basic Treaty rules of Article 81 is a twofold distinction, which is well known from the corresponding antitrust rules of the USA. Actually, the reform largely represents a docile copy of US-antitrust concepts. On the one hand, a rather sharp distinction is made between agreements and concerted practices entered into by enterprises operating on different markets, in particular upstream or downstream (vertical agreements), and agreements concluded between enterprises operating on the same relevant market as competitors (horizontal agreements). The former are dealt with rather leniently, as mirrored by the high threshold for antitrust intervention (30 % individual market share of each party), while the latter may come under control more easily (20 % combined market share). However, actual control still is limited because competitor cooperation is seen as pro-competitive, if efficiency enhancing, notably if contributing to innovation (joint R+D; specialization).²⁰

On the other hand, benevolence with respect to restrictive agreement has its limits, when so-called hardcore restrictions are at issue, such as vertical or horizontal price-fixing, output restrictions, bid-rigging or collective boycotts and refusals to deal. Both distinctions are, of course, by no means new. However, they have been redefined and made peremptory on the basis of a "more economics based" approach,²¹ which is somewhat artificially put in contrast to the previously prevailing legal-classificatory approach. The basic tenets are that competition policy, as expressed through the implementation of the competition rules of the Treaty is an instrument to achieve (overall or consumer) economic welfare, that the proper analytical perspective for examining allegedly anticompetitive practices or transactions is the microeconomic investigation into the efficiency gains or losses resulting from such practices or transactions, and that in cases of doubt, i.e. when a practice is not inefficient under all

development agreements, OJEC 2000 L 304, 7; Commission, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJEC 2001 C 3, 2.

¹⁹ Commission Regulation (EC) 772/2004 of 27 April 2004 on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements, OJEC 2004 L 123, 11; Commission, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJEC 2004 C 101, 2; for its policy see M. Monti, The New EU Policy on Technology Transfer Agreements, Speech 04/19 of January 16, 2004 (available at http://www.europa.eu.int/rapid/press_Release_Action.do? Reference speech/04/198); generally St. De Schrijver, M. Marquis, Technology Licensing in the EU after the Big Bang: the new Technology Transfer Block Exemption Regulation and Guidelines, Bus. L. Rev. 2004, 161.

²⁰ See H. Ullrich in J. Drexler, loc. cit. at 186 et seq. with references.

²¹ See Commission, Green Paper on Vertical Restraints in Competition Policy, COM (96) 721 final, sub no. 54 et seq.; id., Guidelines on Vertical Restraints, no. 6 et seq. (OJEC 2000 C 291, 1); id., Guidelines on horizontal cooperation agreements, loc. cit. at no. 6 et seq..

market conditions or definitely inefficient under existing market conditions, a practice should, in the name of the rationality of the free enterprise system, pass rather than be enjoined.²²

The consequences of this economics based approach reach far beyond the substantive divide between, on the one hand, vertical and horizontal agreements – in the absence of market power, i.e. if inter-brand competition is effective, vertical agreements enhance competitiveness of "brand owners", whereas horizontal agreements always have a potential for collusion -, and, on the other, hardcore and those other restrictions, which are not consistently harmful. Thus, on the level of policy objectives, welfare economics are ill-suited to accommodate competing societal objectives, be they market-related or not.²³ In the first case, they only carry with them losses, in the second, the gains appear to be elusive at best, and in all cases, they imply normative judgements, which may better be made as a matter of determining the framework regulation of the market, since they cannot consistently be incorporated into the assessment of the competitive process as such. Therefore, welfare maximization is claimed to be an overriding goal, and other objectives are, at least in theory, relegated to a secondary level and always subject to controversy, whatever their status is under the Treaty.

Political practice, it is true, may be much more tolerant, if not affirmative of other public interest objectives,²⁴ but it may be so only upon particular legal mandate. As a result, former assumptions of implicit goals of antitrust laws, such as the protection of all enterprises' individual freedom to compete, with all what it implies in terms of containment of power, of preference for individual competition over cooperation, industrial integration and concentration, are no longer accepted as such, but marginalized. Rather, by virtue of an underlying rationale of a self-fulfilling liberalism, efficiency enhancing arrangements are held to be legitimate in view of their welfare effects up to the limits of actual market dominance,

²² See generally M. Motta, loc. cit. 17 et seq., 39 et seq.; Ph. Nicolaidis, loc. cit. 27 (1) Leg. Iss. Econ Integr. at 9 et seq. (2000); recently, the efficiency problem is mainly discussed with respect to mergers, see for a good explanation D. Gerard, Merger Control Policy: How to give meaningful consideration to efficiency claims, 40 CML Rev. 1367 (2003); G.L. Zampa, The Role of Efficiency under the EU Merger Regulation, 4 Eur. Bus. Org. L. Rev. 573 (2003); M. de la Mano, For the customer's sake: The competitive effects of efficiencies in European merger control, in Commission (ed.) Enterprise Papers No. 11, Brussels 2002, 7 et seq..

²³ See M. Motta, loc. cit. at 22 et seq., 26 et seq.; G. Monti, Article 81 EC and Public Policy, 39 CML Rev. 1057 (2002); illustrative J. Tunney, Is the Emerging Legal Concept of Culture the Cuckoo's Egg in the EU Competition Law Nest? (2001) Eur. Comp. L. Rev. 173.

²⁴ See e.g. as regards objectives of environment protection Commission, Guidelines on horizontal cooperation agreements, loc. cit. sub no. 7 (7.4); generally G. Monti, loc. cit., 39 CML Rev. at 1069 et seq. (2002).

and – as far as industrial concentration is concerned – even beyond.²⁵ It is precisely because of this one-dimensional orientation of EU-competition policy that Article 3 (2) Reg. 1/2003 had to allow Member States to bring in some complementary control of unilateral business conduct. It may, indeed, be assumed that the welfare-centric concept of competition, which informs the EU's economics based approach to the antitrust rules of the Treaty, mirrors not only economic imperatives, but, in its turn, shapes the conduct of enterprises on the market, in particular the ways and means of achieving efficiency gains.²⁶ The next question then is to what extent the standards for qualifying competitive conduct as being unfair are also affected.

The impact of the "more economics based" approach of EU competition policy on the order and the style of competition is likely to make itself ever more felt. Thus, on the level of enforcement, the efficiency gains or losses, which, under the more economics based approach, determine the antitrust-law fate of a business arrangement, can be plausibly affirmed, examined and confirmed only if sufficiently detailed factual knowledge about the operation and the effects of the arrangement on the market is available. As this will normally be the case more easily for hardcore restrictions than for non-hardcore restrictions,²⁷ the latter tend to pass particularly easily not only on the basis of a rule of doubt, but also as a matter of bringing the potential for pro-competitive effects to bear, which they may hold. This is all the more so as the transition from an ex-ante to an ex-post control,²⁸ which the more economics based approach requires,²⁹ if it is not to become a disincentive, must focus on the reality of that potential rather than on the eventual failure to realize it.³⁰ As the ex-post control of

²⁵ See Article 2 (2) (3) Reg. 139/2004; Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings, OJEC 2004 C 31, 5 sub No. 76 et seq.; M. de la Mano, loc. cit. sub. 2.2; M. Motta, loc. cit. at 238 et seq., 273 et seq..

²⁶ The Microsoft-case(s), the differences of its assessment as well as the controversies surrounding it in both the USA and the EU should sufficiently illustrate this point, see Commission, decision of March 24, 2004, case COMP/C-3/37.792 Microsoft, not yet officially published (available at http://www.europa.eu.int/comm/competition/antitrust/cases/index/by_nr_75.html.....37_792); A. Heinemann, Antitrust Law and the Internet, in J. Drexel (ed.), loc. cit. at 131, et seq.; E. Fox, What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect, 70 Antitrust L.J. 371, 384 et seq. (2002).

²⁷ See Ph. Nicolaidis, loc. cit. 27 (1) Leg. Iss. Eur. Integr. at 9 et seq.; Commission, Guidelines on horizontal cooperation agreements, loc. cit. sub. no. 11, 24, 33, 90, 102.

²⁸ This is the effect of the substitution of the notification requirement and of the exclusive jurisdiction of the Commission for the grant of an Article 81 (3) exemption decision (Art. 4, 9 (1) Regulation 17/62) by the direct operation (ex lege exemption) of Article 1 (2) Reg. 1/2003 (supra n. 7), see E.J. Mestmäcker, The EC Commission's Modernization of Competition Policy: a Challenge to the Community's Constitutional Order, 1 Eur. Bus. Org. L. Rev. 401, 405 et seq. (2000); A. Riley, EC Antitrust Modernisation: The Commission Does Very Nicely – Thank you! (2003) Eur. Comp. L. Rev. 604 (Part I), 657 (Part II).

²⁹ Merger control represents a common (but no necessary) exception to this principle, see Article 4 Reg. 139/2004, the reason being that structural redress ex post is both too difficult and too costly.

³⁰ The problem has been addressed partially by Commission, Guidelines on horizontal cooperation agreements, loc. cit. sub no. 73 et seq.; and more fully by id., Guidelines on the application of Article 81 (3) of the Treaty,

hardcore restrictions will only raise problems of evidence, rather than of factual economic evaluation, procedural law supports what is the express policy orientation of the more economics based approach, namely - in the interest of international competitiveness - the exploitation of whatever efficiency potential there may be at whatever organization of competition short of outright cartelization.³¹

b) *Control of market power and of public enterprises*

Due to the liberalization of the public sector, in particular in the field of telecommunication and energy supply but also of certain infrastructure facilities for sea or air transportation, the market principle of a competition-driven realization of whatever potential there is for efficiency gains, and as a result, for welfare maximization, has become ever more pervasive in the EU.³² The lever for this transformation has been a broad application of Article 86 of the Treaty.³³ This rule obliges Member States and public enterprises to abide by the rules on competition unless their public interest remit definitely and necessarily exempts them from acting on a level playing field with private enterprises. In particular, within the framework of Article 86, control of abusive conduct by market dominating enterprises, as provided for by Article 82 EC-Treaty,³⁴ has been relied on as a basis for structural remedies. It allows

OJEC 2004 C 101, 97 at no. 44 et seq.. In addition, as ex post control can only seek to compensate for harm done (rather than prevent it), it will be effective only where the harm is identifiable, which is more likely for hardcore restrictions than for other agreements that merely do not hold their promises, i.e. which really are or which have become inefficient.

³¹ See for the resulting reduction to group- or pole-centric competition H. Ullrich in J. Drexler, loc. cit. at 191 et seq., 209 et seq.; id. Patentgemeinschaften, in Festschrift U. Immenga, Munich 2004, 403, 412 et seq., 430 et seq..

³² Best known is the telecommunications sector, where the liberalisation process is now driven by a new competition-oriented regulatory framework, see Directive 2002/21/EC of the European Parliament and of the Council of March 7, 2002 on a common regulatory framework for electronic communication networks and services (Framework Directive), in particular Article 8, 16 (OJEC 2002 L 108, 33), see A. Bavasso, Electronic Communications: A New Paradigm for European Regulation, 41 CML Rev. 87 (2004) for an account of the measures taken according to Article 86 (3) EC-Treaty see J.F. Hochbaum, in H. Schröter, Th. Jakob, W. Mederer (eds), Kommentar zum europäischen Wettbewerbsrecht, Baden Baden 2003, Article 86 annot. 108 et seq..

³³ Article 86 reads:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

³⁴ Article 82 reads:

enforcement of access to markets which have not been or which have not been adequately served by the public entity. Concomitantly, Article 82 of the Treaty has been applied to the private sector as well whenever competition in new, adjacent or in up- or down-stream markets depended on access to essential facilities.³⁵ The risk that either such an interpretation of Article 82 EC-Treaty or, on the contrary, its reading as a rule of equity rather than of preservation of competition as such, ultimately might result in applying the Article so as to frustrate a market dominating enterprise's interest in enhancing its efficiency or, for that matter, the interest of any enterprise to become market dominating by superior efficiency, is now advanced as a reason to limit the applicability of Article 82 EG-Treaty in accordance with a "more economics based approach".³⁶ Whatever the merits of this argument and its consistency with the use of Article 82 within the framework of Article 86 EC-Treaty may be, the tendency again is that of orienting the competition order so as to satisfy the efficiency claims of the monopolist rather than freedom of competition and of choice of all market participants.

2. National Antitrust Laws

Over the last 10 to 15 years, Member States of the European Union, which did not already have a developed system of antitrust law, introduced rules on competition for enterprises essentially modeled on the Community's system. Even Member States with a proper tradition of controlling restrictive business practices, such as France, Germany, and the United

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

³⁵ The essential-facilities doctrine probably has become the most discussed competition law doctrine of the last decade, for an overview see Doherty, Just what are essential facilities? 38 CML Rev. 397 (2001); Chr. Stothers, Refusal to supply as Abuse of a Dominant Position: Essential Facilities in the European Union, (2001) Eur. Comp. L. Rev. 256; recently CJEC of April 29, 2004, case C-418/01, IMS Health/NBC Health, not yet officially reported, and for a monographical treatment under national law J. Herrlinger, Das "Netz" in § 19 Abs. 4 Nr. 4 GWB, Cologne 2003, 7 et passim; F. Haus, Zugang zu Netzen und Infrastruktureinrichtungen, Cologne 2002, 7 et passim.

³⁶ See B. Sher, loc. cit. (2004) Eur. Comp. L. Rev. 243; Chr. von Weizsäcker, Abuse of a Dominant Position and Economic Efficiency, 1 Ztschrft. Wettbewerbsrecht 2003, 58; M. Waelbroeck, Working Paper Panel VII: Future of Competition Law, in Cl.-D. Ehlermann, L. Laudati, The Objectives of Competition Policy, Oxford 1998, 585, 591.

Kingdom, gradually or abruptly adapted their system to that of the EU in view of the constraints set by Reg. 1/2003.³⁷ The result is, on the one hand, a broad similarity of systems, and, on the other, due to the obligation of parallel application of Community law to interstate cases, a limitation of national antitrust control to local markets. Both characteristics would be justification enough to address the antitrust/unfair-competition-law interface only by reference to the principles of antitrust control as embodied in Article 81 and 82 of the EC-Treaty, would not Article 3(2), Reg. 1/2003 allow Member States to apply the rules on the control of the exercise of relational market power³⁸ even with respect to interstate transactions. Their main thrust is on protecting small and medium sized industry against discriminatory refusals to deal and predatory pricing practices of various kinds. However, they are rather akin, if not identical to rules of unfair competition laws directed at discriminatory and predatory practices, and, therefore will be dealt with separately.³⁹

3. The Community Framework for National Laws Against Unfair Competition

Under the Treaty of Rome establishing the European Community, control of practices of unfair competition is a matter of national law. The Treaty neither provides for rules of its own on the matter nor for a specific authority of the Community to deal with it. However, national law against unfair competition may become the subject of Community interest on two accounts, namely when it either constitutes an – unjustified - obstacle to the free movement of goods and services within the Community's Common (Internal) Market or when – legitimate - differences among national laws are such as to affect the functioning of the common market. Both situations are interconnected. In the first case, Article 28 et seq. and Article 48 et seq. of the Treaty will, due to their direct effect, effectively and immediately rule out the application of the rules against unfair competition in question by national authorities or courts, provided that these rules are, in fact, illegitimate in the light of the Treaty's principles of free trade. If, however, they are justified in that they protect a legitimate interest of Member States in protecting enterprises or consumers against a given unfair practice, harmonization of national laws may come in, and it may do so to the extent that the differences of the ways by which Member States regulate the safeguard of such interests obstruct the formation of a truly internal, i.e. a unified market (Article 3 lit. h, Article 94 et seq. EC-Treaty).

³⁷ Germany is a late mover, see Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (decided on May 26, 2004), Bundesdrucksache 411/04.

³⁸ See supra n. 10.

³⁹ See infra III.3.

a) *Free movement of goods and services*

The Treaty's rules on the free movement of goods and services apply to any measure of Member States that directly or indirectly, actually or potentially have a quantitative effect on the free flow of goods or services between Member States, unless such measures can be justified by a public interest in maintaining the obstacle to free trade.⁴⁰ Such public interests may be explicitly recognized by the Treaty itself, namely by Article 30, and then may justify even discriminatory measures. Nevertheless, they may also be a matter of implicit recognition and then will only justify measures that indistinctively apply to national and foreign goods and services. The latter rule, though, on the face of it, allowing for a broad exception from free trade, in fact is the basis of enhanced free trade in that it obliges Member States to accept and recognize goods and services which, according to the law of the exporting Member State, may be lawfully supplied (so-called principle of the country of origin), unless the importing Member State can show an overriding public interest of its own which its legislation seeks to protect by adequate and reasonably proportionate means.

The development and application of these principles has resulted in an extremely rich case law ensuring both a broad liberalization of trade, and the safeguard of basic public interests of Member States, including new public interest policies in the areas of protection of the consumers or of the environment. It is, of course, far from being uncontroversial. As regards national laws against unfair competition, the controversies, however, mainly concern an area, which is of less interest here, namely that of consumer protection against the various forms of misleading advertising, marketing, and product labeling.⁴¹ It is, nevertheless, noteworthy, that these controversies turn on jurisprudential liberalization process which is the result of both the confrontation of different, strict or permissive national concepts of fair or unfair competition, and of a purposive choice of a market-integration oriented standard for evaluating and constraining the legitimacy of protective national regimes of product information and

⁴⁰ The development and actual state of the construction and application of the principles of free trade of goods and services by an overly rich case law is summarized by P. Oliver, W.-H. Roth, loc. cit., 41 CML Rev. 407 (2004); see also N.N. Shuibhne, The free movement of goods and Article 28 EC: an evolving framework, 27 Eur. L.J. 408 (2002), and for an extensive recent examination J. Snell, Goods and Services in EC Law: a study of the relationship between the freedoms, Oxford 2002, 49 et passim

⁴¹ For an overview of the case-law and references see S. Leible in E. Grabitz, M. Hilf, Das Recht der Europäischen Union, looseleaf, Vol. I, Munich 2000, Article 28 EGV, annot 36 et seq..

advertising, namely the introduction by judicial fiat of the European "model consumer".⁴² The determination of the fairness or unfairness of the means chosen when competing for the consumer thus is no longer a matter alone of honesty in trade, whatever its proper definition in general and its determination by law in particular may be. Rather it is also a matter of policy regarding the nature and scope of competition, which is desired in view of a specific public interest.⁴³

In the absence of harmonization of national unfair competition laws, however, such policy orientation of the application of free trade principles to national rules against unfair competition may have to give way to legitimate national policies regarding the definition of what is unfair competition. Thus, the Court has not hesitated in approving of unfair competition remedies which are directed against imports of slavish imitations of products which, as such, are not domestically protected by any intellectual property right. In this case, the acceptable national justification has been that such protection would serve to protect the consumer and to promote honest trade, both of which are in the general interest, and, in addition, supported by principles of international treaty law.⁴⁴ However, the conflict does not disappear.

Indeed the Court's concern for market integration has again been a controlling element in cases where the plaintiff sought to protect its distribution system against parallel trade by relying on principles of unfair competition law. These may make the parallel trader, who has obtained the goods in question from sources who were in breach of contract or whom he induced to breach contract, a dishonest trader, thus giving privity relations a sort of in rem effect. The Court did not have to examine fully the legitimacy of these principles of unfair competition law under the Treaty's rules on free trade. However, it made it clear that, under both the rules on competition and the rules on free movement of goods,⁴⁵ contractual arrangements will be subject to Community control, where, according to national unfair law,

⁴² See CJEC of July 16, 1998, case C-210/96, Gut Springenheide/Tusky, Rep. 1998 I 4657, No. 31, restating existing case law; of January 13, 2000, case C-220/88, Estée Lauder/Lancaster, Rep. 2000 I 117, no. 27; and for an analysis A. Beater, loc. cit. at 164 et seq., 170 et seq., 364 et seq., (372 et seq.) with references.

⁴³ For a critique requiring a genuinely competition/fairness approach rather than a balancing with market integration objectives see A. Beater, loc. cit. at 170 et seq.; id., Zum Verhältnis von europäischem und nationalem Wettbewerbsrecht, GRUR 2000, 963; also F. Ruffler, Aspekte primärrechtskonformer und sekundärrechtskonformer Auslegung nationalen Lauterkeitsrechts, in R. Schulze (ed.), Auslegung europäischen Privatrechts und angeglichenen Rechts, Baden-Baden 199, 97.

⁴⁴ CJEC of March 2, 1982, Industrie Diensten Groep/Beele, Rep. 1982, 707.

⁴⁵ For the former see CJEC of November 25, 1971, case 22/71, Béguelin, Rep. 1971, 949; for the latter CJEC of January 22, 1981, case 58/80, Dansk Supermarked/Imerco, Rep. 1981, 81, no. 17.

(parallel) trade with goods resulting from a simple breach of such contractual arrangements would be held to amount, without more, to unfair trade. This case law, however, is neither very developed nor entirely clear. For one thing, whilst taking account of the support, which unfair competition law may give to contractual relations, seems to be entirely justified as a matter of correctly applying the rules on competition, it is unclear how free movement principles may at all control the legality of contractual arrangements.⁴⁶ For another, the Court has laid down arms when requested to rule on the compatibility with free trade principles of the major means of controlling contractual distribution arrangements, which is the serial numeration of goods.⁴⁷ Asked whether the removal of such numeration may be justified in the interest of free trade, the Court answered that all depends on the objectives that are served by numeration. In particular, if it served several objectives – such as control of both product quality and of distribution channels –, then the parallel trader is referred to the uncertainties of a relief he may obtain by application of the antitrust laws.

Both the relationship between the rules against restrictive practices and the rules against unfair competition, and the limits of using free trade principles as a means to control national unfair competition law, became apparent when the Court was asked to rule on the compatibility of national unfair competition laws with free trade as they apply to pricing policies of enterprises. In a first approach, the Court accepted the legitimacy of subjecting imports of goods from other Member States to national rules prohibiting "gifts coupled to the sale of goods, even if such sales promotion practices were held to be legal in the country of origin."⁴⁸ In the Court's view, the national legislator might reasonably be concerned with the risk of the consumer being misled as to the true price/quality relationship of the main product, and of competition on the merits being distorted by enterprises offering goods for no or an excessively small consideration.

⁴⁶ See CJEC of June 6, 2002, case C-159/00, Sapod Audic/Eco-Emballages, Rep. 2002 I 5031, no. 74; of September 27, 1988, case 65/86, Bayer/Süllhöfer, Rep. 1988, 5249; P. Oliver, W.-H. Roth, loc. cit. 41 CML Rev. at 421 et seq. with references; the controversy may not cover all relevant issues: In Dansk Supermarked it was not the contract as such that was judged against free trade principles, but the combined effect of contractual and statutory obligations, the rules against unfair competition giving an absolute (in rem) effect to the contract, which, in turn, means that parties may trigger such absolute effects (of territorial segregation) by contract. This is a phenomenon, which is known from license contracts, where parties may, by agreement, create limitations of the license contract which have an in rem effect, and, therefore, may be subject to scrutiny under Article 28 et seq., see H. Ullrich in U. Immenga, E.-J. Mestmäcker, (eds.), EG-Wettbewerbsrecht, Munich 1997, 1177 et seq..

⁴⁷ Comp. CJEC of November 11, 1997, case C-349/95, Loendersloot/Ballantine, Rep. 1997 I 6227, no. 39 et seq..

⁴⁸ CJEC of December 15, 1982, case 286/81, Ooesthoek's Uitgevers Maatschappij, Rep. 1982, 4575.

About ten years later, however, the Court refused even to examine under free trade principles national rules on unfair competition, which outlawed sales below costs or at excessively low prices.⁴⁹ The judgment in *Keck et Mithouard* represents a landmark decision in that it redefined the scope of application of free trade principles to national market regulations by excluding regulations of modalities of sales from Community control, provided they are non-discriminatory by nature. As such, it may be explained as an exercise of judicial self-restraint or as a refusal to develop the Treaty's free trade principles into a fundamental rights principle of free enterprise.⁵⁰ In terms of substantive law, however, it may also be explained as an effort to draw a dividing line between the Community's power to control national unfair competition law, and its claim to primacy of its rules on competition with respect to pricing policies of enterprises. Indeed, given the close relationship between the rules against restrictive practices and the rules against unfair practices of competition, why should the Court admit primacy of Community law on the basis of principles that are so ill-suited to do justice to the various circumstantial particularities of competition cases – whether relating to restrictive or to unfair practices – as are the principles of free trade in goods or services?⁵¹ In addition, why should it do so before a preliminary question has been answered, namely that of whether or not Community law would take precedence anyway by virtue of its rules of competition. This question, in its turn, can be answered properly only once the true relationship between the rules against restrictive practices and the rules against unfair practices has been determined. Indeed, a claim to priority may be asserted only to the extent that both set of rules actually may enter into conflict.

b) *Harmonization of national law*

Harmonization of national laws on unfair competition essentially has been a matter of developing and implementing a Community policy on consumer protection. It focused on establishing Community-wide rules on misleading and deceptive advertising,⁵² has been

⁴⁹ CJEC of November 24, 1993, joint cases C-267/91 and C-268/91, *Keck et Mithouard*, Rep. 1993 I 6097; of August 11, 1995, case C-63/94, *Belgapom*, Rep. 1995 I 2467.

⁵⁰ For a fresh reading of this much discussed Court ruling see P. Oliver, H.-W. Roth, loc. cit., 41 CML Rev. at 409, 411 et seq. (2004) with references.

⁵¹ But see CJEC of July 6, 1995, case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe/Mars*, Rep. 1995 I 1923, no. 17 et seq. (20), where in a case of de facto maximum price fixing resulting from the application of the rules against unfair competition the Court preferred principles of free trade over those on free competition.

⁵² Council Directive 84/450/EEC of September 10, 1984 relating to the approximation of the laws, regulations and administrative procedures of Member States concerning misleading advertising (OJEC 1984 L 250, 17 as

opened to comparative advertising,⁵³ and extended to, on the one hand, standards of product or service information and labeling in various sectors,⁵⁴ and, on the other, to the limitation of advertising by certain media or for certain products.⁵⁵ It is up for reform mainly with a view to substantive modernization (in particular due to the rise of e-business⁵⁶), and with a view to bridge divergences of law that have developed in the process of harmonization. However, within the Commission, there seems to be no unanimity as to how and to what extent to harmonize the law of unfair competition. A principle of Community-wide codification of unfair trade practices in business-consumer relations rivals with a regulatory competition concept which, on the basis of the principle of the country of origin, would require, with respect to marketing practices, recognition of other Member States' standards of consumer protection on domestic markets coupled with mere minimum standards of common protection.⁵⁷

These controversies need not be explained here in more detail. They have a common point of departure namely that with respect to determining the unfairness of a practice, both approaches would rely on the principle of the country of origin. However, they differ as to

amended by Directive 97/55/EC of the European Parliament and the Council of October 6, 1997 on the amendment of Directive 84/450/EEC on misleading advertising so as to include comparative advertising (OJEC 1997 L 290, 18).

⁵³ See supra n. 52.

⁵⁴ See references in Commission, Greenbook on Consumer Protection in the European Union, COM (2001) 531 final, sub 2.2; H.W. Micklitz, J. Keßler, *Europäisches Lauterkeitsrecht*, GRUR Int. 2002, 885, 887 et seq.; H. Piper in H. Piper, H. Köhler, *UWG*, loc. cit. § 3 annot. 38.

⁵⁵ See e.g. Directive 2001/37 of the European Parliament and the Council of June 5, 2001 on the approximation of laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, OJEC 2001 L 194, 26; for the background S. Crosby, *The New Tobacco Directive: an illiberal and illegal disdain of the law*, 27 Eur. L. Rev. 177 (2002); Council Directive 89/552/EEC of October 3, 1989 on the coordination of certain legal and administrative rules of Member States on television broadcasting activities, OJEC 1989, L 298, 23.

⁵⁶ See Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of the services of the Information Society, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce), OJEC 2000 L 178, 1).

⁵⁷ See, on the one hand by the Commission's Directorate General for Consumer Protection: Greenbook on Consumer Protection, supra n. 54, and Commission, 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, 98/27/EC (the Unfair Commercial Practices Directive), COM (2003) 356 final of June 18, 2003; and, on the other, Commission, Amended Proposal for a European Parliament Council Regulation concerning sales promotion in the Internal Market, COM (2002) 585 final of October 25, 2002 (which originates from the Internal Market Directorate General); the proposals differ as to scope (broad comprehensive v. punctual, targeted harmonization), as to the balance between consumer protection/producer liberalisation (the sales promotion proposal represents a measure of negative harmonization outlawing restrictions on sale promotions up to a bare minimum of protection – e.g. for children -), and as to form (directive - regulation) for an in-depth analysis see F. Henning-Bodewig, *Richtlinienvorschlag über unlautere Geschäftspraktiken und UWG-Reform*, GRUR Int. 2004, 183, 186 et seq.; A. Beater, *Europäisches Recht gegen unlauteren Wettbewerb – Ansatzpunkte Grundlagen, Entwicklung, Erforderlichkeit*, ZEuPrivR 2003, 11, 27 et seq., 37 et seq.; H.W. Micklitz, J. Keßler, loc. cit. GRUR Int. 2002, 889 et seq.; G. Howells, Th. Wilhelmson, *EC consumer law: has it come of age?* 28 Eur. L. Rev. 370 (2003).

the extent of such reliance. The Internal Market approach apparently is to leave it at that, meaning that regulatory competition between Member States would determine the development of unfair competition law within the Community. By contrast, under the – presently prevailing – consumer-protection approach, consumer-related unfair competition law would be fully harmonized so as to leave no room for additional national protection,⁵⁸ whereas competitor-related unfair competition law, just as under the Internal Market approach, would be largely left to regulatory competition.⁵⁹ For awhile, both approaches seemed likely to be adopted simultaneously on the assumption that they are mutually complementary rather than exclusive.⁶⁰ Whilst such coexistence apparently is no longer politically desired, it still remains that harmonization will be full and comprehensive with respect to consumer-related unfair business practices, the principle of the country of origin having been abandoned in the legislative process.⁶¹

In legal terms, this change of principle is not altogether meaningless. It entails a change of the applicable law, which will be that of the market place where the consumer buys rather than that of the place of production, and thus is in better conformity with reliance on proper information as the main principle of consumer protection.⁶² In economic terms, however, it will not make much difference, if any. To be sure, as regards the level of consumer protection, a definite limit will be set to any race to the bottom that may be inherent in regulatory

⁵⁸ For the full-harmonization effect see Commission, Proposal for a Directive concerning unfair business-to-consumer commercial practices, loc. cit., Article 4 (2), recitals 2, 4, 8, and explicitly the Explanatory Memorandum, ibid. sub No. 30; more clearly Article 3 (5) of the “ Common Position “ by the Council of November 15,2004 (CONSOM 63/MI 215/CODEC 929, Inter-institutional File 2003/0134 (COD)), which, for an additional period of 6 years, accepts divergent national laws, and also ibid. recital 6,11,12,13.

⁵⁹ See Article 1 and recital 5 of Commission, Proposal for a Directive concerning unfair business to-consumer practices, loc. cit.; however, Article 14 provides for some minimum protection against competitor-related unfair trade practices in that it maintains Directives 450/1984 and 55/1997 on misleading and comparative advertising as they apply to competitive relationships between traders. Whether these rules may be read and applied in the same way as the corresponding rules of consumer protection even if Member States do not expressly provide for such parallelism as a matter of granting more than minimal protection, remains to be seen. Clearly, however, aggressive practices are outside the realm of the minimum protection of competitors by Community law.

⁶⁰ See Commission, Proposal for a Directive concerning unfair business-to-consumer practices (as modified by the "political agreement" of the Council of May 25,2004, CONSOM 52/MI 170/CODEC 784 , Inter-Institutional File2003/0134 (COD)), loc. cit., recital 7 and Annex I No. 11, making infringements of the Sales Promotion Regulation an unfair practice.

⁶¹ See Commission, Proposal for a Directive concerning unfair business to consumer practices (as modified by the "Common Position" of the Council), loc. cit., Article 4 (omitting in para. 1 the country of origin principle), and ibid. the Draft Minutes Statements (CONSOM 76/MI 288/ CODEC 1196 of November 12,2004), whereby the Commission and some Member States accept this change only in view of the uniformity of protection following from a maximum harmonization concept, whilst two other Member States are unwilling to accept this concept in view of its limiting effect on existing higher level protection of consumers.

⁶² As to this concept of consumer protection see H.W.Micklitz, J. Keßler, loc. cit. GRUR Int. 2002 at 889 et seq.; skeptical G. Howells, Th. Wilhelmson, loc. cit. 28 Eur. L. Rev. at 380 et seq. (2003), both with references; generally J. Drexl, Die wirtschaftliche Selbstbestimmung des Verbrauchers, Tübingen 1998, 25 et seq., 43 et passim.

competition.⁶³ But the beneficial effects, which are expected from adherence to the principle of the country of origin, equally will be obtained, since full harmonization likewise guarantees an efficient territorial allocation of production, increased economics of scale and reduced transaction costs as enterprises do not have to observe the manufacturing and marketing rules of by 25 Member States. In addition, the liberalization effects will also take place as originally intended. Enterprises will indeed enjoy more autonomy as regards the choice of the ways and means of defining and presenting their offer, since, just as under the principle of the country of origin, the "benchmark" consumer will be the informed average consumer,⁶⁴ and since the guiding principle of protection is that of guaranteeing an informed, economically rational choice of the consumer acting as an "economic agent in a competitive EU".⁶⁵ Clearly, under such an approach to consumer protection against unfair marketing practices, modes of competition will change as the margin of acceptable conduct becomes broader and competitive aggressiveness more readily tolerated.⁶⁶

In fact, increased aggressiveness of competitors may very well be what the new wave of harmonization efforts in the area of "unfair competition" is all about. It expressly is concerned with "stagnation" in the formation of the Internal Market following the accomplishments of

⁶³ See G. Schricker, F. Henning-Bodewig, *Elemente einer Harmonisierung des Rechts gegen unlauteren Wettbewerb in der Europäischen Union*, WRP 2001, 1367, 1370 (summarized as *New Initiatives for the Harmonisation of Unfair Competition Law in Europe*, (2002) *Eur. Int. Prop. Rev.* 271, 273); it is, however, difficult to tell what the bottom is or what high or low protection is for that matter, see H. Ullrich, *L'ordre concurrentiel - Variations sur un thème de Nice*, *Rapport de Synthèse, Mélanges A. Pirovano*, Paris 2003, 663,683 et seq.

⁶⁴ Originally, Article 2 lit.b Commission, *Proposal for a Directive concerning unfair business-to-consumer practices*, loc. cit. expressly referred to the "reasonably well informed and reasonably observant and circumspect" "average consumer". Whilst this reference has been deleted, and even an exception introduced Article 5(3) relating to practices, which specifically concern particularly vulnerable groups of consumers, the substance of the average-consumer approach has been retained, see recital 18 of the "Common Position", loc. Cit., and Commission, *Communication to the Parliament of November 12,2004*, COM (2004) 753 final.

⁶⁵ See D. Byrne (European Commissioner for Health and Consumer Protection), *Consumers as economic agents in a competitive EU*, speech, London, July 5, 2004 (available at http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_pract/speeches); in fact, from the documents of the Commission it appears that it is less the need to protect the consumer than the wish to stimulate her/him to act as a catalyst for interstate trade that motivates the proposals for reform, see Commission, *Proposal for a Directive concerning unfair business-to-consumer practices*, loc. cit., *Explanatory Memorandum*, No. 6 et seq..

⁶⁶ Generally accepted starting points are previously unlawful practices of advertising price reductions by reference to initial prices (see CJEC of March 7, 1990, case C-367/88, *GB-Inno-BM/Confédération du commerce luxembourgeoise*, Rep. 1990, 667; of May 18, 1993, case C-126/91, *Schutzverband/Yves Rocher*, Rep. 1993 I 2361) and the admission of comparative advertising (see supra n. 53 with 52), including direct price comparisons. Such aggressiveness against competitors, however, becomes immaterial. For an example see the systematic exploitation of a competitor's strategy of selling system innovations, as tolerated CJEC of October 25, 2001, case C-112/99, *Toshiba Europe/Katun Germany*, Rep. 2001 I 794: here the crucial balance between on the one hand, a manufacturer's interest in controlling the spare parts market as a matter of cross-subsidizing sales of the main product and, on the other, free consumer choice has been relegated to an issue of trademark law, namely unfair exploitation of the reputation of a distinctive sign.

1992.⁶⁷ Whilst the first harmonization directive of 1984 was limited to the rules against misleading advertising as a matter of political self restraint and feasibility, and whilst it clearly was motivated by considerations of consumer protection, it still recognized that protection against misleading advertising also served fairness as between competitors.⁶⁸ Thus, non-coverage of areas of the law, where competitor interest is more directly at stake, did not mean legislative disinterest or neglect. By contrast, the new generation of harmonization proposals, for the sake of revitalizing the Internal Market, expressly do away with protection of competitors against aggressive sales promotion practices⁶⁹ and/or exclude competitors from Community-wide protection against unfair business methods other than misleading or excessive forms of comparative advertising.⁷⁰ This means two things.

First, to the extent that consumer protection against misleading advertising or against other forms of unfair competition directly or indirectly benefits competitors as well,⁷¹ the latter, whilst not remaining altogether defenseless,⁷² not only may not claim the frustration of their

⁶⁷ See Commission, Greenbook on Consumer Protection, loc. cit. sub. 3.1; id., Follow-up Communication to the Green Paper on EU Consumer Protection of June 11, 2002, COM (2002) 289 final sub No. 23 et seq.; id., Proposal for a Directive concerning unfair business-to-consumer commercial practices, loc. cit. at no. 6 et seq.; id., Communication on sales promotions in the Internal Market – Proposal for a Regulation of the European Parliament and the Council concerning sales promotions in the Internal Market of October 2, 2001, COM (2001) 546 final, sub. 2, 3.

⁶⁸ See Article 1 Directives 84/450, 97/55 on misleading and comparative advertising, which states as its object the protection of consumers, traders and the public interest alike; G. Schricker, F. Henning-Bodewig, loc. cit. (2002) Eur. Int. Prop. Rev. at 272.

⁶⁹ Article 2 and 3 of the Amended Proposal for a European Parliament and Council Regulation concerning sales promotion in the Internal Market of October 25, 2002, COM (2002) 585 final, prevent Member States from imposing

- a general prohibition on the use or commercial communication of a sales promotion unless required by Community law
- a limitation on the value of a sales promotion, except for discounts on fixed-price products and sales below costs
- a prohibition on discounts preceding seasonal sales, or
- a requirement to obtain prior authorization, or any requirement having equivalent effect, for the use or commercial communication of a sales promotion

and, instead, provide for an obligation to give information about the nature and scope of the sales promotion activity.

⁷⁰ Supra n. 59; Commission, Proposal for a Directive concerning unfair business-to-consumer commercial practices (as modified by the "political agreement" of the Council) loc. cit. recital 5a admonishes the Commission to "carefully examine the need for Community action in the field of unfair competition beyond the remit of the Directive". This admonition, however, is not retained by recital 17a) and Article 17a which provide for mandatory review of the Directive.

⁷¹ Commission, Proposal for a Directive concerning unfair business-to-consumer commercial practices (as modified by the "Common Position" of the Council), loc. cit., recital 8 expressly recognizes indirect effects of protection of competitors.

⁷² Article 11 (1) Commission Proposal for a Directive concerning unfair business-to-consumer commercial practices, loc. cit., provides for a right of action of competitors in case consumer interests are violated. The competitor at the rescue of consumer interests rather than at the defense of his/her own interest? How to plausibly and effectively claim the violation of a rule, which expressly is not intended to protect the claimant? Does the standing to sue include claims for losses suffered by consumers? Under German law a competitor

genuinely own competitive interests.⁷³ Rather, the definition of what and how much (indirect) protection they may benefit of is made dependent on which and how much of the interests of consumers enjoy protection, since this is the point of reference against which unfairness is to be assessed. Such a consumer bias of protection ultimately may result in yet another distortion of the process of competition.⁷⁴ In addition, by leaving inter-enterprise trading relations unattended, Community law creates a two-tier level of fairness within the overall system of competition, thus again enhancing aggressiveness.

Second, with respect to the latter concern of protecting enterprises at least against the cruder forms of deceptive and aggressive practices, harmonization will remain minimal,⁷⁵ thus accepting the risk of territorial distortions of competition within the Internal Market.⁷⁶ These will be even more pronounced as regards areas of concern for unfairness for which no harmonization is intended, such as in the areas of protection against misappropriation and counterfeiting of firm-specific innovative achievements, in particular of individual product configurations etc.⁷⁷ Clearly, differences of national rules of unfair competition regarding these matters affect intra-Community trade. The same holds true for differences of national rules regarding trade secret protection, or the unfairness of inducement to breach of contractual relations existing with suppliers, clients, employees or distributors.⁷⁸ All these rules, and there are many more of them, serve to protect competitors, but they also have a systemic dimension.⁷⁹ National laws⁸⁰ as well as Article 1 of the 1984/97 Directive on

would not even have the right to claim his own damages if the law is not intended to protect his interests (Section 823 (2) BGB).

⁷³ Thus, the award of damages for losses suffered by competitors rather than by the consumers becomes a matter of doubt, because, even if, as a matter of standing, national rules of enforcement will allow competitors to sue for damages, granting such damages in excess of consumer losses might be in conflict with the maximum harmonization principle, which precisely is aimed at limiting protection so as to avoid additional burdens on cross-border competition.

⁷⁴ A case illustrating the multiplicity of interests and the potential for a biased balance is CJEC of October 25, 2001, case C-112/99, *Toshiba Europe/Katun*, supra 66. The risk, of course, is greatest where competitors do not enjoy any "parallel protection", e.g. in case of aggressive commercial practices.

⁷⁵ See supra n. 59.

⁷⁶ This has been stressed by Germany and Austria in the Council deliberations, see Draft Minutes Statements, "Competitiveness" Council of May 25, 2004 (CONSOM 52/MI 170/CODEC 748, Interinstitutional File: 2003/0134 (COD)). These Member States also intend to adhere to an "integrated" approach of consumer and competitor protection, as they did in the past, see infra n. 80.

⁷⁷ Just as competitor denigration, these matters have been expressly excluded from harmonization, see Commission, Proposal for a Directive concerning unfair business to consumer commercial practices, loc. cit., Explanatory Memorandum sub No. 40. Note that some forms of slavish imitation are covered by the protection Articles 1 (2) (a), 11, 19 (2) of Council Regulation 6/2002 of December 12, 2001 on the Community Design (OJEC 2002 L 3, 1, rect. OJEC 2002 L 179, 11) grants for unregistered designs.

⁷⁸ As regards discriminatory and predatory practices see infra III.3.

⁷⁹ See with respect to the protection of innovative achievements as an incentive for dynamic competition infra III.1; with respect to the protection of contractual relations and its impact on market segregation infra III.2, with

misleading and comparative advertising⁸¹ recognize the existence of such system effects, and seek to overcome the – true or false? – dichotomy between protecting competitors and protecting competition by postulating that fighting unfair competition serves a public interest, namely precisely the interest in a well functioning, undistorted system of competition. The new generation of harmonization proposals, by separating consumer from business interests and focusing on the former alone, show little, if any concern for the triad of interests of protection and their systemic interdependence. This lack of Community concern would be understandable if competitor protection were simply outlawed or in a mandatory way limited to some basic rules. However, Member States remain free to grant such protection, and, as mentioned above,⁸² Article 3 (3) Reg. 1/2003, accepts it on condition that protection is granted irrespective of the effects the incriminated conduct has on the market. This self-restraint, of course, may not be taken as a complete denial of the existence of such effects, or as an act of acceptance, but simply as a limitation of the Community's antitrust policy.

respect to the treatment of discriminatory and predatory practices and its relationship to the protection of small-and-medium sized industry *infra* III.3.

⁸⁰ See for an overview G. Schriker, F. Henning-Bodewig, *loc. cit.* WRP 2001 at 1368; as regards Germany in particular, the new "Act Against Unfair Competition" of July 3, 2004 (BGB 2004 I 1414), which is intended to modernize the law in anticipation of EU harmonization, expressly provides in Section 1 that the "Act serves to protect competitors, consumers and other market participants against unfair competition. It concomitantly protects the public's interest in undistorted competition".

⁸¹ Article 1 Directive 1984/450, *loc. cit.* reads: "The purpose of this Directive is to protect consumers, persons carrying on a trade or business or practicing a craft or a profession, and the interests of the public in general against misleading advertising and the unfair consequences thereof".

⁸² *Supra* I.2.

III. A Community Role for National Rules against Unfair Competition

1. Community Protection of Competition, National Protection of Competitors?

The overall picture of the relationship between the antitrust rules and the anti-unfair competition rules in the Community thus is somewhat intriguing. On the one hand, the Community, in the interest of enhancing the international competitiveness of its industry in an era of globalization of trade and competition and by a reaction in regulatory competition to the US-example, has reformed the substance of its rules on restraints of competition and obliged Member States to follow it closely. By the same token, the Community has rearranged its enforcement system and integrated Member States authorities and courts into it. However, it expressly left Member States' related systems of granting enterprises protection against unfair business practices of competitors and other enterprises unaffected. On the other hand, the Community, for the sake of stimulating integration and reinforcing the Internal Market, has harmonized national rules against unfair commercial practices as they occur in business-to-consumer relations. In order to achieve its objectives it has invited, if not instrumentalized consumers to behave as economic actors and as legal activists, and it has reduced the role of enterprises to act as purely system-determined competitors. True, they may bring actions for violation of the law. However, like under the antitrust rules, they may not do so in their individual interest and as a matter of their own substantive entitlement, but only in the interest of the system, so to speak as a public interest derivative suit.⁸³

If, therefore, there is to be some consistency in the way the Community's assumes its double role as a guardian against anticompetitive and against unfair practices, namely by leaving the latter largely to Member States as a problem of competitor protection, then the question ought to be raised how Member States may or must play their role. Clearly, as stated earlier, this

⁸³ As to the concept of the "private attorney general", and, more generally, private antitrust litigation as an enforcement policy see C. Jones, Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check, 27 (1) World Competition 13 (2004); contra: W. Wils, Should Private Antitrust Enforcement Be Encouraged in Europe? 26 (3) World Competition 1 (2003); K. Holmes, Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and the UK, Eur. Comp. L. Rev. 2004, 25; for the linkage with public enforcement see Commission, Notice on the cooperation between the Commission and the courts of EU Member States in the application of Article 81 and Article 82 of the Treaty, OJEC 2004 C 101, 54.

question is one of the proper configuration of the competition system in the Community, and clearly, therefore, it cannot be dealt with here in full.⁸⁴ However, by way of illustration, three areas of rules may be shortly examined – for lack of better knowledge by reference to German law.

The selection is, of course, purposive, but may be controversial. Thus, rules of unfair competition law, which protect an enterprise's innovative achievements, may be considered to be constitutive of dynamic competition (sub. a), whereas rules on the protection against interference with contractual relations (sub. b) might be held to be a source of potential conflict with principles of free competition. Finally, rules on predatory or discriminatory conduct could be complementary to antitrust law principles or converge with them (sub c).

a) *Safeguard of trade secrets and non-IPR protected innovations*

Under national law, trade secrets are protected not only as a matter of contract law as it applies to – explicit or implicit – confidentiality agreements, but also as a matter of protection against unfair business practices.⁸⁵ In that respect, Article 39 of the TRIPS-Agreement has brought about a considerable degree of international harmonization both as regards the concept of trade secrets and the definition of what constitutes breach of trade secrets by unfair means. In fact, by equating breach of contract and breach of confidence as such with unfairness in business,⁸⁶ contractually secured trade secrets enjoy protection by the law of torts, including, *inter alia*, protection through the grant of injunctive relief. Thus, older controversies have been put to rest, which turned around both the legitimacy of trade secret protection as an alternative to intellectual property protection, and its limiting effects on competition which otherwise would be possible on the basis of public domain knowledge.⁸⁷ The Community's competition policy, though hesitant for many years,⁸⁸ fully recognizes

⁸⁴ Note that direct conflicts between the Community's rules on competition and national laws on unfair competition are to be solved by the principle of primacy of Community law (see A. Beater, *Unlauterer Wettbewerb*, oc. cit. at p. 158 et seq.), but mostly the question precisely will be whether there actually is such a conflict (see infra sub b, c)). The answer to that question, however, is but the smaller part of the problem of the role of unfair competition law in the overall competition system as established and governed by the Community.

⁸⁵ See Section 17 et seq. German Act Against Unfair Competition (supra n. 80).

⁸⁶ See Article 39, note 10 TRIPS-Agreement.

⁸⁷ Comp. M. Balz, *Eigentumsordnung und Technologiepolitik*, Tübingen 1980,330 et seq.; H.H. Maass, *Information und Geheimnis im Zivilrecht*, Stuttgart 1970, 93 et seq..

⁸⁸ See H. Ullrich in U. Immenga, E.-J. Mestmäcker (eds.), *EG Wettbewerbsrecht*, loc. cit. at 1270 et seq. with references.

agreements protecting know how, and, in accordance with national antitrust laws, even treats restrictive know how licensing in the same way as it treats restrictive patent licensing.⁸⁹ This is not the place to re-examine that position, and the less so as the importance of protecting trade secrets by way of the rules against unfair competition may have diminished due to that much know how nowadays takes the forms of computer programs or databases and, consequently, is protected as such, i.e. by exclusive rights.⁹⁰ Rather, the point precisely is that, with respect to trade secrets, the potential for conflict between the rules against unfair business practices and the antitrust laws has been reduced, or for that matter, elevated to the level of the relationship between intellectual property and competition law.⁹¹

By contrast, the very concept of what may be considered unfair practices of competition in a system of free competition becomes an issue when protection on grounds of unfair competition is extended to innovative or individual achievements of enterprises, which do not enjoy protection by intellectual property rights, and which are not kept secret either. Although the continuous extension of intellectual property protection to all kinds of innovative investments, such as computer programs, databases,⁹² and (useful) designs, may have reduced the need for such protection, the claim is raised frequently and under various circumstances, for example after the lapse of intellectual property protection, if such protection has not been applied for in the first place, or more precisely in case of unavailability of specific protection.⁹³ Courts and doctrine in the various Member States have reacted differently to such claims, a major limiting argument being that, in view of an optimal dissemination and use of innovations, the limits of intellectual property protection must also define the area of free imitation and of free competition.⁹⁴ The European Union, when harmonizing national

⁸⁹ See Sect 18 (No. 1) German Act Against Restraints of Competition (loc. cit. n. 1); Commission Regulation 772/2004 of April 27, 2004 on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements (OJEC 2004 L 123, 11), Article 1 (1) (b) (g) (i), 2 et seq..

⁹⁰ See Article 10 TRIPs-Agreement; Council Directive 91/250/EEC of May 14, 1991 on legal protection of Computer programmes, OJEC 1991 L 122, 42; Directive 96/9/EC of the European Parliament and the Council of March 11, 1996 on legal protection of databases, OJEC 1996 L 77, 20.

⁹¹ See H. Ullrich, Intellectual Property, Access to Information and Antitrust: Harmony, Disharmony, and International Harmonization, in R. Dreyfuss, D. Zimmermann, H. First (eds.), *Expanding the Boundaries of Intellectual Property*, Oxford 2001, 365, 367 et seq.; id., *Expansionist intellectual property protection and reductionist competition rules: a TRIPs Perspective*, 7 *JInt'l Ec. L.* 401 (2004).

⁹² See supra n. 77, 90.

⁹³ A typical example of failure to seek protection is fashion wear (short period for recouping investment), a typical example of unavailability of protection are business methods, advertising slogans etc., but the problems more generally arise with sub-patentable or non-original product configurations, see references infra n. 96, 97.

⁹⁴ This is also the point of departure under German law, see BGH of December 8, 1999, WRP 2000, 493, 496 (modular scaffold); Th. Sambuc, *Der UWG-Nachahmungsschutz*, Munich 1996, 2 et seq.; less pronounced A. Beater, *Nachahmen im Wettbewerb*, Tübingen 1995, 395 et seq.; both with references; see generally W. Cornish,

intellectual property law, has given short shrift of this fundamental principle. Indeed, when harmonizing national intellectual property law, the Community has consistently allowed Member States to alternatively or cumulatively apply their laws on unfair competition as a way of protecting the subject matter of harmonized intellectual property.⁹⁵ The implication of this permissive approach is that Member States remain free not only to put unfair competition rules of protection on top of IPR-protection, but to extend protection by unfair competition law to all sorts of achievements.

Germany, in particular, has a long tradition of affording, on the basis of its "Law Against Unfair Competition", "supplementary protection for achievements in competition" to all kinds of technical and non-technical accomplishments of enterprises. Case law is highly developed and refined, but precisely "casuistic" rather than principled.⁹⁶ However, the starting points for judicial analysis of claims to protection are clear: Protection is not granted for the achievement as such, the subject matter of a successful industrial accomplishment. Rather it is granted as a remedy against specific forms of misappropriation of another enterprise's accomplishments in competition.⁹⁷ In that respect, it is not the investments made for or the efforts spent on such accomplishments that determine protection, but the conduct of the defendant and the manner of misappropriation. These must show the hallmark of unfairness. Thus, a distinction is made between imitation by reverse engineering and simple counterfeit, the latter having little justification, at least not if alternative designs are easily available. But there must also be additional elements of unfairness, such as a risk of deception of consumers in case the accomplishment in question is generally attributed to a specific enterprise, or a risk

D. Llewelyn, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, 5th ed. London 2003, 12 et seq.

⁹⁵ See Article 9 (1) Computer Programme Protection Directive (supra n. 90); Article 13 Database Protection Directive (supra n. 90); Article 16 Directive 98/71/EC of the European Parliament and the Council on the legal protection of designs, OJEC 1998 L 289, 28; there is, therefore, no principle of preemption of national law by Community law as regards these matters, neither in case of harmonization by directive nor in case of unification by regulation (see H. Ullrich, Harmony and Unity of European Intellectual Property Protection, in Benly, D. Vaver (eds.), Intellectual Property in the New Millennium,), even though harmonized law, in fact, does rule on the same subject-matter, see A. Kur, Ansätze zur Harmonisierung des Lauterkeitsrechts im Bereich des wettbewerblichen Leistungsschutzes, GRUR Int. 1998, 771.

⁹⁶ For an account H. Piper in H. Köhler, H. Piper (eds.), UWG, loc. cit. § 1, annot. 602 et seq.; W. Hefermehl, in A. Baumbach, W. Hefermehl (eds.), Wettbewerbsrecht, 22nd ed. Munich § 1, annot. 439 et seq., 495 et seq.; for a monographic analysis A. Beater, Nachahmen im Wettbewerb, loc. cit. 93 et passim; Th. Sambuc, loc. cit. 40 et passim.

⁹⁷ See § 4 No.9 UWG mirroring this traditionally prevailing doctrine, and comp. H. Piper in H. Köhler, H. Piper (eds.), UWG, loc. cit. § 1 annot. 592; H. Köhler in A. Baumbach, W. Hefermehl (eds.), Wettbewerbsrecht, 23rd ed. Munich 2004, UWG §4, annot. 9.4,9.5 et seq. ; skeptical Th. Sambuc, loc. cit. at 7 et seq., 19 et seq; id. in H. Harte-Bavendamm, F. Henning-Bodewig (eds.), UWG, Munich 2004, § 4, annot. 6 et seq.; for a – somewhat indefinite – market oriented approach A. Beater, Nachahmen im Wettbewerb, loc. cit. 344 et seq., 352 et seq..

of reputational damage, or an act of infiltration in and free ride on a rival's product line, in particular if this consists of assembly kits or like products, or some breach of confidence and so on. Some of these criteria are highly controversial or no longer applicable, such as sale of the infringing goods at cut prices.⁹⁸ But the overall picture that emerges is that of a case law which originates from an extension of protection against passing-off practices of competitors (a classical case of unfair competition). That case law is now based on a concept of competition on the merits in that only individual achievements of enterprises are protected, and in that rival enterprises are required to undertake their own individual efforts, and to take risks rather than a free ride.⁹⁹ Thus, the underlying idea is to promote dynamic competition by innovation and differentiation rather than imitative price competition. This is an aspect of competition, which is not covered by the Community's directives on unfair competition law, which are orientated toward price competition, and it is definitely left to legal implementation by Member States by the Community's rules of harmonization in the field of intellectual property.¹⁰⁰ The antitrust laws certainly protect innovative competition, even if based on subject matter, which is not protected by intellectual property.¹⁰¹ In fact, under the antitrust laws, the form of protection does not matter anyway.¹⁰² One of the commonly accepted justifications for the misappropriation rules of unfair competition law is its case-specificity, and, therefore, its flexibility and suitability as a testing ground for new needs for protection. The antitrust laws probably will respect this more easily than claims of antitrust immunity based on the rigidity of exclusive intellectual property rights.¹⁰³

⁹⁸ See Th. Sambuc, loc. cit. at 168 et seq..

⁹⁹ Note that this catchword, like that of "competition on the merits", invites circular arguments. A "free ride" becomes an argument only once it is shown that the object of the ride is not free, but belongs or is attributed for exploitation to somebody else. Basically, free rides are in the interest of the dissemination of innovations, and may even be desirable as a matter of law, e.g. once the term of protection of patents or designs has lapsed, see BGH of December 8, 1999, supra n. 94.

¹⁰⁰ See supra n. 95.

¹⁰¹ See OLG Hamburg of April 8, 1976, WuWE OLG 1724; U. Immenga in U. Immenga, E.-J. Mestmäcker, GWB, loc. cit. § 1 annot 157.

¹⁰² See references supra n. 91.

¹⁰³ For the European development towards a more economics based approach to the intellectual property/antitrust interface see H. Ullrich, IP-Antitrust in Context: Approaches to International Rules on Restrictive Uses of Intellectual Property Rights, 48 Antitrust Bull. 837 (2003); id., Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective, 7(2) JIEL 401, 422 et seq. (2004); for a broad comparative-law analysis A. Heinemann, Immaterialgüterschutz in der Wettbewerbsordnung, Tübingen, 37 et seq., 191 et seq., 289 et seq..

b) *Protecting contractual feudality arrangements*

An example of a more direct influence of the interdependency between the rules against unfair competition and the antitrust laws is presented by the treatment of what may be assimilated to contractual feudality arrangements.¹⁰⁴ Most prominent in this respect are selective distribution systems, which manufacturers of branded goods establish in order to be able to control the channels of distribution of their products, and, thereby, to maintain reputation and appeal. In many countries, and in Germany in particular, unfair competition law affords additional tort law protection for these arrangements in that parallel traders are held liable of acts of unfair competition if they seek to obtain supplies for their "grey" trade either by way of inducing dealers, who are integrated into the system, into breach of contract or by way of exploiting a breach of contract or, finally, by way of covertly acquiring the branded goods. If such is the case, parallel traders may be enjoined from continuing to sell the products in parallel, and they are held liable to the damages caused to the manufacturer of the branded goods.¹⁰⁵ The result, of course, is the stabilization and sclerosis of the distribution system due to the exclusion of intra-brand competition on the retail level. As is well known, antitrust law doctrine and practice largely tolerate these vertical restraints on the assumption that, if inter-brand competition is effective, then they can do no harm. The European Union has also adopted this approach by granting, by way of a Commission regulation,¹⁰⁶ a block exemption for all vertical agreements on the condition that the agreements do not involve so-called hard-core restrictions of competition, and provided also that the individual market shares of the parties do not exceed 30 %.

At about the time the liberalization of the European antitrust approach to vertical restraints took place, German case law, however, began to tighten the standards for assuming unfair competition by parallel traders, who seek to obtain supplies from within the distribution system. First, mere exploitation of opportunities of supply that result from breach of contract

¹⁰⁴ See A. Pirovano, *Les transformations de l'ordre privé économique: L'exemple des réseaux de distribution sélective*, in *Mélanges G. Farjat*, Paris 1999, 211, 218 et seq..

¹⁰⁵ See for details H. Piper in H. Köhler, H. Piper (eds.), *UWG*, loc. cit. § 1 annot 889 et eq.; A. Beater, *Unlauterer Wettbewerb*, loc. cit. at p. 611 et seq..

¹⁰⁶ Commission Regulation 2790/1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices, OJEC 1999 L 336, 21; if practiced without discrimination among qualified dealers, selective distributions systems as such, i.e. which, except for the limitation of sales to specialized trade, do not involve any additional restraints, are not even covered by Article 81 (1) of the Treaty, see Commission, *Guidelines for Vertical Restraints*, OJEC 2000 C 291, 1 sub No. 184 et seq. with references.

by integrated dealers is no longer held to constitute an act of unfair competition.¹⁰⁷ The reason is that this would amount both to give contractual obligations an in rem-effect vis-à-vis third parties, and to unduly burden trade, the parallel trade being unable to tell from the goods whether they are properly or improperly released for trade. Second, to be unfair, an inducement into breach of contract recently has been held to require more than simply a request for supply from an integrated dealer, namely some additional elements of "inducing" the supplier, such as a promise of indemnification should the dealer be sued for breach of contract by the manufacturer.¹⁰⁸ Whilst such a requirement of "qualified" inducement into breach of contract appears to be perfectly justified, in practice it means that the manufacturer must overcome a heavier burden of demonstration and proof when trying to block-off parallel traders. The simple fact that the parallel trader approaches integrated dealers or is in possession of improperly traded goods no longer makes him act improperly. Thus, the combined grip of antitrust law and unfair competition law has been somewhat loosened on the side of the latter so as to give back to the consumer at least a small part of the freedom of choice, which antitrust law nowadays tends to neglect.

c) *Fighting discrimination and predatory practices*

At first sight, discrimination in business relations and predatory practices present typical cases of overlap between the rules against unfair competition and the rules against restrictive business practices. Thus, in Germany boycotts and price-cutting have indeed come under

¹⁰⁷ BGH of December 1st, 1999, WuW DE-R 493; the decision must be read in the context set by CJEC of October 27, 1993, case C-376/92, *Metro-SB-Großmärkte/Cartier*, Rep. 1994 I 15, no. 18 et seq.. Given the considerably different terms of protection which selective distribution system enjoyed under the various national laws against unfair competition, the Court held, that, to be lawful under Article 81 of the Treaty, a selective distribution system, if practiced without discrimination in the EU, does not need to be watertight as regards risks of parallel imports from outside the EU, the rationale being that otherwise less restrictive distribution system would fare worse than watertight systems. This antitrust liberalism required corresponding liberalism on the side of the law against unfair competition. For an overall analysis of these developments see [A. Bergmann](#), *Selektive Vertriebsbindungssysteme im Lichte der kartell- und lauterkeitsrechtlichen Rechtsprechung des Bundesgerichtshofs und des Gerichtshofs der Europäischen Gemeinschaften*, ZWeR 2004, 28. Note that respect of selective distribution systems still may be controlled strictly on the basis of serial numbers: a dealer who deletes them or buys and resells good with deleted serial numbers will be held liable for unfair competition, see BGH, loc. cit. et p. 499; and see CJEC, supra n. 47, which unfortunately did not limit liability for the removal of serial numbers to precisely those losses which a manufacturer legitimately sought to prevent by serial numerotation.

¹⁰⁸ See OLG Düsseldorf of April 30, 2003, GRUR 2003, 89; [J. Tiemann](#), *Das Ende der Unlauterkeit des "Verleitens zum Vertragsbruch" bei selektiven Vertriebsbindungen?* WRP 2004, 289.

unfair competition law long before there even were antitrust laws of any kind.¹⁰⁹ However, the very fact that discrimination, boycotts and sales below costs have been ruled on expressly by the Act Against Restraints of Competition, and differently so by its subsequent reforms, indicates that the purpose or, at least, the perspective of antitrust control over these matters is a different-one.

This difference, it is true, is a rather small one as regards boycotts, i.e. the act of instigating another enterprise not to supply the boycotted enterprise. Both the Act Against Unfair Competition, as read by the courts in constant practice,¹¹⁰ and the Act Against Restraints of Competition (section 21) do outlaw them in virtually identically terms.¹¹¹ Section 21 GWB, in particular, does not require that there be a competitor relationship between the boycotting and the boycotted enterprise or that the call to boycott be actually followed by the enterprises called upon to boycott.¹¹² Nevertheless, the purpose to protect both competition as such and the boycotted enterprise is more definitely confirmed by section 21 than by section 1 UWG, which applies also to practices inviting consumers to boycott certain sources of supply.¹¹³ Moreover, section 21 has been adopted regardless of the prohibition existing under section 1 UWG in order to allow antitrust authorities to intervene, meaning that the enforcement of the rule is in the public interest, and should not be left, as under the UWG, to private interest and willingness or means to bring suit.

By contrast, discrimination and simple refusals to deal present cases that bring the differences between the law against unfair business practices and the law against restrictive conduct clearly to the foreground. Section 20 (ex 26) of the Act Against Restraints of Competition always required cartels and market dominating enterprises to abstain from discriminating or

¹⁰⁹ Group boycotts have been qualified as an unfair practice under general tort law even before the enactment of the Act Against Unfair Competition (see RG of December 14, 1902, RGZ 56, 271; W. Hefermehl in A. Baumbach, W. Hefermehl, (eds.), Wettbewerbsrecht loc. cit. § 1 annot. 282 with references), but this was too small a basis for an effective defense against boycotts.

¹¹⁰ See extensive references by W. Hefermehl in A. Baumbach, W. Hefermehl (eds.), Wettbewerbsrecht, loc. cit. § 1 annot. 283, 286 et seq., H. Köhler in A. Baumbach, W. Hefermehl (eds.), Wettbewerbsrecht, 23rd ed., loc. cit. ,UWG § 4, annot.10.116 et seq.

¹¹¹ Section 21 (1) GWB reads: "Undertakings and associations of undertakings shall not request another undertaking or other associations of undertakings to refuse to sell or purchase, with the intention of unduly harming undertakings". Under Section 1 UWG, the intent to harm specific other enterprises is not a prerequisite of unfairness of boycotts, but it will rarely ever be missing.

¹¹² For details see K. Markert in U. Immenga, E.-J. Mestmäcker (eds.), GWB, 3rd ed. Munich 2001, § 21, annot 7 et seq., 16 et seq., 24 et seq.; Section 21 (1) GWB is broadly applied by the courts, at least as far as economically motivated boycotts are concerned, see BGH of April 27, 1999, GRUR 1999, 1031.

¹¹³ See BGH of November 13, 1979, WuW E BGH 1666; of February 2, 1984, WuWE BGH 2069; by contrast, boycotts committed by consumers are actionable only under general tort law.

unduly impeding other enterprises in trade relations which otherwise are generally accessible.¹¹⁴ In 1973, this prohibition was extended to enterprises holding relational market power vis-à-vis dependent enterprises, i.e. vis-à-vis suppliers or retailers. Originally, the reason for extending the non-discrimination rule was essentially to give non-specialized traders, such as supermarket chains and cash-and-carry dealers, access to the distribution of high brand products in such sectors as consumer electronics, sports equipment or luxury goods etc.¹¹⁵ Subsequently, however, when those retail forms had become more firmly established and began to themselves hold considerable purchasing power vis-à-vis the supply industry, the rule has been limited to protect only small and medium sized industries.¹¹⁶ In that sense, it is both a rule with an interventionist, protective or structuralist purpose and a rule for the safeguard of open markets and free enterprise. Its construction and application have always been informed by this multiple orientation. Thus, on the one hand, standing is granted to enterprises as broadly as possible in terms of whether they qualify for access to the trade in question, and both absolutely or relatively dominant enterprises are required to justify a refusal to deal or discriminatory acts by detailing their reasons. On the other, all sound business reasons for such refusals or discriminatory acts are broadly accepted.¹¹⁷

¹¹⁴ Whilst Section 19 GWB prohibits abuses by market dominating enterprises in general, Section 20 is more directly concerned with discriminations and with practices of obstructing business activities of other undertakings. Section 20 GWB reads in relevant parts:

(1) Dominant undertakings, associations of undertakings within the meaning of Sections 2 to 8, 28 (1) as well as Section 29, and undertakings which set retail prices pursuant to Sections 15, 28 (2), 29 (2) and Section 30 (1), shall not, in business activities which are usually open to similar undertakings, directly or indirectly hinder in an unfair manner another undertaking, nor directly or indirectly treat it differently from similar undertakings without any objective justification.

(2) Subsection (1) shall apply also to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient or reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

(3) Dominant undertakings and associations of undertakings within the meaning of subsection (1) shall not use their market position to cause other undertakings in business activities to grant them preferential terms without any objective justification. Sentence 1 shall apply also to undertakings and associations of undertakings within the meaning of subsection (2) sentence 1, in relation to the undertakings which depend on them.

(4) Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market power directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking offers goods or services not merely occasionally below its cost price, unless there is an objective justification for this.

¹¹⁵ For an illustrative example see BGH of November 20, 1975, WuWE BGH 1491 – "Rossignol".

¹¹⁶ See for the amendments and their reasons K. Markert in U. Immenga, E.-J. Mestmäcker, GWB, loc. cit. § 20 annot 4, 6, 7 et seq., 40 et seq..

¹¹⁷ For a detailed account see K. Markert in U. Immenga, E.-J. Mestmäcker, GWB, loc. cit. 20 annot 92 et seq., 114 et seq., 148 et seq..

In practice, the anti-discrimination rules of the GWB have given rise to the development of a rich case law, the details of which need not be restated here. The basic point is that under the rules against unfair competition no similar prohibition of discrimination in trade has or could have been developed. Given the contract autonomy of enterprises, also of market dominant enterprises, unfairness will not lie simply because an enterprise takes, as a matter of assessing its own interest, arbitrary business decisions vis-à-vis other enterprises, but only if, under the circumstances, a discriminatory act appears to be directly aimed at actually undermining and destroying a competitor's business.¹¹⁸ More generally, unfair competition law may only negatively sort out competitive conduct, which, in addition to being harmful to individual enterprises (rather than to competition as such), is characterized by specific elements of unfairness.¹¹⁹

Such elements, in particular the intent to directly and purposively hurt an individual competitor rather than to rival in competition on one's own merit,¹²⁰ are more typically associated with predatory practices. These, indeed, do represent a grey area between the law against unfair business practices and the antitrust laws. The existence of this grey area is due to the circumstance that, prior to the enactment of the German Act Against Restraints of Competition – and, in fact, prior to any meaningful antitrust legislation in Germany –, the courts had been faced with claims of unfair competition relating to price cutting practices which intentionally were directed at driving an individual competitor out of business.¹²¹ These cases have subsequently been brought under the antitrust laws as well as a matter of preventing abuses of market dominance, but remained within the concurrent application of the Act Against Unfair Competition for procedural reasons.¹²² This again gave the courts the opportunity to extend their case law to practices of predatory price cutting, and to sales below costs, and to outlaw them in case that, due to follower conduct by other enterprises, such

¹¹⁸ See W. Hefermehl in A. Baumbach, W. Hefermehl, (eds.), *UWG*, loc. cit. § 1 annot. 303; H. Köhler in A. Baumbach, W. Hefermehl (eds.), *Wettbewerbsrecht*, 23rd ed., loc. cit., § 4 *UWG*, annot. 10.120 et seq..

¹¹⁹ As to discrimination on non-economic grounds see A. Beater, *Unlauterer Wettbewerb*, loc. cit. at p. 649 et seq..

¹²⁰ For the concept of competition on the merit see infra sub. 2, text accompanying n. 133 et seq..

¹²¹ The landmark case is RG of December 18, 1931, RGZ 134, 342 (Benrather Tankstelle = Benrath gas-station), critically analyzed by A. Beater, *Unlauterer Wettbewerb*, loc. cit. at p. 562 et seq..

¹²² In particular, up until 1998, Section 20 (4) *UWG* had reserved antitrust control of abusive conduct by market dominating enterprises to the administrative cartel authorities, and it was only once they had found an abuse, that a private law suit could be brought, based on the administrative decision. In addition, attribution of jurisdiction in civil matters seems to favor the application of unfair competition rules, see H. Köhler in R. Jacobs, W. Lindacher, O. Teplitzky, *UWG-Großkommentar*, Berlin 1995, § 1 annot. D 79.

practices risk to result in putting competition altogether into jeopardy.¹²³ A case in point is the price war between two leading enterprises on a local market, which in all likelihood will result in the ruin of all smaller competitors.¹²⁴

This case law, in reality, is of rather limited scope. There are many justifications to sales below costs that are easily accepted,¹²⁵ and courts have taken care to put the accent on the structural anti-competitiveness of price cutting practices when holding them to be unfair.¹²⁶ In this context a bitter controversy may be noted, which was about whether the Act Against Unfair Competition may be relied upon to fight the mere risk that, due to predatory practices, a still competitive market may tip from being competitive to being dominated.¹²⁷ Ultimately, it has been brought to rest by, on the one hand, the reluctance of the courts to follow fully such a far-reaching proposition,¹²⁸ and, on the other, by intervention of the legislature. Indeed, in 1990, by adding a new paragraph 4, section 20 of the GWB has been deliberately extended to cover the battlefield between small and medium-sized enterprises and their more powerful, albeit not market dominating enterprises.¹²⁹ Following yet another amendment in 1998 – of the second sentence of section 20(4) GWB more particularly confirms that sales below costs, if practiced on more than only an occasional basis, are tantamount of an unreasonable impairment. They are therefore unlawful as between enterprises having "extraordinary" market power in comparison to the position held by their small and medium sized

¹²³ The matter is highly controversial, but the generally accepted starting point is the principle of autonomy regarding pricing, on the one hand, and the intentional or systematic elimination of competition on the other, see BGH of April 26, 1990, GRUR 1990, 687; H. Köhler in H. Köhler, H. Piper (eds.), UWG, loc. cit § 1 annot 490 et seq., 514 et seq.; W. Hefermehl in A. Baumbach, W. Hefermehl, (eds.), UWG, loc. cit. § 1 annot. 870 et seq.; A. Beater, Unlauterer Wettbewerb, at p. 378 et seq., 561 et seq., all with references.

¹²⁴ BGH of October 27, 1988, WuWE BGH 2547.

¹²⁵ See H. Köhler in H. Köhler, H. Piper (eds.), UWG, loc. cit § 1 annot 515; basically any sound business reason may justify sales below costs, such as cross-subsidization, risk of obsolescence, meeting competition; however, loss of reputation of the brand of the goods sold below costs is not, in itself, a ground of unfairness, see BGH of October 6, 1983, GRUR 1984, 204.

¹²⁶ See references supra n. 123.

¹²⁷ The main protagonist for an application of the rules against unfair competition in the "fore-field" of the antitrust laws was P. Ulmer, Schranken zulässigen Wettbewerbs marktbeherrschender Unternehmen, Baden-Baden 1977, 64 et seq., 103 et seq. (relying on L. Raiser, Marktbezogene Unlauterkeit, GRUR 1973, 443); id., Der Begriff "Leistungswettbewerb" und seine Bedeutung für die Anwendung von GWB- und UWG-Tatbeständen, GRUR 1977, 565; for a critique see E.-J. Mestmäcker, Der verwaltete Wettbewerb, Tübingen 1984, 56 et seq., 72 et seq.; for a critical overview W. Schönemann, in R. Jacobs, W. Lindacher, O. Teplitzky (eds.) UWG-Großkommentar, Einl. D101 et seq., D107 et seq.; H. Köhler in H. Köhler, H. Piper (eds.), UWG, loc. cit § 1 annot 502; id., in R. Jacobs, W. Lindacher, O. Teplitzky, UWG-Großkommentar, loc. cit. § 1, annot. D11 et seq. both with extensive references.

¹²⁸ BGH of March 11, 1997, GRUR 1977, 668 has gone as far as possible under the specific circumstances of competition in the newspaper market, where sales of advertising space, on the one hand, and the public interest in multiplicity of competitors, on the other, require particular attention.

¹²⁹ For the development and rationale see K. Markert in U. Immenga, E.-J. Mestmäcker, (eds.) GWB, § 20, annot 275 et seq., 278 et seq..

competitors,¹³⁰ provided always, that the "predating" enterprise cannot forward a reasonable business justification for its pricing practice. If not, the rule is understood as a sort of per se prohibition, meaning that courts will not inquire into whether the sales below cost actually do harm competition.¹³¹

2. Competition of Competition Rules and the Concept of Competition

In Germany, connecting the application of the rules against unfair competition to the predictable collapse of all competition as a result of intentionally or purposively market-destructive conduct, is not limited to predatory pricing. Practices, such as systematic market foreclosure by free-of-charge distribution of goods, have been brought under the Act Against Unfair Competition as well, and they have been condemned as constituting non-meritorious competition.¹³² The latter concept then has been generalized and used tentatively to control the exercise of market power of large retailers, who obliged suppliers to bear part of the retail costs, such reversal of roles being a way of obtaining undeserved advantages in competition on the retail side.¹³³ Competition on the merits even came to be qualified as a common concept of both the antitrust laws and the rules against unfair competition. This then, conversely, seemed to allow introducing unfair competition criteria into the antitrust laws as a way of giving some minimum content to the vague concepts of abuse of market power or, more specifically, to the concept of blocking-off rivals as a practice which cannot be accepted

¹³⁰ See generally S. Wagner, F. Kühlmann, Sales Below Cost - Can You Stop Your Distributors in the EU? 34 IIC 418 (2003) reporting also on the national law of other EU Member States.

¹³¹ See BGH of November 12, 2002, WuW/E DE-R 1042 overruling, in view of the amended text of Section 20 (4) GWB, BGH of April 4, 1995 WuW E RGH 2977.

¹³² See BGH of February 26, 1965, BGH Z 43, 278; W. Hefermehl in A. Baumbach, W. Hefermehl (eds.), Wettbewerbsrecht, loc. cit. § 1 annot 856 et seq.; H. Köhler in A. Baumbach, W. Hefermehl (eds.), Wettbewerbsrecht, 23rd ed., loc. cit., § 4 annot. 12.17 et seq.; for a narrower approach A. Beater, Unlauterer Wettbewerb, loc. cit. 617 et seq., 624 et seq.; the issue has been of particular concern for the printed press, see W. Hefermehl, *ibid.* § 1 annot 859 et seq.; and recently BGH of November 11, 2003, GRUR 2004, 602.

¹³³ See e.g. BGH of December 17, 1976, NJW 1977, 1242; the leading protagonist again was P. Ulmer, Leistungsfremde Wettbewerbspraktiken marktstarker Unternehmen – Neuorientierung des Diskriminierungsverbots und der Instrumente des UWG, in Bayerisches Staatsministerium für Wirtschaft und Verkehr (ed.), Wettbewerbskongreß München 1977, Munich 1977, 187 et seq.; generally on the concept of competition on the merits W. Hefermehl, Grenzen des Lauterkeitsschutzes, GRUR Int. 1983, 507; on the concept of market level competition (Stufenwettbewerb) see W. Schünemann in R. Jacobs, W. Lindacher, O. Teplitzky (eds.) UWG-Großkommentar loc. cit. § 1 annot C 1 et passim (C 31 et seq., C 186 et seq., C 216 et seq.): The phenomenon of changing roles of industry and trade and the distribution of roles within trade has attracted much attention for the phenomenon of buying power in all Member States of the EU (see H. Ullrich, Kartell- und Wettbewerbsrechtliche Reaktion auf verändertes Nachfrageverhalten des Handels in Frankreich, GRUR Int. 1987, 69) and resulted in an extension of both the scope of the antitrust laws (see Article L 442-6 French c. com, Section 20 (3) GWB; W. Goette, Kaufmacht und Kartellrecht, 2 Ztschrft WettbewerbsR 135 (2003)) and the grant of special exemptions for joint buying by small and medium-sized enterprises (see Section 4 (3) GWB; Commission, Guidelines on the applicability of Article 81 to horizontal cooperation agreements, OJEC 2001 C 3, 2 sub No. 115 et seq.).

if indulged into by market dominating enterprises.¹³⁴ Surely enough, these approaches came under attack because of their structural rigidity. There are no pre-defined roles or functions of enterprises on the market. Rather, it is competition that defines and permanently redefines the roles enterprises may play on the market.¹³⁵ In addition, the notion of competition on the merit, whilst intuitively capturing the basic ideas of individualistic rivalry in the market place, in fact invites circular reasoning.¹³⁶ It is again competition and framework regulation of the market which determine merit and to whom to attribute it.¹³⁷ Therefore, it only rephrases the basic problem, which is to normatively evaluate what is fair in competition and what is not.

Probably, similar objections may be raised against modern attempts to define unfairness by reference to the market dysfunctionality of business practices.¹³⁸ Whilst they seek to separate the realm of the antitrust laws more clearly from that of the rules against unfair competition, they still mirror and even assert the interdependence, however indirect, of both set of rules as a matter of regulating competition in a free-enterprise, open market economy.¹³⁹ More particularly, to the difference of traditional concepts of business honor and ethics with their protectionist tendencies,¹⁴⁰ the law against unfair competition is more distinctly construed as a competition oriented market regulation. It is, however, precisely in this perspective that market power and the safeguard of the existence of competition remain relevant considerations. Clearly also their importance has varied and will continue to vary with the development of the antitrust laws. Rather than being distinguishable by their concern for the effects of business conduct on competition in the market, the rules against anticompetitive

¹³⁴ See P. Ulmer, *Kartellrechtswidrige Konkurrentenbehinderung durch leistungsfremdes Verhalten marktbeherrschender Unternehmen*, Festgabe M. Kummer, Berne 1980, 565; id., *Kartellrechtliche Schranken der Preisunterbietung nach § 26 Abs. 4 GWB*, Festschrift O.-F. Frhr v. Gamm, Cologne 1990, 677, 689 et seq..

¹³⁵ See E.-J. Mestmäcker, loc. cit. at 146 et seq., 151 et seq.; W. Schönemann in R. Jacobs, W. Lindacher, O. Teplitzky (eds.) *UWG-Großkommentar* loc. cit. Einl. D101 et seq.; 107 et seq., id., *ibid.* § 1 annot C 84 et seq..

¹³⁶ See W. Schönemann in R. Jacobs, W. Lindacher, O. Teplitzky (eds.) *UWG-Großkommentar* loc. cit., Einl. D 81 et seq.; H. Köhler, *ibid.* § 1 annot D 33; A. Beater, *Unlauterer Wettbewerb*, loc. cit. at p. 350 et seq., all with references.

¹³⁷ See supra n. 99. The risk of circular reasoning is best illustrated by the misappropriation doctrine which would have it that servile imitation amounts to taking a free ride on a competitor's achievement. There is, however, some merit in imitative competition as a way of disseminating and fully exploiting the advance presented by new knowledge; therefore, most intellectual property rights are granted for a limited term only. The true issue is to determine whose merit is valued most under which circumstances, see also A. Beater, *Nachahmen im Wettbewerb*, loc. cit. at p. 68 et seq., 345 et seq..

¹³⁸ See A. Beater, *Unlauterer Wettbewerb*, loc. cit. at p. 34 et seq., 294 et seq., 330 et seq., 544 et seq.; W. Schönemann in R. Jacobs, W. Lindacher, O. Teplitzky (eds.) *UWG-Großkommentar* loc. cit. Einl. D 37 et seq..

¹³⁹ Under German law one of the more direct links between the two sets of market rules is that, in principle, antitrust violations are actionable as constituting also acts of unfair competition, see BGH of February 21, 1978, WuW E BGH 1519; A. Beater, *Unlauterer Wettbewerb*, loc. cit. at 692 et seq., 712, 714 et seq.; O. Teplitzky in R. Jacobs, W. Lindacher, O. Teplitzky (eds.) *UWG-Großkommentar*, § 1 annot G 182 et seq.; H. Köhler, *ibid.* § 1 annot D 16 et seq.; all with references.

¹⁴⁰ See A. Beater, *Unlauterer Wettbewerb*, loc. cit. at 69 et seq., 101 et seq., 113 et seq..

practices and the rules against unfair practices seem to be linked by this criterion, at least as far as the determination of unfairness between enterprises is concerned. Therefore, the Community legislator of Reg. 1/2003 took a fortunate decision when leaving Member States the power to control both the abuses of sub-dominant market power and the unfairness of commercial practices in competition. Member States may thus find out by regulatory rivalry¹⁴¹ which approach better fits their needs and their legal tradition, and the Community may trust that none will persistently provide for protectionist principles of abuse or unfairness, as this would hurt the competitiveness of its industry, at least in the long run.¹⁴²

In fact, dangers for the peaceful co-existence of Community antitrust law and national control of the abusive exercise of superior or of relational market power and of fairness in competition may rather lurk on the side of the Community. This may be so because, to the extent that Member States' rules against anticompetitive conduct by non-dominating enterprises are essentially aimed at protecting small-and-medium sized industry, there is a potential for conflict with Article 82 of the Treaty – and, as a consequence, with Article 86. This is because this provision is likely to be read less as a conduct-controlling rule protecting the freedom of remaining competitors than as a result-oriented rule outlawing only the inefficient exploitation or preservation of monopolistic market power.¹⁴³

Thus if, for example, the criticism of the application of Article 82 to refusals to deal¹⁴⁴ will be accepted as a matter of adopting a rationale of microeconomic efficiency and of keeping promises of reward in dynamic competition, allowing Member States to subject these enterprises, or – worse – even the only relatively powerful enterprises to duties to deal, would

¹⁴¹ Regulatory rivalry is frequently seen as an alternative to harmonization of national laws in the EU and possibly even accepted by the Court of Justice of the Community (see with regard to corporate law W. Ebke, *Überseering: Die wahre Liberalität ist Anerkennung*, JZ 2003,927 ; with respect to contract law G. Wagner, *The Economics of harmonization : the case of contract law*, 39 CMLRev.995 (2002) ; more generally as regards the integration/decentralization dichotomy J.Snell, loc.cit. at 35 et seq.) , but the underlying concepts are still controversial, see for a short discussion and references H. Ullrich, *L'ordre concurrentiel : Rapport de synthèse ou « Variations sur un thème de Nice »*, in *L'ordre concurrentiel*, loc. cit. at 663,683 et seq..

¹⁴² For an economic discussion of this issue see H.W. Sinn, *The New Systems Competition*, Oxford 2003, 178 et seq.; for a broader legal analysis see J. Drexl, *International Competition Policy After Cancún: Placing a Singapore Issue on the WTO Development Agenda*, 27(3) *World Competition* 419 (2003). It should be noted that in the EU, due to primacy of European competition law, systems competition may play only within a firm framework preventing a race to the bottom and allowing not more than the establishment of rather narrow testing fields for national law.

¹⁴³ See supra II 1 b) and references n. 36.

¹⁴⁴ See references supra n. 35, 36 and more particularly with respect to the control of the exercise of intellectual property rights by market dominating enterprises CJEC of April 29, 2004, case C-418/01 – IMS Health/NDC Health, not yet officially reported; A. Ditman, A. Jones, *Competition Law and Copyright: Has the Copyright Owner Lost the Ability to Control his Copyright?* Eur. Int. Prop. Rev. 2004, 137.

result in establishing a split-level system of entrepreneurial freedom and of subjection to antitrust control. Such a two-tiered system would be the less tolerable as the Community conceives of its welfare economics based competition policy as an instrument of enhancing international competitiveness of its industry,¹⁴⁵ which it may not wish to see undermined by Member States. Overtly by amending Reg. 1/2003 or covertly by reinterpreting Article 2 (2), Member States' authority, therefore, may become limited on the ground that there can be only one homogeneous competition policy for the Community. The litmus test of the true relationship between antitrust law and anti-unfair competition law in the Community will then be whether, by relying on Article 3 (3) Reg. 1/2003, Member States may maintain full autonomy at least with respect to the definition and control of unfair business practices, including the use of "structuralist" safeguards against market-disruptive uses of relative or absolute market power. Pragmatically speaking, the reservation of such residual power of control to Member States might, on the one hand, serve as a safety-valve in case Community control appears to be too limited, if not biased in favor of major enterprises. On the other, it may also serve as a way to have private litigation find out – literally by trial, but also by failure – which practices are really harmful, and harmful enough to be administratively controlled under the antitrust laws.¹⁴⁶

¹⁴⁵ See Commission, A pro-active Competition Policy for a Competitive Europe, COM (2004) 293 final of April 20, 2004; id., The Commission puts industry centre stage and reinforces competitiveness in an enlarged European Union, Press release IP/04/501 of April 20, 2004; for the USA see (Rede Dep. Att. Gen. in Korea).

¹⁴⁶ Such, in fact, was the development in Germany, where protection under the rules on unfair competition was sought when antitrust law did not provide for relief from predatory practices by powerful competitors, and where, subsequently, more teeth were given to the antitrust rules, see *supra* III.1 c) text accompanying n. 120 et seq..

IV. Conclusion

A more principled argument for maintaining Member States' full authority of control of unfair practices of competition in business relations might again be based on a substantive distinction between the objectives and the implementation of the rules against anti-competitive and against unfair practices. In Germany, a major difficulty in determining the respective roles of both sets of market regulation has been due to the circumstance that the Act Against Restraints of Competition originally and basically had been founded on a system-oriented concept of freedom of competition, however controversial, imperfect and subject to instrumentalist revisions.¹⁴⁷ The Act Against Unfair Competition, by contrast, had its origins in protectionist notions of honest trade and ethical conduct,¹⁴⁸ and needed to be brought in line with modern concepts of competition-driven market development. Using the Act Against Unfair Competition to fight market-destructive practices with no protectionist objective in mind meant both refurbishing unfair competition law and pre-empting the antitrust laws. This was no easy task, and in a way, the antitrust laws reacted by an extension so as to pre-empt unfair competition rules in their turn.

In the Community, the situation is or has become different. Whilst its understanding of the rules of competition has become ever more instrumentalist,¹⁴⁹ and, in fact, favors forms of dynamic oligopolistic and of group competition,¹⁵⁰ national laws against unfair competition are or should be conceived and applied in a perspective of non-instrumentalist competition. Their function is to set standards of respect for rival enterprises which, as a matter of stimulating all, rather than demotivating minor market participants, safeguard a minimum of mutual freedom of competition. Therefore, rather than closely following the competition

¹⁴⁷ For the development see D. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus*, Oxford 1998, 266 et seq., 296 et seq.; H. Ullrich in J. Drexl (ed.), loc. cit. at p. 168 et seq..

¹⁴⁸ See reference supra n. 140.

¹⁴⁹ See Commission, supra n. 145; this instrumentalist understanding is one of the reason why all kinds of other policy objectives may also legitimately be relied upon to justify restrictive agreements, however incompatible they may be with the goal of welfare maximization, see supra n. 23 and for further illustration Commission, *Guidelines on horizontal cooperation agreements*, loc. cit., No. 159 et seq.; 179 et seq., with respect to promoting innovation and/or technology transfer H. Ullrich, loc. cit. 48 *Antitrust Bull.* 837 C 2003); id., *Expansionist Intellectual Property Protection and Reductionist Competition Rules*, 7 (2) *J. Int'l. Ec. L.* 401 (2004).

¹⁵⁰ See supra II 1a) and n. 31.

concepts of the Community's competition policy,¹⁵¹ Member States may, with respect to individual market conduct, and within the Community's framework of antitrust regulation, develop their own vision of a freedom-oriented market system, including the control of abuses of market power if it is exercised to destroy competition. This will of course result in some protection of competitors, but it is not protectionist for that matter.¹⁵² Competition is made of and by competitors. Granting each of them protection of their basic freedom of individual competition would seem to be complementary of, rather than contrary to the development of the Community's system of undistorted competition.

Complementarity of the anti-trust and the anti-unfair competition rules is by no means a new insight. However, its terms change over time, and it is as complex a complementarity as is competition itself. Indeed, given the kaleidoscopic nature of competition, unfair competition law quite naturally brings a variety of competition concerns into play, which are either outside the scope of the antitrust laws or have been marginalized by it. The areas examined here should have illustrated that point; it could have been made with respect to many other areas as well.¹⁵³ The change of terms of the relationship of complementarity has many reasons, which originate from both areas of law. However, whilst formerly the establishment of a system of undistorted competition on the basis of antitrust rules in the Community (or in Germany) led to a revision of the concepts of unfairness, the recent revision of the Community's (and of Germany's¹⁵⁴) antitrust rules may now require unfair competition law to develop, on the basis of the lessons taken, its own concepts of unfairness more independently.

¹⁵¹ Contra: St. Koos, *Europäischer Lauterkeitsmaßstab und globale Integration*, Munich 1996, 181 et seq., 188 et seq..

¹⁵² As suggested so many times by a one-dimensional view of competition, which cares too little about the proper balance of freedom and power see e.g. Chr. Bright, *EU Competition Policy: Rules, Objectives and Deregulation*, 16 *Oxford J. Legal Stud.* 535, 546 et seq. (1996)); at any rate, the reservation made by Article 3 (3) Reg. 1/2003 in favor of general principles of EU-law, as safeguarded by the Court of Justice (see supra II.3 a)), should suffice to avoid protectionism.

¹⁵³ A rather obvious example of complementarity of antitrust and anti-unfair competition rules is presented by tying practices, with which the former deal as a market foreclosure problem, and the latter as a consumer deception issue, see BGH of July 9, 2002, WuW E DE-R 1006, 1008 et seq., 1010.

¹⁵⁴ The fundamental conceptual changes, which the proposed full adaptation of the German Act Against Restraints of Competition will, entail have not yet been realized or at least have not been made explicit by either the Government or the expert press, see Bundesregierung, *Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, Bundesrat Drucksache 441/04 of May 28, 2004.