

Unfair Competition Law in the EU and in the Czech Republic

(Paradoxes of the current state and the new trends)

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I. INTRODUCTION

1. In science, it is considered good manners to start by delimiting concepts that are to be used in one's analysis. However, good habits may turn into bad ones whenever the delimitation of key concepts becomes so thorough and detailed that little time and space is left for a serious discussion of other issues. Let me therefore leave aside any considerations of what constitutes law in general and law on unfair competition in particular, while only briefly discussing the notions of 'current state and 'trends in development'. The expression 'European' is used in the sense of referring to the situation in the member countries of the EU.

2. A 'state' may be understood as any position (even a very turbulent one) in which the object of one's scholarly investigation is currently to be found. However, as the expression itself indicates, a 'state' more often tends to refer to a situation under which the phenomenon studied remains in a relatively stable situation and its development proceeds only gradually, i.e. not by means of changes which are sudden, significant and still 'unsettled'. This understanding of the term becomes even clearer if it is substituted with the notion of 'a point of departure'. This is used to describe a fixed point from which one either sets out on certain pursuits or at least considers the available options.

3. The expression 'trends' indicates, also by virtue of its plural form, that the pursuits may be variable, that a definite selection between them has not been made, and that the direction of any of the pursuits has not yet been precisely set. We will reach the same conclusions if the fashionable word 'trends' is substituted with the traditional expression 'tendencies'.

II. UNFAIR COMPETITION LAW AND ITS CURRENT STATE WITHIN THE EU

1. European law against unfair competition is presently at a paradoxical stage of its development: it has become difficult to distinguish between its state (in the sense of a stabilized situation) and its various developmental trends. The long and gradual process of its maturation, which has led to a certain convergence in European countries (groups of countries) with different legal cultures and often very different structures of regulating unfair competition, seems to have come to an end.¹

2. The current state of European law against unfair competition (resembling quick-sand rather than a firm point of departure) was the topic of two symposia held in 2005. The first was organized by the Munich-based Max Planck Institute for Intellectual Property, Competition and Tax Law in Budapest, Hungary from 16 to 18 June 2005 under the title „Das Recht gegen den unlauteren Wettbewerb in den neuen Mitgliedstaaten: Impulse für Europa“ („Law Against Unfair Competition in the New Member States: Incentives for Europe“). As some conclusions from this conference will be referred to in the text below, let me just briefly note here that the current ambivalent nature of European law against unfair competition was rightly underlined by the interrogative form of the title of the final session: *Das Recht der Beitrittsländer als „Züglein an der Waage“?* (The Law of the New Member States as „the Element that May Tip the Scales“?). The implication was that the positions of the new member states could have some weight in the disputes between the founding members of the EC; namely that there is, within the EU, some kind of a competition for the positions held by the new member states.

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¹ HARTE-BAVENDAMM/HENNING-BODEWIG: UWG (Gesetz gegen den unlauteren Wettbewerb, Kommentar, Verlag C. H. Beck, 2004, chapter Ausländisches Recht (Länderberichte), pp 180-346.

2. The second symposium was organized in Vienna by the local Faculty of Law in cooperation with several governmental and industrial institutions. Its title (identical with the conference proceedings²) was even more characteristic of the current situation in this field than the title of the former symposium, namely „Lauterkeitsrecht im Umbruch“, indicating that law against unfair competition has presently reached a certain turning point. Although some of the conference contributions will be mentioned below, it may be generalized that some (though not all) speakers proposed, to varying degrees, that unfair competition law has to get rid of many traditional approaches and seek new theoretical foundations (paradigms) and new legislative solutions. The German word „Umbruch“ (i.e. 'break-up') in the title of the conference may, as I will show later on, have been meant to indicate that unfair competition law, up to now conceived of in a uniform way, might 'break up' into two parts: first, provisions applicable in mutual relations between entrepreneurs themselves and second, provisions applicable in relations between entrepreneurs and consumers.

3. The current state of European law against unfair competition (understood as its more stabilized situation) does, however, deserve a less sceptical approach. There is some firm ground provided by the provisions of Article 28 (formerly Article 30), Article 29 (formerly Article 34) and Article 30 (formerly Article 36) of the Treaty Establishing the European Community (hereinafter referred to as „the Founding Treaty“), as amended by subsequent treaties and published in the Official Journal. These articles prohibit any quantitative limitations on export and import between member states, as well as any other measures with an identical effect. At the same time, however, there is no exclusion of prohibitions or limitations of export, import or transit, if they are substantiated by an appeal to public decency, public order, public security, protection of health and life of people and animals, protection of plants, protection of national cultural heritage with artistic, historical or archaeological value, or protection of industrial and commercial ownership. Such prohibitions or limitations may not, however, serve as means of arbitrary discrimination or veiled limitation of trade between member states.

4. The above-mentioned provisions of the Founding Treaty are complemented with the representati-

ve decision-making practice of the European Court of Justice („ECJ“). Its decisions may be considered as relatively consistent, although the court has to cope with numerous vague legal terms contained in the provisions of the Founding Treaty. It mostly appears from ECJ's decisions that the measures with an identical effect such as quantitative limitations on export and import are those measures which follow (or might follow) from unfair competition law and its national regulations (restrictions on advertising, ways of identifying goods, requirements on the composition of goods constituting a competitive advantage or disadvantage, etc).³ Such measures do not immediately concern export and import as such, but they may, in their consequences, make the free movement of goods and services between EU member states more difficult or expensive. The acceptability of such measures has been assessed, according to the decision-making practice on the part of ECJ, on the basis of the „principle of the country of origin“, unless the circumstances stated in Article 30 of the Founding Treaty exceptionally justify some other solution. This has led to the unification of restrictions on advertising and other issues, as well as the review of their necessity and reasonability, eventually resulting in some deregulation measures⁴ primarily in those EU member states which had placed particularly strong demands on the standards of competitive behaviour.

5. The decision-making practice of the ECJ has also arrived at a new conception of the ultimate recipients of various forms of marketing communication, who might be misinformed when making consumer decisions: it has been applying „the normative model of the European consumer“ as a person who is reasonably mature, careful, judicious and able to differentiate when sufficient information is provided to him/her.⁵

6. It should be hardly surprising to find out that a stronger role (a point of departure) in European unfair competition law is played primarily by the decision-making practice of the ECJ. Unfair competition law (regardless of whether relying on extensive normative regulation or not) is always, to a significant degree, a kind of judge-made law and this can-

² KREJCI, KESSLER, Augenhof (editors): Lauterkeitsrecht im Umbruch, Manzsche Verlags- und Universitätsbuchhandlung, Vienna 2005.

³ KROKER, E.R.: Irreführende Werbung (Die Rechtsprechung des EuGH, Verlag Orac, Vídeň, 1998; Einzinger, M.: Die gemeinschaftsrechtlichen Vorgaben für das österreichische Lauterkeitsrecht, in Proceedings cited in Note 2, p. 3 and following.

⁴ SCHRICKER, G.: Deregulierung im Recht des unlauteren Wettbewerbs, GRUR International 7/1994, p. 586 and following.

⁵ Cf. FEZER, K.H.: Das wettbewerbsrechtliche Irreführungsverbot als ein normatives Modell des verständigen Verbrauchers im Europäischen Unionsrecht, WRP 9/95, p. 671 and following; LUCKNER, F.G.: Are the different Concepts of the Consumer in Legislation and Jurisprudence satisfactory, Revue Internationale de la Concurrence, 1/1996, p. 5 and following; TRAUB, F.: Sind die verschiedenen Verbraucherleitbildern in Gesetz und Rechtsprechung angemessen, Revue Internationale de la Concurrence 3/1996, p. 14 and following.

not be otherwise even in European law against unfair competition. This follows from the character of human creativity as well as the forms that this creativity assumes in business activities (even perverse ones), which cannot be all anticipated in any detailed list of undesirable competitive activities. This is supported by the assumption that various European nations are likely to enrich (as well as debase) European competitive culture by means of highly peculiar forms of competitive behaviour.

7. As regards the normative measures in European law against unfair competition, **Council Directive of 84/450/EEC of 10 September 1984 on misleading advertising** has been in effect for some time. Its transposition into the national legal systems and its application in the original form did not encounter any serious difficulties. This was probably also because it captured the then existing state of the normative regulation and judicature in European countries rather than introducing anything entirely new. In many cases, the explicit implementation of the directive into the national legal systems was replaced by a finding that the existing normative regulation and judicature already satisfy the requirements of the directive.

8. **The Directive on misleading advertising was amended and complemented with the Directive of the European Parliament and of the Council 97/55/EC on comparative advertising.** The adoption of the directive itself was a long-term and controversial process because there existed significant differences of opinion concerning comparative advertising. These differences were overcome by a compromise solution, under which comparative advertising is allowed as long as it meets many demanding and cumulative conditions. It is paradoxical that such a „permission“ does not really encourage the development of comparative advertising and rather exists as an example of deregulation which, when implemented by means of too tight a regulation, has a rather insignificant effect.⁶

9. Unfair competition is the subject matter of the recently adopted **Directive of the European Parliament and of the Council No. 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices** (referred to as **Directive 2005/29/EC**), whose time limit for the transposition into national legislatures has not passed yet (the deadline is 12 June 2007). Due to the existence of doubts about the suitable ways of

such a transposition and the highly controversial opinions on this Directive (as well as its certain internal inconsistency), it will be the focus of the following discussion on the current trends in European unfair competition law.

III. CURRENT TRENDS IN EUROPEAN UNFAIR COMPETITION LAW

1. Unfair competition law was, in its original shape (and on the basis of the original „philosophy“), meant to ensure fair conditions in a competition between competitors, thus protecting the individual competitors as well as the competition itself and its common interests. The protection of consumers was only a side product of this final goal. However, within the hierarchy of values protected by this field of law, the protection of consumers and the protection of the public interest in distorted competition gradually came to acquire an identically important (and recently perhaps even a more important) position.

Such a triad of protected values (interests) also found its expression in theoretical considerations, as well as the normative measures and the legislative practice inspired by such theory. This was originally the goal proclaimed in **Directive 84/450/ECC**. One of the strong current tendencies within European unfair competition law is the attempt to safeguard the unity of this law, which protects all of the three above-stated interests (values) at the same time.⁷

2. A different trend is indicated by the fact that **Directive 2005/29/EC** concerns only unfair commercial practices with respect to consumers; in the „Brussels“ terminology, this is labelled as B2C (business-to-consumers), not B2B (business-to-business) – so it does not concern the relations between entrepreneurs (competitors) themselves. At the same time, the intended purpose of **Directive 84/450/ECC** has been changed: from now on, it should serve only for the protection of entrepreneurs.⁸ This tends to be criticized mainly in countries with a thorough and unified regulation of the area of unfair competition law (Germany and Austria), with strong objections to the trend, already initiated, towards the break-up of the unified law against unfair competition and its metamorphosis into a certain kind of „consumer law“ which protects compe-

⁶ SHERER, I.: Partielle Verschlechterung der Verbrauchersituation durch die Rechtsvereinheitlichung bei vergleichender Werbung. WRP, 2/2001, p. 95.

⁷ Cf. the express provision in Section 1 of the new German act on unfair competition of 3 July 2004 and the commentary on this act in the work cited in Note 1, p. 471 and following.

⁸ Cf. Article 14, paragraph 1 of **Directive 2005/29/EC**, under which Article 1 of **Directive 84/450/EC** is modified as follows: „The purpose of this Directive is to protect traders [emphasis added] against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted“.

titors only indirectly.⁹ It is being pointed out that such a disunity weakens the protection of consumers, too, since even consumers may be harmed e.g. by belittling competitors, an issue not regulated in Directive 2005/29/EC. Such fears are, to a certain extent, addressed in section 8 of the preliminary provisions of the preamble of the Directive, stating that the Directive indirectly protects „legitimate businesses from their competitors who do not play by the rules in this Directive“. The European Commission has also declared its intention to investigate whether even the B2B area needs such a unified regulation of unfair commercial practices as adopted for regulating the relation between businesses and consumers.

3. Traditional regulations of unfair competition often consist of a „general clause“ (i.e. a general provision delimiting and prohibiting unfair competition, which may also serve independently for specifying the elements constituting unfair competition) and a variable number of special elements constituting unfair competition. The development has gradually led to an increase in specially regulated instances of unfair competition. This was done by various means – the stabilization of judicature reaching out towards the general clause and thus creating so-called „judge-made“ and „professorial“ elements constituting unfair competition (mainly in the German and Austrian models of development of unfair competition law), the creation of highly extensive, semi-official catalogues of „sins“ in competition (a model used in France by means of the self-regulating institutions in the field of advertising – Bureau pour la Vérification de la Publicité), and the transfer of judicial elements constituting unfair competition into legal regulations (the Polish model which was rumoured at scholarly conferences to codify German judicature). Another current trend in European law against unfair competition may be characterized by means of a rising importance (and an increasing number) of general provisions (general clauses) regulating unfair competition and, at the same time, a rising significance (and also an increasing number) of specifically regulated instances of unfair competition. The first trend is perceptible in Directive 2005/29/EC with its general clause delimiting and prohibiting unfair commercial practices (the extent of this delimitation is discussed below) and its general delimitation of misleading actions (with a particular provision for misleading omissions) and aggressive actions. The second trend is apparent (though not exclusively) from An-

nex I to Directive 2005/29/EC. This Annex (referred to as „a black list“) includes 31 instances of misleading and aggressive actions which are to be, under any circumstances, considered as unfair. The parallel increase of the importance (and number) of both general and special provisions need not be understood only as two competitive but also compatible ways of legal regulation. Both can be well applied for standard and less common instances of unfair competition, one or the other may serve well to lawyers of different types. However, let it also be noted that the over-abundance of special provisions and „supplementary parts“ of normative texts (numerous definitions, extensive reasonings, desiderata in European directives) may actually obstruct the decision-making process concerning contentious cases because any experienced lawyer will be able to find and choose, out of the spate of words and ideas, something to support the position of his or her client. The danger we face as a result of too extensive casuistic regulations was aptly identified by the poet and artist Jiří Kolář in the following verse: „While the world is drowning in commands, it is not within its power to carry out any of the ten main commandments.“¹⁰

4. The growth of specialized prohibitions of unfair competitive practices in Directive 2005/29/EC and some more recent legal regulations (for the German regulation, see below) may easily lead to the conviction that the current trend in European unfair competition law, which could be expressed by means of the idea of „unification by means of deregulation“, is turning.¹¹ Such an impression, however, may be misleading. Discussions over Directive 2005/29/ES indicate that behaviour which is prohibited 'per se' might be permissible, if it does not meet the prohibiting conditions in the general clause and if a decision-making body resorts to the 'golden rule' of unfair competition law (i.e. „the circumstances of particular cases are decisive“)¹² Objections against the 'black list' have been, in the discussions going on at the two above-mentioned conferences, made less serious by the fact that almost all kinds of actions in the list have already been included in German and Austrian „judge-made elements constituting unfair competition“. At the same time, some instances of unfair competition that have long been identified and typified in judicature are not included in the 'black list'. This leads to the consideration whether the list is taxative or demonstrative and whether actions not included

⁹ UMMENBERGER-ZIERLER, E.: Aufgabe und Wirken der UWG-Reform – Kommission, Proceedings cited in Note 2, pp. 1-2.

¹⁰ KOLÁŘ, J.: Psáno na pohlednici I, Mladá fronta, Praha 1999, p. 93.

¹¹ SCHRICKER, cited in Note 4.

¹² ENZINGER, cited in Note 3, p. 11.

in the 'black list' are henceforth allowed 'per se'.¹³ (In my opinion, the list is taxative in its form, which, however, does not prevent the new general clause to apply to acts prohibited in pre-existing national general clauses, even though such actions are not included in the 'black list'). The tendency towards a more lenient or strict regulation of unfair competition will, after all, be decided by the degree to which decision-making practice is developed, stabilized and exacting and to what extent it applies general provisions on unfair competition, which enable certain shifts in the stringency of the regulation to occur even without amending the legal regulations or which might even be contrary to such changes. Moreover, as indicated above, Directive 2005/29/EC contains not only the 'black list' but also numerous general provisions and other parts which allow for a relatively significant flexibility in its transposition into the national legal systems (cf. the „triviality clause“ in the new German regulation under which marginal („trivial“) harm should not be sanctioned) as well as in 'EC-oriented' application of unfair competition law. (An example of such a Janus-faced character is to be found in paragraph 6 of the preliminary provisions of the Directive, which, among other, states „In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible.“)

5. The general clauses of some traditional regulations of unfair competition law contained, and some still contain, expressions which might be ascribed a general ethical content (cf. „honest business customs“ in the Paris Agreement, and „good manners“ in the Austrian and the original German regulations). The dominant trend in legal theory (and decision-making practice) stems from the belief that unfair competition law should, above all, ensure a functionality of the competition and that the resulting requirements and the requirements of general morality merely intersect. This tendency is not denied but rather strengthened by more current regulations in European law against unfair competition. Thus Directive 2005/29/EC and the most general of its general provisions formulates the criterion of unfair competition in a new way. This concerns the conflict between a particular commercial practice and the requirements of professional care if such a lack of professional care may be capable – to put it in a more condensed way – of affecting economic decisions of those at whom such a practice is aimed. Such

a solution, combining a sufficient degree of generality and a more specific guideline for deciding particular cases, seems to be rational. Moreover, no serious objections have been raised against it, but it will be true in this respect as well that decisive for the content of some very general formulations (vague legal terms) will be the manner in which they will be construed in stabilized decision-making practice.

6. The problematic nature of Directive 2005/29/EC consists of the fact that it has, in a way, brought into question two of the existing decision-making procedures of the ECJ, as mentioned above. This is the principle (applied, among other, in Directive 2003/31/EC on electronic commerce), under which the permissibility of marketing and competitive measures was assessed according to the „law of the country of origin“, unless specific circumstances gave ground for using a more traditional solution, namely the law of the state within whose territory such marketing measures operate and where the competitive clash occurs.¹⁴ The „clash“ between such solutions (and, in a way, tendencies) has not, by far, come to an end, as attested by the debates over Directive 2005/29/EC. Its proposed version did use the concept of „law of the country of origin“, but the opposition to such a clear-cut solution was so strong that the incompatibility of opinions was overcome „in a diplomatic way“ – the final version of the text of the directive omitted the „principle of the law of origin“ as a fundamental criterion when assessing the permissibility of marketing measures. As a result, the assessment of this issue has been left out to be decided in particular instances. The conflict between the above-mentioned tendencies thus continues and is likely to continue as long as there are differences in the national legal regulations of unfair competition and differences in interpretation of formally identical regulations, arising from, among other, the various economic development and different legal and cultural traditions of individual EU member states. Any unifying role thus most likely will have to be played by the decision-making practice of the ECJ again.

7. Directive 2005/29/EC has also somewhat weakened the above-mentioned normative model of the European consumer, applied up to now by the decision-making practice of ECJ, since it places such requirements on consumers and their properties that are not entirely unequivocal. On the one hand, it operates (in paragraph 18 of its preliminary provisions) with the notion of the 'average consumer' as understood by the

¹³ GAMERITH, H.: Richtlinie über unlautere Geschäftspraktiken: bisherige rechtspolitische Überlegungen zu einer Nezebestaltung des österreichischen UWGm sbornik, cited in Note 3, p. 151 and following.

¹⁴ LINDACHER, Z.: Zum internationale Privatrecht des unlautere Wettbewerbs, WRP 10/96. p. 990 and following.

ECJ, i.e. a consumer who has sufficient information and is reasonably observant and circumspect. At the same time, however, the purpose of this directive is to prevent the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. **The character traits worthy of special attention include, among other, the credulity of consumers which makes them particularly susceptible to a commercial practice** (cf. paragraph 19 of the preliminary provisions)¹⁵ The possibility of a divided interpretation is further indicated by the final text of paragraph 18: „The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.“

IV. THE CURRENT STATE OF THE CZECH LEGAL REGULATION OF UNFAIR COMPETITION

1. The Czech legal regulation of unfair competition contained in Section 41 and subsequent sections of the Commercial Code appears to be stable. After 1989, a brief legal regulation containing a general clause and several elements constituting unfair competition was included in the then Economical Code, approximately corresponding to the level of detail contained in the Paris Agreement. The Commercial Code then basically took over the private law provisions from the pre-war Act against Unfair Competition No. 111/1927 Sb., with some more or less fortunate modifications. The more fortunate ones include the provision in Section 41 of the Commercial Code where, above all, the concept of the 'competitor' is defined (stressing mainly that this need not be an entrepreneur). This section further provides that competitive activity (for the purpose of achieving economic benefit) should be cultivated in a free manner. This may be understood in such a way that it is essentially permitted to use as wide a range of competitive methods as possible and innovate the competitive practices. Certain limitations of competitive activities are relegated in Section 41 of the Commercial Code only to a secondary position. This may be understood as an expression of a belief that a limitation of entrepreneurial activities has a subsidiary importance and should be interpreted in a restrictive rather than extensive manner. The hierarchical arrangement of Section 41 of the Commercial Code and its wording provide a certain guideline

for deciding when the requirement of free cultivation of competitive activities comes into conflict with some or other limitations of competitive activities. This provision anticipates some current conceptual opinions which apply the general principles of private law even in relation to unfair competition law.¹⁶

2. The Czech legal regulation satisfied more up-to-date tendencies from the beginning also by using the expression „good manners of business competition“ in its general clause, thus enabling to distinguish (with certain implications for the decision-making activity) this concept from the general institute of „good manners“ used in the Civil Code, and the public-law conception of „good manners“ as used in the Act on the Regulation of Advertising and in the Act on Trademarks.

3. The later development was anticipated by the regulation of unfair competition in the Commercial Code also by failing to take over some special provisions from the pre-war regulation which had been inspired by German and Austrian laws and which were, during the subsequent process of deregulation, abandoned in these countries (e.g. prohibitions on providing free gifts with sold products).

4. The regulation of sanctions against unfair competition is contentious mainly because it makes use of a generally little successful regulation of damages for infractions in the Commercial Code. The provision is Section 54(2) is „too fervently European“ (and excessively protectionist in relation to the consumer), as it specifies that in unfair competition disputes, the burden proof is reversed whenever the consumer acts as the plaintiff. There will be frequent questions when the consumer will be able to bear his or her burden of proof without serious problems; there will thus be no reasons for reversing the burden of proof. On the other hand, sometimes (e.g. in cases of superlative advertising), there will be reasons for reversing the burden of proof even if the plaintiff is a competing entrepreneur.¹⁷

5. The take-over of substantial parts from the pre-war regulation of unfair competition made it possible to apply many high-quality pre-war judicial findings. Consequently, quite an extensive current judicature of a relatively good quality came into existence.¹⁸ Although the Czech pre-war regulation had been – as mentioned above – inspired by the German and Austrian regulations, scholarly literature and judicature from these countries continue to influence Czech scholarly literature on unfair competition, and affect, in a mediated way, the decision-making practice.

¹⁵ This problem was pointed out at the Budapest conference by Professor Jochen Glöckner and dealt with by Markéta Selucká in a workshop at the Faculty of Law, Masaryk University.

¹⁶ Constitutional principles were relied on by Professor R.M. Hilty during his interpretation of private-law rules of competitive behaviour at the Budapest conference.

¹⁷ See ELIÁŠ, BEJČEK, HAJN, JEŽEK: *Kurs obchodního práva, Obecná část, Soutěžní právo*, 4. vydání, p. 389.

¹⁸ MACEK, J.: *Rozhodnutí ve věcech obchodního jména a nekalé soutěže*. C. H. Beck, Praha 2000.

6. Directive 84/450/ECC was not taken over in its original „long“ form into the Commercial Code. This was (as in Germany and Austria) probably based on the conviction that the current regulation – shorter and more abstract, as contained in Sections 45 and 46 of the Commercial Code, combined with the decision-making practice of courts with respect of this regulation – is sufficient to achieve the purpose of this directive. The additions and amendments of this directive, arising from Directive 97/55/EC on comparative advertising, were taken over into the Commercial Code on the basis of its „harmonizing“ and „technical“ amendments. This was done together with certain deviations in formulation, which have been subject to criticism by scholars.¹⁹

V. CURRENT TRENDS IN CZECH LAW AGAINST UNFAIR COMPETITION

1. The fundamental trend in the current and anticipated development of Czech unfair competition law (both as regards its theory, decision-making practice and intended legislation) is a minimum number of new significant tendencies as well as a minimum number of conceptual considerations about the further orientation of this field of legal regulation.

2. I attempted to formulate some less traditional approaches in one of my monographs a few years ago.²⁰ In this book, I emphasised the importance and the biological conditioning of human competitive behaviour, pleading for an understanding of a certain degree of aggression, allurements and simulation in business competition, and, in some respects, of a more lenient assessment of some manifestations of business competition. I also recommended that some traditional categories of unfair competition law – namely 'competitive relation' and 'competitive intention' should be replaced with terms of a more objective character: 'competitive situation' and 'competitive orientation of behaviour'.

3. The available decision-making practice seems to indicate the existence of a relatively insignificant trend towards alleviating the relatively strict previous assessment of unfair competition. However, there still persists a strong tendency to bring actions (and, consequently, to adjudicate, mainly by first instance courts) in cases concerning competitive behaviour according to the special elements constituting unfair competition rather than the general clause against unfair competition. It cannot be claimed

that the current Czech decision-making practice has already led to the formation of more stable „judge-made elements constituting unfair competition“.

4. As regards legislative intents, there is a very conservative (some might even say 'conserving') trend in the intended legal regulation of unfair competition. A novelty should be the transfer of the current regulation of unfair competition from the Commercial Code to the Civil Code.²¹ While some minor changes actually worsen the current regulation (e.g. the absence of the existing text of Section 41 of the Commercial Code, which delimits, to a certain extent, competitors and is related to the way the right to business competition is conceived of in constitutional law; Section 2471 of the proposed Civil Code merely lists restrictions), some improve it (such as the regulation of comparative advertising conforming to the EU directive, and the generally more suitable regulation of damages), some preserve the current legal state criticized in scholarly literature (the reversal of the burden of proof in unfair competition disputes only for the benefit of consumers), and still others preserve the existing statutory formulations (good manners of competition), they cannot be identified as mistaken, but they do not reflect the new trends in European unfair competition law and in the national legal systems of individual member states.

VI. CONCLUSIONS FOR THE FURTHER DEVELOPMENT OF CZECH UNFAIR COMPETITION LAW

1. Czech law against unfair competition cannot, in the short term, remain in the same normative state as at present. This is obvious from the fact that, under Section 19 of Directive 2005/29/EC, the member states have to adopt and publish, by 12 June 2007, legal and administrative regulations necessary for complying with this Directive. For this reason, the section on unfair competition in the draft proposal of the new Civil Code would have to be changed, if this code was to be passed prior to the above-stated date. This, however, is not planned and is improbable also for other reasons.

2. As regards the transposition of Directive 2005/29/EC into the Czech legal system, inspiration could be sought primarily in those models which have been inspired by the pro-

¹⁹ VEČERKOVÁ, E: Aktivní legitimace ve sporech z nekalé soutěže po novele obchodního zákoníku. *Obchodní právo* č. 3/2001, p. 2 and following. Includes a comprehensive overview of literature concerning this issue.

²⁰ HAJN, P.: *Soutěžní chování a právo proti nekalé soutěži*, Masarykova univerzita, Brno 2000.

²¹ The proposal of the Civil Code (parts one to four), Draft proposal by the working group, main drafters: Eliáš, K., ZUKLÍNOVÁ, M.: Ministry of Interior of the Czech Republic, no date.

posed and implemented regulation in countries with a similar legal culture and legal history (both generally and in the area of unfair competition law in particular), i.e. in Germany and Austria.

3. Germany has adopted a new Act on Unfair Competition of 3 July 2004 (Gesetz gegen den unlauteren Wettbewerb – referred to below „the new German AUC“), which has also been heralded as the transposition of Directive 2005/29/ES into the national legal system. This unified normative regulation is not, by any means, a mere transcription of the said directive or its 'black list'; it only takes over some basic thoughts, concepts and structural features (e.g. 'definitions'), trying to overcome some of its contested issues and expressing certain modernising trends in unfair competition law. Since a detailed analysis of this regulation is beyond the scope of this study and will be subject to a special article, let me just briefly use this space to outline some of the concepts of the new German AUC, which:

- a) should serve for the protection of „competitors and consumers, as well as other participants in the market, from unfair competition. At the same time, it protects public interest in undistorted competition“;
- b) abandons the traditional concept of 'good manners' in connection with business competition and makes do with the prohibition of 'unfair competition';
- c) delimits the concept of unfair competition in such a way that unfair competitive practices are impermissible only if they may affect competition to the detriment of competitors, consumers and other participants in the market in a significant manner (the German original refers to a 'not insignificant manner'). This is a general clause of a dual character. The second part tends to be referred to as a „triviality clause“, introducing the principle of „de minimis“ into unfair competition law, too;
- d) contains a list of 11 examples in the general clause (previously partly contained only in judicature);
- e) regulates, in a particularly detailed manner, deceptive advertising, comparative advertising and persistent and unwanted solicitation (unzumutbare Balaestigung);
- f) contains traditional legal means against unfair competition (action to compel a duty to refrain from and remove a faulty state) and their detailed regulation;
- g) conditions the claim for damages by an action based on fault;
- h) regulates the channelling of profits (for the benefit of the state budget) obtained through unfair competition towards a large number of individual consumers;
- i) takes into account collective actions;
- j) contains a special provision on short terms of statutory bar with respect of unfair competition;
- k) contains some criminal law provisions concerning unfair competition.²²

4. One of the solutions proposed by Helmut Gamerith in Austria²³ recommends that Directive 2005/29/EC should be transposed into the national legal system by means of the current Austrian AUC. Changes should be made only in the wording delimiting business competition and in the general clause. These changes in wording are most likely to have been inspired by the German regulation (mainly its „triviality clause“) and the classification of unfair practices in Directive 2005/29/EC into misleading (including omissive) and aggressive actions. Such a brief regulation is being justified by reference to the fact that the existing Austrian regulation of unfair competition (and the extensive judicature forming a part of such regulation) conforms to the requirements of Directive 2005/29/EC.

5. Other solutions, proposed by Guido Kucsko in Austria,²⁴ recommend that Directive 2005/29/EC and its 'black list' should be transposed into the national legal system in as detailed and literal manner as possible. The reasoning behind these proposals makes it clear that this should primarily simplify the task of attorneys-at-law and the choice of marketing measures to be applied not only in Austria but also in other EU countries.

5. Each of the above-mentioned proposals (and many other possible ones) has its pros and cons. Discussions over these issues should also be started in this country, going hand in hand with the overall consideration of the future development of Czech law against unfair competition. The solution which I personally find as the most suitable one is the exclusion of the regulation of unfair competition from the Commercial Code and – prior to the deadline for the transposition of Directive 2005/29/EC into the Czech legal system – its inclusion in an independent legal regulation on unfair competition. This would also satisfy the idea from the reasoning on the draft proposal of the Civil Code requiring that business competition be

²² See ALEXANDER, CH.: Die strafbare Werbung in der UWG-Reform, WRP, 4/2004, p. 407 and following.

²³ GAMERITH, H.: work cited in Note 13, p. 168.

²⁴ KUCSKO, G.: Wünsche an die österreichische UWG-Reform aus der Sicht der Praxis – ein Plädoyer, Proceedings cited in Note 3., p. 169.

removed from the Commercial Code mainly because it is not limited to entrepreneurs only and includes other competitors, private rights and duties of other persons (e.g. so-called „auxiliary persons“). Such a regulation could provide a way of transposing Directive 2005/29/EC into the Czech legal system by means of one of the ways (or their combination) realized or pro-

posed abroad (e.g. a brief basic regulation according to the above-mentioned model by Gamerith supplemented by an annex with a 'black list' in harmony with the text of the said Directive). At the same time, some legislative improvements brought by the draft proposal of the new Civil Code could be used and others, not contained in the proposal, could be added.