

one or more payments under the contract have not been made, and (b) the consumer has not exercised the right to unwind in respect of the contract.”

The (amended) CPUTR 2008 also provide a, fairly crude, sliding scale of the quantum of discounts.²⁸ In terms of damages, which is of course an established remedy for misrepresentation in England and Wales,²⁹ significantly a consumer is given the right to claim damages for “alarm, distress or physical inconvenience or discomfort” subject to a remoteness test.³⁰ Unlike the other remedies, there is a due diligence defence (s27J(5)(b): “the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice”).

VI. Concluding Remarks

As a result of the CPAR 2014 the UK now has specific private law remedies for some unfair commercial practices. Yet these remedies, which largely operate alongside remedies under the general law, have added complexity to this area of consumer law, not least as a result of the legislative drafting. Indeed, with concerns about fragmentation in mind, there is an argument that these reforms should have been absorbed into the Consumer Rights Act 2015. Moreover there are significant continuing issues around the ability and willingness of con-

sumers to make full use of such remedies³¹ as well as issues of consumer education; and it is ultimately those issues which may dull the potency of these reforms. ■

- 28 Regulation 27I (4): “Subject to paragraph (6), the relevant percentage is as follows: (a) if the prohibited practice is more than minor, it is 25 %, (b) if the prohibited practice is significant, it is 50 %, (c) if the prohibited practice is serious, it is 75 %, and (d) if the prohibited practice is very serious, it is 100 %.”. Regulation 27I(6) concerns products where the contract price exceeds £5,000.
- 29 There is some authority that damages (or a similar remedy) may be awarded for undue influence and/or duress: see *Mahoney v Purnell* [1996] 3 All E.R. 61 and Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) 3.57.
- 30 Regulation 27J (1): “Subject as follows, a consumer has the right to damages if the consumer: (a) has incurred financial loss which the consumer would not have incurred if the prohibited practice in question had not taken place, or (b) has suffered alarm, distress or physical inconvenience or discomfort which the consumer would not have suffered if the prohibited practice in question had not taken place. (2) The right to damages is the right to be paid damages by the trader for the loss or the alarm, distress or physical inconvenience or discomfort in question. (3) The right to be paid damages for financial loss does not include the right to be paid damages in respect of the difference between the market price of a product and the amount payable for it under a contract. (4) The right to be paid damages under this regulation is a right to be paid only damages in respect of loss that was reasonably foreseeable at the time of the prohibited practice”.
- 31 See H. G. Beale, ‘Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts’ in J Beatson & D Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995, Clarendon, Oxford).

Peter Jung*

UCP-Directive and Swiss Law against Unfair Competition

The UCP-Directive 2005/29/EC and Swiss law against unfair competition differ in many respects. They are each characterised by different purposes, scopes of application and diverging concepts of unfairness and ways of enforcement. Even in cases in which similar EU-norms directly inspired special rules in the Swiss UCA such as the rules on unfair contract terms, consumer credit advertising, spamming, pyramid promotional schemes and transparency in e-commerce, they differ in detail and they are applied differently. In the end, Swiss law against unfair competition maintains its characteristics and adopts EU-law in an isolated manner only.

I. Introduction

Switzerland is neither an EU- nor an EEA-Member State.¹ The country officially asked for EU-membership in 1992,² but this request – although never formally repealed – is dead letter, as the referendum of 2001 turned out negative.³ Nevertheless, the law of the European Union has an impact on Swiss law. Before covering this topic with respect to the law against unfair competition (III.), this article highlights the main differences between the UCP-Directive 2005/29/EC and the Swiss Act against Unfair Competition (UCA) in a first part (II.).

II. Divergences between the UCP-Directive and Swiss Law

1. Different purposes

Besides contributing to the proper functioning of the internal market,⁴ the UCP-Directive aims at achieving a high level of

consumer protection.⁵ It does so by approximating the laws, regulations and provisions of the Member States on unfair commercial practices harming consumers’ economic interests (Art 1 Directive 2005/29/EC). By contrast, the purpose of the Swiss UCA is much broader: It seeks to ensure fair and undistorted competition in the interest of all concerned (Art 1 UCA). According to this purpose article, the Swiss UCA has primarily one objective target, which is to protect competition *as such* against unfair practices and distortions⁶ in *any*

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- 1 Switzerland was signatory party of the EEA Agreement but was unable to ratify it after the negative result of the referendum on 6 December 1992; see Botschaft des Bundesrats über das Folgeprogramm nach der Ablehnung des EWR-Abkommens vom 24.2.1993, BBl 1993 I, 805 et seq.
- 2 See for the motifs of this request dated 20 May 1992 ‘Bericht über einen Beitritt der Schweiz zur Europäischen Gemeinschaft’, BBl 1992 III, 1185 et seq.
- 3 76.8 % of the Swiss population voted against the immediate commencement of accession negotiations on 4 March 2001.
- 4 The objective of market integration is explained in recitals 2 et seq; the full harmonisation approach of the UCP-Directive does not preclude the Member States from addressing legal requirements related to taste and decency (recital 7 Directive 2005/29/EC) or from specifying in national law the main characteristics of particular products (recital 14 Directive 2005/29/EC).
- 5 The objective of consumer protection is explained in recitals 6 et seq Directive 2005/29/EC.
- 6 See in depth Peter Jung, in: Peter Jung and Philippe Spitz (eds), *Bundesgesetz gegen den unlauteren Wettbewerb (UWG) – Kommentar* (Stämpfli 2010) Art 1 paras 2 et seq.

interest of *all* stakeholders⁷ and not to protect the specific economic interests of consumers only. It safeguards the interests of consumers as well as competitors and of demanders other than consumers while also protecting the public interest. Additionally, the UCA covers non-economic interests such as the protection of the personal sphere if a behaviour with a relevant impact on competition threatens them.⁸

2. Different scopes of application

The different extents of the purposes lead to different scopes of application: Whereas the UCP-Directive applies exclusively to business-to-consumer commercial practices during and after a commercial transaction in relation to a product, the Swiss UCA applies to *any behaviour* which could potentially affect the relationship between competitors or between suppliers and demanders.⁹ That is why the Swiss UCA applies to *any person* such as competing suppliers on an offer market, competing demanders on a demand market and third parties such as the media,¹⁰ test organisations¹¹ or scientists,¹² Furthermore, contrary to EU-law (Art 3 (1) Directive 2005/29/EC), Swiss law does not require a direct link to a commercial transaction in relation to a product in order for it to be applicable. Thus, there is no doubt that, for example, behaviour on demand markets¹³ or marketing strategies that draw attention to a supplier in general and not to special products,¹⁴ fall within the scope of the UCA, too.

Even though the UCP-Directive indirectly protects the economic interests of legitimate competitors¹⁵ as well and gives them standing,¹⁶ it neither covers nor affects national laws on unfair commercial practices which harm competitors' economic interests only or which relate to a transaction between traders.¹⁷ Therefore, in contrast to the Swiss UCA (Art 3 (1) let a, let e, Art 4, Art 4 a), it does not contain provisions concerning impediments to competitors.

Despite the objective target of the Swiss UCA and the general scope of application, one can on the other hand observe an inconsistent trend towards the protection of individual consumer interests by competition law over the last years. The most important example is the special rule in Art 8 UCA.¹⁸ This rule provides for an unlimited content control of general contract terms by competition law but is restricted to consumer contracts only.¹⁹ Although the UCA does not explicitly state what happens if the standard terms do violate Art 8 UCA, the prevailing opinion argues that the appropriate consequence is partial invalidity of the respective terms.²⁰ The invalidity results from Art 20 (1) of the Swiss Code of Obligations, which states that if a contract is against the law, it is void. This legal consequence is in fact atypical for unfair competition law, which does not normally deal with the question of the validity of a contract concluded in violation of the UCA.²¹ In contrast, the UCP-Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract (Art. 3 (2) Directive 2005/29/EC).

3. Different concepts of unfairness

As far as the prohibited behaviours are concerned, the UCP-Directive is quite close to the traditional unfairness approach, which characterises for example the Paris Convention²² and the ICC-Code.²³ The UCP-Directive defines unfair behaviour as any behaviour that is contrary to the requirements of professional diligence. These respective standards are set out in Art 2 let h, which requires a trader to behave in accor-

dance with honest market practice and/or the principle of good faith in the trader's field of activity. In contrast, the Swiss UCA is characterised by a combination of the classical unfairness approach on the one hand and the so-called functional approach protecting the mechanisms of an undistorted competition on the other hand (Art. 1 UCA).²⁴ Parting from this dualistic approach, Swiss doctrine has tried to group the recognised cases of unfair competition in four main categories (misleading and aggressive practices, impediments to competitors, parasitism and advantage due to breach of the law).²⁵ This method, however, remains much more contested as for example in German law.²⁶

Like the UCP-Directive (Art 5 Directive 2005/29/EC), Swiss law contains a general clause of unfair competition (Art 2 UCA). However, Swiss courts are very reluctant to apply this provision, which in turn means that there are only few cases

7 See in depth Reto M. Hilty, in: Reto M. Hilty and Reto Arpagaus (eds), *Basler Kommentar UWG* (Helbing Lichtenhahn 2013) Art 1 paras 89 et seq.

8 Peter Jung (n 6 above) *Einleitung* para 18.

9 BGE 82 II 544, 548 ("Schmähschriften"); BGE 117 IV 193, 197 f. ("Bernina"); BGE 120 II 78 ("Mikrowellenherd I"); in depth Peter Jung (n 6 above) Art 2 paras 10 et seq.

10 BGE 117 IV 193 ("Bernina").

11 Andreas Gersbach, *Der Produkttest im schweizerischen Recht* (Schulthess 2003), 131 et seq.

12 BGE 120 II 76, 79 ("Mikrowellenherd I").

13 See for an example of an abuse of a dominant position in a demand market Carl Baudenbacher, *Lauterkeitsrecht – Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG)*, (Helbing Lichtenhahn 2001) Art 2 paras 152 et seq.

14 OGER SH sic! 2012, 409, 410 ("Fresh alpine milk"); Peter Jung (supra note 6) Art 2 para 10.

15 Recitals 6 and 8 Directive 2005/29/EC.

16 According to Art 11 para 1 subpara 2 Directive 2005/29/EC Member States shall provide for legal provisions under which also competitors may take legal action against unfair commercial practices and/or bring unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings in order to protect effectively the interests of consumers.

17 Recital 6 Directive 2005/29/EC.

18 See in depth Daphne Frei and Peter Jung, 'Revised Control of Unfair Terms in Swiss Law – Consumer Protection by Competition Law?' (2015) *EuCML* 165 et seq; Esther Widmer, *Missbräuchliche Geschäftsbedingungen nach Art 8 UWG* (Dike 2014); Alexander Brunner/Anton K. Schnyder/Andrea Eisner-Kiefer (eds), *Allgemeine Geschäftsbedingungen nach neuem Schweizer Recht* (Schulthess 2013); Jörg Schmid, 'Die Inhaltskontrolle Allgemeiner Geschäftsbedingungen: Überlegungen zum neuen Art 8 UWG' (2012) *ZBJV* 1 et seq; Markus Hess and Lea Ruckstuhl, 'AGB-Kontrolle nach dem neuen Art 8 UWG – eine kritische Auslegeordnung' (2012) *AJP* 1188 et seq.

19 With a critical approach in depth Peter Jung, 'Die systematische Stellung der offenen AGB-Inhaltskontrolle im UWG – Vertrags- und wettbewerbsrechtliche Folgeprobleme', in: Alexander Brunner, Anton K. Schnyder and Andrea Eisner-Kiefer (eds), *Allgemeine Geschäftsbedingungen nach neuem Schweizer Recht* (Schulthess 2013) 129 et seq.

20 Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) vom 2. September 2009, *BBl* 2009, 6152 and 6179; Jörg Schmid (n 18 above) 16 and Ingeborg Schwenzer, *Schweizerisches Obligationenrecht – Allgemeiner Teil* (6th edn, Stämpfli 2012) para 46.05; concerning Directive 93/13/EEC: ECJ at 26.6.2000, *ECLI:EU:C:2000:346*, Case C-240/98 to C-244/98 (*Océano*), para 30.

21 Peter Jung (n 19 above) 160.

22 Art 10^{bis} (2) Paris Convention for the Protection of Industrial Property of March 20, 1883: "Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition".

23 Art 1 (1) Consolidated ICC Code Advertising and Marketing Communication Practice (download under <<http://www.iccwbo.org>>): "All marketing communications should be legal, decent, honest and truthful".

24 Botschaft zum einem Bundesgesetz gegen den unlauteren Wettbewerb (UWG) vom 18. Mai 1983, *BBl* 1983, 1009, 1038 et seq and 1043 ("Der Rechtsbegriff 'Treu und Glauben' erfasst also sowohl Verletzungen der Geschäftsmoral als auch solche von Funktionsregeln des Wettbewerbs..."); see in depth Peter Jung (n 6 above) Art 1 paras 10 et seq.

25 See in depth Peter Jung (n 6 above) Art 2 paras 33 et seq.

26 See mainly the critique of Reto M. Hilty (n 7 above) Art 2 paras 60 et seq.

in which the Federal Supreme Court (Bundesgericht, Tribunal fédéral, Tribunale federale) based its judgment on the general clause.²⁷ The reason for the scarce use of the general clause lies in the barring effect that special rules have: It is often argued that the general rule does not apply to a case because a special rule is generally applicable, barring any resort to the general clause. However, while it is true that the case may fall within the scope of a special rule, more often than not, the specific prerequisites of that special rule are in fact not met.²⁸ That is one of the main reasons why the Swiss legislator considerably extended the list of special rules against unfair competition in Art 3 UCA in 1994,²⁹ 2007³⁰ and 2012.³¹ In 2012 for example, it added a special rule according to which the inobservance of a remark in the telephone book that a client does not want to be contacted or his data being forwarded for marketing purposes is considered to be unfair (opt-out model). Mainly due to its narrow wording³² and interpretation³³ this rule remained generally ineffective.³⁴ Yet, instead of trusting in the additional application of the general clause in case of non-applicability of the special rule by the courts, members of the Swiss parliament have started to discuss an amendment of the special rule in order to protect the users of mobile phones.³⁵ In doing so, the legislator gives the courts even more scope to apply special rules instead of the general clause. Thus, the court's as well as the legislator's behaviours regarding the general clause mutually reinforce the non-application of it.

The existing special rules of the UCA prohibit for example unnecessary injurious statements (Art 3 (1) let a UCA), misleading statements (Art 3 (1) let b, let c UCA), measures causing confusion with the products or services of others (Art 3 (1) let d UCA), bait-and-switch offers (Art 3 (1) let f UCA), particularly aggressive sales methods (Art 3 (1) let h UCA), spamming (Art 3 (1) let o UCA), non-transparent offers (Art 3 (1) let p, let s UCA), fictitious invoices (Art 3 (1) let q UCA), pyramid promotional schemes (Art 3 (1) let r UCA), unfair sweepstakes (Art 3 (1) let t UCA), inducements to a breach of contract with third parties (Art 4 UCA), bribery (Art 4 a UCA), exploitation of someone else's achievements (Art 5 UCA), violation of business secrets (Art 6 UCA), non-compliance with working conditions (Art 7 UCA) and the use of unfair contract terms in consumer contracts (Art 8 UCA). Even though the respective norms are quite specific in order to serve mostly also as criminal offences, they do not compare to the concreteness of the «black list» of unfair commercial practices as set out in Annex I of Directive 2005/29/EC.

4. Different ways of enforcement

Whereas the UCP-Directive only broadly regulates the effective enforcement of competition law by the Member States (Art 11, 12, 13 Directive 2005/29/EC) the Swiss UCA provides for a large range of possible enforcement tools in private (Art 9 et seq UCA), administrative (Art 20 UCA) as well as in criminal law (Art 23 et seq combined with Art 3 to Art 6 UCA). Due to the fact that most of the special rules against unfair competition may entail criminal sanctions, criminal proceedings play an increasingly important role for the enforcement of competition law.³⁶ As far as the private sanctions are concerned, it should be stressed that, in Swiss law, not only competitors (Art 9 UCA) and consumers (Art 10 (1) UCA) as well as business associations (Art 10 (2) let a UCA) and consumer organizations (Art 10 (2) let b UCA) can sue, but also the Swiss Government may bring private action for an injunction before the courts. According to Art 10 (3)

UCA this is possible, if the Swiss Government considers the action necessary in order to protect public interest, namely if the reputation of Switzerland abroad is threatened or infringed and those affected in their economic interests reside abroad or if the interests of several people or groups of members of a sector or other collective interests are threatened or infringed.³⁷ Regardless of the applicable conflict of laws rules, the public claim is mandatorily treated according to Swiss competition law as *lois d'application immédiate* (Art 10 (5) UCA).³⁸ If in the public interest, the Government may also inform the public about any unfair competition practices by naming the respective doers (Art 10 (4) UCA).³⁹

III. Impacts of EU-Law on Swiss Law against Unfair Competition

1. Autonomous enactment of EU-Law

The influence of EU-law and especially the UCP-Directive on Swiss law against unfair competition follows the general mechanisms⁴⁰ by means of which EU-law has an impact on Swiss law. The most important mechanism takes place on the legislative level and is called “autonomous enactment” of EU-rules in Swiss law (*autonomer Nachvollzug, reprise autonome*).⁴¹ If possible and reasonable, Swiss law tries to be in line with EU-law. It does so because this facilitates access to regulated markets and because it allows Swiss enterprises

27 See mainly BGer sic! 1999, 156 (“Kamov”) and BGE 102 II 292, 294 et seq (“Bico-flex/Lattoflex”); see also BGE 104 II 322, 333 et seq (in casu answered in the negative).

28 So for example for the precisely formulated special rules Lucas David and Reto Jacobs, *Schweizerisches Wettbewerbsrecht* (5th edn Stämpfli 2012), N 54.

29 Adaption of the Swiss UCA (now Art 3 (1) let k–m, 4 let d UCA) to Directives 87/102/ECC and 84/450/ECC by Bundesgesetz vom 18. Juni 1993 über die Änderung des UWG (AS 1994, 376).

30 Adding of Art 3 let o (now Art 3 (1) let o) and Art 45 a Telecommunications Act against Spamming by Bundesgesetz vom 24. März 2006 über die Änderung des Fernmeldegesetzes (AS 2007, 921).

31 Adding of Art 3 (1) let p and let q (register scams), Art 3 (1) let r (pyramid promotional schemes), Art 3 (1) let s (e-commerce), sweepstakes (Art 3 (1) let t) Art 3 (1) let u (cold calling) by Bundesgesetz vom 17. Juni 2011 zur Änderung des UWG (AS 2011, 4909).

32 The special rule only protects telephone connections that are registered in an official list (“telephone book”) and therefore in practice does not protect against cold calling on mobile phones.

33 It is for example discussed if the rule applies to electronic or private blocking lists (see Gregor Bühler, in: Reto M. Hilty and Reto Arpagaus (eds), *Basler Kommentar UWG* (Helbing Lichtenhahn 2013) Art 3 (1) let u para 8).

34 Nevertheless, the Swiss Government issued 17 cease-and-desist-warnings, filed 41 criminal charges and sanctioned 17 enterprises by autumn 2015.

35 Motion 15.3598 of Ständerätin Anita Fetz “Stopp dem Telefonterror. Allgemeines Verbot von Werbeanrufen auf Mobiltelefone”.

36 Mario M. Pedrazzini and Federico Pedrazzini, *Unlauterer Wettbewerb, UWG* (2nd edn, Stämpfli 2002) para 26.30; Peter Jung, ‘Tendenzen im Recht gegen den unlauteren Wettbewerb’, in: Rita Trigo Trindade, Henry Peter and Christian Bovet (eds), *Economie Environnement Ethique, Liber Amicorum Anne Petitpierre-Sauvain* (Schulthess 2009) 204 et seq.

37 Guido Sutter and Florian Lörtscher, ‘Klagerecht des Bundes gegen missbräuchliche AGB’ [2012] recht, 93 et seq.

38 David Rüetschi, in: Reto M. Hilty and Reto Arpagaus (eds), *Basler Kommentar UWG* (Helbing Lichtenhahn 2013) Art 10 paras 39 et seq.

39 David Rüetschi (n 38 above) Art 10 paras 46 et seq.

40 See for these mechanisms Peter Jung, ‘Das Argument der Europakompatibilität im schweizerischen Privatrecht’ (2010) ZSR 513, 525 et seq.

41 Carl Baudenbacher, ‘Zum Nachvollzug europäischen Rechts in der Schweiz’ (1992) EuR 309 et seq.; Lukas Siegenthaler, *Die Einführung europäischen Gemeinschaftsrechts in das schweizerische Recht* (Helbing Lichtenhahn 1996); Bruno Spinner and Daniel Maritz, ‘EG-Kompatibilität des schweizerischen Wirtschaftsrechts – Vom autonomen zum systematischen Nachvollzug’, in: Peter Forstmoser et al. (eds), *Der Einfluss des europäischen Rechts auf die Schweiz, Festschrift für Roger Zäch zum 60. Geburtstag* (Schulthess 1999) 127 et seq.

to apply the same rules and behave commercially in the same way in Switzerland as in the European Economic Area.⁴²

In the field of competition law there are several examples of an anticipation or transposition of EU-Directives to Swiss law by the free will of the Swiss legislator. Already during the legislative process leading to the present UCA in the first half of the nineteen-eighties, the Commission-proposal for the Council Directive concerning misleading and unfair advertising of 1978⁴³ was taken into consideration.⁴⁴ Namely the new rules on public advertising in respect of consumer credit contracts (now Art 3 (1) let k–n UCA) were formulated according to the rules of the first Consumer Credit Directive 87/102/ECC. They were however, not yet adapted to the regulations of the new Consumer Credit Directive 2008/48/EC.⁴⁵ In 1994,⁴⁶ a new rule on the reversal of the burden of proof in the field of misleading advertising (Art 13 a UCA) was established which almost literally copied Art 6 of the former Directive 84/450/EEC concerning misleading advertising into Swiss law.⁴⁷ In 2007,⁴⁸ a special rule against spamming (now Art 3 (1) let o UCA) imitating Art 13 of the Directive 2002/58/EC on privacy and electronic communications was integrated in the UCA.⁴⁹

In 2012, many new special rules entered into force amongst which the already mentioned revised Art 8 UCA was drafted as an equivalent to Art 3 (1) Unfair Contract Terms Directive 93/13/EEC.⁵⁰ Unfortunately, neither an at least indicative list of unfair contract terms as in Annex 1 Directive 93/13/EEC⁵¹ nor a «black list» of always unfair terms and a «grey list» of presumed unfair terms as in Art 84 and Art 85 CESL-Proposal was put in place in order to clarify this rather abstract norm.⁵² The lack of jurisprudence on the new Art 8 UCA only adds to the legal uncertainty concerning the mentioned provision.⁵³

In 2012, the Swiss legislator adopted a new rule on pyramid promotional schemes (Art 3 (1) let r UCA) which is very similar to the misleading commercial practice number 14 Annex I Directive 2005/29/EC. In the course of the legislative procedure, the draft of that provision was expressly modified in order to adapt it to EU-law.⁵⁴ The new rule on unfair sweepstakes (Art 3 (1) let t UCA) is similar to number 31 Annex I Directive 2005/29/EC but has not expressly been introduced according to EU-law⁵⁵. The new rule on proforma or fictitious invoices (Art 3 (1) let q UCA) is similar to number 21 Annex I Directive 2005/29/EC but narrower in scope since it concerns solely register entries and advertisements.⁵⁶ The new Art 3 (1) let s was inspired⁵⁷ by Art 4 Distance Contracts Directive 97//EC as well as by Art 5 (1) let c and Art 10 (1) E-Commerce Directive 2000/31/EC but the Swiss norm is quite eclectic so that one cannot really interpret it according to EU-standards.⁵⁸ Finally, the new norms on cooperation between national enforcement authorities are largely influenced by the Regulation (EC) No 2006/2004 on consumer protection cooperation from 2004.⁵⁹

When Swiss legal norms are consciously drafted according to models in EU law, one should preferably interpret them in line with ECJ rulings and perhaps even with the decision of a Member State's Supreme Court.⁶⁰ This concerns at least those ECJ rulings already published when the respective norm was drafted. Any other approach would result in disrespect of the Swiss legislator's intention.

2. EU-law as persuasive authority

Taking into consideration that Swiss legal norms against unfair competition are often vague and broad, reference to

definitions and provisions in the UCP-Directive or to ECJ rulings can help to substantiate the Swiss norms.⁶¹ Since EU-law is a compromise accepted by 28 Member States it has a relatively great persuasive authority. This is particularly true for the concrete «black list» of unfair commercial practices in Annex I of the Directive 2005/29/EC.⁶² As the Swiss UCA does not contain a definition of the term consumer, one part of the doctrine⁶³ refers to the definition of consumer contracts established in Art 32 (2) Civil Procedure Code and Art 120 (1) Federal Statute on Private International Law defining consumer contracts as contracts on supplies for ordinary consumption intended for the personal use of the consumer or his family and offered by the other party in the course of its professional or commercial activity. The other part of the doctrine refers to the broader definition of Art 3 Swiss Consumer Credit Act defining the consumer as any

42 Vernehmlassungsvorlage nebst Begleitbericht für ein Bundesgesetz über den elektronischen Geschäftsverkehr (Teilrevisionen des Obligationenrechts und des Bundesgesetzes gegen den unlauteren Wettbewerb) vom Januar 2001, 5 (download under <<https://www.bj.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/archiv/e-geschaeftsverkehr/vn-ber-d.pdf>> accessed 28 March 2016); Peter Jung (n 40 above) 525.

43 Com(77) 724 final.

44 Botschaft UWG 1009, 1021.

45 Luca Maranta and Philippe Spitz, in: Peter Jung and Philippe Spitz (eds), Bundesgesetz gegen den unlauteren Wettbewerb (UWG) – Kommentar (Stämpfli 2010) Art 3 let k–n para 8.

46 Bundesgesetz vom 18. Juni 1993 über die Änderung des UWG (AS 1994, 376).

47 Philippe Spitz, in: Peter Jung and Philippe Spitz (eds), Bundesgesetz gegen den unlauteren Wettbewerb (UWG) – Kommentar (Stämpfli 2010) Art 13 a paras 2 et seq.

48 Bundesgesetz vom 24. März 2006 über die Änderung des Fernmeldegesetzes (AS 2007, 921).

49 See for the impact of EC-law Oliver Arter, 'Lauterkeitsrechtliche Aspekte von Werbung mittels E-Mail' (2004) AJP 1067, 1070 et seq.

50 Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) vom 2. September 2009, BBl 2009, 6151, 6171, 6173 and 6179.

51 See for the indicative nature of Annex I Directive 93/13/EEC ECJ at 7.5. 2002 ECLI:EU:C:2002:281, Case C-478/99 (Commission of the European Communities v. Kingdom of Sweden), para 22.

52 COM(2011) 635 final (since withdrawn).

53 See for several uncertainties Daphne Frei and Peter Jung (n 18 above) 165 et seq.

54 See Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) vom 2. September 2009, BBl 2009, 6151, 6169 and 6177.

55 See for the discussion in Parliament AmtlBull StR 2010, 932 et seq (Ständerat Hermann Bürgi and Bundesrätin Doris Leuthard referring to German and Austrian law but – out of ignorance – not to EU-law).

56 Reto Arpagaus, in: Reto M. Hilty and Reto Arpagaus (eds), Basler Kommentar UWG (Helbing Lichtenhahn 2013) Art 3 (1) let q para 4.

57 See the discussion in Parliament AmtlBull StR 2010, 932 (Bundesrätin Doris Leuthard); see for the first proposal the 'Vernehmlassungsvorlage nebst Begleitbericht für ein Bundesgesetz über den elektronischen Geschäftsverkehr (Teilrevisionen des Obligationenrechts und des Bundesgesetzes gegen den unlauteren Wettbewerb) vom Januar 2001', 5 and 8 (download under <<https://www.bj.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/archiv/e-geschaeftsverkehr/vn-ber-d.pdf>> accessed 28 March 2016).

58 Thomas Probst, in: Peter Jung and Philippe Spitz (eds), Bundesgesetz gegen den unlauteren Wettbewerb (UWG) – Kommentar (2nd ed, Stämpfli 2016) Art 3 (1) let s para 5 (under print).

59 See Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) vom 2. September 2009, BBl 2009, 6151, 6164.

60 Especially concerning Art 13 a UCA Mario M. Pedrazzini and Federico Pedrazzini (n 36 above) para 20.03; BGE 129 III 335, 350 et seq; BGE 130 III 182, 190 et seq; BGE 125 II 293, 306 et seq; Thomas Probst, 'Die Rechtsprechung des Europäischen Gerichtshofes als neue Herausforderung für die Praxis und die Wissenschaft im schweizerischen Privatrecht' (2004) BJM 225, 247 et seq and 253 et seq.

61 See as an example for the persuasive authority of ECJ rulings BGE 123 I 152, 166 (referring to ECJ at 17.10.1995 ECLI:EU:C:1995:322, Case C-450/93C-478/99 – Kalanke).

62 Peter Jung (n 6 above) Einleitung para 188 ("Argumentationsschatz").

63 Andreas Furrer, 'Eine AGB-Inhaltskontrolle in der Schweiz?' (2011) HAVE 326; Sylvain Marchand, 'Art 8 LCD: un léger mieux sur le front des intempéries' (2011) HAVE 328, 330.

natural person who is acting for purposes which are outside his trade activity, business or profession.⁶⁴ One could decide this controversy in favour of the latter opinion arguing that it is in line with Art 2 let a UCP-Directive.⁶⁵

When evaluating the influence of a commercial practice on the average consumer whom it reaches or to whom it is addressed, Swiss courts tend to refer to the image of a consumer being sufficiently informed, reasonably observant and circumspect to attention in the particular situation.⁶⁶ But as provided for in the UCP-Directive, Swiss courts also consider a special need for protection when the practice addresses children, elderly people, foreigners or mentally restricted people.⁶⁷ In a case concerning telephone-sex, the Federal Supreme Court held that clients are not supposed to be able to calculate and thus know the total price of a call if the price is only indicated per minute.⁶⁸ Moreover, the image of the consumer as someone particularly vulnerable and defenceless influences the new special rules on register entries and advertisements, sweepstakes and pre-contractual information duties in e-commerce.⁶⁹

V. Conclusion

The impact of EU-law and especially of the UCP-Directive on the Swiss law of unfair competition is relatively small. Certainly, one can find some common recent developments and

direct influences concerning consumer protection by competition law (control of unfair contract terms, advertising for consumer credits) and new unfair practices (lack of transparency in e-commerce, pyramid promotional schemes, unfair sweepstakes, fictitious invoices). Even in cases where EU-norms directly inspire special rules of the Swiss UCA, they differ in detail and at least in wording. Beyond these isolated convergences Swiss law against unfair competition remains independent. It maintains its peculiarities in comparison to EU-standards like the unity of unfair competition law, the strong functional approach, the limited significance of the general clause, the possibility of private enforcement by the government and the relatively great importance of criminal sanctions. In cross-border situations one will have to be aware of these divergences for the foreseeable future. ■

64 Guido Sutter and Florian Lörtscher, 'Klagerecht des Bundes gegen misbräuchliche AGB' (2012) recht 93, 100.

65 See in context with Art. 8 UCA and Art 2 let b Directive 93/13/EWG Peter Jung (n 19 above) 152.

66 BGE 132 III 414, 427 ("Taxes de pharmacie"); BGE 129 III 426, 435 ("Unclean hands"); BGer sic! 2013, 462 ("Bilderrahmen"); Carl Baudenbacher (supra note 13) Art 1 para 62.

67 Mario M. Pedrazzini and Federico Pedrazzini (n 36 above) para 1.73.

68 BGE 132 II 240, 249 et seq ("Nummernwiderruf"); BGE 128 IV 177, 182 ("Telefonsex").

69 Botschaft zur Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb (UWG) vom 2. September 2009, BBl 2009, 6151, 6174 et seq.

Book Reviews

Marcus Tschersich, Privacy by Default in the European Union Proposal for Data Protection Regulation. Hamburg, Verlag Dr. Kovač, 2015, 1-190 pages. ISBN: 978-3830082118. € 85,80.

The book consists of five short essays that take up the challenge of empirically studying the effects of restrictive privacy default settings in social network sites (SNS). The studies are based on Facebook or adopt privacy settings pioneered by Facebook. Although the author conscientiously points out to the limitations of all five studies and the need for future research, his contribution to the data privacy debate is especially relevant given the controversy surrounding the provision on "privacy by default" in the Proposal for General Data Protection Regulation (GDPR).¹ The idea of "privacy by default" (PbDef), first developed by Ontario Information and Privacy Commissioner Ann Cavoukian, has been equally praised by privacy advocates for its potential to grant more control to users of SNSs and other electronic devices, and chastised by SNS providers and lobbyists of technological firms that see the concept as either too excessive or endangering the SNSs' very business model. In a few sentences in each of the essays, the author summarizes the main arguments in favour of and against PbDef, as well as existing literature on default bias. Clearly, the originality and emphasis of the studies lay in the design of the empirical tests and the statistical analysis of the gathered data. However, the brevity of the contextual framework in which the author situates his work hampers both the possibility for wider readership of the essays, e.g. one beyond the privacy community, and a more in-depth discussion of his findings within the privacy community.² In addition, the essays lack any legal analysis of the consequences of PbDef under EU law, in particular in relation to provisions in the GDPR related to (express) consent and the responsibilities of data controllers.

For the first paper, the author builds up an SNS privacy interface prototype to investigate the influence of default settings and interface style on the privacy configuration behavior of users. An experiment is conducted with an overall of 632 students. The author shows that based on the combined effect of default settings and interface style, users having an interface with multiple pages keep their default settings for the categories of *Status Updates* and *Media* but tend to deviate from the default on *Profile Information*. The author explains this tendency with the fact that the category of *Profile Information* is the one that the participants view first. Whereas the test confirms previous studies on default bias, the author convincingly argues that through the use of a more transparent and less complex interface (in the form of a privacy setting list instead of multiple pages scattered throughout the platform), the majority of participants converge in configuring their settings in sharing information with friends. Thus, "the concerns of SNS providers regarding the functionality of the platform are for the most parts unfounded."³

1 Article 23.2 of the GDPR (Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to their Personal Data and on the Free Movement of Such Data, COM (2012) 11 final.) provides that: "the [dats] controller shall implement mechanisms for ensuring that, by default, only those personal data are processed which are necessary for each specific purpose of the processing and are especially not collected or retained beyond the minimum necessary for those purposes, both in terms of the amount of the data and the time of their storage. In particular, those mechanisms shall ensure that by default personal data are not made accessible to an indefinite number of individuals."

2 The author avoids any normative argumentation and does not engage at length with other academics that explore the PbDef topic. For instance, see Lauren E. Willis, Why Not Privacy By Default, 29 *Berkeley Technology Law Journal* 61 (2014).

3 M. Tschersich, "Privacy by Default in the European Union Proposal for Data Protection Regulation", p. 77.