Putting the Consumer First?: The Varying Objectives of German and European Competition Policy

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I. Introduction

[1] Two recent decisions by a German regional court and the European Court of Justice have sparked a heated public debate on the Continent about the objectives of German and European competition policy. More specifically, the courts' decisions in *„Zentrale zur Bekämpfung des unlauteren Wettbewerbs" v. C&A Mode KG* (1) and *Zino Davidoff SA v. A & G Imports Ltd* (2) respectively, have focussed attention on the proper place of the consumer in national and supranational competition policy. The local media, politicians, lobby groups, and the general public have with some exceptions reacted strongly against the alleged benefitting of 'vested interests' at the expense of the 'general interest'. Calls for fundamental changes to the existing laws have accordingly been widespread and vociferous.

[2] The general reaction may partly derive from a certain misapprehension about the nature of competition policy. Competition policy is not necessarily designed to ensure that "competition serves ultimately consumers", as one journalist put it. (3) German and European law and jurisprudence demonstrate that its objectives may in fact vary considerably. For its part, the European Community has opted for a policy that aims at 'workable competition' as opposed to 'perfect competition'. The pursuit of competition to make the market function properly is offset by wider objectives such as social and redistributive objectives, market integration, protection of small and medium-sized enterprises, and consumer protection. (4) The objectives of competition law - *de lege lata* and *de lege ferenda* - must, according to one expert, be considered provision by provision. For a statute's individual provisions can serve thoroughly different objectives separately or in combination, as long as they do not give rise to inherent contradictions. How far the identified objectives are in fact promoted is again a function of the individual provision. (5)

[3] The following article will consider the *C&A* and *Zino* decisions as case studies in competition policymaking, that is to say in the balancing of the interests of various marketplace participants, as revealed in two provisions of German and European competition law. It will begin with a *precis* of the facts, issue, and ruling in the two decisions. It will then examine the decisions from the perspective of the precise balance of interests that the courts found in the impugned national or supranational provisions. Lastly, it will consider recent proposals to reform German/European competition policy in favour of consumer interests.

II. The Decisions

A. *C&A*

[4] The dispute in *C&A* concerned the offer by the eponymous clothing chain of a 20 percent discount on all its products at each of its 184 stores in Germany during the first business week of the New Year (January 2-5, 2002). The offer was initially extended to customers paying with credit or debit cards. A watchdog against unfair competition (*Die Zentrale zur Bekämpfung des unlauteren Wettbewerbs* or "ZBW") secured a temporary injunction from a regional court in North Rhine-Westphalia (*Landgericht Düsseldorf*) on January 3, ordering C&A Mode KG to cease the promotion.

[5] The clothing chain, Germany's fourth largest, called the promotion its "Euro-Service" and contended that it was intended to facilitate the transition from Deutsche Mark to Euro as Germany's legal tender. C&A claimed that it wanted in the first days following the Euro's introduction to avoid long queues at cashiers and to ensure that enough Euro-change was on hand. (6) C&A argued that such promotions, especially when an individual discount targetted only at cardholders, were fully legal following the repeal of the Rebates Act and Gifts Regulation last summer. (7) The Rebates Act and Gifts Regulation had imposed widespread and strict limits on the granting of rebates. (Rebates were defined in Paragraph 1 of the Rebates Act to include, inter alia, any 'reduction from the generally announced or demanded price of the sales product.' For payments in cash, for example, a rebate of just 3 percent could be granted. (Paragraph 2 of the Rebates Act)) The legislative leeway that businesses now enjoyed in the marketplace was not yet clear. (In the intervening half year, the new sales possibilities provided by the repeal had not been extensively exploited. (8) Moreover, an expert commission that had been appointed to eliminate any discrepancies arising from the repeal of rebate rules and the retention of the UWG restrictions had not yet reported.)

[6] The ZBW successfully argued that the promotion violated competition law. Although the Rebates Act and Gifts

Regulation had been repealed, a free-for-all in the pursuit of customer's business was not from now on allowed. Specifically, the ZBW characterized the promotion as a 'special event' ("Sonderveranstaltung"), which according to Paragraph 7 and 8 of the Law Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* or "UWG"), is in the circumstances unlawful. The German Chambers of Industry and Commerce (*Deutsche Industrie- und Handelskammer* or "DIHK") shared this opinion. Despite the repeal of the Rebates Act and Gifts Regulation, a discount offer remained unlawful if it met the terms of a special event per Paragraph 7 UWG. (9) Paragraph 7 Section 1 UWG generally forbids special events, including their announcement. (10) Special events are only allowed in three exceptional instances: during the time-limited winter- and summer sales (11), the clearance sales (12), and the so-called anniversary sales. (13) That the discount was offered in conjunction with the introduction of the euro did not change its illegality, according to the ZBW's application. (14) The public would assume that on the occasion of the Euro's introduction a particular sales promotion was taking place and not that the discount was a service from C&A in return for customers' abstention from payment in cash. In sum, the sales event 'served to accelerate product sales and created the impression that special purchasing advantages were being conferred', argued the ZBW on the terms of the UWG. (15)

[7] For its part, the German Retailers Association (*Hauptverband des Deutschen Einzelhandels* or "HDE") stated that C&A should not have restricted the discount precisely. Both the unusually high discount and the restricted circle of customers were in legal order; it was the time-limit that was not. Had the clothing chain offered a discount to all customers using credit or debit cards without limiting this offer to a specific time period and then had it at some future point ceased to offer the discount, the promotion would not have been contestable. (16) Generally speaking, the HDE opposes time-limited sales. It believes that temporary changes in prices confuse consumers and are unfair because they force people to interrupt their schedules in order to rush to stores to take advantage of price cuts. (17)

[8] Immediately after the regional court issued its temporary junction, C&A extended its discount offer to all customers regardless of how they paid. The clothing chain justified its decision on the basis that it was seeking to clarify the situation for the sake of its uncertain customers. It claimed to be responding to the first temporary injunction, by alleviating the pressure on would-be customers (18) and legally replacing one sale with another. (19) On the same day (January 4), however, the regional court forbid C&A from making the new offer and threatened the clothing chain with a 250.000 euro fine should it persist. The ZBW had again applied to the court, arguing that the revised offer clearly breached the temporary injunction. The extension of the offer to all customers did not rebut the charge that the offer offended against the applicable law regarding special sales events. (20) For its part, the HDE agreed that the second discount offer represented a clear violation of the UWG, especially since the offer remained time limited. It believed that C&A was attempting to find the boundaries of the relevant law. (21)

[9] The HDE's assessment of C&A's strategy was borne out by events. C&A defied the second injunction and persisted with its discounts on the last scheduled day, January 5, of its promotion. The clothing chain now faces the fine threatened with the second injunction. At last report, C&A was in negotiation with the court and intended to appeal any fine. As one newspaper noted, "Germans are watching the case closely to see if the standoff between C&A and the Dusseldorf district court yields any precedents that could weaken half-century old laws". (22)

B. Zino

[10] The disputes joined in *Zino*concerned two trade mark proprietors, Zino Davidoff and Levi Strauss, who objected to the placing of their products on the British market by the companies A&G Imports, Costco Wholesale, and Tesco Stores. The proprietors had previously sold their products outside the European Economic Area (23), but only some of their distribution contracts contained reservations to the effect that the distributors were to market the products outside the EEA and not within the EEA. Zino Davidoff and Levi Strauss claimed that the import and sale of their products constituted an infringement of their trade mark rights.

[11] To the preceding fact pattern the ECJ applied Article 7 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (24), as amended by the Agreement on the European Economic Area of 2 May 1992 (25). The Court found in its decision of 20 November 2001 that the amended Article 7 effectively limits the exhaustion of the rights elsewhere conferred on a trade mark proprietor to instances where products have been placed on the market within the EEA by the proprietor or with his consent. (26) The corollary of this finding was that the Directive allows a proprietor to market his products outside the EEA without exhausting his rights within it. (27) The key question in the Court's view was whether consent to the placing of trade mark products within the EEA, if the same products had first been marketed outside the EEA, may be implied as well as express and if so, in which situations it may be implied. The ECJ ruled that implied consent must be "unequivocally demonstrated" from the "facts and circumstances" prior to, simultaneous with or subsequent to the placing of the goods on the market outside the EEA that the proprietor has renounced his right to oppose placing of the goods within the EEA. (28) Accordingly, "mere silence" of a trade mark proprietor could not be interpreted as an implied

consent. (Implied consent could not be inferred from the fact that: a) a proprietor had not communicated to all subsequent purchasers of the products placed on the market outside the EEA his opposition to marketing within the EEA; b) the products carry no warning of a prohibition on their being placed on the market within the EEA; c) the proprietor has transferred the ownership of the products without imposing any contractual reservations, even where the law of the contract includes an unlimited right of resale in the absence of such reservations.) It was for the trader alleging consent to prove that the proprietor had implied consent to the placing of the goods on the market in the particular territory and not for the proprietor to demonstrate its absence. (29)

III. The Subtext

A. C&A

[12] The laws currently governing special events have been variously justified. For example, they have been rationalized as protecting "respectable suppliers from the machinations of their competitors" and as protecting German consumers "from the pressure emanating from such temporary special offers, which possibly lead to overhasty purchases." (30) Others claim that the regime was intended to protect small enterprises against competition from other small enterprises or more from the large chains. (31) Whatever the rationale for their passage almost a century ago, the consequence of the laws should be clear from the C&A saga: the UWG is the tool of particular interests. (32) The parties to the proceedings illustrate this truth. The complaint about the discount offer was brought by the ZBW. Although the ZBW takes up complaints from consumers and fights for competition in the marketplace, it does so solely from the perspective of business. The body was founded and is sustained by various associations, businesses, and chambers of industry and commerce with the goal of supporting fair commercial practice. (33) Business, stated the ZBW's head, has a pronounced need for an effective implementation of the rules of the game in competition. (34) Considering the economic justification for these rules and possibly pressing for their reform is not, however, its concern. (35) More than that, the ZBW will assume the role of advocate on behalf of aggrieved competitors, as was likely the case in the C&A proceedings. (36)

[13] The issue of the euro's introduction seems a red herring, a distraction to the real issue above, from two perspectives. First, C&A seized the opportunity of the euro's introduction as the business rationale behind its promotion and then as the legal rationale behind its defence. Neither rationale rings true. The business rationale is particularly unconvincing: no other large retail chain felt it necessary to offer discounts to cope with the euro's introduction - they took other measures such as extending their opening hours (37); attracting more customers, the result of offering discounts, exacerbates rather than avoids long queues at cashiers; a 20 percent discount seems excessive encouragement to pay without cash etc.. For its part, the legal rationale was found by the regional court to be unconvincing. C&A wisely dropped the euro-rationale with its second discount offer: neither the business nor the legal case would have stood up, as the offer was extended to all customers regardless of how they paid. (Whether the dispute was an intended coup or a slip-up by its in-house lawyers, C&A could hardly have wished for better publicity for its stores, which have in recent years been hard hit by competition. (38)) Second, the issue of the euro's introduction, considered more broadly, does like the promotion concern price competition. (One of the economic rationales behind the new currency is greater competition resulting from greater transparency in the euro-zone: consumers can compare prices more easily and shop where the best values are to be had.) The various levels of price competition implicated in the various ways of shopkeeping are, however, only superficially related. (39) The C&A dispute manifests a different dynamic: it concerns sales practices and not products for sale, the German marketplace rather than the internal market, and national conventions instead of continental coordination. (40) Put otherwise, the purpose of the euro's introduction is to promote interstate trade in goods and not to ensure commercial freedom as such.

B. Zino

[14] The ECJ's reasoning begins with the premise that Articles 5 and 7 of the Directive lay down the rule of Community exhaustion. The consequence is not merely that Member States are not allowed to provide in their domestic law for exhaustion of the rights conferred by a trade mark in respect of products placed on the market outside the EEA. (41) The Court's initial premise also ensured that the cases would be settled within the four corners of the Directive, that is to say, that the claims of trade mark infringement would be determined according to the Directive's terms alone. For its part, the Directive is a highly technical, tightly written piece of legislation in the 'finest' Brussels tradition. These traits allow for little interpretive leeway. Proper construction of its Articles effectively excludes judicial consideration of public policy.

[15] The hermeneutic dynamic is most clearly - and most pivotally - at play in the Court's characterization of the rights conferred by a trade mark. As noted, the ECJ was required to determine whether the consent of a trade mark proprietor to marketing within the EEA may be implied. To make this determination the Court defined the rights

according to other terms of the Directive and not according to any external measure. Put otherwise, the rights were relatively and not absolutely valued. "In view of its serious effect in extinguishing the exclusive rights of the proprietors [...] (rights which enable them to control the initial marketing in the EEA), consent must be so expressed that an intention to renounce those rights is unequivocally demonstrated." (42) When the rights are so highly valued, it follows that mere silence cannot be interpreted as an implied consent, a conclusion that the Court quickly reaches. (43) The practical significance of the Court's approach is that instead of considering the interests of other marketplace participants as well as those of the proprietors of the trade marks, the ECJ considers solely the proprietors' interests.

[16] Assessed from a similarly 'internal' perspective, the Court's approach is open to question. First, it may be reasonably asked why, if the effect in extinguishing the exclusive rights of the proprietors is as "serious" as the ECJ contends, the complainants in Zino did not take steps to ensure that their exclusive rights were to be reserved within the EEA. (44) It is conceivable that the proprietors presumed the existence of the rule, or more specifically the protection, that the Court set out. This seems unlikely, however. Commercial contracting is distinguished by a 'belt and braces' approach (i.e. multifold security precautions) Moreover, the parties to the proceedings held sharply divergent views over the appropriate rule (45). The result is that the courts put a higher value on their rights than the right-holders do themselves, a result that seems nonsensical. Second, the ECJ's approach to the protection of trade mark rights seems inefficient. A&G, Tesco, and Costco argued that proprietors should be required to ensure, inter alia, that any rights that they wish to reserve are stipulated in the contracts for the sale and resale of the products. (46) Given that right-holders best know their wishes, just as they best know the value of their rights (above), it seems sensible to require them to make those wishes explicit. The alternative, i.e. that the traders should be required to ascertain the right-holders' wishes, can at best be deemed an awkward arrangement. (This is all the more so when the traders are far down the distribution chain. The Court found that it is not relevant that authorised dealers have not imposed on the traders reservations setting out the trade mark proprietor's opposition to the marketing of his products within the EEA, even though the dealers have been informed of it by the proprietor. (47) Subsequent purchasers must therefore seek to inform themselves of the proprietor's wishes.) Instead, the defendant in an action for trade mark infringement, like the defendant in civil actions generally, should be presumed to have acted correctly, i.e. with the consent of the trade mark proprietor, unless the proprietor proves the contrary. The burden of proof otherwise rests on the wrong party. (48)

[17] Assessed from an 'external' as opposed to an 'internal' perspective, the ECJ's approach in *Zino* is also open to question. To many observers, the Court's approach exemplified legalism: adherence to the letter of the law at the expense of worthy ulterior considerations. The ECJ ruling offers trade mark proprietors considerable protection from so-called parallel imports (here products that are placed on the market outside the EEA and that are subsequently imported into the EEA) and price dumping (here cut-rate prices on perfume and jeans, inter alia). Zino Davidoff and Levi Strauss should thereby be better able to partition their markets and position their products as they see fit. The corollary of the enhanced judicial protection afforded the trade marks is, however, higher prices for the products. Traders like Tesco will no longer be able to arbitrage price differentials between EEA and non-EEA markets without the proprietors' permission, as the ruling leaves traders little room to manoeuvre in seeking to prove that the "facts and circumstances" from which consent may be inferred exist. (49) The consequence of the proprietors' enhanced ability to partition markets is an ability to maintain price differentials, or rather the inability of traders to exploit price differentials between markets and (presumably) pass on benefits to consumers in the form of lower prices. (50) A British consumers advocacy group called the ruling "appalling" because it inhibited consumers' access to lower-priced branded products and restricted their choice of where to buy them. (51) The trade mark proprietors counter-argued that the cheaper sales of their products damage the image and so the value of their brands. By damaging the value of their brands, proprietors receive lower returns on their investment in building up the brand. Lower returns can only lead to less innovation and, in the long run, reduce consumer choice. (52)

[18] Unfortunately, the empirical evidence for the two sides' contrasting claims is inconclusive. The leading study of the phenomenon of international exhaustion - i.e. untrammeled, parallel imports - suggests that implementing such a policy may well have off-setting short-term and long-term consequences. Short-term benefits would result if the policy created more competition and lower prices, but long-term costs could well include reduced investment in manufacture, supply, and customer care. The study advised that these potential costs "should weigh heavily with policymakers". (53)

IV. Alternatives

A. C&A

[19] As one German newspaper correctly predicted upon the issuance of the first temporary injunction, "[m]ost consumers will probably find it hard, however, to regard this verdict as a victory of competion regulations." (54) The reaction of the general public and the media was overwhelmingly negative: consumers found C&A‘s offer clever and

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financially attractive, while editorialists inveighed against an outdated 'a nanny state' mentality. (55) German politicians of various stripes have also come out in favour of C&A and called for more competition. A leader of the opposition Free Democratic Party captured the mood best: "[i]f a judge can prevent discounts that benefit consumers, the law needs to be changed." (56) C&A has successfully wrapped itself in the flag of economic reform. Said a company spokesman: "if [the dispute] leads to a change and leads to less regulation, we would be happy with that. We are a European company and we see fewer limitations in other countries and more possibilities. Germany has too many regulations." (57)

[20] The C&A dispute has triggered a heated discussion about the future of German and European laws concerning unfair competition. The recent legislative trend has been towards greater liberalisation in the German and European marketplace. First, the rules concerning shop closing were loosened. Then came the repeal of the Rebates Act and Gifts Regulation. The climate of opinion - most importantly in business circles but also in the media, general public, and among politicians - seems now be shifting against the remaining restrictions on competition. With this change in mood, pressure will in parallel build for a change in the existing laws such as concerning special sales events. For its part, the German Association of Branches and Self-Service Department Stores (*Der Bundesverband der Filialbetriebe und Selstbedienungs-Warenhaeuser* or "BFS") called for an outright deletion of the ban on special events in Paragraph 7 UWG. BFS argued that following the repeal of the Rebates Act and Gifts Regulation, it would be consistent for the ban on special events also to be repealed, because sales promotions with particular discount arrangements could otherwise still be forbidden. A liberalisation of competition law is in the BFS's view required. (58) The DIHK was essentially in agreement. It argued that a fundamental reform of the UWG was needed more than ever before: German competition law must be rationalized and is in some respects also open to further liberalisation. However, the DIHK warned against an outright repeal of the special events ban in response to the C&A dispute: the ban is quite often the sole effective means of protection for consumers against deceitful commercial practices. Accordingly, reasoned the DIHK, it must be carefully considered how in the event of future liberalisation such practices could still be caught. (59) The HDE rejected calls for the government to immediately repeal Paragraph 7 UWG; it favours a comprehensive reform of the law after the German parliamentary elections in September. (60) The same division may be seen in the government's ranks, according to its statements regarding possible changes to the UWG. The Ministry of Consumer Protection, Food and Agriculture has come out in favour of reform. The country, said an undersecretary in the Ministry, needed to change the antiquated laws, which were based on "the idea that the consumer has to be protected from lower prices." (61) In contrast, the Justice Ministry favours a 'go-slow approach', preferring to wait until an advisory group set up after the repeal of the Rebates Act and Gifts Regulation makes its recommendations.

[21] In the event, the German government could avoid having to resolve these divisions within its ranks or between interests in the policymaking process, since the issue of sales practices may be resolved at the European level. The European Commission has proposed a regulation to lift barriers to cross-border sales promotions such as discounts and 'two-for-one' offers. The Internal Market Commissioner, who launched the proposals last October, regards the rules as a crucial element to establishing a single European market for consumers and retailers. "The Union", states the Proposal for a Regulation of the European Parliament and the Council concerning sales promotions in the Internal Market, "thus urgently needs a regulatory framework for the efficient cross-border use and commercial communication of sales promotions." (62) As it now stands, the Regulation could prompt Germany to simplify its retail regulations, including reforming the law regarding sales events. (63) Agreeing upon a common set of ground rules in the face of considerable divergence of national practice may, however, prove difficult. Nine countries, including France, Italy, and Germany, are apparently trying to delay a decision on the proposals; three countries, including the UK, are understood to be in favour of a speedy approval. The nine countries claim to be concerned about the compatibility of the proposal with a forthcoming consultation paper on consumer protection in the EU. (64) A spokesman of the EU Commissioner for Consumer Protection acknowledged that sales promotion is one of the most delicate issues in Brussels. "It could be many years before this Regulation enters into force across Europe, if it is ever passed." (65)

B. Zino

[22] Globally, the mood may be turning against trade mark proprietors and the tolerance of market partitioning and pricing differentials shrinking. (66) With this change in mood, pressure will build for a change in the existing laws. As such, it may be fair to say that "[r]ights owners have won the battle but not the war", as a US lawyer observed in the aftermath of the *Zino* decision. (67) Attention is already shifting from Luxembourg to Brussels. The UK government, which disagreed with the decision, refrained from criticism of the ECJ's reasoning in *Zino*, recognizing that the ECJ could "only interpret the law as it stands." Instead, a government spokesman stated that "[w]e need proposals from the European Commission to change the Trademarks Directive." (68)

[23] One such proposal might draw on the US regime. In the US, traders can bypass the authorised retail chains set up by trade mark proprietors - subject to contractual reservations - and sell imported cheap products, provided that

they are already on sale in the country. (As explained, the ECJ in *Zino* rejected such a "first sale" defence.) The UK government, for one, apparently champions a US-style regime of unfettered parallel imports. (69) Reforming the Directive is, however, easier called for than done. All 15 member states must agree to a change in the parallel imports regime under EU law (per Article 308 EC Treaty). France and Italy, which are home to many famous trade mark proprietors, such as LMVH and Gucci, are adamantly opposed to such any such change. (70) It should be recalled that during the proceedings the French government argued that parallel imports should be allowed into the EEA only where the trade mark proprietor gives express consent. (71) Likewise, Italy attempted to retain national control over the matter, characterizing consent for reimportation into the EEA as not concerning consent to exhaustion and a matter for EU law but rather as an act disposing of the trade mark rights and therefore a matter for Italian law. (72) For his part, the Commissioner for the Internal Market, supports the French and Italian stance. The Commissioner apparently believes that a change could harm brand owners without causing significant falls in prices. (73) During the proceedings, the Commission argued that the question was not whether consent must be express or implied, but rather whether the trade mark proprietor has had a first opportunity to benefit from the exclusive rights he holds within the EEA. (74)

V. Conclusion

[24] The recent decisions in *C&A* and *Zino* had, as one newspaper described it, "consumers seething with anger and many a free trader crying foul." (78) Public opinion has reacted strongly against the favouritism shown by the German and European courts to small retailers and trade mark proprietors at the expense of consumers and discounters, respectively. The reasoning in both judgments appears, however, fundamentally sound. As the courts could only interpret the laws as they stand, pressure to reform the laws, the UWG and the Trade Marks Directive, is considerable and is building.

[25] As they plan their campaign for liberalisation, would-be reformers should be under no illusions about the nature of competition policy. Competition issues are pervasive in economic activity and thereby give rise to a wide variety of possible legislative objectives. These objectives may be desirable in economic or other terms. Given the variety of possible objectives, value judgments and tradeoffs must at some point be made, say, between pursuing maximum efficiency and maintaining high levels of employment. Even judged in terms of economic desirability alone, no particular competition policy is a priori preferable. The marketplace is comprised of many different participants, each of whom can with some plausibility claim to be representing the 'general interest' in the pursuit of their own interest. Although the arguments of the small retailers and trade mark proprietors are clearly self-serving, they cannot be dismissed simply on that basis. (76) The marketplace dynamic revealed in the two decisions demonstrates as much. (In the context of the *C&A* decision and the UWG, C&A's competitors contend that the impugned provisions ensure that small and medium-sized enterprises have an equitable opportunity to participate in the market place for the benefit of consumers, who thereby enjoy greater choice of products. In the context of the *Zino* decision and the Trade Marks Directive, the proprietors contend that damaging the value of their brands could only lead to less innovation for consumers. Consumers are being urged with some reason to consider more than just price and short-term savings in assessing existing competition policy.) In short, in competition policymaking, no particular policy is a priori preferable, and all interests are in a sense vested interests.

[26] Would-be reformers should similarly be under no illusions about their ability to effect change at either the national or supranational level. If there is a marketplace of products, there is also a marketplace of votes and here too must proponents of reform sell their product. An application of public choice theory seems convincing in the context of competition policymaking. As there is no obvious end to pursue and there are various self-interested means through which to pursue any chosen, the political process appears as "an implicit market with demanders (voters or interest groups) of government policies exchanging political support [...] for desired policies." (77) The experience of trade policymaking as informed by the theory suggests, however, that in competition policymaking narrow interests will tend to dominate thinly-spread interests in the political process. (78) To date, this analysis seems to fit the political process at both the national and supernational levels as regards the passage of the UWG and Trade Marks Directive and their reform: the small retailers' or trade mark proprietors' interests have long prevailed over the consumers'. (79)

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(1) Judgments of the *Landgericht* Duesseldorf, 3 January 2002 & 4 January 2002. NB: The author was unable to obtain a copy of the Judgments themselves from the Court or the Complainant prior to writing this report.

(2) EC, Case C-414/99, joined with Levi Strauss & Co., Levi Strauss (UK) Ltd and Tesco Stores Ltd, Tesco plc (C-415/99) as well as with Levi Strauss & Co., Levi Strauss (UK) Ltd and Costco Wholesale UK Ltd (C-416/99): Judgment of the Court of Justice of the European Communities, 20 November 2000. Available on line at: http://europa.eu.int/cj/index.htm; hereinafter "ECJ" and "Zino".

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(3) FRANKFURTER ALLGEMEINE ZEITUNG, 4 January 2002, p. 17.

(4) Gabriel Gloecker et al., GUIDE TO EU POLICIES, Blackstone: London, 1998, p. 159-161, 241-42. The multi-fold objectives of competition policy may just as clearly be seen in other jurisdictions' legislation. For example, section 1.1 of the Canadian Competition Act identifies the purpose of the Act as being "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices." In this series of objectives, it is also noteworthy that the objective of benefiting small and medium-sized enterprises precedes that of benefiting consumers, which is the last listed. Competition Act and Commentary (2000 Consolidation), Butterworths: Toronto/Vancouver, 1999, p. 1.

(5) Fritz Rittner, WETTBEWERBS- UND KARTELLRECHT (2nd. ed.), C.F. Mueller: Heidelberg, 1999, p. 21-22.

(6) FRANKFURTER ALLGEMEINE ZEITUNG, 4 January 2002, p. 1. According to a company spokesman, 30 percent on average of C&A customers pay with credit or debit cards. It was expected that this share would rise to 50 percent during the promotion. FRANKFURTER ALLGEMEINE ZEITUNG, 4 January 2002, p. 16.

(7) FRANKFURTER ALLGEMEINE ZEITUNG, 4 January 2002, p. 16.

(8) DIE ZEIT, 10 January 2002, p. 26.

(9) C.H. BECK, 7 January 2002, archived at publisher's website without page citation.

(10) 'Special offers' - "*Sonderangebote*" - do not qualify as special events per 7(2) UWG. These are defined as offers of single products or product groups in the context of regular commercial business.

(11) Winter- and summer sales may take place during prescribed two-week periods that begin on the last Mondays of January and July, respectively per 7(3)(1) UWG.

(12) per 8(1) to 8(3) UWG.

(13) Anniversary sales may take place every 25 years per 7(3)(2) UWG.

(14) As quoted in FRANKFURTER ALLGEMEINE ZEITUNG, 4 January 2002, p. 16.

(15) See Paragraph 7 Section 1 UWG: "*der Beschleunigung des Warenabsatzes dienen und den Eindruck der Gewaehrung besonderer Kaufvorteile hervorrufen.*"

(16) As quoted in FRANKFURTER ALLGEMEINE ZEITUNG, 4 January 2002, p. 16.

(17) INTERNATIONAL HERALD TRIBUNE, 8 January 2002, p. 1.

(18) FRANKFURTER ALLGEMEINE ZEITUNG, 5 January 2002, p. 17.

(19) INTERNATIONAL HERALD TRIBUNE, 8 January 2002, p. 1.

(20) FRANKFURTER ALLGEMEINE ZEITUNG, 5 January 2002, p. 16.

(21) *Ibid.*

(22) INTERNATIONAL HERALD TRIBUNE, 8 January 2002, p. 1.

(23) The European Economic Area or "EEA" comprises the 15 European Union Member States as well as Norway, Iceland, and Liechtenstein.

(24) OJ 1989 L 40, p. 1; hereinafter the "Directive".

(25) OJ 1994 L 1, p. 3.

(26) Article 5(1) of the Directive states that "the registered trade mark shall confer on the proprietor exclusive rights therein", including the entitlement "to prevent all third parties not having his consent from using in the course of trade: (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered." Business dealings that include "importing or exporting the goods under the sign" may be prohibited, per Article 5(3)(c).

(27) Zino Judgment at paragraph 33.

(28) *Ibid.* at paragraph 47.

(29) It should be noted that traders may continue to exploit price differentials within the EEA. These differentials - and parallel imports with them - are likely to increase significantly with European enlargement. Traders will be able to import cheap products from eastern Europe into western Europe with few legal restrictions. FINANCIAL TIMES, 21 November 2001, p. 17.
(30) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 4 January 2002, p. 5.
(31) DIE ZEIT, 10 January 2002, p. 26.

(32) The law can through judicial development change its meaning. For example, a rule that was originally intended by the legislator for the protection of competitors can come to be applied also for the protection of consumers. Rittner, p. 21.

(33) FRANKFURTER ALLGEMEINE ZEITUNG, 4 January 2002, p. 17.

(34) *Ibid.*

(35) *Ibid.*

(36) The DIHK put the matter most colourfully perhaps. Applicable law, it argued, must be enforced in order to ensure weapon parity - "*Waffengleicheit*" - among suppliers. As quoted in C.H. BECK, 7 January 2002, archived at publisher's website without page citation.

(37) FRANKFURTER ALLGEMEINE ZEITUNG, 3 January 2002, p. 1, 13.

(38) FRANKFURTER ALLGEMEINE ZEITUNG, 5 January 2002, p. 17. One German newspaper, Die Welt, speculated that C&A had made so much money with the promotion that its gains more than covered the threatened fine. As cited in INTERNATIONAL HERALD TRIBUNE, 8 January 2002, p. 1.

(39) Pace the view of one newspaper: "[i]t did not take long for the new euro notes and coins to collide with the European old-world ways of shopkeeping." *Ibid.*

(40) I realize that the distinction between sales practices and products for sale, drawn from ECJ jurisprudence concerning the former Article 30 EC Treaty (the new Art. 28), is not always clear, but here the distinction is loosely used to make an analogy. As will be discussed below, the distinction may soon be further blurred by the proposed EC legislation over sales promotions.

(41) Zino Judgment at paragraph 32. The Italian Government had argued that the Directive did not embody a complete harmonisation. It submitted that such exhaustion is not provided for by the Directive but is a matter for the national law in question. Ibid. at paragraph 38f.

(42) *Ibid.* at paragraph 45.

(43) *Ibid.* at paragraph 53ff.. It is true that several paragraphs precede this conclusion. These paragraphs merely repeat, however, the defendants' counter-arguments.

(44) As noted, only some of the proprietors' contracts with distributors contained reservations to the effect that the distributors were to market the products outside and not within the EEA, even though the law of the contract included an unlimited right of resale in the absence of such reservations.

(45) *See*, for example, Zino Judgment at paragraph 44.

(46) *Ibid.* at paragraph 50.

(47) *Ibid.* at paragraph 62.

(48) The Economist put the matter more bluntly: "the question [...] is not whether brands need to control how they are sold to protect their image, but whether it is the job of the courts to help them do this." (ECONOMIST, 24 November 2001, p. 62.) The newspaper cited the precedent of the Italian clothes label Gucci, whose image was being destroyed by loose licencing and over-exposure in discount stores. Gucci did not save its image by resorting to the courts but by ending contracts with third-party suppliers, controlling its distribution better, and opening its own stores.
(49) A senior Tesco executive was quoted as saying that the ruling risks "creating a Fortress Europe with a vengeance." (As quoted in Ibid.) This view of the magnitude of the setback that the ruling represents for so-called grey market imports may be somewhat exaggerated. As one British lawyer noted, while Tesco and other high-profile retailers can now "expect to be pursued if they ever step out of line", there remains a "huge industry - the iceberg underneath" of parallel import sales through independent shops and other outlets. (As quoted in FINANCIAL TIMES, 21 November 2001, p. 17.)

(50) I say 'presumably' because the trade mark proprietors often claim that removing the restriction on parallel imports would not lead to significant falls in prices, as retailers would pocket the majority of the benefits. This prediction, most recently put forward by the British Brands Group, seems to me implausible. (As quoted in FINANCIAL TIMES, 21 November 2001, p. 17.) First, to win business, the discount retailers have to cut prices significantly. Consumers would otherwise continue to give their custom to authorised dealers out of habit and/or superior customer care. Second, the prediction is contradicted by an alternative argument of the trade mark proprietors that the cut-rate prices are damaging the brand image.

(51) Spokesman for the Consumer's Association as quoted in INTERNATIONAL HERALD TRIBUNE, 21 November 2001, p. 15.

(52) ECONOMIST, 24 November 2001, p. 62.

(53) As cited in FINANCIAL TIMES, 21 November 2001, p. 17.

(54) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 4 January 2002, p. 5.

(55) Ibid. For example, one German wrote in a letter to the editor, "[w]hile I thank the German Retail Association for attempting to protect us feebleminded consumers from confusion over low prices and disruption of scheudules, I would rather be confused than pay high prices. And I prefer to go looking for bargains at my leisure rather than during prescribed two-week periods when the other 80 million residents of Germany are doing the same." (As printed in INTERNATIONAL HERALD TRIBUNE, 10 January 2002, p. 9.) An editorialist argued that the citizen, who may vote upon turning 18, should be shown greater trust as a consumer. For many years already, consumers have used shops' pricing policies of shops to their advantage. (FRANKFURTER ALLGEMEINE ZEITUNG, 5 January 2002, p. 1.)

(56) As quoted in INTERNATIONAL HERALD TRIBUNE, 8 January 2002, p. 1.

(57) As quoted in *Ibid.*

(58) FRANKFURTER ALLGEMEINE ZEITUNG, 17 January 2002, p.18. It should be no surprise that the head of Metro, one of Germany's largest supermarket chains, came out strongly in favour of a liberalisation of the discount rules and a reform of the UWG. The tight restrictions, which he said were unique in Europe, must be abolished outright. (As quoted in DIE WELT, 14 January 2002, p. 11.)

(59) As quoted in C.H. BECK, 7 January 2002, archived at publisher's website without page citation.

(60) FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 9 January 2002, p. 1.

(61) As quoted in *Ibid.*

(62) Commission of the European Communities, COM(2001) 546 final, 2.10.2001, p. 2.

(63) The EU Commissioner for Consumer Protection has said that making discount offers like C&A would become problem-free in Germany with the passage of the Regulation. (As quoted in DIE WELT, 14 January 2002, p. 1.) There is a recent precedent for European developments prompting such changes in retail regulations: the repeal of the Rebates Act and Gifts Regulation came about partly as a response to the requirement that Germany put the EU directive on e-business into effect immediately. (FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 13 December 2000, p. 5.) More generally, the ECJ has long controlled the unfair competition laws of member states

from the perspective of the former Article 30 (now Article 28) EC Treaty if they hinder the free movement of goods within the community. Rittner, p. 19.

(64) FINANCIAL TIMES, 17 January 2002, p. 2.

(65) As quoted in German in DIE WELT, 14 January 2002, p. 11. The consumer protection competence is based on Article 95 (the former Art. 100a) EC Treaty, according to which harmonising measures may be adopted by the Council by a qualified majority. Nonetheless, proponents are far from having collected the number of votes necessary for adoption.

(66) In the court of public opinion, the arguments of the traders in Zino have met with far more support than those of the trade mark proprietors. This reaction was marked in the UK, where price differentials tend to be higher than in the rest of the EU. The ancillary argument of Levi Strauss that customers need trained advisers when buying jeans has in particular met with "snorts of derision" in the British media. FINANCIAL TIMES, 21 November 2001, p. 17.

(67) As quoted in *Ibid.*

(68) As quoted in *Ibid.*

(69) *Ibid.*

(70) *Ibid.*

(71) Zino Judgment at paragraph 44.

(72) *Ibid.* at paragraph 38.

(73) FINANCIAL TIMES, 21 November 2001, p. 17.

(74) Zino Judgment at paragraph 44.

(75) ECONOMIST, 24 November 2002, p. 62.

(76) The arguments of the small retailers and trade mark proprietors may be challenged on other bases. Just how realistic - and therefore worthy of consideration - the fears of retailers about further liberalization of the UWG is open to doubt. The repeal of the Rebates Act and Gifts Regulation was met with similar reactions: complete dismantling of the legislation was said to imply "the danger of large trade chains deactivitating competition mechanisms with massive discounts." (FRANKFURTER ALLGEMEINE ZEITUNG (English Edition), 13 December 2000, p. 5.) First, as noted, in the half year following the repeal of the Rebates Act and Gifts Regulation, the new sales possibilities had not been extensively exploited. The C&A promotion came therefore as even more of a surprise. Second, the clothing chain's discount offer was adjudged to violate the UWG. Liberalization of the UWG need not necessarily mean a law of the jungle in the marketplace: other competition laws and regulations would remain in force. (All marketplace participants are aware and in agreement that competition can only take place under fair conditions. (Rittner, p. 6-7.)) Anti-competitive practices would continue to be prosecuted for the benefit of the retailers as well as the shoppers. Third, as one journalist pointed out, it is not clear that small retailers across all business lines would necessarily be threatened by liberalisation. It is true that in the grocery business an unprecedented consolidation has recently occurred, the result of which is that many 'Mom-and-Pop' shops have shut. Competition in many other business lines does not, however, revolve around price, because the products are not so readily comparable as in the grocery business. (To be specific, the small retailers in the clothing business are boutiques, designer shops etc. that already serve another clientele on different terms than C&A, the 'Aldi of the Textile Trade'.) (DIE ZIET, 10 January 2002, p. 26.)

(77) Michael J. Trebilcock and Robert Howse, THE REGULATION OF INTERNATIONAL TRADE (2nd ed.), Routledge: London/New York, 1999, p. 15.

(78) As Trebilcock and Howse explain in the trade policymaking context, "[t]his is largely a function of the differential mobilization and hence lobbying costs faced by producer and consumer interests". *Ibid.*

(79) It is worth emphasizing that interest groups have apparently reorganised successfully at the supranational level, recognizing the far-reaching impact EC legislation and effectively penetrating its policy process. It is true that in the C&A saga, the EU, as played by the Commission, has assumed the role of the liberalising influence. It seems that on the European level, the competition authorities have a fundamentally different image of the consumer than do the

German: the 'flighty average consumer' has been replaced by the 'enlightened market actor'. (Rittner, p. 20.) The Commission has, however, been unable so far to convince a qualified majority of member state governments to share its image: the proposed regulation on sales promotions has met with staunch resistance in Council. Moreover, the EU in the form of the ECJ played the role of the anti-competitive influence in the Zino decision. The ECJ found in favour of the trade mark proprietors over the traders, holding on the terms of the Directive that parallel imports were held to be legal within the EEA but not necessarily from without. This competition policy does not, given member states' veto in the matter and the strong proprietors' lobby in a couple, look like it is soon to change. Liberalisation seems only to extend to the borders of the EU.