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QUESTION B

On what legal grounds could or should commercial practices, i.e. manufacturing, marketing, distribution or advertisements, of items produced or services rendered in violation of standards, statements, commitments or CSR voluntarily issued or adopted by an undertaking, be sanctioned or prevented?

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1. INTRODUCTION

1. In economically advanced countries with sophisticated and well-educated consumers, where effective competition has meant that many products are similarly priced and of similar quality, undertakings often seek to differentiate themselves from their competitors in other ways apart from price and quality. Increasingly, it is recognised that the "reputation" of an undertaking affects the purchasing decisions of consumers. One important facet of the reputation of an undertaking is whether it has a CSR policy and if so, its nature. Good evidence of the importance of CSR policies in such decisions is that despite the price of Fair Trade coffee being materially higher than non-Fair Trade coffee, consumers will buy Fair Trade coffee even though the same producers of coffee will sell part of the same produce through normal channels. Furthermore, CSR policies do not just affect consumer decisions. Surveys have shown that employees increasingly wish to work for companies with CSR policies. Thus in one survey, 35% of interviewees said that they would take a 15% paycut to work for a company committed to CSR.[1]

2. Good evidence of the importance of CSR policies is that Starbucks has adopted an elaborate and detailed set of standards (appropriately named C.A.F.E![2]) which it complies with when sourcing coffee beans. This standard requires its coffee growers to comply with certain minimum social and environmental standards. Starbucks promotes this policy in its promotional material.

3. This international report examines the ever-increasingly important issue of corporate social responsibility (CSR). In particular, it considers how the laws of those countries who have provided national reports control and regulate the use by undertakings of CSR as an adjunct to the marketing and promotion of goods or services of those undertakings.

4. National reports have been provided as follows:

   4.1. Professor Dr Susanne Augenhofer (Germany)

   4.2. Veronique Selinsky and Linda Arcelin (France)

   4.3. Laurie Caucheteux and Michaela Roegiers (Belgium)

[1] See http://netimpact.org
[2] Coffee and Farmer Equity practices

4.4. Paulo Parente (Brazil)

4.5. Linda Brugioni (Italy)

4.6. Dr Adam Liber (Hungary)

4.7. Dr Max W. Mosing (Austria)

4.8. Igor Svechkar (Ukraine)

4.9. Jonathan Moss (United Kingdom)

5. These countries are hereinafter referred to as "the Reporting Countries"

2. CSR POLICIES AND LEGAL CONTROL: OVERVIEW

6. The national reports show that there are no *sui generis* laws which are aimed specifically at the legal control of CSR policies adopted by undertakings. The nearest to a *sui generis* law is, in the European Union, the enactment of the Unfair Commercial Practices Directive ("UCPD")[3]. This is discussed below.

7. Invariably, the laws of the Reporting Countries do not seek to regulate or provide legal remedies if an undertaking does not comply *per se* with a voluntarily adopted CSR policy. However, where the undertaking fails to comply with such a policy *and* advertises and promotes that policy, then the law may intervene. In general, the relevant laws are

7.1. Unfair competition (encompassing consumer protection laws)

7.2. Competition law.

8. However, CSR policies are also encouraged via a number of alternative legal mechanisms. Thus, public procurement laws in Europe permit objectives of sustainable development to be taken into account when awarding public contracts[4].

9. Moreover, self-regulation is encouraged and the legal framework for this is a multipartite contractual mechanism. Organisations who promote particular CSR policies to businesses will often require contractual adherence to a code of

[3] Directive 2005/29/EC [2005] O.J. L149/22

[4] EC Directive 2004/18 [2004] O.J. L134/114 on the coordination of procedures for the award of public works contract and EC Directive 2004/17 [2004] O.J. L134/1 on public procurement in the water, energy, transport and postal services sector.

conduct before businesses can promote which will have dispute resolution mechanisms to deal with non-compliance. This has a self-disciplining effect.

3. ANALYSIS OF REPORTING COUNTRIES' LAWS REGARDING CSR

3.1. UNFAIR COMPETITION

10. The most relevant type of law relevant to the wrongful advertisement or promotion of CSR is the law of unfair competition. Thus, all the laws of Reporting Countries prohibit commercial practices which involve unfair competition in the context of business-to-consumer (B2C).

European Union - UCPD

11. The UCPD is a directive which seeks to harmonise the laws of the European Union on unfair commercial practices harming consumers' economic interests[5]. The notion of "unfairness" is clearly very dependent on a wide range of factors including cultural, social and ethical norms which themselves vary throughout the European Union (although Recital 7 of UCPD makes it clear that it is not intended to deal with matters of taste and decency). In particular, some Member States have a rich tradition of unfair competition whereas countries like United Kingdom, have not historically favoured such laws save in very limited circumstances. Thus, very recently, the Court of Appeal of England and Wales has held that there is no justification for implying a "good faith" term into a contract[6].

12. However, even in the UK, it is recognised that the law of contract is ill-fitted to controlling business-to-consumer relationships and contracts whereby the consumer has little or no power to influence the contractual terms and many transactions are done over the web[7].

[5] Art.1. See fn. 3

[6] *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200

[7] Indeed, this problem is very real in relation to online contracts. In one well-known example, a company inserted a term that the purchaser's soul would belong to the company for eternity and never received any comment from any purchaser!!

13. The UCPD thus seeks to redress the balance of power towards the consumer by ensuring that unfair commercial practices are outlawed. The structure of the UCPD is as follows:

    13.1. It applies only to B2C unfair commercial practices. However, competitors are able to complain about unfair B2C practices of undertakings[8]. Furthermore, in the case of CSR codes, such are aimed at the consumer.

    13.2. A commercial practice is unfair if (a) it is contrary to the requirements of professional diligence and (b) it materially distorts or is likely to materially distort the economic behaviour of consumers.[9] "Professional diligence" is defined as the "standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity"[10].

    13.3. Without prejudice to the generality of the above, the UCPD states that commercial practices which are misleading (as set out in Arts.6 and 7) and aggressive (as set out in Arts.8 and 9) are to be considered unfair.

    13.4. Finally, Annex 1 of the UCPD deems certain commercial practices as unfair.

14. Of particular relevance is the notion of a misleading commercial practice. A threshold requirement is that the practice must be misleading in some way *and* cause or be likely to cause the average consumer to "take a transactional decision that he would not have taken otherwise". A narrow interpretation of this provision would be that *but for the misleading statement*, the average consumer would have taken a different decision regarding the purchase of products or services i.e. he would not have bought the product if the misleading statement had not been made but would have bought it with the misleading statement. However, this interpretation would be difficult to prove and ignores the fact that it is rare that there is any *one* factor which causes a consumer to

[8] Art.11 UCPD (see fn.3) („ such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may (a) take legal action against such unfair commercial practices...)
[9] Art.5, UCPD (see fn.3)
[10] Art.2(h), UCPD (see fn.3)

buy a product. Rather, the decision to buy a product arises from a combination of factors. Moreover, it is sufficient if the commercial practice is "likely to cause the average consumer" which suggests that it need only be an influential factor if not a decisive factor. Moreover, many of the deemed misleading practices in Annex 1 are unlikely to be decisive to a purchaser as whether to buy or not but all may be considered influential. This is important because it may be difficult to show that a CSR policy is critical to a purchaser's decision to buy products from an undertaking.

15. Another issue is the definition of "commercial practice". This is defined as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, *directly connected* with the promotion, sale or supply of a product to consumers"[11] As commented on in the Austrian report, it is unclear how close the nexus between the breach of the relevant CSR code and the undertaking's indication to be bound by the code must be for it to fall within these provisions. Thus, the Austrian report asks whether it is necessary that the code and the breach appear in the same advertisement. The definition of "commercial practice" underlines the fact that the UCPD does not prohibit breaches of CSR codes *per se.* Rather, it must be shown that the CSR policy is used as a "sales tool" for selling goods or services. Whilst the CJEU has emphasised that "commercial practices" in the UCPD should be given a "particularly wide definition"[12], not *every* aspect of a CSR policy is directly connected with the sales or promotion of goods. Thus, it may be difficult to show an undertaking of a general obligation to give away 1% of a company's income to a charity is directly connected with the promotion, sale or supply of a product. If such a fact is used in advertising or promotional material for such products, it would be difficult for the company to deny that it is using such a fact to promote its goods. However, where such a fact is merely recorded on a company's website under headline "charitable activities", it may be difficult to show the necessary "direct connection" to trigger the application of UCPD.

[11] Art.2(d), UCPD (see fn.3)

[12] ¶36, C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] E.C.R. I-217, CJEU

16. The UCPD deals specifically with unfair commercial practices relating to "codes of conduct" that clearly are relevant to CSR policies. Thus,

16.1. Non-compliance by a trader with "commitments contained in codes of conduct by which the trader has undertaken to be bound where (i) the commitment is not aspirational but is firm and capable of being verified and (ii) the trader indicates in a commercial practice that he is bound by the code" is prohibited provided such causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise[13]. In the context of these provisions, the Belgian report says that the intention of the legislator is to sanction only breaches of a code of conduct that have an actual impact on the consumer. This may be another way of analysing whether a commitment is aspirational or firm. In general, consumers play little attention to aspirational commitments (e.g. "eco-friendly") but do to firm commitments (e.g. "wood sourced only from forests certified as sustainable by the Teak Sustainable Forestry Organisation"). The latter has an actual impact on the consumer but the former does not.

16.2. Annex 1 of the UCPD sets out that the following practices are deemed to be unfair. Of particular relevance are practices whereby an undertaking

16.2.1. Claims to be a signatory to a code of conduct when the trader is not;

16.2.2. Displays a trust mark, quality mark or equivalent without having obtained the necessary authorisation;

16.2.3. Claims that a code of conduct has an endorsement from a public or other body which it does not have;

16.2.4. Claims that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without

[13] Art.6(2)(b), UCPD (see fn.3)

complying with the terms of the approval, endorsement or authorisation.[14]

17. "Code of conduct" is defined as "an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors"[15]. In Germany, this has generated some academic debate as to whether this requires more than one party to the code of conduct with the opinion suggesting that provided other businesses have the possibility to sign up to the code, it is sufficient if only one undertaking has undertaken to be bound by the code.[16] However, if the promotion of a CSR policy involves misleading information, then such debate is academic because the UCPD prohibits such promotions regardless whether such relates to a code of conduct as defined.

18. The UCPD also prohibits misleading *omissions*[17]. Thus, where a commercial practice omits *material* information that the average consumer needs to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, then such is an unfair commercial practice. In the case of an invitation to purchase a product, the "main characteristics to an extent appropriate to the medium and the product" are deemed material by the UCPD and thus must be included[18]. The German national report takes the view that the UCPD does not force undertakings to inform the consumer about their CSR policies although some authors in Germany take the view that it does[19]. However, it should be remembered that the "main characteristics" provision is simply a deeming provision. Its absence is not fatal to a finding of misleading omission. In considering the issue whether it is or is not misleading to omit to refer to a CSR policy, a possible approach is consider the converse position - whether it would be misleading to promote the policy if the undertaking did *not* comply with the policy. If such is found to be the case, then as a matter of logic,

[14] Annex 1, Clauses 1 to 4.
[15] Art.2(f) UCPD (see fn.3)
[16] para. 2(b) (p.6 and p.7). German Report.
[17] Art.7 UCPD (see fn.3)
[18] Art.7(4)(a) UCPD (see fn.3)
[19] Para 2(e) and footnote 35 German Report.

it must follow that the CSR policy has caused the consumer to make a transactional decision that he would not have taken otherwise and thus it would be a material omission *not to inform* the consumer about the CSR policy. For instance, if an undertaking has a CSR policy from sourcing its foodstuffs from sustainable farming and breaches such a policy, such is very likely to be held to be an unfair commercial practice. It thus follows that a CSR policy of sourcing from sustainable farming is a practice that is likely to cause a consumer to make a transactional decision he or she would not otherwise make and not informing the consumer of such is a misleading omission within the meaning of UCPD. However, the *failure* to inform a consumer of a CSR policy can hardly be considered to be *unfair* as such can only word to the disadvantage of the undertaking with the CSR policy rather than the consumer. In other words, taking the above example, a failure to inform consumers that foodstuffs bought by consumers from an undertaking have been grown using sustainable farming can hardly be a matter of complaint by consumers save the most diehard curmudgeon[20].

19. However, what if a company is one of the few or only undertaking *not to have* a CSR policy? For instance, if a clothing manufacturer is one of the very few (or possibly the only one) which sources its clothing from a third world manufacturer who uses child labour where the children are paid very little, is the *failure* to draw the consumer's attention to such, a misleading omission? Many consumers may say that they would not wish to buy clothing which has been made using child labour and therefore such is highly material to their purchasing decisions. Whilst such may not be a *main characteristic*, such a practice is likely to be considered material information that the *average consumer* needs to take an informed transactional decision[21]. If such is the case, the fact that the CSR policy does not relate to the main characteristics of the product is not fatal to the application of the UCPD.[22]

[20] A lovely English word which describes a person who is ill-tempered full of resentment and stubborn notions – particularly towards modern fashions and ways of thinking and is very "contrary" in his thinking. Such a person may despise the whole notion of CSR in the same instinctive sense that he or she despites any form of human rights or anti-discrimination laws!!

[21] Art.7(1)

[22] Art.7(4) is a deeming provision. It does not set the test.

20. The UCPD does not seek to prohibit self-regulation by organisations responsible for compliance with codes provided such is in addition to the ability to seek redress before the courts or in administrative proceedings[23]. Normally, self-regulation is via multipartite contracts or undertakings agree voluntarily to abide by the decisions of organisations which administer self-regulatory code and the sanctions or remedies that such codes permit.

21. Up and until 12th June 2013, Member States of the European Union were able to continue to apply national provisions within the field approximated by the UCPD which were more restrictive or prescriptive. However, as such a date has now expired, the substantive law of Member States in this area should now be harmonised[24].

22. Outside the European Union, there also exist unfair competition laws that are relevant to the promotion of CSR policies. Thus

    22.1. Brazil has a Consumer Code of Protection which prohibits the provision of false information where such either refers to a characteristics of the product but also where such information could be interpreted as a factor which attracts the consumer to the product or service. This is likely to include promotion of CSR policies.

    22.2. Ukraine has a law on protection against unfair competition and a law on protection of consumer rights which prohibits unfair business practices that mislead the consumer and the presentation of information which is untrue and/or incomplete so as to permit them to make a conscious, competent and free choice as to the selection of products or services.

3.2. LAWS OTHER THAN UNFAIR COMPETITION

23. Reporting Countries also have laws that are not strictly unfair competition laws but which are relevant to CSR policies. Thus

    23.1. Germany has laws relating to the advertisement of food where such is promoted as being organic or sustainably harvested[25].

[23] Art.10
[24] Art.3(5) UCPD. This does not apply to unfair competition practices relating to financial services.
[25] s.11 German Law on Food and Food Safety (*Lebensmittel- unde Futtermittelgesetzbuch*). It should however be emphasised that Germany does have a general B2C law of unfair competition.

23.2. In France, under the French Commercial Code, directors may incur civil liability where ethical standards are infringed as mismanagement is defined with regards to social interests.

23.3. In the Italian Civil Code, the use directly or indirectly of any means which is "not compliant to professional fairness principles and suitable to cause damage to another business" is considered unfair competition[26].

23.4. In the United Kingdom, the law of passing off is relevant. This permits "class" actions whereby undertakings which collectively own goodwill in a particular symbol or logo (i.e. Fair Trade farmers) could bring an action against an undertaking who uses such a symbol or logo but in a manner which is inconsistent with the public's understanding of what the symbol denotes. Whilst it might be thought that such adds nothing to the UCPD, in the United Kingdom, the domestic legislation which implements the UCPD does not permit competitors or consumers to enforce it[27]. Proceedings can only be brought by regulatory authorities.

24. The adoption of CSR policies are often heavily encouraged by governments. This is often done by incorporating them in "standards" which can be voluntarily adopted by undertakings with the latter advertising that they are standard-compliant. Thus, in Austria, the Austrian Standard Institute has published certain standards (ONORMEN) which can be considered as economical ethical policies. Austrian law on standards prohibits the usage of ONORMEN or confusingly similar signs.[28] However, this can be seen as a type of unfair competition law as, at its essence, is that undertakings must not mislead the consumer.

25. Often, the consumer may have a contractual remedy. Thus, in France, the principle of estoppel imposes a responsibility on a party not to occasion

[26] Article 2598(3) Italian Civil Code.

[27] The Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277). It is of note that in November 2008, the Law Commission of the United Kingdom considered whether there should be a private right of redress for unfair commercial practices. Whilst it held that such had its attractions, it was clear that there were concerns that such would radically change UK law, make a dramatic difference between consumer contracts and commercial contracts and create a large number of small claims which would have a negative effect on businesses (see http://lawcommission.justice.gov.uk/docs/rights_of_redress_advice1(2).pdf) .

[28] S.8 Law on Standards 1971 (*Normengesetz 1971).* However, this can only enforced by Austrian administrative authorities.

detriment to another party by acting inconsistently with an understanding concerning their contractual relationship which it has caused that other party to have and upon which that other party has reasonably acted in reliance. This could include the promotion of a CSR policy. Under UK law, such could amount to a pre-contractual misrepresentation which entitles the purchaser to avoid the policy. In France, there is a similar doctrine based on the "defects of consent" principle. Whilst consumers will be unlikely to bring such actions, a trade purchaser who has purchased produce following a misrepresentation about their ethical characteristics i.e. the produce had been grown in an environmentally sustainable way, may be more inclined to bring an action (particularly if downstream purchasers or consumers discover such facts and boycott the produce).

26. Ultimately, all of the above laws are concerned with misleading or unfair communications by the undertaking which has the CSR policy direct at consumers. It does not matter whether the CSR policy is an external policy (i.e. Fair Trade) or a unilateral policy adopted by the undertaking.

27. However, in certain cases, the adoption of a CSR policy may give rise to a liability even if not used in connection with advertisement or promotion to consumers. Thus, in France, under natural law[29], a policy voluntarily adopted by a business can acquire a binding force. Thus, as held by the Cour de Cassation, a unilateral commitment to execute a natural obligation, when taken in full knowledge, is transformed into a legal duty. Also, as said by the French national report, CSR policies voluntarily adopted by directors on behalf of their company, create a legal duty on the company. It is unclear whether this duty exists regardless whether the company advertises or promotes such a policy. However, even if it did, such should not be equated to an equivalent law to the UCPD. This is because the latter only prohibits practices which materially affect the consumer's decision to buy certain goods whilst the former is not dependent on such.

28. In summary, the importance of CSR policies in the 21st century means that an undertaking which adopts a CSR policy and promotes or advertises such a

[29] *Theorie des obligations naturelles*

policy, cannot, with impunity, breach such policies. Such will, in all the Reporting Countries, normally amount to an unfair commercial practice or unfair competition.

29. However, it is important to emphasise that the *remedy* is not that the undertaking must comply with the CSR policy (a point made clearly by the Ukrainian report) but that the undertaking must not promote goods or services by reference to the CSR policy where it does not comply with such a policy. Thus, the laws are intended to prevent consumers from being deceived or confused by advertising or promotional campaigns rather than requiring the undertaking to comply with the CSR policy.

4. THE UNDERTAKINGS THAT CAN ENFORCE UNFAIR COMPETITION LAW

30. Reporting Countries were asked to consider whether the above unfair competition laws could be enforced by regulatory authorities, consumers, competitors and suppliers and purchasers of the goods or services (e.g. the supplier of Fair Trade coffee).

31. In this respect, the answers from the Reporting Countries vary and it is useful to put the information in a tabular format. In some reports, the issue whether a class action can be brought by a group of consumers and thus this is also dealt with where mentioned.

	Regulatory authority	**Competitor**	**Class Action**	**Consumer/Consumer Associations**	**Supplier**	**Purchaser**
Germany	No[30]	Yes	No	No[31]/Consumer Associations can enforce[32]	No	No

[30] The UWG (*Gesetz gegen den unlauteren Wettbewerb)* permits business associations, chambers of commerce and industry or craft chambers to bring an action but there is no actual regulatory authority tasked with enforcement of the UWG.However, the *Wettbewerbszentrale* although not a state body is a highly influential independent association whose main role is enforce the law against unfair competition.

France	Yes[33]	Yes	NK	No[34]/Consumer associations can enforce	Yes	Yes
Belgium	Yes[35]	Yes (provided it has an interest)	No.[36]	Yes (provided he has a direct and personal interest)	Yes	Yes
Brazil	Yes[37]	Yes	NK	Yes/consumer associations can enforce	Yes	Yes
Italy	Yes[38]	Debated[39]	Yes	Yes/Consumer associations can enforce	Yes[40]	Yes [41]
Hungary[42]	Yes[43]	Yes	Yes[44]	Yes/No[45]	Yes	Yes
Austria	Yes[46]	Yes[47]	Debated[48]	Yes	Yes[49]	Yes[35]

[31] There is some debate on this issue but the prevailing view is that the UWG is not a *Schutzgesetz* (protective law) – see p.16 German Report.
[32] E.g. the German federal consumer organisation (*Verbraucherzentrale Bundesverband)* or consumer centres in the German lande.
[33] The main authority is the L'Autorite de Regulation Professionelle de la Publicite (AARP)
[34] Where the legal cause of action is unfair competition claims.
[35] Minister of Economic Affairs and the Director General of the Federal Public Service of Economic Affairs.
[36] Intended to be brought in and being discussed in Parliament.
[37] Public prosecutor
[38] Autorita Garante della Concorrenza a del Mercato (AGCM)
[39] This is the subject of academic debate but as pointed out by the Italian National Rapporteur, Art.27 Consumer Code indicates that "any subject or organisation having interest" can seek enforcement against a misleading practice.
[40] If they have a "relevant interest".
[41] Although there is some debate whether an association of suppliers can bring an action.
[42] In general, any legal entity which can show it has suffered may enforce the unfair competition laws.
[43] The UCP Act (which implements the UCPD) is primarily enforced by the National Consumer Protection Authority (NCPA) but the Hungarian Competition Authority has the right to enforce the law on misleading and comparative advertising. The HCA may issue a "class action" on behalf of a class of consumers in the courts provided it has commenced its own competition supervision proceedings.
[44] Provided that the claimants' interests are sufficiently aligned to each other. See also previous foonote.
[45] A consumer association does not have *locus standi* as it is not itself an injured party.
[46] The Austrian Unfair Competition Act is enforceable by the Federal Competition Authority but only where such is likely to distort significantly competition to the detriment of enterprises. It is not clear

Ukraine	Yes[50]	Yes	NK	Yes	Yes	Yes
United Kingdom[51]	Yes[52]	No	No	No	No	No

32. It can be seen from the above that there is considerable variety as to who can enforce unfair competition laws. In some countries (e.g. Ukraine and Hungary), the only requirement for *locus standi* is that the suing party is aggrieved i.e. affected adversely by the practice complained of. However, the United Kingdom does not permit the enforcement of unfair competition laws other than by regulatory or statutory authorities[53]. This has had some strange results. For instance, in the context of comparative advertisements (potentially a form of unfair competition), aggrieved competitors have brought actions for trade mark infringement where their registered mark is used and in such circumstances, the CJEU has held that European unfair competition laws concerning comparative advertising are a complete defence if the conduct falls within such laws[54]. This depends arbitrarily on whether the defendant has used a registered trade mark in the advertisement. In contrast, in Germany, there is no regulatory authority to enforce the German unfair competition law but instead its enforcement is left to powerful consumer associations or other associations such as the Wettbewerbszentrale (which is an independent institution of German industry whose aim is to ensure that companies compete fairly on the marketplace).

33. Many countries report that it would be unusual for consumers to bring an action even though they have locus standi because of the cost and uncertainty of such

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that there is a specific regulatory authority which is there to protect consumers (as opposed to enterprises).

[47] Provided the competitor is "directly affected"

[48] See ¶2.2.2.2 of Austrian National Report

[49] Provided the supplier or purchaser is directly affected

[50] Antimonopoly Committee of Ukraine (AMC)

[51] In implementing the UCPD, the United Kingdom has not conferred a private cause of action for breach of the directive. As the UK does not have any other laws of unfair competition, a competitor or consumer would have to rely upon other laws e.g. passing off, malicious falsehood, trade mark infringement or contract law which are much more limited in scope.

[52] This will either be enforced by the Office of Fair Trading or local authority trading standards officers.

[53] Unfair Trading Regulations 2008

[54] E.g. see C-533/06 *O2 Holdings v 3G UK Ltd* [2008] E.C.R. I-4231, CJEU

actions. However, as a counterbalance, consumer associations play an important role in protecting the consumer against unfair competition. However, because consumer associations are not themselves injured by the actions, certain countries e.g. Hungary, do not permit them to bring actions to enforce unfair competition laws. In such circumstances, the non-CSR compliant undertaking does not have to fear the award of damages.

34. Art.11 UCPD requires Member States to ensure that persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may take legal action against such unfair commercial practices and/or bring proceedings before an administrative authority competent to decide on complaints or to initiate legal proceedings.[55] There is an interesting issue whether such gives Member States complete discretion as to which persons or organisations have locus standi to enforce in a private action domestic legislation implementing the UCPD. The German reporter considers that such gives significant discretion to Member States with regards to who can bring enforcement proceedings. This may indeed be a correct analysis. On the other hand, the wording of Art.11 UCPD suggests that if national laws on unfair competition laws *prior* to implementation of the UCPD permitted e.g. a competitor to bring an action against an undertaking for unfair commercial practices, then Member States must ensure that such undertakings also have the right of action under the UCPD. Apart from the United Kingdom, where no private action can be brought at all for breach of domestic legislation implementing the UCPD, in the other Reporting Countries, private actions can be brought and in general, such includes both competitors and consumers where such have a legitimate interest In the case of the United Kingdom, neither competitors nor consumers have locus standi but may inform administrative authorities to initiate appropriate legal proceedings but cannot compel them to bring such actions (and indeed such authorities will prioritise according to their limited resources). It is highly arguable that the UK's enforcement of the UCPD in this regard is deficient. However, there is considerable discretion given to Member States under the UCPD as how to implement the directive.

[55] Art.11

5. THE COURTS AND TRIBUNALS THAT CAN ENFORCE UNFAIR COMPETITION LAWS AND THE AVAILABLE REMEDIES?

35. In general, unfair competition laws concerning CSR policies can be enforced in the courts of Member States. However, in certain countries, unfair competition laws can be enforced in administrative proceedings before an administrative tribunal which may itself also have the ability to enforce unfair competition laws in civil courts. In this sense, such organisations are similar, in the field of competition law, to the European Commission which acts as both enforcer and also as a first instance administration tribunal.

36. It is useful to set out the differences in the Reporting Countries regarding whether there exists an administrative tribunal for enforcing unfair competition laws and the remedies available to them (the position regarding *competition* laws i.e. abuse of dominant position/anti-competitive conduct is not considered).

Germany	No regulatory or administrative tribunal for enforcement of unfair competition laws. Enforcement is through the courts.
France	The AARP can bring proceedings before the Jury de Deontologique Publicitaire (JDP) but such cannot order fines or imprisonment but may request the withdrawal of the disputed advertisements[56].
Belgium	The Minister of Economic Affairs may conduct an investigation and issue a warning that undertaking cease practice. However, it has no right to levy fines (although non-compliance with an injunctive order is punishable by fines). If not complied with, matter may be referred to the Public Prosecutor. If pursued through the criminal courts, then fines from €250 to €10,000
Brazil	Enforcement through courts

[56] It is not clear whether the JDP has any legal powers to prohibit advertisements or promotions or is instead, a self regulatory organisation which relies upon organisations complying with its rulings. It would appear the latter is the case.

Italy	AGCM can enforce unfair competition and issue prohibitory orders and issue fines (€5000 to €500,000). The AGCM can act *ex officio* or at requests of any subject or organisation having an interest (eg competitors, consumers).
Hungary	The NCPA (National Consumer Protection Authority) and HCA (Hungarian Competition Authority) may injunct the offending practices and/or issue fines (between €50 and €6.5million or 10% of the net turnover of the undertaking in the previous business year)
Austria	Public administrative authorities such as BWB and those responsible for enforcement of standards may issue cease and desist orders but their jurisdiction is limited[57].
Ukraine	The AMC may issue cease and desist orders and fines (up to 5% of annual turnover of undertaking in previous financial year). The consumer protection authority may also impose fines (up to 30% of the relevant sales revenue)
United Kingdom	There is no administrative authority which can issue cease and desist orders or fine for breach of unfair competition. Enforcement by regulatory authorities is through the courts.

6. ENFORCEMENT THROUGH COURTS

37. As discussed above, there is considerable variety as to whether private undertakings (e.g. competitors) can bring civil proceedings under the laws of the Reporting Countries for breaches of CSR policies. The UCPD specifically envisages that competitors be able to bring proceedings.

38. However, as with any civil proceedings where the proceedings are brought not by a body tasked with enforcement of particular legislation but rather a private individual, a claimant will often need to show that it has sufficient interest in the subject matter of the proceedings and that it has suffered damages.

[57] Thus, it does not extend to all unfair commercial practices –s ee ¶2.3.1.1. Austrian Report

39. In general, where there is a breach of a CSR policy, it will not be difficult for a consumer who has purchased products where there has been an overt breach of the policy to show that he was misled and that he is entitled to compensation. However, aside from "class" actions by consumers, such proceedings are rare. In general, the interests of the consumers are protected by consumer associations or regulatory organisations.

40. In the case of competitors, an undertaking who breaches its well-publicised CSR policy may indeed be harmful to a competitor. For instance, an undertaking who misleads the public by saying that teak (tropical wood) furniture has been sourced from forests where sustainable forestry is practised when in fact such is not the case will have a competitive advantage to those undertakings who do source from sustainable forestry as wood sourced from the latter will invariably be more expensive.

41. In the case of CSR policies, Reporting Countries were asked to consider three different scenarios in the context of a competitor being able to obtain relief against an undertaking which has not complied with its CSR policy:-

    41.1. Coffee marketed with a Fair Trade label which was not sourced from Fair Trade coffee farmers **(Scenario 1)**;

    41.2. Coffee marketed by a business which has imported coffee using ships which emit excessive carbon dioxide which do not comply with a business's "green" CSR policy (**Scenario 2)**;

    41.3. Coffee marketed by a business which advertises its CSR policy of providing 2% of all sales revenue to educating children in the third world but upon audit, is found not to have complied with that policy (**Scenario 3)**.

42. Whilst it might be thought that within the European Union, the ability to recover is harmonised, such is not the case. The UCPD does not harmonise the procedural aspects of enforcing the UCPD other than to require that Member States "shall ensure that adequate and effective means exist to combat unfair commercial practices". The modality of enforcement is very much left to the Member States.

43. These three scenarios were chosen because they differ widely in the *nexus* between the products being bought (coffee) and the offending practice. Plainly, the first scenario has the closest nexus although it should be emphasised that a failure to comply with the first scenario does not mean *necessarily* that the coffee's *characteristics* are any different. This is because Fair Trade conditions relate to social as well as environmental conditions.

44. The following were the responses of the Reporting Countries set out in tabular form as to whether a competitor could obtain injunctive or financial relief where another undertaking breaches its CSR policy:-

	Scenario 1	**Scenario 2**	**Scenario 3**
Germany	Injunction in all three cases. Damages are also available if competitor can prove damage was caused by violation of the UWG (unfair competition law) and the acts were done with intent or were negligent. In practice, easier to prove such in Scenario 1 and 3 as opposed to 2. Under German law, no business can request disgorgement of profit.		
France	Remedies can include injunction or award of damages depending on circumstances of case. A competitor would be unlikely to be able to prevent Scenario 3.		
Belgium	Injunctive relief and damages	Probably too vague for any relief[58]	Yes but difficult to prove damage
Brazil	Injunction and damages if capable of being proven		
Italy	Injunction/damages	Depending on proof of harm to competitor, injunction and damages	Dependent on proof of harm to competitor, injunction and damages
Hungary	Injunction/damages – dependent on competitor proving damage		

[58] See judgment of Commercial Court, 19th December 1996 (*Gand* DCCR 1997/52) where "bio" was considered very general and thus not an unfair practice (See para. 2.4.2.2, Belgium Report).

Austria	Injunction and damages if capable of being proven.		
Ukraine	The nexus between the CSR statement and the products/services of the CSR offender is "of paramount importance" for a competitor to obtain both injunctive and financial relief		
United Kingdom	Injunctive relief and damages (action in passing off or trade mark infringement)	Nexus is too weak – no relief	Nexus is too weak – no relief

45. It can be seen from the above that in large part, Reporting Countries do permit undertakings to sue their competitors for breach of CSR policies. Their right to do so is largely dependent on their ability to show that the breach of the CSR policy has caused them damage. In other words, *locus standi* is determined by whether the undertaking concerned has suffered from the breach of the CSR policy. Clearly, such is much easier in the case of Scenario 1 than Scenario 2 and 3. Moreover, it would presumably be easier to demonstrate *locus standi* if the complainant undertaking itself has a CSR policy the same or similar to the one that it alleges has not been complied with by a competitor. Thus, suppliers and distributors of Fair Trade coffee will be in a better position to complain about another competitor who falsely claims that it is distributing Fair Trade coffee than an undertaking which does not distribute Fair Trade coffee. However, there is no reason in principle why the latter could not complain if it can be shown that he has lost market share to the defendant by reason of its false claim.

46. Scenarios 2 and 3 are clearly much more difficult for a complainant undertaking to demonstrate loss. It is less clear from the national reports whether the need to show that the undertaking has suffered damage is a prerequisite to *injunctive* relief or merely damages. In other words, if an undertaking cannot show that he has suffered damage but can show that it has "sufficient interest", it is not clear whether such an undertaking would be entitled to injunctive relief.

7. ABILITY TO OBTAIN INFORMATION

47. In many cases, it will be difficult to show that an undertaking has or has not complied with its advertised CSR policy. By their very nature, a breach of a CSR policy is not obvious to the purchasing consumer. He is highly unlikely to know whether the coffee has indeed been purchased from Fair Trade coffee growers or whether the undertaking does contribute a percentage of its sale revenue to educating children in the third world.

48. The recent European scandal on the inclusion of horsemeat in pork and beef by suppliers demonstrates the need for full investigatory powers and the obtaining of information. In general, investigation into these will not be the province of consumers but regulatory organisations and consumer associations. However, undertakings also may wish to obtain information from competitors who they suspect of misleading the public with regards to their CSR policies and/or their compliance.

49. Art.12 of UPCD requires Member States to confer upon courts or administrative authorities the power to require traders to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if such appears appropriate on the basis of the circumstances of a particular case. Thus, as the Belgian report shows, this can be implemented by shifting the burden of proof onto the defendant to show compliance with its CSR policy. As Art.12(b) UCPD says, if the evidence provided is not furnished or is deemed insufficient, then the court or administrative authority may consider the factual claim as inaccurate.

50. Again, differences emerge from the Reporting Countries which is best shown in tabular form

Germany	Limited (particularly where such information is required to show a violation of German unfair competition laws)
France	Not answered
Belgium	Minister of Economic Affairs can conduct investigations to detect infringements. However, consumers and competitors have little means to obtain information although under Belgian law, the judge can shift the burden of proof onto the defendant to show no

	breach of CSR policy.
Brazil	Public bodies tasked with enforcement have wide ranging investigative powers. In case of civil proceedings, there is limited ability to obtain information prior to the issue of proceedings
Italy	AGCM can request information (or upon request to AGCM by competitors, consumer associations, etc) about compliance of business with its CSR policy.
Hungary	No ability for private or public concerns to obtain information directly from businesses but can submit complaint to HCA who can investigate and order provision of information (if in competition supervision proceedings)
Austria	No ability for private or public concerns to obtain information. However, in civil proceedings, the CSR business may have the burden of proof to prove correctness of allegation of fact as opposed to complainant to prove such is false.
Ukraine	Limited for private concerns. AMC (regulatory authority) has powers where there is "reasonable suspicion" that possible non compliance with CSR policy may amount to an offence actionable by such authority or the court.
United Kingdom	Public bodies tasked with enforcement have wide ranging investigative powers. In case of civil proceedings, there is limited ability to obtain information prior to the issue of proceedings.

51. The above demonstrates that it may be very difficult for private concerns to demonstrate breach of CSR policies in civil proceedings unless there is some evidence giving rise to a *prima facie* case of breach of the CSR policy. Within the European Union, this suggests that Art.12 has not been implemented in a proper manner. In countries where disclosure of documentation is not ordered and the burden of proof remains with the complainant, proof of non compliance with a CSR policy may be difficult. As said by the German national report, "violations of CSR policies are difficult to detect".

52. However, conversely, regulatory authorities appear to have wide range investigative powers to discover unfair competition practices.

8. ARE LAWS OF REPORTING COUNTRIES FIT FOR PURPOSE?

53. In general, the Reporting Countries reported that they considered that their laws were satisfactory and able to deal with breaches of CSR policies by undertakings. There is a need to distinguish here between (a) whether the existing law is fit for purpose to deal with breaches of CSR policies (b) whether in practice the law is being properly enforced.

54. In relation to the first part, despite the lack of existence of *sui generis* laws, the Reporting Countries demonstrate that breaches of CSR policies are capable of being dealt with adequately within the framework of existing laws – particularly, unfair competition laws. Thus, there is no request for *sui generis* laws to deal with breach of CSR policies. However, as noted by the Austrian report, ultimately for a breach of a CSR code to fall within the UCPD as an unfair commercial practice, it must be shown that the practice is directly connected with the promotion, sale or supply of a product to consumers. Thus, general obligations stated by companies to support charities which are breached may be difficult to show that such falls foul of the UCPD.

55. Many countries reported the need to strengthen the ability to obtain information and also the right to introduce "class actions". In relation to the latter point, the European Commission is alive to this. Thus, in June 2013, it issued a non-binding recommendation that Member States introduce "collective redress mechanisms" to improve access to justice[59].

56. In particular, many of the national reports said that there is no ability to audit compliance with the CSR policies. Thus, the Belgian national report complained of the lack of transparency with regards to implementing CSR policies. It suggested that such could be detected in a number of ways e.g. encouraging the

[59] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress" COM (2013) 401/2 (http://ec.europa.eu/justice/civil/files/com_2013_401_en.pdf)

adoption of standards (e.g. ISO26000[60]) and thus leaving the issue of compliance to the authorities administering the standard; use of "labels" which can only be used where the undertaking complies with the conditions of such labels; social rating agencies and annual reports[61]. The idea here is that regulatory organisations which administer the use of such standards, labels etc can limit the use of such indicia to those undertakings they have investigated. However, as recognised by the Belgian report, such depends on active involvement by these organisations.

57. The need for transparency of large companies and groups with regards to their CSR policies has been recognised by the European Commission in its communication "A renewed strategy 2011-2014 for Corporate Social Responsibility"[62] where it has recommended that Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information of large companies and groups be amended to include a non-financial statement containing information relating to at least environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including the following:

> (i) a description of the policy pursued by the company in relation to these matters;
>
> (ii) the results of these policies;
>
> (iii) the risks related to these matters and how the company manages those risks.[63]

58. Indeed, the proposal requires large companies[64] which do *not* pursue such policies to provide an explanation why they do not. Thus, a large company may not choose the path of silence! Of significance is that the annual report must where appropriate include both financial and non-financial key performance

[60] Guidance on how business and organisations can operate in a socially responsible way
[61] Since 1995, Belgian companies must file a "bilan social" which is a social report which includes information on environmental and social issues.
[62] COM (2011) 681 final of 25 October 2011
[63] The proposal is that Art.46 Directive 78/660/EC and Art.36 Directive 83/49/EEC are amended (see Art.1 of the draft amending directive).
[64] Defined as a company whose average number of employees exceed 500 and their balance sheet exceeds €20 million or a net turnover of €40 million

indicators "to the extent necessary for an understanding of such development, performance or position"[65].

59. The ability to enforce compliance with unfair competition laws will often rest on administrative organisations which have to prioritise. Thus, as noted by the Italian report, enforcement before the AGCM is not that effective due to the workload of the authority.

60. When considering the need for sanctions for breaches of voluntary CSR policies, it is important not to deter their adoption in their first place. There is a balance to be struck between deterring companies from breaching such policies and encouraging them to adopt them in the first place. The world is a better place if companies do adopt CSR policies but intermittently breach them than if companies are discouraged by "heavy handed" enforcement from adopting them in the first place. It should be remembered that in many cases, the power of investigative journalism and the ability to "name and shame" is a more powerful deterrent than recourse to legal proceedings. After all, companies adopt CSR policies because they know that their reputation is important and that consumers are sensitive to environmental-social concerns. They will not lightly risk losing that reputation. So in the same sense that a company has a self-interest in ensuring that its trade mark is not used for poor quality products but there is no law to prevent them from doing so, it might be said that a company with a CSR policy will not lightly risk its reputation being destroyed by breaching its own CSR policy. However, that consideration is lessened if it is difficult to prove a breach.

61. In this sense, one may consider that unfair competition laws where the promotion of CSR policies must be connected with the promotion, sale or supply of products strikes the right balance. A company which deliberately uses its CSR policy as a "sales promotional tool" should not expect many favours from the law if it breaches such a policy. On the other hand, a company who believes that it is right to donate a proportion of its general revenue (as opposed to revenue from sales of a particular product) to a charity but upon investigation, it is found that it failed to do so, but there is no evidence that it

[65] ibid. Although not wholly clear, it seems that such should relates to the CSR policies.

has sought to rely upon such a fact in promoting its products, may legitimately say that no one has suffered as a result.

9. COMPETITION ISSUES

62. Reporting Countries were asked whether CSR policies raised any competition issues (as opposed to unfair competition) issues. A particular concern arises where a number of competing undertakings agree to commit to a CSR policy. In such cases, often there will be a trademark or symbol which can be used only by such undertaking to demonstrate their adherence to such a CSR policy. A good example is the "dolphin-friendly tuna" symbol below which is a registered trade mark[66].

63. Because of consumer pressure, a number of undertakings who are competitors may be parties to a common CSR code. Such a code will be contractual in nature and will set out rules and conditions which must be complied with regarding the catching of tuna which minimise the risk of dolphins being accidentally killed. Such will have the effect of co-ordinating behaviour at a horizontal level.

64. The European Commission has analysed standardisation agreements and issued Guidelines concerning Horizontal Cooperation Agreements. In general,

66 In fact, in the United States, the Dolphin Protection Consumer Information Act describes the conditions in which tuna product may be labelled dolphin-safe.

provided any undertaking is free to accede to such standards or code, it is difficult to see how any issues of competition law arise. Para 280 says

> [280]. Where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms will normally not restrict competition within the meaning of Article 101(1).

65. In general, NGOs and private organisations which encourage the adoption of a particular environmental standard operate in a manner that is consistent with the above approach. Such organisations have little interest in preventing undertakings from having access to such standards and indeed the nature of such organisations (which tend to be not-for-profit) is that they would wish to encourage as many undertakings as possible to adopt such codes.

66. It is rare that a CSR policy can ever be considered a true barrier to entry such that competition is not feasible by companies that operate outside the CSR policy. As said by the German national report, it is likely that there are a lot of consumers who are not willing or able to buy expensive tuna. Invariably, the adoption of a CSR policy means higher prices and those consumers who are more concerned about price than social or environmental factors will not buy such tuna.

67. Concerns may arise where the CSR policy has become a *de facto* standard in a market sector. This will be the case where it is shown that in large part, there is effective consumer resistance to buying goods which do not adhere to a particular CSR code. In such cases, the CSR policy may be considered akin to an "essential facility" and which access is necessary to in order for an undertaking to compete in a particular market. However, as pointed out in the French report, the Commission Guidelines on the application of Art.101(3) of the TFEU do not prohibit *de facto* standards as within the standard, suppliers may compete on price, quality and product. This is undoubtedly the case with CSR policies where such does not seek to control such primary characteristics of products but much more indirect characteristics e.g. the nature of production of those products. Indeed, a review of supermarket shelves demonstrates that of dolphin-friendly tuna, there is considerable variety in price.

68. However, it is notable that Art.101(3) does *not* mention that factors to be considered are environmental or social benefits arising from an agreement that falls within Art.101. It is notable that in certain domestic competition laws, equivalent provisions do mention environmental protection. Thus, Art.17 of the Hungarian Competition Act which in large part replicates Art.101(3) includes within the first condition not only technical or economic development but also "environmental protection". Given the importance of the environment, it is considered that the Hungarian approach is preferable to the purely economic approach of Art.101(3).

69. Outside the European Union, the Brazilian and Ukrainian national reports did not identify any particular issues with competition law and CSR policies. Whilst they did not rule out that the application of standard competition laws could give rise to issues, no specific ones were identified. However, in the case of horizontal agreements which do lead to establishment of standards protected by IPRs which are adhered to by undertakings with a collective substantial market share, the Brazilian report states that there may be a need for FRAND licensing.

70. As said by the Italian report, particular competition concerns may arise where the CSR policy is a *de facto* standard and is associated with a collective mark in the control of a single organisation. That said, it is rare that a mark *per se* can be an effective barrier to entry to a market. Organisations are free to use other marks which signify dolphin-friendly tuna if the conditions imposed by the single organisation are too onerous. This distinguishes itself from technical standards which are protected by patents where an organisation may have no alternative but to use the protected technology. Furthermore, as already said, organisations who own collective or certification marks which can only be used by undertakings who agree to abide by the codes governing methods of production will generally not wish to restrict access to the use of those marks provided that the undertaking agrees to comply with the associated code of conduct.

71. In summary, the national reports do not identify any specific issues relating to the adoption of CSR policies by a number of competitors. Furthermore, there is no suggestion that competition laws should be adapted to deal with issues raised by the adoption of CSR policies.

10. CONCLUSIONS AND PROPOSALS

72. The adoption of CSR policies by businesses is obviously to be encouraged. A heavy handed approach by the law to such which amounts to a deterrent to their adoption is to be discouraged.

73. CSR policies and their adoption by undertakings will rarely raise issues of competition law. If any change was required, it is that agreements which are prima facie anti-competitive (i.e. fall within Art.101(1) TFEU) should allow environmental and social consideration to be borne in mind when considering exemption.

74. Unfair competition laws are concerned with *breaches* of CSR policies where such are used to promote and advertise goods or services. It is clearly right as a matter of policy that undertakings cannot on the one hand, seek to promote the sales of their goods by reference to CSR policies and yet on the other hand, breach those CSR policies.

75. There are no laws specifically dealing with compliance of undertakings with their CSR policies outside unfair competition law (or laws closely associated with unfair competition e.g. passing off). Thus, no countries reported *sui generis* laws to deal with breaches of CSR policies e.g. a general right to audit an undertaking's self-proclaimed CSR policy. Where the CSR policy is an external standard or code, then the self-interest of the organisation administering that standard or code can be relied upon to police compliance (e.g. administrative authorities responsible for ensuring compliance with ISO standards). However, clearly such considerations are inapplicable to CSR codes which are not governed or administered by external organisations.

76. There is considerable diversity when it comes to who can enforce unfair competition laws and this could be considered unsatisfactory. Regulatory authorities will often not have the resources to deal with breaches of CSR codes and consumers will rarely bring direct action (as opposed to complaining to the relevant organisation). It would appear that the most effective enforcers are consumer associations and competitors. However, unlike with consumers, in both cases, it will be difficult to prove damage and thus if brought in civil courts, the non-CSR compliant undertaking, may have little to fear from an

award of damages. Such factors favour the ability of consumer "class actions" to be brought whereby substantial damages could be awarded although care must taken to prevent their abuse.

77. There is little or no evidence that non-compliance with CSR policies is a problem in the Reporting Countries. Thus, any proposal or recommendation for discussion at the LIDC congress should proceed with care for fear of causing more problems than it solves. However, the following recommendations are made :-

RECOMMENDATION ONE

78. An analysis of European Union laws and the laws of the Reporting Countries demonstrates that breaches of CSR policies will generally only give rise to a right of legal action where such are used in close connection with the promotion or advertisement of goods or services, In the case of the UCPD, there is the threshold requirement that such must be "directly related" to the promotion of goods.

79. It is considered that the concept of "directly related" sets the threshold too high. CSR policies will often influence consumers to buy goods even if such CSR policies are not directly related to the promotion of good. A company that has a robust and strong CSR policy will often generate a "feel good" feeling about that company which subtly and indirectly influences a consumer to buy its goods. In some respects, this can be considered similar to the way that a brand image subtly influences a consumer to buy goods bearing that brand. Such brand image may bear little relationship to the characteristics of the product itself (a good example is the positive "feel good" brand image of the Virgin brand) but still materially affects the consumer decision to purchase the goods or services of a company.

80. However, as said at [61] above, the *mere* fact that a company has breached a publicised CSR policy should not give rise to a cause of action. Such could positively discourage companies from adopting CSR policies. Thus a balance needs to be struck.

81. It is proposed that the test for nexus for whether a cause of action under unfair competition laws or similar laws arises in relation to a breach of a publicised CSR policy is as follows:-

The CSR policy in issue would materially influence the reasonable consumer's decision to purchase goods or services of the undertaking promoting the CSR policy.

82. The above test avoids arguments as to whether *but for* the CSR policy in issue, the consumer would have bought the goods - a test which would be very difficult to satisfy and sets the threshold too high. Furthermore, the resort to the legal fiction of the "reasonable consumer" ensures that the courts are not bound by evidence from consumers who said that they were materially influenced when such evidence appears to be an unreasonable conclusion.

RECOMMENDATION TWO

83. As said above, there is considerable variety as to who can enforce unfair competition laws relevant to breaches of CSR policies. It is clear that a wide variety of undertakings are capable of being affected by breaches of CSR policies. A distinction needs to be drawn between the right to sue (*locus standi*) and the cause of action. In relation to the latter, CSR policies are aimed and focussed at consumers and not at suppliers or competitors. Thus, the test (see Recommendation One), should always be related to the effect of the CSR policy (and thus its breach) on consumers. In relation to the right to sue, the question is whether a wider class of persons other than consumers should be able to bring a private action where the latter condition is satisfied.

84. It is clear that the businesses of suppliers, purchasers and competitors can be materially affected by breaches of CSR policies where consumers are likely to make purchasing decisions based on those CSR policies. Thus, a coffee distributor who supplies Fair Trade coffee is likely to be adversely affected by a competing coffee supplier who promotes its adherence to a Fair Trade coffee code of conduct but does not comply with it. Equally, Fair Trade coffee producers in developing countries will suffer as well (by reason of reduction in coffee being bought from them) as a result of the offending undertaking.

85. In such circumstances, there is no rational basis for restricting the right to sue to just consumers or indeed leaving enforcement to regulatory organisations. Indeed, such is recognised in the Art.11 UCPD (see [34] above). It is tempting to say that those who have suffered damage should have the right to sue. In other words, *locus standi* should be based on the ability to prove that the undertaking has suffered damage as a result of the offending undertaking's conduct in breaching its CSR policy. However, such would mean that the issue of *locus standi* could not be determined until conclusion of proceedings which is unsatisfactory. Furthermore, in certain cases, it may be difficult for a competitor, supplier or producer to prove that it has suffered damage. A good example of this would be where a Fair Trade coffee producer or supplier is one of many qualifying Fair Trade coffee producers or suppliers and a retail coffee chain is failing to comply with its publicised policy of buying Fair Trade coffee. The coffee producer or supplier may find it very difficult to establish that it has suffered any loss of sales (e.g. because the retail coffee chain did not historically buy from that coffee producer supplier when it did comply with its CSR policy). However, that Fair Trade coffee producer or supplier may be the only producer supplier with sufficient financial resources to litigate the retail coffee chain. Its interest would be primarily to obtain injunctive relief rather than damages. Injunctive relief would, in the wide sense, benefit *all* Fair Trade coffee suppliers and thus a particular supplier or producer would be bringing proceedings in a representative capacity.

86. In such circumstances, it is considered that any undertaking (including any natural person) which can satisfy the court that he, she or it has "sufficient interest" should be applied. Such a test has considerable flexibility and permits a court or tribunal to take account of a wide range of factors and not just whether the suing undertaking has suffered damage. In particular, it is considered that such a test should, as a matter of principle, permit an undertaking who is a member of a group where it can be established that the group, *considered as a whole*, would be materially affected by the offending undertaking's breach of CSR policy, be able to satisfy such a test of "sufficient interest". Accordingly, the following recommendation is made

Any natural or legal person with sufficient interest has standing to bring an action against an undertaking which has breached a publicised CSR policy

RECOMMENDATION THREE

87. As discussed above, there is variety in the laws of the Reporting Countries as to the ability to bring consumer class actions against undertakings which have breached CSR policies. As said at [55] above, the European Commission has recommended their introduction but subject to restraints to prevent their abuse. In this respect, as commented in the European Commission recommendation, the Commission has proposed that contingency fees and punitive damages should be prohibited as these are seen as creating an industry for abusive class action[67].

88. In the case of CSR policies, the need for class actions is mitigated where there are active associations which will protect consumers' interests (such as the Wettbewerbszentrale in Germany) or effective enforcement authorities. However, these organisations invariably have limited resources and must prioritise those resources.

89. Class actions (or to use the more European terminology, "collective redress" actions) have a disciplining effect on undertakings who fail to comply with their publicised CSR policies. Such undertakings will often have little to fear from individual consumer actions, will know that regulatory organisations may not have sufficient resources to bring enforcement action and may consider that competitors or suppliers may have difficulties in establishing that any damage has been suffered. However, a class action will be feared by such organisations because of the potential to pay substantial damages and the adverse publicity that such could cause.

90. The issue as whether to permit class actions is, of course, not unique to CSR and raise a host of issues as to how they should be regulated – for instance, one particular issue is whether there should be an "opt-in" or "opt-out" approach to persons who fall within the class – which are not peculiar to actions based on breach of CSR policies. Furthermore, there is considerable variety. Thus, the

[67] Para. 30 Recommendation, cited at fn.57

opt-in model is generally used but in certain European Union countries such as Portugal, Bulgaria and Netherlands, the "opt-out' model is used. The Commission favours the opt-in approach.

91. It is not considered prudent to make detailed recommendations as to how class actions in breach-of-CSR policy actions should be controlled and conducted – particularly to prevent abusive litigation. Such issues are not specific to such actions and should be considered at a wider level. However, it is recommended

***In principle,* class actions where an undertaking has breached a publicised CSR policy should be permitted.**

RECOMMENDATION FOUR

92. In civil proceedings, as identified in this report, it is often difficult to prove that an undertaking has breached a CSR policy. Such facts and information as necessary to prove such will normally only be in the possession of the undertaking. The UCPD seeks to address this by requiring companies to provide information and/or reversing the burden of proof where they do not. On the other hand, it would be disproportionate and potentially damaging to undertakings if speculative claims can be brought against them which require them to divert resources to prove that they comply with their CSR policies. Thus, it is considered that the appropriate balance to be struck is that a complainant should be required to establish a *prima facie* case that the defendant undertaking has breached its CSR policy. If such is established, then the undertaking should be required to adduce information that it has not. This could be achieved by court orders or alternatively, by shifting the burden of proof to the defendant undertaking so that there is an incentive to provide such information. Accordingly, the following recommendation is made

Where a prima facie case is made out that an undertaking has breached a publicised CSR policy, a court should have the power to order that the undertaking provide relevant information and/or reverse the burden of proof onto the undertaking to prove that it has not breached its CSR policy.

RECOMMENDATION FIVE

93. As discussed above, there appear to be few if any concerns about CSR policies giving rise to anti-competitive concerns. That said, it is unsatisfactory that when considering competition concerns raised by CSR policies that a narrow economic approach should be taken to considering whether such comply with competition law. For example, when considering a CSR code promoted by an independent not-for-profit organisation which horizontal undertakings owning more than 50% of the relevant market contractually adhere to, it would be wrong in principle if analysis of any anti-competitive effects caused by horizontal cooperation was not entitled to take into account the beneficial effects to the environment and social working conditions that adherence to such a code has. At the heart of competition law is whether conduct by one or more undertakings is such as to have a detrimental effect on consumers' interests. When considering whether such is the case, the 21st century consumer's interests extend beyond mere price and quality. Thus, it is considered that the Hungarian approach (see [61] above) which allows consideration of such factors when deciding whether to exempt prima facie anti-competitive agreements should be adopted. Accordingly, the following recommendation is made:

In considering the application of competition laws to CSR policies, the beneficial effect on the environment and social working conditions should be taken into account