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Protection against unfair competition in the European Union: from divergent national approaches to harmonized rules on search result rankings, influencers and greenwashing

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Abstract

- This article provides an overview of the complex interplay between harmonized rules of unfair competition law at EU level and national approaches in the Member States. It discusses case law, sheds light on the objectives underlying protection against unfair competition and describes intersections with intellectual property rights.
- The analysis addresses general clauses that allow unfair competition law in the EU to keep pace with constantly changing marketing practices. It discusses the concept of confusion from a comparative trademark and unfair competition law perspective. Moreover, misleading practices, discrediting and denigrating allegations, slavish imitation, unfair free-riding, trade secret rules and transparency obligations will be explored.
- The analysis includes recent extensions of the canon of unfair competition rules, in particular in the field of product rankings within search results, influencer marketing and greenwashing. Particular attention will also be devoted to the growing body of transparency obligations in online marketing contexts, including obligations in the area of targeted behavioural advertising that follow from the Digital Services Act.

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1. Introduction

In the European Union (EU), unfair competition law is not fully harmonized. The Unfair Commercial Practices Directive (UCPD)[1] harmonizes the approach to unfair practices in business-to-consumer relations. It protects consumers against misleading and aggressive practices. The Directive on Misleading and Comparative Advertising (MCAD)[2] sets forth harmonized rules in the field of advertising. The protection of undisclosed know-how and business information has been harmonized in the Trade Secrets Directive (TSD).[3] Outside of these specific legislative instruments, national legislation regulates significant areas of substantive unfair competition law.[4]

The regulatory approach in EU Member States differs considerably. Some countries, such as Austria, Belgium, Denmark, Germany, Greece, Hungary, Slovenia, Spain and Sweden, have enacted specific unfair competition acts seeking to protect competition in the interest of all market participants, including competitors and consumers, and serving the objective to safeguard the general

1 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, *Official Journal* L 149, 22.

2 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), *Official Journal* L 376, 21.

3 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, *Official Journal* L 157, 1.

4 A Ohly, 'Trademark Law and Advertising Law in the European Union: Conflicts and Convergence', in I Calboli and JC Ginsburg (eds) *Cambridge Handbook on International and Comparative Trademark Law* (Cambridge: CUP 2020) 323, 323–324.

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interest of the public in undistorted competition.[5] Protection against unfair competition may also form part of the Intellectual Property Code (Portugal), the Commercial Code (Czech Republic and Slovakia) or a Competition Act including antitrust provisions (Estonia, Latvia and Lithuania).[6] Other countries, such as France, Italy and the Netherlands, distinguish between consumer protection laws and related enforcement mechanisms, and general civil responsibility for acts of unfair competition, in particular on the basis of general tort law.[7]

2. Importance of general clauses

Recognizing the need for a flexible regulatory framework to allow the law to keep pace with constantly changing trade practices and market circumstances,[8] unfair competition law in the EU rests on flexible, general clauses. Article 5(1) UCPD states that '[u]nfair commercial practices shall be prohibited'. A similar overarching prohibition—encompassing business-to-business relations—can be found in unfair competition laws of EU Member States.[9] Section 1(1) No 1 of the Austrian Federal Act Against Unfair Competition, for example, seeks to prevent market participants from using 'an unfair commercial practice or other unfair act that is capable of influencing competition to the detriment of companies to a more than insignificant extent'. According to section 3(1) of the Danish Marketing Practices Act, '[t]raders shall exercise good marketing practice'. Section 3(1) of the German Act Against Unfair Competition states that '[u]nfair commercial practices shall be illegal'. Article 4(1) of the Spanish Law on Unfair Competition states that '[a]ny behaviour that is objectively contrary to the requirements of good faith is considered unfair'. Section 5 of the Swedish Marketing Act requires marketing to be 'consistent with good marketing practice'. A general ban of unfair commercial practices may also follow from the application of general tort law.[10]

To determine whether a given marketing practice complies with overarching, open-ended requirements of fairness and good practice, judges may depart from traditional approaches focusing on ethical standards of fairness and decency in a given community.[11] At the core of this development lies a concern about circular assessment criteria. If the focus is on the customs and perceptions of honesty in a given sector, the trade circle whose business practices serve as a reference point for determining honest practices de facto shapes the legal standards, in the light of which the unfairness of behaviour is to be evaluated.[12] To escape this circularity, the test can be aligned with the objective of ensuring the efficient operation of competition as a core instrument of market economies.[13]

Developments in EU Member States attest to this trend.[14] Prior to the adoption of the 2004 Act Against Unfair Competition, the German Federal Supreme Court regarded an act of competition as unfair if it 'contradicts the sense of decency of a reasonable average tradesman or if the general public disapproves [the act] or considers it intolerable'.[15] This ethical approach has been abandoned

5 s 3(1) Danish Marketing Practices Act; s 1 German Act Against Unfair Competition; art 1 Spanish Law on Unfair Competition. As to Denmark, Finland, Norway and Sweden, see also M Viken, 'The Borderline Between Legitimate and Unfair Copying of Products – A Unified Scandinavian Approach?' (2020) 51 *International Review of Intellectual Property and Competition Law* 1033, 1036.

6 See the overview provided by F Henning-Bodewig, 'Die Bekämpfung unlauteren Wettbewerbs in den EU-Mitgliedstaaten: eine Bestandsaufnahme' (2010) *Gewerblicher Rechtsschutz und Urheberrecht—International* 273, 283–84.

7 Ohly (n 4) 325.

8 Spanish Supreme Court (Tribunal Supremo), 7 April 2014, ECLI:ES:TS:2014:1876, Rumba/Ryanair, 8 (quinto), *Gewerblicher Rechtsschutz und Urheberrecht—International* 2015, 1047, 1049.

9 As to the requirement of impairing competition to a more than insubstantial extent, see F Henning-Bodewig, *Unfair Competition Law—European Union and Member States* (The Hague/London/New York: Kluwer Law International 2006) 129. See also art 30 Bulgarian Act for the Protection of Competition; s 44 Czech Commercial Code; art 50 Estonian Competition Act; art 1 Greek Act to Combat Unfair Competition; art 18(1) and (2) Latvian Competition Act; art 16 Lithuanian Competition Act; art 2 Hungarian Act to Combat Unfair Competition; art 14 Commercial Practices Act of Luxembourg; art 3(1) Polish Act to Combat Unfair Competition; art 317 Portuguese Intellectual Property Code; art 1 Romanian Act to Combat Unfair Competition; s 44 Slovakian Commercial Code; art 13(2) Slovenian Act for the Protection of Competition. As to the European Economic Area, s 25 Norwegian Marketing Control Act stipulates that '[n]o act shall be performed in the course of trade which conflicts with good business practice among traders.'

10 art 1240 French Code Civil; art 6:162 Dutch Civil Code.

11 Cf KN Peifer, 'Schutz ethischer Werte im Europäischen Lauterkeitsrecht oder rein wirtschaftliche Betrachtungsweise?', in RM Hilty and F Henning-Bodewig (eds) *Lauterkeitsrecht und Acquis Communautaire* (Heidelberg/Dordrecht/London/New York: Springer 2009) 125, 125–28; E Ulmer, *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft* (Vol I, Munich 1965) 42–43; SP Ladas, *Patents, Trademarks, and Related Rights—National and International Protection* (Vol III, Cambridge, Massachusetts: Harvard University Press 1975) 1685–86.

12 Ulmer (n 11) 249; HW Micklitz et al, *Study on the Feasibility of a General Legislative Framework on Fair Trading* (Vol I–II, Institut für Europäisches Wirtschafts- und Verbraucherrecht e.V. 2000) 13 and 467.

13 R Podszun, 'Spezielle Wettbewerbsförderung durch Europäisches Lauterkeitsrecht: Plädoyer für ein allgemeines Europäisches Wettbewerbsrecht' in RM Hilty and F Henning-Bodewig (eds) *Lauterkeitsrecht und Acquis Communautaire* (Heidelberg/Dordrecht/London/New York: Springer 2009) 151, 156–57 and 163–68. As to the evolution of approaches considering the functioning of the free market economy as a whole, see A Kamperman Sanders, 'Unfair Competition: Complementary or Alternative to Intellectual Property in the EU?', in C Geiger (ed) *Constructing European Intellectual Property—Achievements and New Perspectives* (Cheltenham: Edward Elgar 2013) 329, 338; R Callmann, 'Unlauterer Wettbewerb zum Wohl der Allgemeinheit?', *Markenschutz und Wettbewerb* 1926/1927, 378; R Callmann, *Der unlautere Wettbewerb* (Mannheim: Bensheimer 1929).

14 Cf Viken (n 5) 1045.

15 German Federal Supreme Court (*Bundesgerichtshof*), 14 October 1993, case I ZR 40/93, 'PS-Werbung II', *Gewerblicher Rechtsschutz und Urheberrecht* 1994, 220 (222); German Federal Supreme Court, 18 May

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in favour of an analysis seeking to safeguard the freedom of competitors to develop their business in an environment of fair, undistorted competition.[16] Discussing deliberate obstruction of competitors,[17] the Court deemed an impairment unfair 'if the purpose of the impairment is to prevent competitors from developing their business and thus to displace them, or if the impairment leads to the impaired competitors no longer being able to adequately assert their performance on the market through their own efforts'.[18] Addressing the hierarchy between ethical and economic considerations, the Spanish Supreme Court held that ethical considerations of a general nature were subordinate to requirements directly following from the exigencies of economic competition. It would be wrong to invoke ethical boundaries to repress conduct 'that proves to be competitively efficient and that promotes the performance of a person or a third party on the basis of its merits, without causing an alteration in the competitive structure or the normal functioning of the market'.[19]

As to the competitive relationship necessary for an action against unfair competition, elastic concepts—merely requiring a trader to place itself in competition with the claimant in some way—have arisen in some Member States.[20] Hence, an indirect competitive or substitutive relationship between goods or services can already be sufficient.[21] For instance, it may be deemed sufficient that there is an interdependence between the business advantages which one party intends to achieve for itself or a third party, and the disadvantages—in the sense of an impairment of competition—which the claimant suffers.[22]

Concrete indications of conduct that may be regarded as dishonest can be derived from decisions of the Court of Justice of the European Union (CJEU) in the field of trademark law. In the EU, limitations of the exclusive rights of trademark proprietors can only be invoked if the use at issue is carried out in accordance with honest practices in industrial or commercial matters.[23] Elaborating on the honest practices proviso in this context, the CJEU held in *Gillette*—apparently relying on MCAD criteria for determining the permissibility of comparative advertisement—that use of a mark will not be in accordance with honest practices if

> it is done in such a manner as to give the impression that there is a commercial connection between the third party and the trade mark owner; it affects the value of the trade mark by taking unfair advantage of its distinctive character or repute; it entails the discrediting or denigration of that mark; or where the third party presents its product as an imitation or replica of the product bearing the trade mark of which it is not the owner.[24]

3. Specific prohibited acts

From court decisions applying the outlined general clauses and requirements, clusters of cases have emerged that have found their way into non-exhaustive statutory catalogues of unfair practices.[25] The application of general clauses and general tort law has also led to the identification of specific conditions for protection against forms of unfair commercial behaviour, such as slavish imitation and unfair free-riding, which require a cautious approach to prevent the erosion of more specific rules of intellectual property law.

As a result, unfair competition law in the EU is characterized by an interplay of open-ended, flexible clauses prohibiting unfair commercial practices in general, and more concrete statutory examples of dishonest conduct. Following this approach, EU law offers several avenues for obtaining protection against confusion (Section 3.1), discrediting and denigrating allegations

1995, case I ZR 91/93, 'Busengrapscher', *Gewerblicher Rechtsschutz und Urheberrecht* 1995, 592, 593–94; German Federal Supreme Court, 25 January 2001, case I ZR 53/99, 'Telefonwerbung für Blindenwaren', *Gewerblicher Rechtsschutz und Urheberrecht* 2001, 1181, 1182. Cf Peifer (n 11) 134–37.

16 R Podszun, 'UWG § 3 Verbot unlauterer geschäftlicher Handlungen' in H Harte-Bavendamm and F Henning-Bodewig (eds) *Gesetz gegen den unlauteren Wettbewerb* (4th edn, Munich: Beck 2016) para 142.

17 s 4 No 4 German Act Against Unfair Competition.

18 German Federal Supreme Court, 22 June 2011, case I ZR 159/10, 'Automobil-Onlinebörse', para 65 (unofficial translation by the author).

19 Spanish Supreme Court (*Tribunal Supremo*), 8 October 2007, ECLI:ES:TS:2007:6143, Schindler/Ascensores Pruertollano, 6 (séptimo) (unofficial translation by the author). Cf. R García Pérez, Comment on Spanish Supreme Court (Tribunal Supremo), 7 April 2014, ECLI:ES:TS:2014:1876, Rumba/Ryanair, Quinto, *Gewerblicher Rechtsschutz und Urheberrecht—International* 2015, 1049, 1051.

20 W Büscher, 'Aus der Rechtsprechung des EuGH und des BGH zum Lauterkeitsrecht seit Ende 2015', *Gewerblicher Rechtsschutz und Urheberrecht* 2017, 105, 105–06.

21 For a description of the spectrum of approaches, see Henning-Bodewig (n 6) 273–87. As to the historical evolution of protection going beyond direct competition, see Kamperman Sanders (n 13) 338.

22 German Federal Supreme Court (Bundesgerichtshof), 24 February 2022, case I ZR 128/21, 'Zweitmarkt für Lebensversicherungen II', Available at www.bundesgerichtshof.de (accessed 21 December 2023), para 13; German Federal Supreme Court, 21 April 2016, case I ZR 151/15, 'Ansprechpartner', *Gewerblicher Rechtsschutz und Urheberrecht* 2016, 1193, para 15.

23 art 14(2) reg (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), *Official Journal* 2017 L 154, 1 ('EUTMR'); art 14(2) Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, *Official Journal* 2015 L 336, 1 ('TMD').

24 CJEU, 17 March 2005, case C-228/03, Gillette/L.A.-Laboratories, para 49. For a more detailed discussion of the honest practices condition in EU trademark law, see A Kur/MRF Senftleben, *European Trade Mark Law—A Commentary* (Oxford: OUP 2017), paras 6.71–6.77.

25 A Ohly, 'A Fairness-Based Approach to Economic Rights', in PB Hugenholtz (ed) *Copyright Reconstructed—Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Alphen aan den Rijn: Wolters Kluwer 2018) 83, 89–90.

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(Section 3.2), misleading practices (Section 3.3), slavish imitation (Section 3.4) and other acts of misappropriation (Section 3.5). In addition, the Trade Secret Directive sets forth detailed rules to ensure trade secret protection (Section 3.6). With regard to online marketing contexts, a trend towards specific transparency obligations can be observed (Section 3.7).

3.1 Creating confusion

In line with Article 10bis(3)(1) of the Paris Convention for the Protection of Industrial Property ('Paris Convention' or PC), comparative advertising is impermissible in the EU when it creates confusion among traders, between the advertiser and a competitor or with regard to a competitor's trademarks, trade names, other distinguishing marks, goods or services.[26] In *Toshiba/Katun*, the CJEU clarified that a sign falls within the category of 'other distinguishing marks' if the public 'identifies it as coming from a particular undertaking'.[27] The protection following from the ban on confusing trade practices, thus, goes beyond trademarks and trade names. It includes other identifiers of commercial origin. With regard to product numbers used by an equipment manufacturer to identify spare parts and consumable items, the qualification as 'other distinguishing marks' may nonetheless be doubtful when such numbers are used alone without an indication of the manufacturer's trademark.[28]

With regard to the concept of confusion, the CJEU has drawn a parallel with the confusion test in EU trademark law.[29] In principle, the interpretation is the same at the European[30] and national[31] level. An actionable likelihood of confusion arises when 'the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings'.[32] The more distinctive the source identifier at issue, the greater will be the likelihood of confusion.[33] However, the confusion test is not satisfied if unauthorized use merely calls to mind the memory of a competitor's marks without causing direct (product) or indirect (origin) confusion.[34]

While parallels may be drawn between these conceptual contours in trademark and general unfair competition law, the test applied in practice need not be congruent because of different reference points. In EU trademark law, confusion has traditionally been determined on the basis of an *abstract* appreciation of interdependent factors, in particular, the similarity of the signs, the similarity of goods and services, and the degree of distinctiveness of the mark.[35] In unfair competition law, by contrast, the analysis is based on an analysis of the *concrete* circumstances surrounding the marketing of the goods or services at issue and the impact of these circumstances on the transactional decision taken by the average consumer.[36] While the consideration of all concrete circumstances in unfair competition cases includes sign and product similarity and the mark's level of distinctiveness, these factors need not be decisive. Instead, other parameters, such as using different colors for the product packaging, displaying text in a different font, etc, may create a different overall impression and dispel concerns about consumer confusion.[37]

However, developments in CJEU jurisprudence give rise to the question whether it is justified to assume that the described dichotomy—an abstract assessment in trademark law; a concrete assessment in unfair competition law—exists to this day. In the comparative advertising case *O2/Hutchison*, the CJEU took the position that the trademark confusion analysis had to be 'limited to the circumstances characterising that use'—in the sense of an assessment of the circumstances surrounding the use of the protected mark in that specific case.[38] In the keyword advertising case *Google France and Google*, the CJEU held that a trademark's advertising function was adversely affected when the advertisement was so vague that the average consumer could not determine whether there was a commercial connection with the trademark proprietor.[39] Hence it seems that the individual advertising message accompanying the allegedly infringing use is a decisive factor.[40] In *Specsavers/Asda*, the CJEU took

26 art 4(h) MCAD.

27 CJEU, 25 October 2001, case C-112/99, Toshiba/Katun, para 49.

28 CJEU, ibid, paras 50–51.

29 art 9(2)(b) EUTMR; art 10(2)(b) TMD. Cf Kur/Senftleben (n 24) paras 5.105–5.110.

30 CJEU, 12 June 2008, case C-533/06, O2/Hutchison, para 49; CJEU, 22 June 1999, case C-342/97, Lloyd Schuhfabrik Meyer, para 17.

31 For an explicit confirmation of this point, see Austrian Supreme Court (*Oberster Gerichtshof*), 10 May 2011, case 17 Ob 10/11 m, Jungle Man, 8. Cf Büscher (n 20) 116.

32 CJEU, ibid, para 59.

33 CJEU, 11 November 1997, case C-251/95, Puma/Sabel, para 24.

34 CJEU, ibid, paras 16 and 26.

35 Kur/Senftleben (n 24) para 5.106; A Ohly, 'Interfaces Between Trade Mark Protection and Unfair Competition Law: Confusion About Confusion and Misconceptions About Misappropriation?', in N Lee et al (eds) *Intellectual Property, Unfair Competition and Publicity* (Cheltenham: Edward Elgar 2014) 33, 41.

36 art 6(2)(a) UCPD. Cf CJEU, 26 October 2016, case C-611/14, ECLI:EU:C:2016:800, Canal Digital Danmark, paras 45–47.

37 Ohly (n 35) 42–44.

38 CJEU, 12 June 2008, case C-533/06, O2/Hutchison, para 67.

39 CJEU, 23 March 2010, cases C-236/08-238/08, Google France and Google, para 90.

40 Ohly (n 35) 45.

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into account, in the context of assessing a likelihood of confusion, the particular form in which Specsavers' trademark had consistently been used in the marketplace.[41] In *Mitsubishi/Duma*, the CJEU lent weight to the fact that 'despite the removal of the signs identical to the mark and the affixing of new signs on the forklift trucks, the relevant consumers continue to recognise them as Mitsubishi forklift trucks'.[42] Again, an extraneous factor—the product's 'own face' in the marketplace (a factor known from slavish imitation cases)[43]—entered the equation. Finally, the CJEU declared that even in the context of trademark registration decisions,[44] the marketing circumstances constituted a relevant factor 'to be taken into account at the stage of the global assessment of the likelihood of confusion'.[45] In light of this case law, it seems inaccurate to paint a black and white picture. The trademark analysis may be less abstract than traditionally assumed. Market reality and certain concrete marketing circumstances may enter the picture and add shades of grey, bringing the assessment closer to the unfair trading analysis applied in unfair competition law.[46]

3.2 Discrediting and denigrating allegations

The specific harm of false allegations described in Article 10bis(3)(2) PC is addressed in national provisions declaring it unfair—unless the facts are demonstrably true—to assert or disseminate facts about the goods, services or business of a competitor, or about the entrepreneur or a member of the management of the business, that could harm the operation of the business or the credit of the entrepreneur.[47] To assess whether a statement concerns relevant 'facts' in the sense of the prohibition, a distinction may be drawn between subjective value judgments and statements of fact.[48] To cover mere value judgments, national law in EU Member States may supplement the prohibition of false factual statements with a more general ban on discrediting and denigrating allegations.[49] The assessment of allegations of this nature (the insinuation of criminal conduct, for example), requires a weighing of interests in the light of the guarantee of freedom of expression.[50] In *Rumba/Ryanair*, the Spanish Supreme Court dealt with media statements in which Ryanair had referred to providers of online flight booking services, in addition to allegations of illegal ticket sales and consumer theft, as 'parasites of the sector'.[51] The Court emphasized that the right of every market participant to see its honour and reputation respected had to be weighed against Ryanair's freedom of expression.[52] The balancing of interests in the light of the principle of proportionality, however, did not offer support for insulting messages that objectively discredited a competitor. As Ryanair's statements did not constitute a criticism of the professional activity of travel agencies, but an 'insulting and unnecessary disqualification' of their professional behaviour, the conduct constituted an unfair commercial practice.[53]

Further rules on discrediting and denigrating statements can be found in the field of comparative advertising.[54] In *Pippig/Hartlauer*, the CJEU clarified that the comparison of rival offers, particularly as regards price, was at the heart of comparative advertising. Therefore, a price comparison could not in itself entail the discrediting or denigration of a competitor who charged higher prices.[55] The advertiser also enjoyed the freedom of choosing the number of comparisons between products. There was no obligation to restrict price comparisons to the average prices of the products offered by the advertiser and those of the competitor.[56] An advertiser was also free, for the purposes of lawful comparative advertising, to reproduce the competitor's logo and a picture of its shop front.[57]

3.3 Misleading practices and measures against greenwashing

The harmonization of unfair competition law in the EU has led to a remarkable concretization of prohibited misleading acts in line with Article 10bis(3)(3) PC. A

41 CJEU, 18 July 2013, case C-252/12, ECLI:EU:C:2013:497, *Specsavers/Asda*, paras 37–38. Cf Kur/Senftleben (n 24) paras 5.115–5.118.

42 CJEU, 25 July 2018, case C-129/17, ECLI:EU:C:2018:594, Mitsubishi/Duma, paras 44–45.

43 Cf Dutch Supreme Court (*Hoge Raad*), 19 May 2017, ECLI:NL:HR:2017:938, Mi Moneda, *Nederlandse Jurisprudentie* 2017, 315, para 3.4.2; German Federal Supreme Court (*Bundesgerichtshof*), 4 May 2016, case I ZR 58/14, 'Segmentstruktur', *Gewerblicher Rechtsschutz und Urheberrecht* 2017, 79, paras 58–59.

44 art 8(1)(b) EUTMR.

45 CJEU, 4 March 2020, case C-328/18P, ECLI:EU:C:2020:156, EUIPO/Equivalenza Manufactory, para 70, referring back to CJEU, 22 June 1999, case C-342/97, ECLI:EU:C:1999:323, Lloyd Schuhfabrik Meyer, para 27.

46 Ohly (n 35) 45–46.

47 s 7(1) Austrian Federal Act Against Unfair Competition; s 4(2) German Act Against Unfair Competition; art 9 Spanish Law on Unfair Competition.

48 Cf German Federal Supreme Court (*Bundesgerichtshof*), 31 March 2016, case I ZR 160/14, 'Im Immobiliensumpf', Gewerblicher Rechtsschutz und Urheberrecht 2016, 710, paras 28–31.

49 s 4(1) German Act Against Unfair Competition.

50 German Federal Supreme Court, ibid, para 51–57.

51 Spanish Supreme Court (*Tribunal Supremo*), 7 April 2014, ECLI:ES:TS:2014:1876, Rumba/Ryanair, 3 (primero).

52 Spanish Supreme Court, ibid, 8 (quinto).

53 ibid.

54 art 4(d) MCAD. Going beyond advertising, national law may apply this rule more broadly. See s 4(1) German Act Against Unfair Competition.

55 CJEU, 8 April 2003, case C-44/01, ECLI:EU:C:2003:205, Pippig/Hartlauer, para 80.

56 CJEU, ibid, para 81.

57 ibid, paras 83–84.

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commercial practice is regarded as misleading when it deceives, or is likely to deceive, the persons to whom it is addressed and may affect their economic behaviour due to its deceptive nature. Misleading conduct is also actionable when, because of its impact, it injures, or is likely to injure, a competitor.[58] The misleading action can relate to various elements, including

- product characteristics, such as availability, nature, execution, composition, method and date of manufacture, fitness for purpose, quantity, specification, geographical or commercial origin;
- the commitment, motives, sponsorship or approval of the trader, including compliance with codes of conduct;
- the price calculation or a specific price advantage, the need for a service, part, replacement or repair;
- the nature, attributes and rights of the trader or his agent, including identity, assets, qualifications, awards and distinctions, affiliation, ownership of industrial, commercial or intellectual property rights;
- the rights of the consumer, including rights to replacement or reimbursement.[59]

With regard to price indications that are divided into several components, the CJEU held in *Canal Digital Danmark* that advertising may be misleading when one price component is particularly emphasized, while another is completely omitted or presented less prominently. The average consumer may wrongly believe that he only must pay the emphasized component of the price.[60] Further rules on business-to-consumer relations follow from the enumeration of 27 misleading practices in Annex I UCPD.

This statutory 'black list' includes several detailed descriptions of unfair conduct, such as:

- making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising)[61];
- falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice[62];
- using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)[63];
- establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products[64];
- claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent[65];
- including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.[66]

The practices listed in Annex I UCPD are deemed unfair per se. Hence, there is no need to demonstrate a particular impact on consumers or the market to establish their unfairness and impermissibility.[67]

Outside the specific cases listed in Annex I, this is different. Article 6 UCPD makes it a condition that a misleading practice cause, or be likely to cause, a transactional decision which the average consumer would not have taken otherwise.[68] While untruthful or deceptive information will often impact and misroute consumer decisions, more difficult scenarios can arise when correct product and price information is combined with doubtful indications concerning non-pecuniary objectives, such

58 art 2(b) MCAD; art 6(1) UCPD.

59 art 3 MCAD; art 6(2) UCPD.

60 CJEU, 26 October 2016, case C-611/14, ECLI:EU:C:2016:800, Canal Digital Danmark, paras 43–44.

61 Annex I UCPD, No 5. According to national case law, the focus of this provision is not on in adequate stockpiling, but inadequate information about the lack of stockpiling. The risk of inadequate information can only be eliminated by providing an explanatory note, which must be 'clearly formulated, easy to read and easily recognizable'. See German Federal Supreme Court (*Bundesgerichtshof*), 17 September 2015, case I ZR 92/14, 'Smartphone-Werbung', *Gewerblicher Rechtsschutz und Urheberrecht* 2016, 395, para 20.

62 Annex I UCPD, No 7.

63 ibid, No 11.

64 ibid, No 14.

65 ibid, No 19.

66 ibid, No 21.

67 Ohly (n 25) 90.

68 arts 6(1) and (2)(a), 7(1) and (2) UCPD. For an assessment of this requirement in the area of misleading price indications, see CJEU, 26 October 2016, case C-611/14, ECLI:EU:C:2016:800, Canal Digital Danmark, paras 45–47.

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as charitable goals or the aim of protecting the environment.[69] The promise of protecting one square metre of rainforest, for instance, raises the question whether, when purchasing the product, the consumer cares about the individual square metre, or wishes to support the environmental project more generally.[70]

In EU unfair competition law, the objective to protect the environment is becoming more and more important. The goal of environmental protection and the fight against so-called 'greenwashing'[71] is likely to culminate in a remarkable enrichment of the rules on misleading practices. This development is not surprising in the light of Article 37 of the EU Charter of Fundamental Rights ('Charter' or CFR) that brings the strong societal interest in environmental protection and sustainable development into focus:

> [a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.[72]

Additional support for new rules follows from the Circular Economy Action Plan[73] which the European Commission adopted in 2020 as a pillar of the European Green Deal—Europe's agenda for sustainable growth.[74] The Action Plan seeks to make the EU economy fit for a green future to strengthen its competitiveness whilst protecting the environment, and give new rights to consumers. An important element of the Action Plan is the objective to establish a legal framework that makes product policies more sustainable, in particular by enhancing the sustainability and repairability of goods in the European market.[75]

Seeking to translate these general goals into concrete unfair competition rules, the Proposal for a Green Transition Directive (PGTD)[76]—aiming at consumer empowerment through better protection against unfair practices—contains a whole set of new norms in the area misleading practices. If adopted,[77] the Green Transition Directive would supplement the list of elements to which a misleading action may relate by adding 'environmental or social impact', 'durability' and 'reparability' to the enumeration of relevant product characteristics in Article 6(1)(b) UCPD.[78] The Green Transition Directive would also add a further case to the list of misleading practices in Article 6(2) UCPD, namely the case of 'making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and without an independent monitoring system.'[79]

The protection against misleading practices also covers omissions: situations where a trader hides material information, provides such information in an unclear, unintelligible, ambiguous or untimely manner, or fails to identify the commercial intent of the commercial practice in cases where this is not already apparent from the context.[80] A trader withholds information if the consumer does not receive it, or does not receive it in such a way that he can take it into account when making a business decision.[81] For instance, the CJEU clarified in *Pippig/Hartlauer* that the omission of the better-known brand is misleading in comparative advertising when brand information may significantly affect the buyer's choice and the brands of rival products differ considerably in the extent to which they are known.[82] In the appreciation of omissions, the factual context and circumstances must

69 As to reintroducing ethical considerations following from this type of product marketing, see Peifer (n 11) 137–41.

70 German Federal Supreme Court (*Bundesgerichtshof*), 26 October 2006, case I ZR 33/04, 'Regenwaldprojekt I', para 34.

71 Cf. J Schwarzbauer, 'Die lauterkeitsrechtliche (Un-)Zulässigkeit von Greenwashing' (2023) *Gewerblicher Rechtsschutz und Urheberrecht* 1593, 1593–95.

72 Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities* 2000 C 364, 1, art 37.

73 European Commission, Communication 'A New Circular Economy Action Plan for a Cleaner and More Competitive Europe', 11 March 2020, COM(2020) 98 final.

74 European Commission, Communication 'The European Green Deal', 11 December 2019, COM/2019/640 final.

75 ibid, 7–9. Cf MRF Senftleben, 'Developing Defences for Fashion Upcycling in EU Trademark Law', *Gewerblicher Rechtsschutz und Urheberrecht—International* 2023, Available at https://doi.org/10.1093/grurint/ikad131 (accessed 21 December 2023), 1–2; S Geiregat, 'Trading Repaired and Refurbished Goods How Sustainable is EU Exhaustion of Trade Marks?' *Gewerblicher Rechtsschutz und Urheberrecht—International* 2023, Available at https://doi.org/10.1093/grurint/ikad124 (accessed 21 December 2023), 10–11; A Tischner and K Stasiuk, 'Spare Parts, Repairs, Trade Marks and Consumer Understanding' (2023) 54 *International Review of Intellectual Property and Competition Law* 26, 28; C Vrendenbarg, 'IE en de circulaire economie: stimulans of obstakel?' (2023) *Nederlands Juristenblad* 971, 971–72.

76 European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information, 30 March 2022, COM(2022) 143 final.

77 A provisional political agreement on the proposed Directive was reached by the European Parliament and the Council on 19 September 2023. Available at https://www.consilium.europa.eu/en/press/press-releases/2023/09/19/council-and-parliament-reach-provisional-agreement-to-empower-consumers-for-the-green-transition/ (accessed 21 December 2023).

78 art 1(2)(a) PGTD.

79 art 1(2)(b) PGTD.

80 art 7(1) and (2) UCPD.

81 Cf German Federal Supreme Court (*Bundesgerichtshof*), 21 July 2016, case I ZR 26/15, 'LDA tested', *Gewerblicher Rechtsschutz und Urheberrecht* 2016, 1076, para 27.

82 CJEU, 8 April 2003, case C-44/01, ECLI:EU:C:2003:205, Pippig/Hartlauer, para 53.

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be considered, including limitations of the communication medium involved.[83] The proposed Green Transition Directive would enhance the existing rules on misleading omissions in Article 7 UCPD by specifically regulating the case of product comparisons, 'including through a sustainability information tool…'.[84] The underlying concept of 'sustainability information tool' is defined broadly. It covers software and (parts of) websites which provide information about 'environmental or social aspects of products, or which compares products on those aspects'.[85]

Finally, the proposed Green Transition Directive would add a whole catalogue of new items to the 'black list' of unfair, impermissible practices in Annex I UCPD, including:

— displaying a sustainability label which is not based on a certification scheme or not established by public authorities;
— making a generic environmental claim for which the trader is not able to demonstrate recognized excellent environmental performance relevant to the claim;
— making an environmental claim about the entire product when it actually concerns only a certain aspect of the product;
— omitting to inform the consumer about the existence of a feature of a good introduced to limit its durability;
— claiming that a good has a certain durability in terms of usage time or intensity when it does not;
— presenting goods as allowing repair when they do not or omitting to inform the consumer that goods do not allow repair in accordance with legal requirements;
— inducing the consumer into replacing the consumables of a good earlier than for technical reasons is necessary.[86]

3.4 Slavish imitation

Protection against slavish copying of products or services[87] is available in many EU Member States.[88] As this type of protection could undermine the specific protection requirements of intellectual property rights,[89] unauthorized copying is only actionable if specific criteria of unfairness are fulfilled.[90] In particular, it is deemed unfair when the copying causes avoidable confusion as to the commercial origin of goods or services.[91] The requirement of 'avoidable' confusion safeguards the freedom of competition after the expiry of intellectual property rights. The imitation of technical or aesthetic product features is only actionable if the competitor could have implemented the technical know-how or design without slavishly replicating the product that previously enjoyed patent or industrial design protection.[92]

For a claim based on slavish imitation to have success, national law may require that the imitated good or service have acquired an individual competitive position—its 'own face'[93]—in the relevant market. It must be distinguishable from similar other products or services.[94] As to the concept of confusion, there is a tendency of aligning the analysis with the criteria that have evolved in harmonized EU trademark law (Section 3.1).[95] Accordingly, a likelihood of confusion can be assumed when the public considers the imitation to be the original, or believes

83 art 7(2) UCPD.
84 art 1(3) PGTD.
85 art 1(1) PGTD.
86 PGTD, Annex.
87 As to the extension to services, cf Viken (n 5) 1042.
88 Cf O-A Rognstad, 'Om forholdet mellom retten til parallellimport og nasjonale regler om markedsføring' (2000) *Nordiskt immateriellt rättsskydd* 320, 326–27. As to the permissibility of protection against slavish imitation at the national level despite potential interferences with the free movement of goods and services, see CJEU, 14 September 2010, case C-48/09 P, ECLI:EU:C:2010:516, Lego/Mega Brands, para 61; CJEU, 2 March 1982, case 6/81, ECLI:EU:C:1982:72, BV Diensten Groep/Beele, para 15. Cf Henning-Bodewig (n 9) 129.
89 Cf A Kamperman Sanders, 'Do Whiffs of Misappropriation and Standards for Slavish Imitation Weaken the Foundations of IP Law?', in E Derclaye (ed) *Research Handbook on the Future of EU Copyright* (Cheltenham: Edward Elgar 2009) 567.
90 Cf. German Federal Supreme Court (*Bundesgerichtshof*), 19 November 2015, case I ZR 149/14, 'Pippi-Langstrumpf-Kostüm II', *Gewerblicher Rechtsschutz und Urheberrecht* 2016, 725, paras 22–28, where the Court denied additional protection of fictive characters on the basis of the general clause in s 3(1) of the German Act Against Unfair Competition in the light of specific intellectual property legislation that offers protection avenues.
91 s 4(3)(a) German Act Against Unfair Competition; s 30 Norwegian Marketing Control Act; s 14 Swedish Marketing Act.
92 Dutch Supreme Court (*Hoge Raad*), 20 November 2009, ECLI:NL:HR:2009:BJ6999, Lego, *Nederlandse Jurisprudentie* 2011, 302 (Lego); Dutch Supreme Court (*Hoge Raad*), 31 May 1991, ECLI:NL:HR:1991:ZC0259, Borsumij/Stenman, *Nederlandse Jurisprudentie* 1992, 391. As to the requirement of an almost exact copy in Danish law, see M Rosenmeier and JH Schovsbo, 'Brugskunstbeskyttelsen mod «meget nærga°ende efterligninger». Er Højesterets praksis pa° kant med EU-retten? U2015B.181' (2015) *Ugeskrift for Retsvæsen* 181–85.
93 Dutch Supreme Court (*Hoge Raad*), 19 May 2017, ECLI:NL:HR:2017:938, Mi Moneda, *Nederlandse Jurisprudentie* 2017, 315, para 3.4.2. Cf German Federal Supreme Court (*Bundesgerichtshof*), 4 May 2016, case I ZR 58/14, 'Segmentstruktur', *Gewerblicher Rechtsschutz und Urheberrecht* 2017, 79, paras 58–59; Norwegian Supreme Court, 29 November 2005, case HR-2005-1857-A, Viet Thai Mat AS/Hong Kong Frukt Tobakk og Asiamat ('Rice bag'), *Norsk Retstidende* 2005, 1560, para 30.
94 See s 14 Swedish Marketing Act requiring the product to be 'known and distinctive.' Cf Danish Supreme Court, 19 June 2013, case U2013.2636 H, 7 March 2012, case U2012.1983 H, 9 February 2001, case U2001.1006 H; Italian Supreme Court, Cass 14 May 2020, case 8944, Cass 12 February 2009, case 3478, Cass 26 November 2008, case 28215, Cass 19 January 2006, case 1062.
95 Cf Viken (n 5) 1042–43.

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that the products in question—even if they are not identical, but make a similar overall impression—come from the same or economically linked undertakings.[96]

Apart from cases concerning avoidable confusion, protection against slavish imitation may also be available if the offer of replicas unreasonably exploits or impairs the assessment of the replicated goods or services, or the knowledge or documents for making replicas have been obtained in a dishonest way.[97]

3.5 Unfair free-riding

Prior to partial harmonization at EU level, protection against unfair free-riding—in the sense of a broad misappropriation doctrine covering the evocation of a competitor's products, services or other commercial achievements—has already been an element of continental-European legal traditions.[98] Repercussions of these national traditions impacted the evolution of harmonized EU law. Article 4(f) MCAD, for instance, can be understood to ban comparative advertising that takes unfair advantage of 'the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products.'[99] Trademarks with a reputation enjoy protection against acts that take unfair advantage of the mark's distinctive character or repute.[100]

Discussing the concept of 'parasitism' in the context of EU trademark law, the CJEU explained that it covers cases where, by reason of a transfer of the trademark image or evocation of product characteristics, 'there is clear exploitation on the coat-tails of the mark with a reputation.'[101] More specifically, this protection is available when a third party calls to mind the mark with a reputation[102] and attempts to ride on the coat-tails of that mark 'in order to benefit from its power of attraction, its reputation and its prestige, and to exploit, without paying any financial compensation and without being required to make efforts of his own in that regard, the marketing effort expended by the proprietor of that mark…'[103]

The inclusion of protection against unfair free-riding in specific intellectual property legislation, such as trademark law, raises the question in which circumstances there is room for comparable protection following from general unfair competition law.[104] Developments in EU Member States show that an action based on unfair competition is only possible in exceptional circumstances. Under Dutch law, for instance, it has been recognized that an achievement not falling within the province of intellectual property law may enjoy protection against unfair free-riding if it can be put on a par with a creative or inventive effort eligible for intellectual property protection.[105] In practice, however, the question of comparability is hardly ever answered in the affirmative. In *KNVB/NOS*, for instance, the Dutch Supreme Court held that the organization of premier league and national football competitions for professional clubs did not constitute an achievement equivalent to the effort necessary to obtain an intellectual property right.[106]

Developments in other EU Member States confirm the exceptional nature of protection against misappropriation. The German case *Hartplatzhelden.de* concerned an advertisement-based website for sharing video clips of remarkable scenes of amateur football matches.[107] As one of Germany's regional football associations sued the website operators for profiting unfairly from its organizational and training efforts, the German Federal Supreme Court discussed the question whether protection could follow from the general ban of unfair commercial practices in German unfair competition law.[108] It concluded that this was only conceivable if strict conditions were

96 Dutch Supreme Court, ibid, para 3.4.5. Cf Viken (n 5) 1039–40, 1043–44.

97 Section 4(3)(b) and (c) German Act Against Unfair Competition.

98 For a discussion of the scope of national legislation covering the unfair 'appropriation of merits', see Italian Supreme Court, Cass 13 July 2021, case 19954. Cf A Ohly, 'Is the Unauthorised Commercial Exploitation of Sports Events Unfair?', in MRF Senftleben and J Poort et al (eds) *Intellectual Property and Sports—Essays in Honour of Bernt Hugenholtz* (The Hague/London/New York: Kluwer Law International 2021) 197, 200.

99 CJEU, 8 April 2003, case C-44/01, ECLI:EU:C:2003:205, Pippig/Hartlauer, para 44. For a discussion of the question whether it is wise to apply the MCAD catalogue not only to identify permissible forms of comparative advertising but also to prohibit all cases not satisfying all listed requirements, see Ohly (n 35) 51–55.

100 art 9(2)(c) EUTMR; art 10(2)(c) TMD.

101 CJEU, 18 June 2009, case C-487/07, ECLI:EU:C:2009:378, L'Oréal/Bellure, para 41.

102 CJEU, 23 October 2003, case C-408/01, Adidas/Fitnessworld, ECLI:EU:C:2003:582, para 29.

103 CJEU, 18 June 2009, case C-487/07, ECLI:EU:C:2009:378, L'Oréal/Bellure, para 49.

104 Cf A Kur, '(No) Freedom to Copy? Protection of Technical Features under Unfair Competition Law', in M Adelman and R Brauneis et al. (eds) *Patents and Technological Progress in a Globalized World* (Berlin: Springer 2009) 521, 522.

105 Dutch Supreme Court (*Hoge Raad*), 27 June 1986, ECLI:NL:PHR:1986:AD7158, Holland Nautica/Decca, *Nederlandse Jurisprudentie* 1987, 191, para 4.2; Dutch Supreme Court (*Hoge Raad*), 20 November 1987, ECLI:NL:HR:1987:AD0056, Staat/Den Ouden, *Nederlandse Jurisprudentie* 1988, 311.

106 Dutch Supreme Court (*Hoge Raad*), 23 October 1987, ECLI:NL:HR:1987:AD0055, Koninklijke Nederlandse Voetbalbond/Nederlandse Omroep Stichting, *Nederlandse Jurisprudentie* 1987, 310, para 5.1. Cf Asser Institute and Institute for Information Law, *Study on Sports Organisers' Rights in the European Union* (Amsterdam/The Hague 2014) 35–36, Available at https://www.asser.nl/media/2624/final-report_sor-2014.pdf (accessed 22 December 2023).

107 German Federal Supreme Court (*Bundesgerichtshof*), 28 October 2010, case I ZR 60/09, 'Hartplatzhelden.de', *Gewerblicher Rechtsschutz und Urheberrecht* 2011, 436, paras 1–3.

108 s 3(1) German Act Against Unfair Competition.

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fulfilled. Alternative protection avenues, such as intellectual property rights, had to prove insufficient. Protection had to be necessary to ensure continued investment in the claimant's organizational activities. Finally, the Court weighed the claimant's protection interests against those of the website operator and the general public.[109] In the light of these criteria, no need for protection on the basis of unfair competition law was found. The amateur clubs could invoke their house right to control stadium access and video recordings.[110] As the website was an important source of information with regard to amateur football matches, the freedom of information of platform users and the public interest in freedom of competition tipped the scales against a finding of unfair free-riding.[111]

The exceptional nature of protection against misappropriation has also been confirmed in court decisions concerning ambush marketing. In *FFR/Fiat*, the French Supreme Court dealt with an advertising campaign for the Fiat 500 in which the car producer alluded to a rugby match between France and England in the Six Nations Championship and an upcoming match between France and Italy.[112] Invoking protection against parasitic competition in French unfair competition law,[113] the French Rugby Federation argued that Fiat had unfairly exploited its efforts, investments and notoriety. The Court, however, emphasized that Fiat had merely reproduced a publicly known game result and future match. The use of such facts could not be qualified as an unfair activity capturing the economic flow resulting from the rugby tournament.[114] The Court also rejected allegations of causing confusion. Fiat had not given the impression of being an official sponsor.[115]

3.6 Protection of trade secrets

With the adoption of the Trade Secret Directive in 2016, detailed harmonized rules have emerged in the area of trade secret protection.[116] In line with Article 39(2) TRIPS, Article 2(1) TSD defines 'trade secret' as information that (i) is secret in the sense of not being generally known within relevant circles; (ii) has commercial value because it is secret; (iii) has been subject to reasonable steps to keep it secret. The circle of trade secret holders entitled to invoke protection encompasses not only the original developer of the know-how but also any other natural or legal person 'lawfully controlling a trade secret',[117] such as licensees with access to the secret in the framework of research, production or distribution agreements. The scope of protection covers the

- unlawful acquisition following from conduct that is contrary to honest commercial practices, in particular unauthorized access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files revealing the secret information[118];
- unlawful use or disclosure by a person who has acquired the trade secret unlawfully; breaches a confidentiality agreement or any other duty not to disclose the trade secret; or breaches a contractual or any other duty to limit the use of the trade secret.[119]

In this context, 'infringing goods' are defined as 'goods, the design, characteristics, functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed.'[120] This definition can be understood to extend protection beyond observable product features. Arguably, a product is also infringing when secret commercial data, such as information on customers and suppliers, business plans, and market research and strategies,[121] have been employed for production or marketing purposes.

However, EU trade secret protection also sets forth limits. The acquisition is lawful when it follows from honest commercial practices, such as independent discovery or creation, or reverse engineering based on the observation, study, disassembly or testing of a product or object that has been made available to the public or is lawfully in the possession of a person who is not legally bound to limit the acquisition of the secret.[122] The exercise of the right to freedom of expression and information, including freedom of the press and pluralism of the media, is exempted from the control of trade secret holders. Moreover, trade secret protection does not affect the privilege

109 German Federal Supreme Court, ibid, 24–28. Cf Ohly, *Exploitation of Sports Events*, 200–202.
110 German Federal Supreme Court, ibid, 24 and 27.
111 German Federal Supreme Court, ibid, 25 and 27.
112 French Supreme Court (*Cour de cassation*), 20 May 2014, ECLI:FR:CCASS:2014:CO00515, Fédération française de rugby/Fiat, premier moyen.
113 art 1240 Code Civil. Cf. S Nérisson 'France' in F Henning-Bodewig (ed) *International Handbook on Unfair Competition* (Munich: C.H. Beck 2013) 207 (s 11), paras 62–69.
114 French Supreme Court, ibid, premier moyen.
115 French Supreme Court, ibid, second moyen.
116 As to previous national approaches based on general tort law, see for example, Dutch Supreme Court (*Hoge Raad*), 31 January 1919, case ECLI:NL:HR:1919:AG1776, Lindenbaum/Cohen, *Nederlandse Jurisprudentie* 1919, 161.
117 arts 2(2) and 4(1) TSD.
118 art 4(2) TSD.
119 art 4(3) TSD.
120 art 2(4) TSD.
121 Recital 2 TSD.
122 art 3(1)(a) and (b) TSD.

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of 'whistleblowers' to reveal misconduct, wrongdoing or illegal activity, as long as this is done to protect the general public interest.[123]

3.7 Transparency in behavioural advertising and influencer marketing

In the area of transparency obligations, the number of specific rules is growing exponentially against the background of online advertising and marketing strategies. The discussion on keyword advertising in EU trademark and unfair competition law already showed several years ago that additional transparency measures may be necessary to ensure fair behaviour and a well-functioning marketplace in online contexts. In *Google/Louis Vuitton*, the CJEU held that keyword advertising amounted to trademark infringement when the advertising message, while not suggesting the existence of an economic link, was vague to such an extent on the origin of advertised goods or services that normally informed and reasonably attentive internet users were unable to determine, on the basis of the advertising link and the commercial message attached thereto, whether the advertiser was a third party or economically linked to the trademark proprietor.[124] This decision pointed towards a shift from proof of likely confusion by the claimant to a positive obligation on the defendant to secure market transparency.[125] As explained above, it also confirmed that concrete marketing circumstances surrounding the use of a trademark may impact the confusion analysis.[126]

In case law, specific transparency rules have also evolved with regard to influencer marketing. The German Federal Supreme Court held that the commercial purpose of an advertising contribution which an influencer published in social media for the benefit of a third party company could not be inferred from the fact that the influencer could be expected to act not only for purely private purposes but also for the benefit of her own company. It could not be deemed sufficient that a commercial purpose was apparent from the circumstances. Instead, the influencer had to actively ensure that consumers could identify any commercial purpose at first sight and without any doubt. As to the existence of a commercial purpose, the Court clarified that influencer posts could be deemed commercial when they displayed an 'advertising surplus' going beyond a regular private comment on positive product experiences. For a relevant advertising surplus, it was usually sufficient that the influencer added a hyperlink to the website of the manufacturer whose product was depicted in a social media publication, even if the purchase of products was not directly possible on the linked page of the manufacturer.[127]

Seeking to strengthen and modernize consumer protection in the light of online marketing strategies,[128] the EU legislator has added new statutory rules to the Unfair Commercial Practices Directive. As a result of this initiative, the aforementioned 'black list' of misleading, generally impermissible conduct in Annex I UPCD (Section 3.3) now also covers search result rankings and consumer product reviews. According to these new rules, it is unfair to state that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that these reviews really originate from consumers with relevant product experience.[129] It is also unfair to submit, or commission another legal or natural person to submit, false consumer reviews or endorsements, or to misrepresent consumer reviews or social endorsements, in order to promote products.[130]

Addressing sponsored search results and search result rankings, the new rules prohibit the practice of providing search results in response to a consumer's online search query without clearly disclosing that paid advertisements are among the search results or that the service provider has received a payment for giving products a higher ranking within the search results.[131] Outside the black list of unfair conduct that is prohibited per se, the regulation of product search functionality also enriched the rules on misleading omissions in Article 7 UPCD. When offering consumers the opportunity to search for products on the basis of a keyword, phrase or other input, the service provider must provide general information on the main parameters determining the ranking of products

123 art 5(a) and (b) TSD.

124 CJEU, 23 March 2010, cases C-236/08-238/08, Google France and Google, para 90; CJEU, 25 March 2010, case C-278/08, BergSpechte/Trekking.at, paras 36 and 38–40.

125 MRF Senftleben, 'Adapting EU Trademark Law to New Technologies – Back to Basics?', in C Geiger (ed) *Constructing European Intellectual Property* (Cheltenham: Edward Elgar 2013) 137, 162–63; A Ohly, 'Keyword Advertising auf dem Weg zurück von Luxemburg nach Paris, Wien, Karlsruhe und Den Haag' (2010) *Gewerblicher Rechtsschutz und Urheberrecht* 776, 780; N van de Laan, 'Die markenrechtliche Lage des Keyword Advertising' in J Taeger (ed) *Digitale Evolution—Herausforderungen für das Informations- und Medienrecht* (Oldenburg: Oldenburger Verlag für Wirtschaft, Informatik und Recht 2010) 597, 605.

126 Ohly (n 35) 45.

127 German Federal Supreme Court, 9 September 2021, case I ZR 90/20, 'Influencer I', *Gewerblicher Rechtsschutz und Urheberrecht* 2021, 1400, 1400.

128 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, *Official Journal* 2019 L 328, 7.

129 Annex I UCPD, No 23b.

130 ibid, No 23c.

131 ibid, No 11a.

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presented to the consumer as a search result and the relative importance of those parameters, as opposed to other parameters. This information must be made available in a specific section of the online interface that is directly and easily accessible from the page where the search results are presented.[132]

Developments in the EU also show that a need for specific transparency and information obligations may arise from targeted behavioural advertising.[133] In the legislative process leading to the adoption of the Digital Services Act (DSA),[134] the European Commission highlighted the need for transparency to arrive at accountable digital services,[135] ensure a fair environment for economic operators[136] and empower consumers.[137] Accordingly, Articles 26 and 27 DSA impose specific transparency obligations on online platforms. These obligations concern product recommender systems and advertising services. Article 26 DSA states that online platforms displaying advertising on their online interfaces:

> shall ensure that, for each specific advertisement presented to each individual recipient, the recipients of the service are able to identify, in a clear, concise and unambiguous manner and in real time, the following:
>
> (a) that the information is an advertisement, including through prominent markings […];
>
> (b) the natural or legal person on whose behalf the advertisement is presented;
>
> (c) the natural or legal person who paid for the advertisement if that person is different from the natural or legal person referred to in point (b);
>
> (d) meaningful information directly and easily accessible from the advertisement about the main parameters used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters.

Expanding beyond mere source transparency (sub (b) and (c): 'Who sent this?'), this provision explicitly demands parameter transparency (sub (d): 'Why me?'). The accompanying Recital 68 DSA clarifies that consumers should receive not only information on the main parameters used to target them, but also 'meaningful explanations of the logic used to that end, including when this is based on profiling.' Hence, the new transparency obligations are intended to capture the principles and criteria underlying automated processes of directing specific advertising to targeted consumers.

With regard to advertising systems used by very large online platforms and very large online search engines, Recital 95 DSA highlights particular risks that may arise from the scale of advertising activities—reaching more than 45 million active recipients of the service—and the 'ability to target and reach recipients of the service based on their behaviour within and outside that platform's or search engine's online interface'. In the light of this risk dimension, Recital 95 DSA identifies a need for 'further public and regulatory supervision.' In this vein, Article 39(1) DSA obliges very large online platforms to ensure public access, through application programming interfaces, to repositories of advertisements displayed on their online interfaces until one year after the last use of the advertising. Article 39(2) DSA specifies which information items must be provided. With regard to targeted behavioural advertising, it requires information on 'whether the advertisement was intended to be presented specifically to one or more particular groups of recipients of the service and if so, the main parameters used for that purpose including where applicable the main parameters used to exclude one or more of such particular groups.'[138]

The DSA is not the first piece of EU legislation that deals with transparency for online advertising: the General Data Protection Regulation (GDPR)[139] already sets forth obligations to inform consumers not only about the collection of personal data but also about the underlying purpose and logic of automated profiling, and potential consequences for consumers.[140] A number of GDPR Recitals refer to the principles of fair and transparent processing[141] and state further that those principles 'require that the data subject be informed of the existence of the

132 art 7(4a) UCPD. As to corresponding transparency obligations of general search engines, see art 5(2), (3) and (5) of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, *Official Journal* 2019 L 186, 57.

133 S Scheuerer, 'Artificial Intelligence and Unfair Competition – Unveiling an Underestimated Building Block of the AI Regulation Landscape' (2020) *Gewerblicher Rechtsschutz und Urheberrecht—International* 1, 3–4.

134 European Commission, 15 December 2020, Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Document COM(2020) 825 final 2020/0361.

135 European Commission, ibid, Explanatory Memorandum, 1–2.

136 ibid, 5–7.

137 ibid, 9. As to further proposals to reduce consumer vulnerability in the digital environment, see N Helberger and O Lynskey et al, *EU Consumer Protection 2.0—Structural Asymmetries in Digital Consumer Markets* (Brussels: BEUC 2021) 78–79.

138 art 39(2)(e) DSA.

139 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *Official Journal* 2016 L 119, 1.

140 N Helberger et al, 'Macro and Exogenous Factors in Computational Advertising: Key Issues and New Research Directions' (2020) 49 *Journal of Advertising* 377, 382, 386.

141 Recitals 39, 58, 60, 71, 78 GDPR.

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processing operation and its purposes' and be provided with 'any further information necessary to ensure fair and transparent processing taking into account the specific circumstances and context in which the personal data are processed.'[142]

4. Conclusion

Despite all complexities arising from the application of a specific amalgam of unfair competition rules at national and EU level, the foregoing analysis attests to the remarkable potential of unfair competition law in the EU to react to constantly changing market circumstances and marketing practices. With regard to online contexts, detailed rules have evolved that seek to regulate search engine rankings and search-related advertising services, influencer marketing, targeted behavioural advertising and transparency in online marketing contexts more generally. Moreover, the analysis sheds light on current initiatives to employ unfair competition law—in particular, the rules on misleading practices—as a vehicle to fight greenwashing, support honest traders in the circular economy and strengthen the protection of the environment. This latter development seems particularly important from the perspective of the overarching policy goals underlying protection against unfair competition in the EU: fair play between competitors, a high level of consumer protection, and the establishment of a well-functioning marketplace that serves the general public interest in undistorted, fair competition. Considering current reform proposals seeking to translate environmental sustainability goals into concrete unfair competition rules, it may be said that there is a clear tendency in EU unfair competition law to broaden the spectrum of policy objectives. In addition to traditional economic and market-based considerations, the societal interest in environmental protection must be factored into the equation when determining which marketing practices can be deemed fair.

142 Recital 60 GDPR.

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