

The Concept of Business Undertaking in Finnish and European Consumer Law – A Critical Review of a Finnish Supreme Court Case

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1 Introduction

A generally accepted view of the level of consumer protection in the Nordic countries is that it is high.² In addition to the Nordic countries, other European countries also introduced consumer legislation in their national legal systems during the 1960s and 1970s.³ The first steps towards a common consumer policy were taken by the EEC also in the 1970s.⁴ The EU member states and the EEA countries have since been obliged to implement various EC directives on consumer protection. The European national legal systems consequently contain extensive consumer protection legislation.⁵

Consumer law today is an area of law that is largely European in character, although significant differences remain between the member states regarding certain aspects.⁶ A good example is the monitoring of legal and regulatory compliance in the different member states. There are separate consumer authorities in the Nordic countries, whereas other countries rely on the willingness of private consumer organizations to bring violations to the courts. In some countries the emphasis is on self-regulation.⁷

Despite national differences as to the details, traditional consumer protection legislation, not only in the Nordic countries but also in the other

2 Within the Nordic countries, Sweden was the first to have a specific act on consumer law. The Act (1970:417) on the Market Court established the Swedish Consumer Ombudsman as a governmental authority. The Finnish legislation originates from 1978, when both the Consumer Protection Act (38/1978) and the Act on the Consumer Ombudsman (40/1978) entered into force. The Norwegian consumer legislation stems from 1972 when the Marketing Act (no. 47 of June 16, 1972) was enacted. In Denmark, consumer legislation was created through two acts, the Marketing Act (no. 297 of June 14, 1974) and the Consumer Complaint Board Act (no. 305 of June 14, 1974).

3 For example, Chapter 39 of the Consumer Credit Act 1974 (July 31, 1974) in the UK and the amendment of the German *Gesetz gegen den unlauteren Wettbewerb* in 1965 giving consumer organizations (*Verbraucherschutzverein*) the right to sue. See Cseres, Katalin Judit, *Competition Law and Consumer Protection*, Kluwer Law International, The Hague 2005, pp. 161-163.

4 The starting point was the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ 1975, C 92, p. 1.

5 The importance of consumer law has grown during recent years. In the Charter of Fundamental Rights of the European Union, OJ 2007, C 303, p. 1, article 38 contains a provision according to which "Union policies shall ensure a high level of consumer protection." This requires common EU-legislation, which has led to extensive consumer protection legislation in the member states. On the other hand, article 38 is based on article 169 of the Treaty on the Functioning of the European Union (TFEU).

6 Within the EU, regulation to date has been largely based on the use of minimum directives, which have made it possible for member states to introduce or maintain stricter provisions for the benefit of consumers. It is evident that the use of minimum directives has led to differences between the different member states, see Schulte-Nölke, Hans & Twigg-Flesner, Christian & Ebers, Martin (eds.), *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States*, Sellier, Munich 2008, *passim*.

7 See e.g. Howells, Geraint & Weatherill, Stephen, *Consumer Protection Law*, Ashgate Publishing, Padstow 2005, p. 603 *et seq.*

EEA-countries, has been built around the basic relationship between a consumer and a business undertaking. The basic concepts of consumer law have been shaped in a way to facilitate an extensive application of the provisions of consumer protection legislation. The key concepts of this legislation in Finland are consumer, business undertaking and consumption utility.⁸ The first two of these concepts, consumer and business undertaking, are of great importance on the European level as well. Both the present European consumer *acquis* and the Draft Common Frame of Reference (DCFR) are based on this very fundamental division of legal relations between business to consumer (B2C) and other relations such as business to business (B2B) and consumer to consumer (C2C).

The focus within the Finnish consumer law scholarship has particularly been on the concept of consumer, while the concept of business undertaking (or trader) has not attracted the same interest.⁹ In the first precedent under

8 Consumer Protection Act (38/1978), Chapter 1, Sections 3-5. Only the translation of the concept of consumer is unproblematic. The concepts of *elinkeinonharjoittaja* in Finnish and *näringsidkare* in Swedish are here translated as business undertaking. Another possible translation could have been trader, or simply business as in the DCFR 1.-1:105(2). The concept of *kulutushyödyke/ konsumtionsnyttighet* is difficult to translate into English. Consumption utility is not a good translation, but it is used here as a synonym to consumer goods and services.

9 In Finland, these concepts have been discussed by Wilhelmsson, Thomas, *Konsument-skyddet i Finland, Allmän del*, Juristförbundets förlag, Helsingfors 1989, pp. 96-108, Bärlund, Johan, *Reklamation i konsumentavtal, En kontraktsrättslig studie av konsumentens reklamation som en förutsättning för att konsumenten skall kunna åberopa näringsidkarens avtalsbrott*, Juristförbundets förlag, Helsingfors 2002, pp. 24-49, and Sisula-Tulokas, Lena, *Bryssel - Rom - CISG - Luxemburg - Heinola: En resa i IP-rätt med HD 2005:114 som guide*, in Waselius & Wist, With Wisdom, Waselius & Wist, Porvoo 2007, pp. 148-153. The focus is on the concept of business undertaking in Bärlund, Johan, *Begreppet näringsidkare inom konsumenträtten*, Tidskrift utgiven av Juridiska Föreningen i Finland 2010, pp. 557-585. In Sweden, the consumer concept is discussed by e.g. Herre, Johnny, *Den oenhetliga nordiska köprätten, särskilt reglerna om skadestånd*, Tidskrift for Rettsvitenskap 1999, pp. 126-128, while both the concepts are analyzed by Olsen, Lena, *Konsumentskyddets former*, Iustus förlag, Gothenburg 1995, pp. 23-27. In Danish law, Madsen, Palle Bo & Bruun Nielsen, Anne-Dorte, *Dansk forbrugerret*, Schultz, Copenhagen 1986, pp. 55-57, where the concepts of consumer and business undertaking are discussed, is still of relevance. A more recent discussion about the concept of consumer is found in Møgelvang-Hansen, Peter, *Forbrugerrollen som retligt begrep*, in Iversen, Torsten & Kristensen, Lars Hedegaard & Werlauff, Erik (eds.), *Hyldestskrift til Jørgen Nørgaard*, Jurist- og Økonomforbundets Forlag, Copenhagen 2003, pp. 543-553. For the Norwegian discussion, see Selvig, Erling & Lilleholt, Kåre, *Kjøpsrett til studiebruk*, 4. ed., Universitetsforlaget, Otta 2010, pp. 51-53, Tverberg, Arnulf *Forbrukerkjøpsloven med kommentarer*, Gyldendal, Otta 2008, pp. 86-104 and Løchen, Torvald C. & Grimstad, Amund, *Markedsføringsloven med kommentarer*, 7. ed., Universitetsforlaget, Otta 2003, pp. 20-22 and 31-32.

In Germany, the concept of consumer has been actively discussed, e.g. by Denking, Fleur, *Der Verbraucherbegriff: Eine Analyse von persönliche Geltungsbereiche verbraucherrechtlichen Schutzvorschriften in Europa*, De Gruyter Rechtswissenschaften Verlags-GmbH, Berlin 2007, Ultsch, Michael, *Der einheitliche Verbraucherbegriff*, Nomos, Baden-Baden 2006, Neumann, Nils, *Bedenkzeit vor und nach Vertragsabschluss: Verbraucherschutz durch Widerrufsrecht und verwandte Instrumente im deutschen und im französischen Recht*, Mohr Siebeck, Tübingen 2005, pp. 27-72, and Elßner, Christof & Schirmbacher, Martin, *Die Gesellschaft bürgerlichen Rechts als Verbraucher?*,

Finnish law, the Finnish Supreme Court (FSC) took a position on the scope of the Consumer Protection Act (38/1978) (CPA). In December 2008, the FSC gave its judgment 2008:107. This case is interesting because the FSC for the first time gives a detailed interpretation of one of the three key concepts of the CPA, i.e., business undertaking, as defined in Section 5 of Chapter 1 of the CPA. The other two key concepts, i.e. consumer (CPA Ch. 1, Sec. 4) and consumption utility (consumer goods and services) (CPA Ch. 1, Sec. 3) have not yet been subject to FSC review.¹⁰

In the case, FSC 2008:107,¹¹ a limited company providing consulting services to corporate management had sold a horse to a private person. The company's purposes were listed in the Finnish Trade Register, one of which being that the company could own horses. However, the company had not previously been involved in the trade of horses or other kinds of consumer goods. Therefore, the FSC found that the activities with regard to the sale of the horse had not been carried out from a professional perspective. As a consequence, the company had not acted as a business undertaking in the CPA's sense in connection with the sale of the horse. The conclusion of the FSC, therefore, was that the company was not a business undertaking in relation to the private person and that the CPA thus did not apply to the case. Both the District Court and the Court of Appeal had reached the same conclusion.¹² Consequently, the consumer was not able to invoke a provision in the CPA (Ch. 12, Sec. 1d), according to which the consumer could bring a civil action against the business in the court of the consumer's domicile. The consumer in the actual case had not filed the action against the business undertaking before the court of the defendant's domicile. The result in the case was that the consumer did not have the right for the court to judge whether the horse conformed to the sale agreement.

This article more closely analyses the concept of a business undertaking under Section 5 of Chapter 1 of the Finnish CPA in light of the FSC case 2008:107. This case raises several interesting questions from a European point

Verbraucher und Recht 2003, p. 247 *et seq.* The concept of business is dealt with by Krämer, Martin, *Der Gewerbebegriff im Zivilrecht*, Verlag Dr. Kovac, Hamburg 2009.

10 However, in the FSC case 2005:114, the concept of consumer was according to the Brussels Convention, which on March 1, 2002 was replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The concept of consumer is not the same in the Brussels Convention as it is in the Finnish CPA. *See* Sisula-Tulokas 2007, p. 152.

11 The reader should note that this author provided a legal opinion based on documents in the case and in favor of one of the two parties at trial, an opinion written before the district court had given its ruling. A preliminary question in the trial was whether the action against the vendor had been brought in the appropriate forum. The plaintiff, i.e. the consumer, had brought an action before the district court of her own domicile, i.e. the District Court in Hyvinkää, based on CPA Ch. 12, Sec. 1 d(2). The defendant objected, arguing that the forum should be the court of the defendant's domicile, i.e. the District Court of Espoo. It was, therefore, a matter submitted for an expert opinion whether the CPA was applicable.

12 This meant that the individual could not invoke the provision in the former CPA Ch. 12, Sec. 1 d(2) under which the consumer could bring an action before the court of her own domicile.

of view. First and foremost, the criteria for a business undertaking according to the Finnish CPA should be more systematically examined as to what they are. The FSC's ruling is compared to these criteria, and this author gives views on the interpretation of the concept. The FSC's position will not be simply identified, but submitted to a critical review. The hypothesis here is that the FSC completely ignores the fact that consumer sales on the EC legal level since the early 2000s are governed by the Consumer Sales Directive,¹³ which also contains definitions of consumer and seller. This directive has been implemented in Finland so that the provisions of the CPA are alleged to meet the minimum requirements of the directive.¹⁴ The intention here therefore is to give a more detailed analysis of the interpretation of the concept of business undertaking within Section 5 of Chapter 1 of the CPA, against the background that the term is to meet the requirements of the Consumer Sales Directive. However, it is not sufficient to take into account only the Consumer Sales Directive when the concept of consumer is analysed, as the CPA intends to also implement¹⁵ several other EU-directives.¹⁶ The correct implementation of a

13 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. According to Art. 11, there was an obligation for the member states to implement the directive not later than January 1, 2002.

14 See Regeringens proposition (RP) 89/2001 till Riksdagen med förslag till lag om ändring av konsumentskyddslagen (Legislative bill 89/2001 to amend the CPA), p. 7. In Sweden, the directive has been implemented by the Act (2002:565) amending the Act on Marketing (1995:450), the Act (2002:588) amending the Act on Consumer Services (1985:716), and the Act (2002:587) amending the Act on Consumer Sales (1990:932). The Danish actions to implement the directive consist of the Act amending the Act on Marketing (no. 342 of 02/06/1999) and the Act amending the Act on Sales (no. 213 of 22/04/2002). Norway has according to its EEA-membership implemented the directive through enactment of the Act 2002-06-21 no. 34 on Consumer Sales and of Section 23 of the Act 2009-01-09 no. 02 on Marketing.

15 On this point, Finnish law differs from the situation in the other Nordic countries. Only Finland has adopted an extensive CPA, containing provisions for both collective and individual consumer protection. In the other Nordic countries, there are different acts for different consumer protection regulations. The regulation of consumer credit can be mentioned as an example. In Finland, the provisions are found in CPA Ch. 7, whereas the corresponding provisions in the other Nordic countries can be found in Swedish law in the Act on Consumer Credit (1992:830), in Danish law in the Act on Credit Contracts (no. 157 of 25/02/2009) and in Norwegian law in the Act on Financial Contracts (of June 25, 1999 no. 46).

16 The directives are Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services, Directive 2005/29/EC of

directive in Finnish law, when included in the overall CPA, requires that the scope of application of the CPA be broad enough to fulfil the requirements of the different directives. One can point out that the implementation of the Unfair Commercial Practices Directive from 2005 led to extensive amendments to the CPA Ch. 2, but the definitions in first chapter were unchanged. The concept of a business undertaking should also be interpreted in the same way regarding all the provisions in the CPA, regardless of the fact that some of the chapters are influenced by EU-directives while others are not.¹⁷

Arguing for this point of view, I also take into account sources from Swedish, Norwegian and Danish law. Another interesting, fairly new European set of rules is the Draft Common Frame of Reference (DCFR), also referred to here as a yardstick for measuring whether the FSC's ruling 2008:107 can be regarded as acceptable in light of the newest development in European consumer law.

This article also gives a (small) example of how the FSC fails to show that it has understood that rethinking is needed in normal legal reasoning (in consumer law). As a legal researcher, this author has had the opportunity to maintain that the legal reasoning of the FSC is clearly out of date and does not take into account the inevitable European dimension of consumer law. The FSC neglects the impact of European consumer law on the legal sources and on the ways of legal reasoning in consumer law cases.

This article proceeds as follows: Firstly, Section 2 describes how the Finnish concept of business undertaking has received its current wording. Section 3 specifies the general starting points for the interpretation of the term, after which a detailed analysis of the different criteria of the concept of business undertaking follows in Section 4. Section 5 assumes a position on the interpretation of the concept by the FSC. How do the different criteria relate to each other? Has the current European context of the concept been

the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC and Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC. It is important to note that the concept of business undertaking is not necessary identical in the directives mentioned, *see* Schulte-Nölke & Twigg-Flesner & Ebers 2008, p. 471.

17 It could of course be argued that the provisions in the different chapters should be interpreted in accordance with the respective directives, which could lead to different extensions depending on the background directive. This, however, is not in accordance with the general view that a concept should be interpreted uniformly within one act. *See* Peczenik, Aleksander, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation*, Fritzes, Gothenburg 1995, p. 331: "If an act is a perfect instrument, it does not contain any words the interpretation of which will be different depending on their position in the act" (author's translation).

taken into account? Does the FSC assess the impact of a ruling for future cases? This article concludes by pointing out certain *de lege ferenda* aspects.

2 The Concept of Business Undertaking According to the Finnish Consumer Protection Act

The wording of the concept of business undertaking was slightly redefined in connection with the extensive reform of the CPA in 1994, but its substance did not change compared to the original wording.¹⁸ The current provision in Section 5 of Chapter 1 of the CPA (16/1994) reads:

For the purposes of this Act, a *business undertaking* is defined as a natural person or a private or public legal person who, in order to obtain income or other economic benefit, offers, sells or otherwise transfers consumer goods or services on a professional basis and for consideration.

When comparing the wording of the current Finnish provision with the corresponding provisions in the other Nordic countries, one is struck by how complicated the Finnish provision is. The concepts in Swedish, Norwegian and Danish law merely contain the definition according to which a business undertaking is any party acting within its business activity.¹⁹ In Finnish law, there is a clear ambition to define the meaning of business activity.

In its original form (38/1978), the provision read:

For the purposes of this Act, a *business undertaking* is defined as a natural person or a private or public legal person who offers, sells or otherwise transfers consumer goods or services on a professional basis and for consideration.

18 RP 360/1992 till Riksdagen med förslag till lag om ändring av konsumentskyddslagen och vissa lagar som har samband med den (Legislative bill 360/1992 to amend the CPA and some other related acts), p. 46.

19 At first glance, the corresponding definition in the Swedish Consumer Sales Act (1990:932) seems clearly simpler: “any natural or legal person who is acting for purposes relating to his own business activities” (author’s translation). The problem with the Swedish definition is that the concept of business activity is not defined in the Act, which is why the Swedish definition is based on a circular reasoning. According to Herre, Johnny, *Konsumentköplagen - En kommentar*, 3rd edition, Norstedts, Vällingby 2009, p. 68, this definition does not lead to problems concerning interpretation. The Norwegian Act 2002-06-21 no. 34 on Consumer Sales, Section 1, can be criticized as well: the act will be applied “when the seller or the representative of the seller acts within his business activity” (author’s translation). The concept of business activity is not defined. There was, however, no intention to change the current situation, *see* the Norwegian legislative bill Ot.prp. nr. 44 (2001-2002) om lov om forbrukerkjøp (forbrukerkjøpsloven), p. 232. Formerly, the concept of a professional seller, “yrkesselger”, was used in Section 4 of the Norwegian Act 1988-05-13 no. 27 on Sales. In the Danish Act (LBK no 237 of 28/03/2003) on Sales, the concept of business undertaking can be found in Section 4a: “a business undertaking that acts within its business” (author’s translation). According to Madsen & Bruun Nielsen 1986, p. 55, a business undertaking is “anyone who is engaged in independent, private business activities” (author’s translation).

Comparing the wordings, one finds that the 1994 version contains a new expression, i.e. “in order to obtain income or other economic benefit”. According to the legislative bill, the purpose of this addition was to clarify that those public services, such as education, health care and day care, as offered by public sector entities, fall outside the concept of business undertaking in the CPA. When the public sector offers such services, for example, secondary or university education, the goal is not to raise revenue or other economic benefits. The legislative bill states that this addition is not a substantive amendment of the original version.²⁰ One can therefore conclude that the addition is a merely a clarification of the concept of business undertaking.

Secondly, the end of the provision in Section 5 of Chapter 1 of the CPA is slightly modified in the Finnish and Swedish versions so that the final part “for consideration” now applies to all ways of acting, i.e. offering, selling or otherwise transferring, while the expression “for consideration” previously in the Finnish and Swedish versions was limited only to the last form of acting, i.e. transferring. This adjustment according to the legislative bill was only to have the wording better match the wide concept of consumption utility.²¹ There was no intent to change the concept substantively. The link between the current and original wording is strong, and therefore the legislative bill and scholarship concerning the original concept of business undertaking are still relevant.

In addition, it is important to note that the roots of the concept of business undertaking are in competition law. The draft legislative bill to the consumer protection legislation²² states that the concept of business undertaking is the same as in contemporary competition law, i.e. the Act on the Promotion of Economic Competition (423/1973).²³ However, there was no explicit legal definition of business undertaking in the original proposal to the CPA, and the definition was introduced into the first legislative bill to the CPA.

The main difference in comparison with the wording of the Competition Act was that the term “utilities” (goods and services) had been replaced by the term “consumption utilities” (consumer goods and services). The fact that the concept of business undertaking in competition law has been the direct model

20 RP 360/1992, pp. 8 and 46. See also Sevón Leif, Wilhelmsson, Thomas, Koskelo, Pauliine, *Ehdotus kuluttajansuojalain muuttamisesta - työryhmän muistio*, Oikeusministeriön lainvalmisteluosaston julkaisu (OLJ) 9/1988, pp. 9 and 95.

21 RP 360/1992, p. 46.

22 Kivivuori, Antti, af Schultén C. G., Tala, Jyrki & Sevón, Leif, *Förslag till konsument-skyddslagstiftning*, Lagstiftningsavdelningens vid justitieministeriet publikation (LJP) 12/1974, p. 21.

23 The provision in the 1973 Competition Act, i.e. Section 2, reads: “With business undertakings referred to in this Act shall be meant any natural person or private or public legal person, which professionally offers for sale, buys, sells or otherwise delivers utilities in return for consideration.” This formulation is very close to the wording of the current provision, Section 3 in the Competition Act (480/1992): “In the context of this Act, a business undertaking shall mean a natural person, or a private or public legal person, which professionally offers for sale, buys, sells, or otherwise obtains or delivers goods or services (*product*) in return for consideration.”

for the concept in consumer law allows taking into account the interpretation of the concept in competition law when interpreting the concept in consumer law.

According to this definition, a business undertaking is a natural or private/public legal person. Schematically, the situation can be described in such a way that a person belonging to one of these three categories in the provision, i.e. natural persons, private legal persons and public legal persons, must meet the specific criteria listed in the provision in order to qualify as a business undertaking in the CPA's sense. As the three categories of persons cover all kinds of persons, the specific criteria will fully determine when the person is acting as a business undertaking or not.

According to my opinion, the Finnish concept of business undertaking in the CPA needs a more thorough analysis. The concept consists apparently of different parts, which can be regarded as independent criteria. The specific criteria of the definition of a business undertaking in Section 5, Chapter 1 of CPA are: the income criterion, the professionalism criterion, the offering criterion, the consumption utility criterion and the consideration criterion.²⁴ For each criterion, the crucial question is drawing a line between those activities meeting the criterion in question and those that do not. Moreover, there is reason to analyse whether, to what extent, and in what way the specific criteria are cumulative.

3 The Starting Points of the Interpretation

The legislative bill of the CPA indicated that the concept of business undertaking of Section 5 of Chapter 1 of the CPA is intended to be broadly interpreted, and the same view appears in the scholarship.²⁵ The same applies

24 Of these criteria, the income criterion, the professionalism criterion and the consideration criterion are considered to be also characteristic for competition law, *see* Rainer Lindberg, *Elinkeinonharjoittajan käsite kilpailuoikeudessa*, Kilpailuviraston selvityksiä 1/2006, Kilpailuvirasto, Helsinki 2006, p. 32.

25 RP 8/1977, p. 15. This view is repeated in the academic literature: Kivivuori, Antti., af Schultén C. G, Sevón, Leif, Tala, Jyrki, *Kuluttajansuoja*, Tammi Kustannusosakeyhtiö, Helsinki 1978, p. 34, Kempainen, Jukka, *Kuluttajansuojalaki - Kuluttajansuojalain selityksiä*, Werner Söderström, Porvoo 1978, 1:5, Wilhelmsson, 1989, p. 102, Bärlund 2002, p. 43, and Herler, Brita Christina, *Kommentarer till konsumentskyddslagen. Del I*, Vaasan yliopisto, s.l. 2007, pp. 25 and 30. In Bärlund 2002, p. 43, this author indicates that the then Consumer Complaint Board also has interpreted the term broadly. It is noteworthy that the Kouvola Court of Appeal in its Judgment 987/2007, 20.09.2007 (S dnr 07/527), i.e. this horse case, refers to RP 8/1977 and states that the concept of business undertaking should be interpreted broadly. A broad interpretation of the concept is also advocated by Olsen 1995, p. 25, regarding Swedish law. The case, NJA 2001 p. 155, where the Swedish Consumer Sales Act could be applied to a dispute in which the seller of a boat was formally a private person, but where the boat had had a connection closer to the seller's business than private sphere, also suggests a broad interpretation of the concept of business in Swedish law. *See* Johnny Herre, *Fel i såld segelbåt?*, Juridisk Tidskrift 2001-02, p. 125. *See* further Ulf Bernitz, *Svensk och europeisk marknadsrätt 1 – Konkurrensrätten och marknads-ekonomins rättsliga grundvalar*, Norstedts, Stockholm: 2005, p. 30, who describes the concept of business undertaking in market law, to which he also refers collective consumer law. According to Bernitz, the concept must be interpreted as "very extensive". Concerning

to the concept of business undertaking in Section 3 of the Competition Act: the interpretation of the term business undertaking should be broad.²⁶

Another factor influencing the interpretation of the scope of the concept of business undertaking is the fact that the Finnish CPA is intended to implement, among other directives, the EC Consumer Sales Directive.²⁷ The amendment of chapter five of the CPA on consumer sales in connection with the implementation of the directive was based on the understanding - apparently without any discussion - that the scope of the Finnish CPA is at least as broad as the directive. This is why the implementation of the directive did not cause any changes in the first chapter of the CPA containing the main legal definitions.²⁸

When one reads the reasoning in the case FSC 2008:107, one notices that these two aspects, i.e. a broad interpretation and the European background of the concept of business undertaking, are missing in the legal reasoning of the FSC. The FSC's interpretation seems to be focused solely on a literal interpretation of the rule in Section 5 of Chapter 1 of the CPA.²⁹ The case is interesting because the interpretation of the concept of business undertaking is

Danish law Madsen & Bruun Nielsen 1986, p. 56 states: "The concept is thus very extensive." Kruse, A. Vinding, Clausen, Nils Jul, Edlund, Hans Henrik, Ørgaard, Anders *Købsretten*, 4. udg., Thomson Reuters, Vojens: 2009, p. 67, states that the concept "must not be understood narrowly". An extensive interpretation of the concepts of business undertaking and business activity also applies regarding the Finnish Unfair Business Practices Act (1061/1978), see Aaltonen, Aimo O., *Sopimattomasta menettelystä elinkeinotoiminnassa*, Lainopillisen ylioppilastiedekunnan kustannustoimikunta, Vammala 1985, p. 7 and Paloranta, Paula, *Markkinointioikeus käytännössä*, Talentum, Tampere 2008, p. 139.

26 RP 148/1987 till Riksdagen med förslag till lag om konkurrensbegränsningar (Legislative bill 148/1987 on a Competition Act), p. 16 and RP 162/1991 till Riksdagen med förslag till lag om konkurrensbegränsningar (Legislative bill 162/1991 on a Competition Act), p. 9 and Aalto-Setälä, Ilkka., Kärkkäinen, Hannu K, Lehto, Petri, Petäjäniemi-Björklund, Anne, Stenborg, Markku, *Kilpailulait ja laki julkisista hankinnoista*, 4th ed., Tietosanoma Oy, Pieksämäki 2008, p. 30, Kuoppamäki, Petri, *Uusi kilpailuoikeus*, WSOYpro, Vantaa 2006, p. 44, Määttä, Kalle, *Uusi kilpailunrajoituslaki*, Edita Publishing, Helsinki 2004, p. 59 and Kuoppamäki, Petri, *Markkinoiden sääntely EY:n ja Suomen. kilpailuoikeudessa*, Suomalainen lakimiesyhdistys, Jyväskylä 2003, p. 454. See also Lindberg 2006, p. 32 note. 62.

27 As the Directive is a minimum directive according to its Art. 8(2), the member states may have rules that ensure better protection for consumers than the directive requires. Regarding the scope of application, this means that the scope can be broader, but cannot be narrower, than the scope of the directive.

28 The relationship between the directive and the CPA's scope is not even mentioned in RP 89/2001. This is because, in connection with the 1994 reform, the scope of the CPA had been broadened so that the scope was conceived to be at least as comprehensive as the EC directives on consumer matters.

29 In the district court's interlocutory ruling 07/579, March 19, 2007, the result is justified (author's translation): "From the wording of the act it can be concluded that the provision refers primarily to a situation where a legal person sells several products to consumers. It should not be denied that a legal person, which has sold one matchbox to a consumer, does not become a business undertaking in the CPA's sense solely on the ground that the legal person is a limited company."

surprisingly narrow and has no trace in either the *travaux préparatoires* or consumer law scholarship. The FSC places emphasis on a requirement that the business undertaking should also on a larger scale be focused on consumer goods. According to the FSC, it is not enough that there is an isolated case of a consumer – business undertaking relationship, but the business undertaking must be also more widely engaged in activities that focus on consumers. Did the FSC reach a correct conclusion?

4 The Different Criteria of the Concept of Business Undertaking

4.1 *The Income Criterion*

As mentioned above, the income criterion was included in the legal definition with the 1994 amendment of the CPA. Already earlier this criterion was described in the legislative bill: the activity of the business undertaking must be focused on the acquisition of income, even if this criterion was not mentioned in the actual provision.³⁰ After the 1994 amendment, this requirement is explicitly mentioned in the Act with the wording “in order to obtain income or other economic benefit” to give a person the status of a business undertaking in the CPA’s sense. When one reads the original legislative bill, it becomes clear that this is explicitly a general characterization of the business undertaking’s activities, since the legislative bill specifies that the undertaking’s performance in a particular case can be gratuitous.³¹ In other words, the income criterion is associated with the business undertaking’s activities in general, and should not be attributed to any particular transaction with a consumer.

As already indicated above, the 1994 amendment stemmed from a need to pinpoint that services offered by public corporations for non-commercial purposes would fall outside the concept.³² The aim of the public body is not to receive income from these activities. Such activities cannot be described as containing a business risk, which is mentioned as a criterion of the business undertaking in the original legislative bill to the CPA.³³

In the original CPA legislative bill, it is stressed that the activities of the business undertaking need not necessarily be profitable, and it is sufficient that the purpose of the business undertaking is to provide income.³⁴ Activities

30 RP 8/1977, p. 16. There should be intent to gain income.

31 RP 8/1977, p. 16.

32 This distinction had already been mentioned in the first draft of the Consumer Protection Act, see Kivivuori et al, LJP 12/1974, pp. 21-22. In the Consumer Disputes Board case (2292/83/08), a private person leased a piece of land from a city for residential purposes. According to the Board, this was a matter of such public policies that the city could not be perceived of as a professional.

33 RP 8/1977, p. 15.

34 RP 8/1977, pp. 15-16. Compare with the opinion in von Bar, Christian, Clive, Eric, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* complete edition. Volume I, Sellier, Munich 2009, p. 101, according to which the Finnish CPA requires that there should be an intent to make a profit in order to

aimed at breaking-even in accordance with a cost-recovery principle are therefore sufficient. This view also applies to the concept of business undertaking in the Competition Act.³⁵ The activity of a business undertaking should, as mentioned above, be organized according to commercial principles.³⁶

The definition of business undertaking in the Consumer Sales Directive in Art. 1(2)(c),³⁷ which contains the concept of ‘seller’, has no income criterion. However, this criterion is clearly implied, for example, by the verb ‘sell’ used for the seller’s business. This implies that the activity takes place for remuneration and in order to gain income.³⁸ The definition of business in

fulfill the criteria of a business undertaking. This must be an error, as the opposite opinion is clearly mentioned in the Finnish *travaux préparatoires*. This opposite opinion is presented in Swedish law by Bernitz 2005, p. 30, Herre 2009, p. 68, and Olsen 1995, p. 26. In Norwegian and Danish law, as well, there is no requirement that there has to be an intent to make a profit, *see* Løchen & Grimstad 2003, p. 20, and Tverberg 2008, p. 88 in Norwegian law, and Madsen & Bruun Nielsen 1986, p. 55 and Vinding Kruse & Clausen & Edlund & Ørgaard 2009, p. 67 in Danish law. There is no requirement for profit making according to the Finnish Unfair Business Practices Act, *see* RP 114/1978, p. 10.

35 RP 148/1987, p. 16 and Betänkande av konkurrens- och priskommittén, Kommittébetänkande (KB) 1987:4, p. 121. *See also* Aalto-Setälä et al 2008, p. 33 and Määttä 2004, p. 57. *See also* the Finnish Competition Agency’s decision Dno 915/61/99, 5.12.2001, in which a corporation formed to take care of waste management under the cost-recovery principle, was a business undertaking within the meaning of Section 3 of the Competition Act. But compare with Lindberg 2006, p. 33, who believes based on business economic grounds, that the requirement for profit-seeking in practice always is one of the key features of economic activity. E.g. the primary purpose of a co-operative still needs not necessarily be to gain profit. *See* Mähönen, Jukka & Villa, Seppo, *Osuuskunta* in Kirsti Rissanen, Airaksinen, Manne, Bärlund, Johan, Castrén, Martti, Harju, Ilkka, Jauhiainen, Jyrki, Kaisanlahti, Timo, Kivivuori, Antti, Kuoppamäki, Petri, Mähönen, Jukka, Villa, Seppo & Wilhelmsson, Thomas, *Yritysoikeus*, 2nd ed., WSOYpro., Juva 2006, pp. 445-446. The requirement that the business must generate profit would in some cases lead to that the co-operative would not be perceived as a business undertaking with Lindberg’s logic, an interpretation which otherwise has no support in the *travaux préparatoires* or the legal scholarship.

36 Bärlund 2002, p. 44.

37 The provision reads: “*seller*: shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession”. Compare with the clearly more extensive concept of trader in Directive 2005/29/EC of the European parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’): “‘trader’ means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader”. It is important, however, to note that this Directive under Art. 3.2 does not apply to the contractual relationship between a business undertaking and a consumer.

38 The income criterion is not mentioned by Micklitz, Hans-W., Reich, Norbert & Rott, Peter. *Understanding EU Consumer Law*, Intersentia, Antwerp 2009.

DCFR 1.-1:105(2)³⁹ gives the explicit affirmation that profit is not any requirement for fulfilling the criteria of a business.

4.2 *The Criterion of Professionalism*

The professionalism criterion has been considered to relate, on one hand, to the fact that the activities should be organized according to commercial principles and be connected with the entrepreneurial risk, and on the other hand, that activities should have a certain duration in time. The original legislative bill contained the requirement that the activity of the business undertaking is conducted according to the principle of professionalism.⁴⁰ There is no evidence, however, that the intention would have been to connect the professional nature particularly to the consumer goods and services. In competition law, the business undertaking's activities must also be professional.⁴¹

It is particularly in connection with the professional nature that it becomes necessary to consider how a broad interpretation of the concept of business undertaking is achieved. In the original legislative bill, it was noted that the concept of business undertaking is not necessarily the same as in tax law.⁴² In the legal scholarship, *Thomas Wilhelmsson* concluded that the concept of business undertaking in the CPA has intentionally been given a “broader content” than in the law governing the Finnish Trade Register or in tax law.⁴³ In competition law, one can as well find similar thoughts according to which the concept of business undertaking in competition law is broader than the term under other laws.⁴⁴

39 DCFR 1.-1:105(2) “A ‘business’ means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person’s self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity.”

40 RP 8/1977, p. 15. The same criterion can be found in the Unfair Business Practices Act, *see* RP 114/1978, p. 10.

41 *See e.g.* KB 1987:4, p. 121 and Lindberg 2006, p. 32.

42 RP 8/1977, p. 15. The same observation has also been made in competition law, *see* Kuoppamäki 2003, p. 454 note. 44.

43 Wilhelmsson, Thomas, *Kuluttajaoikeuden soveltamisala ja rakenne*, in Rissanen et al. 2006, p. 931, and Wilhelmsson 1989, p. 102. Herler 2007, p. 30 states that the concept of business undertaking has a greater extent than the corresponding concept in trade register law.

44 Aalto-Setälä et al. 2008, p. 34. Here, it is unclear if it is argued that the concept of business undertaking in competition law should also be broader than the concept of the CPA. However, in competition law these authors have not contemplated the fact that the extensive concept of business undertaking in consumer law has its historical roots in competition law. Statements in the competition law scholarship should therefore in my view be *seen* as only referring to e.g. tax law and trade register law, but not to consumer law, as here the concept is as broad as in competition law.

When the criterion of professionalism has been addressed in the *travaux préparatoires* and the legal scholarship, it has usually been concerning the boundary towards the activities that an individual is engaged in,⁴⁵ and the boundary towards public authorities.⁴⁶ In the case of the boundary towards activities of private persons, it has been stressed that the activity needs not be extensive, and may be limited in time. The activity need not be a full-time or year-round activity. The FSC formulates the rule in such a way that the activity to some extent has to have continuity and extent in time. The classic example is the private person who buys a stock from a company in bankruptcy, and sells it for a limited time. The person should be perceived as a business undertaking as defined in Section 5 of Chapter 1 of the CPA.⁴⁷

In some cases by the Consumer Complaint Board, the volume of activity has also been subject to assessment. How extensive must the activity of a business be in order to be considered professional? Also here the starting point is the same: the activity needs not be comprehensive.⁴⁸

In addition to private citizens, the activities of non-profit associations have been subject to scrutiny. A non-profit organization may have an activity that gives the association the status of a business undertaking.⁴⁹ The same borderline situations can be found when dealing with the concept of business undertaking in the Competition Act.⁵⁰

In competition law, the boundary towards the public sector is perceived as more problematic than in consumer law.⁵¹ All public activities that are organized according to business principles are activities of a business

45 From the Swedish case NJA 2001 p. 155, a conclusion can be drawn that there is a dichotomy when the other party is a consumer: either the seller is a business or an individual: "The Act [on Consumer Sales] does not apply when the business is selling an asset in such circumstances that he may be regarded as acting as a private individual."

46 The distinction is the same in Swedish, Norwegian and Danish law. See e.g. Olsen 1995, p. 26 in Swedish law, Løchen & Grimstad 2003, p. 21, and Tverberg 2008, pp. 88-90 in Norwegian law, and Madsen & Bruun Nielsen 1986, p. 56 and Vinding Kruse & Clausen & Edlund & Ørgaard 2009, p. 68 in Danish law. The same distinction is found in the Finnish Unfair Business Practices Act, see RP 114/1978, p. 10.

47 The example is mentioned in RP 8/1977, p. 15, Kivivuori et al. 1978, p. 34, Kemppinen 1978, 1:5, Wilhelmsson 1989, p. 102, Bärlund 2002, p. 43 and Herler 2007, pp. 28 and 30.

48 The Consumer Complaints Board in several cases has ruled on what should be considered a sufficient activity for the person to be considered a business undertaking in the CPA's sense. In case dnro 84/33/3042 and 84/33/3712, the Board concluded that a person who had bought 4-5 cars for resale should be perceived as a business undertaking. Similarly, the Board considered in case dnro 91/36/1057 that the sale of five litters during a period of four years made the person a business. In the same direction was the case by the Turku Court of Appeal January 25, 2002, S 00/2253, mentioned by Ämmälä, Tuula, *Suomen kuluttajaoikeus*, Talentum, Jyväskylä 2006, pp. 17-18. However, the Board in the cases dnro 85/36/1057 and 85/36/2605 was of the opinion that the sale of 1-3 litters in a few years' time did not constitute business activity.

49 RP 8/1977, p. 16, Wilhelmsson 1989, p. 103 and Kivivuori et al. 1978, p. 34.

50 RP 148/1987, p. 16, KB 1987:4, p. 121 and Lindberg 2006, p. 32.

51 Määttä 2004, p. 58.

undertaking.⁵² These activities are usually of systematic procedures and of a certain amount.⁵³ According to *Kalle Määttä*, the public community is always acting as a business undertaking if it has organized its activities in the form of a company.⁵⁴ This is quite understandable, because the different company forms are available when a party wants – for various reasons – to engage in business activities other than as an individual tradesman.⁵⁵

Within the consumer law scholarship, the business risk is not seen as an absolute characteristic of the activities of the business undertaking, as a public authority can often be operating without entrepreneurial risk in the form of a company. Despite this, the authority is perceived as a business undertaking.⁵⁶

The same requirements exist in the Consumer Sales Directive⁵⁷ as well as in Swedish,⁵⁸ Norwegian⁵⁹ and Danish⁶⁰ law. In terms of the professionalism criterion, it should be noted how the corresponding definition in Art. 1(2) (c) of the Consumer Sales Directive is designed. In place of the adverb ‘professionally’, the legislator has chosen to use an adverbial “in the course of his trade, business or profession”, which functions independently without the need to consider against whom – consumers or other business undertakings – the activity is addressed.⁶¹ In the DCFR, the concept of business contains the phrase “for purposes relating to the person’s self-employed trade, work or profession”, which in my opinion describes the professionalism criterion.

4.3 *The Criterion of Offering*

Section 5 in Chapter 1 of the CPA contains an exhaustive list of different forms of activities that are attributed to a business undertaking, i.e. offering, selling or

52 Määttä 2004, p. 63.

53 Lindberg 2006, p. 32.

54 Määttä 2004, p. 63.

55 See Airaksinen, Manne & Jauhiainen, Jyrki, *Yritysmuotojen pääpiirteet* in Rissanen et al. 2006, p. 119.

56 Kivivuori *et al.* 1978, p. 35.

57 This is implied already by the wording “in the course of his trade, business or profession”. See also Serranok Luna, *Article 1: Scope and definitions*, in Bianca Massimo C., Grundmann, Stefan (eds.), *European Sales Directive - Commentary*, (Antwerp: Intersentia 2002), p. 114.

58 Herre 2009, p. 67, who formulates the requirement by the words “acts professionally”.

59 Løchen & Grimstad 2003, p. 20. Tverberg 2008, p. 88 uses the concept of “professional”. As I mentioned in footnote 19 *supra*, the concept of a professional seller was used in Sec. 4 in the Norwegian Sales Act until a separate Consumer Sales Act was enacted in 2002.

60 In Danish law, the term professional is used, see Madsen & Bruun Nielsen 1986, p. 56.

61 When Micklitz *et al.* 2009, p. 159 describes the concept of seller in the Consumer Sales Directive Art. 1(2)(c), there is a reference to the corresponding concept in the Unfair Contract Terms Directive 93/13/EEC. About this concept, Micklitz *et al.* 2009, p. 135, in connection with the boundary to public utility undertakings, states: “Private companies, however, would come under the scope of application at any event.”

otherwise transferring consumer goods or services.⁶² At first glance, one could imagine that only those activities are regulated in the CPA, since the concept of a business undertaking is dependent on the definition of those activities. A literal interpretation could lead a reader to believe that e.g. an advertising agency creating advertising for a wholesaler does not engage in activities of a business undertaking as defined in the CPA. The advertising agency's activities are directed only to other companies, i.e. wholesalers. By a similar literal interpretation one could possibly believe that an advertisement in which a company promotes only its own company's image without mentioning any consumer goods or services would mean that the marketing is not conducted by a business undertaking in the CPA's sense.

However, the starting point is that here, in the same way, the concept of business undertaking should be interpreted broadly. The scholarship therefore has regarded it as obvious that the advertising agency can be regarded as a business undertaking in the CPA's sense, as well as the company which is engaged in company image marketing, if the addressees of the marketing are consumers.⁶³ Among the cases brought to the Consumer Ombudsman, we find a case where a company invited consumers, i.e. prospective clients, to drink mulled wine. The company was considered by the Consumer Ombudsman to be a business undertaking in the CPA's sense, even though the business undertaking in connection with the offering of mulled wine did not offer consumer goods for sale, sell or otherwise offer such goods.⁶⁴

It can be argued that the criterion of offering has been watered down when it is interpreted beyond its linguistic boundaries as set out in Section 5 of Chapter 1 of the CPA. The scholarship has nevertheless determined that the CPA does not apply to a business undertaking which only buys goods from consumers.⁶⁵ Such kind of activity occurs among traders who engage in precious metals, antiques, old books or other collectibles. It is not uncommon for these businesses to target their marketing to consumers in which they try to attract customers who sell objects.⁶⁶ It goes without saying that we should be able to

62 When interpreting the concept of business undertaking, Section 1 of Chapter 1 of the CPA must also be considered. The provision is actually one of the few original provisions that remain from the original 1978 act. This provision gives the ultimate borders to the scope of the Act, as it reads: "This Act applies to the offering, selling and other marketing of consumer goods and services by businesses to consumers. The Act applies also where a business acts as an intermediary in the transfer of goods or services to consumers." In the *travaux préparatoires*, emphasis is placed on the fact that a comprehensive provision has been sought. It is interesting to note that the commentary written by the drafting civil servants, stresses that too much emphasis should not be given to the words used in the provision. The advice is given that conclusions based on the selected words in Section 1 of Chapter 1 of the CPA must be drawn with caution. See Kivivuori *et al.* 1978, pp. 25-26.

63 Wilhelmsson 1989, pp. 89 and 103. The example concerning the advertising agency is also found in RP 8/1977, p. 13.

64 Kuluttajansuoja 7/1983, p. 17.

65 Wilhelmsson 2006, p. 927 and Wilhelmsson 1989, p. 87.

66 An example of this is an approximately 10x10 cm big advertisement (author's translation), "Do you have stamps/letters or coins to sell?", found in the newspaper Hufvudstadsbladet 21/09/2010.

set the same requirements for fairness and good faith as regards other marketing from business undertakings to consumers, according to Chapter 2 of the CPA in the case of this form of marketing. The same applies to the fairness of contractual terms according to Chapter 3 of the CPA. Of course, Chapter 5 does not apply to traders' buying activities, since the chapter applies only to consumer sales, *i.e.* consumers buying consumer goods.

One argument for allowing "purchase advertising" to be covered by the CPA is that the CPA applies to "image advertising", *i.e.* advertisements for the company's image. If the business undertaking involved in a purchasing activity from consumers, sells as well utilities to consumers, the purchasing advertisement will serve as advertising even for the sales operations.

The criterion of offering has been problematic after the implementation of the EC directive on unfair commercial practices, as there have been voices propagating for that the directive must be interpreted to also include the marketing of the trader's buying activity if it is addressed to consumers.⁶⁷ It seems that the scope of the CPA should have been reviewed in conjunction with the implementation of the directive, so that the CPA with certainty would be as extensive as the directive.⁶⁸

In Section 1 of the Swedish Consumer Sales Act, the concept of seller contains the notion of "is acting for purposes related to their own business". The term is much broader than the scope of the Act, which regulates the sale and transfer of movables.⁶⁹ The DCFR also has a broad way to describe the activities of the business: "acting for purposes..." The Consumer Sales Directive defines the seller in a narrow way in Article 1(2)(c): a "person who, under a contract, sells consumer goods". Here, the definition is formulated in line with the scope of the directive.

67 Howells, Geraint, Micklitz, Hans-W. & Wilhelmsson, Thomas, *European Fair Trading Law - The Unfair Commercial Practices Directive*, Ashgate, Bodmin Cornwall 2006, p. 55. See the Commission Staff Working Document - Guidance on the Implementation / Application of Directive 2005/29/EC on Unfair Commercial Practices, 03/12/2009, SEC (2009) 1666, p. 9, which clearly argues that purchasing activities are not covered. In Sweden, the concept of marketing in the Marketing Act since 1995 also includes purchase advertising, see *Otillbörliga affärsmetoder*, SOU 2006:76, p. 196. An interesting fact is that the directive in the United Kingdom has been implemented so that the Act also covers traders' buying activities, see Consumer Protection from Unfair Trading Guidance on the United Kingdom Regulations (May 2008) Implementing the Unfair Commercial Practices Directive, p. 15, www.oft.gov.uk/shared_of/business_leaflets/cpregs/oft1008.pdf (visited 14/09/2011).

68 In RP 32/2008 till Riksdagen med förslag till lag om ändring av 2 kap. i konsument-skyddslagen och av vissa lagar som har samband med den, the question whether the scope of the CPA is at least as wide as the scope of the directive is entirely ignored. The only discussion is whether the scope of Ch. 2. is sufficiently wide, see RP 32/2008, p. 8.

69 This also concerns Norwegian and Danish law.

4.4 *The Consumption Utility Criterion*

The concept of business undertaking is special as it refers to another key concept in Chapter 1 of the CPA, *i.e.* the concept of consumption utility as found in Section 3. The concept of consumption utility was also reformed in 1994:

“For the purposes of this Act, *consumption utilities* are defined as goods, services and other merchandise and benefits that are offered to natural persons or which such persons acquire, to an essential extent, for their private households.”

The reform led to an extension of the previous concept so that it now covers all goods and services offered to individuals or which individuals, to an essential extent, acquire, provided that the goods and services are used in private households. The prerequisite that a utility should not be considered a consumer good or service, therefore, is that it is offered to others than natural persons and used almost exclusively elsewhere than in private households. The idea was that any promotion of the business undertaking addressed to the citizens as individuals should fall within the scope of the CPA.⁷⁰ The scholarship has therefore indicated that the concept of consumer goods and services, because of its wide scope, so to speak has become meaningless and that the scope of the CPA to a large extent is determined by the definitions of who are consumers and business undertakings.⁷¹

An example of a commodity that the Consumer Complaint Board did not consider as consumer goods was a light building for machines, which a consumer had acquired. I have myself, in a different context, argued that a light building for machines is usually not offered to, or to any significant degree used by, private individuals for private households.⁷² As a result of the fact that there are utilities that are not consumption utilities, the consumption utility criterion must be given independent significance to the concept of business undertaking.

In relation to the Unfair Commercial Practices Directive, such restrictions are problematic because there is no such limitation in the directive. A consumer, buying a machine hall from a trader, must be protected by the Directive against unfair practices in the customer relation regulated in Section

70 RP 360/1992, p. 8. This statement is also an argument for including purchase advertising targeted to consumers.

71 Wilhelmsson 1989, p. 96. *See, however, Castrén, Martti, EU-Suomen markkinaoikeus, Kauppakaari, Jyväskylä 1997, p. 28, who believes that the concept of business undertaking in the CPA is narrower than that of the Competition Act due to the fact that the definition of CPA includes the concept of consumption utility. To that extent, he is quite right in that there are goods that are not perceived as consumption utilities.*

72 *Se Consumer Complaints Board 94/37/1903 and Bärnlund 2002, p. 50 note. 148.*

1 of Chapter 2 of the CPA.⁷³ Now the situation falls outside the scope of the CPA due to the definition of a consumption utility.

In the case FSC 2008:107, the Supreme Court gave in its reasoning significant importance to the fact that the concept of consumer goods and services contains the words in their plural form, *i.e.* consumption utilities.⁷⁴ According to the FSC, a professional who offers a single consumer good or service occasionally, and as an isolated event, is not a business undertaking in the CPA's sense.⁷⁵ I return to the sustainability of this argument in Section 5 below.

Interestingly, both Section 1 of the Swedish Consumer Sales Act and Article 1(2)(c) of the Consumer Sales Directive contain a reference to consumer goods in a plural form.⁷⁶ The Swedish provision contains the phrase "sale of goods" and the directive contains in a similar way the expression "consumer goods".⁷⁷

There are no traces in the scholarship of the opinion that selling of one sole versus many consumer goods could be decisive regarding the application of the concept of business undertaking. My own view is that the use of the plural form is a normal way of writing legal provisions, and there is no requirement that there must always be more than one single entity.

4.5 *The Criterion of Consideration*

The concept of business undertaking in the CPA contains finally the expression "for consideration" to demonstrate that the activity of the business undertaking

73 Compare Howells & Micklitz & Wilhelmsson 2006, p. 69, which obviously has taken over the Finnish way of thinking about an individual consumer who acquires a commodity normally not offered to consumers, *i.e.* he should not be protected by the Directive. This position can be compared to the view on the Directive in the United Kingdom: as soon as consumers potentially are affected, the Directive applies. *See* Consumer Protection from Unfair Trading 2008, p. 15.

74 A comparison can be made here to how the German legal scholarship has defined the scope of the Consumer Sales Directive: "Der Anwendungsbereich der Verbrauchergüterkaufrichtlinie ist auf ein Vertragsverhältnis beschränkt, in dem ein professionell tätiger Verkäufer (Art 1 Abs 2 lit c) einem Verbraucher (Art 1 Abs 2 lit a) ein Verbrauchsgut (Art 1 Abs 2 lit b) ... verkauft." *See* Roland Michael Beckmann, *BGB zu §§ 433 et seq.* in Staudinger, Beck-online, <http://beck online.beck.de> (06/09/2011), Rn 28. The concept of consumer goods is here in the singular form.

75 Castrén 1997, p. 28, also uses the plural form of the concept of consumption utility when discussing the concept of business undertaking in the CPA: "[I]t is required that consumptions utilities are kept for sale, sold or otherwise offered" (author's translation).

76 In the Norwegian Consumer Sales Act, the bare noun "thing" is used and does not reveal in the Norwegian language whether it is a plural or singular form as both forms are equal. The concept of "selling of things" to a consumer is used. The Danish law is unambiguously singular in Section 4a of the Sales Act: "Ved forbruger køb forstås *et køb*, som en køber (forbruger) foretager hos en erhvervsdrivende, der handler som led i sit erhverv, når køberen hovedsagelig handler uden for sit erhverv" (italics added).

77 The DCFR contains no reference to consumption utilities in connection with the definition of the concept of business undertaking.

in general must not be gratuitous.⁷⁸ This does not prevent some of the services from being gratuitous. Only if a significant part of the activities is gratuitous, such as e.g. when the Salvation Army distributes food to the needy, does the CPA not apply.⁷⁹ However, the organization can carry out activities, such as the activities of the Salvation Army's second-hand shops, where the CPA may apply.⁸⁰

The consideration criterion is used, as stated above, also as a criterion for the concept of business undertaking in Section 3 of the Competition Act.⁸¹ As for the concept of business undertaking in the CPA, each performance need not be subject to consideration in order to lead to the application of the Competition Act.⁸² The consideration criterion and the relationship between a gratuitous and remunerated performance have received particular attention in the Supreme Administrative Court's ruling of January 31st, 2005.⁸³ In that case, the Supreme Administrative Court found that the fact that the Finnish Traders' Association's gratuitous web portal, which was subject to competition law review, gave the Finnish Traders' Association's income as a result of selling ad space in the portal, could not be ignored. According to the Supreme Administrative Court, the activity was carried on for consideration. The Supreme Administrative Court referred the case back to the Market Court.⁸⁴

The Consumer Sales Directive, as well as Swedish, Norwegian and Danish law, does not express a separate consideration criterion, but the criterion is implied when the contract is a sales contract.⁸⁵ Neither does the DCFR have an

78 See Section 4.1 *supra*.

79 Bärlund 2002, p. 44. The situation *seems* to be the same in Danish and Norwegian law, *see* Vinding Kruse & Clausen & Edlund & Ørgaard 2009, p. 67 and Tverberg 2008, p. 91.

80 This is also the case when applying the Finnish Unfair Business Practices Act, *see* RP 114/1978, p. 10, where it is mentioned that economic activity for charity purposes can be a form of business activity.

81 Lindberg 2006, p. 33, claims the criterion of consideration is the same as the income criterion. From the Legislative bill RP 360/1992, p. 46, concerning Section 5 of Chapter 1 of the CPA one can read that there is a difference between these two criteria. The income criterion is needed to move such cases outside the application of the law where e.g. a municipal health center treats patients for a small fee. Strictly speaking, the fee fulfills the criterion of consideration, but due to the fact that the income criterion is not met, the CPA is not applied. However, one may ask whether the income criterion fully captures all situations if the criterion also allows gratuitous performances in some cases.

82 *See* RP 148/1987, p. 16 and KB 1987:4, p. 121, which state that the activity of a business undertaking can have the character of not being gratuitous, even if some performances may be gratuitous. *See also* Määttä 2004, p. 57.

83 Dnr 1338/2/03 taltio 208.

84 The Market Court had decided on the case 72/03 and held that since there was no charge for the portal, the Finnish Traders' Association could not be considered to fall under the concept of business undertaking.

85 The sources I had access to do not address the issue of gratuitous favors. In the Norwegian legal scholarship, the payment expectation is associated with purchase; *see* Selvig & Lilleholt 2010, p. 102.

explicit consideration criterion although it is clearly stated in the commentary that remuneration is normally required.⁸⁶

4.6 *Summary*

There is no doubt that of the five criteria discussed above, the income criterion and the criterion of professionalism are of great relevance when the definition of the concept of business undertakings is concerned. In terms of the criteria of offering and consumption utility, however, arguments can be made against their position as defining criteria for the concept of business undertaking in the CPA. The criterion of offering has been interpreted broadly in such a way that it has been diluted. It is also clear that the Directive on Unfair Commercial Practices has stretched the limits of the concept further, especially if purchase advertising directed at consumers should be covered. The criterion of offering is then too narrow. Similarly, I have some doubts on the consumption utility criterion as it is shaped in the CPA as there are no similar restrictions - in my opinion - in the Directive on Unfair Commercial Practices. Finally, the criterion of consideration could obviously be subsumed under the income criterion, especially when there are difficulties in distinguishing it from the income criterion. It does not matter whether the criterion of consideration is kept separate from the income criterion or whether it is subsumed under the income criterion for my criticism of the FSC's ruling.

5 **A Closer Analysis of the FSC's Interpretation of the Concept of Business Undertaking**

5.1 *The FSC's Interpretation Seems to be Literal*

From the above, it appears that the criteria in the *travaux préparatoires* and the legal scholarship have been assessed relatively independently and extensively. From that point of view, the case FSC 2008:107 is a clear exception, since the FSC connects two of the criteria in a way that leads to a concept of business undertaking in a narrower meaning than previously. The FSC thus provides a clearly restrictive interpretation of the concept of business undertaking, as the professionalism criterion is connected to the consumer utility criterion. It appears that the court had the perception that the definition of business undertaking in the CPA is an exception to the general concept of seller, which may be why the FSC has chosen a restrictive interpretation of the concept of business undertaking. This is hardly consistent with the general statements in the *travaux préparatoires* and the legal scholarship, according to which the concept should be interpreted broadly.

In its ruling, the FCS indicates as an absolute criterion that the professionalism criterion will apply specifically to consumer goods:

⁸⁶ von Bar & Clive 2009, p. 93.

“Since the company has not otherwise traded with horses or other kinds of consumer goods and thus the activity was not carried out professionally, the company had not in the horse sale acted as a business undertaking in the sense of the Consumer Protection Act.”⁸⁷

This is an innovation, founded in neither the *travaux préparatoires* nor the legal scholarship. Regardless of the fact that the seller was a limited company, which carried out business in the form of consultancy targeting other companies’ senior management, the activity of the company did not constitute the activity of a business undertaking in the CPA’s sense, according to the FSC. The FSC thus views the situation as that there are businesses, as in the Trade Register Act’s sense, which fall under the concept of business undertaking in the CPA’s sense, and the corresponding equivalent business undertakings registered in the Trade Register, which fall outside the concept of business undertaking in the CPA when having a consumer as their counterparty.

Without significance was also the fact that the company’s activity as set out in the Trade Register included that the company could own horses, as it was not proven that the company would have sold horses other than the horse involved in this case. One can only speculate on how many horses the FSC would have required before it would have found reason to hold that there was a professional sale of horses to consumers: perhaps *one more* horse would have been enough.

The facts of the case were such that the company’s main activities were not targeted at consumers, which, according to the FSC, resulted in the statement that the company’s activities were not professionally related to consumer goods.⁸⁸ Does the range of the activities targeted at consumers really have an independent meaning in the context of the business undertaking’s other economic activities when assessing the applicability of the CPA?

Interestingly, the FSC requested a statement from the Consumer Dispute Board. The Board is very concise in its conclusions. The Board indicates that there are no cases dealing with a company selling a single consumer good in such a situation that the company’s business in general does not include the sale of consumer goods for consideration. In conclusion, the Board maintains that the company in this case is not a business undertaking within the wording of Section 5 of Chapter 1 of the CPA.⁸⁹ The Board justifies its position only with a reference to the wording of the provision.

This view of the Consumer Dispute Board in my opinion is not in tune with an earlier case in which the Board took a position on the question whether a

⁸⁷ Author’s translation. FSC 2008:107, the latter part of the heading.

⁸⁸ The reasoning is also essentially the same in the judgments of the District Court and the Court of Appeal.

⁸⁹ Statement Dnr 49/72/2008 of the Consumer Complaint (*sic!*) Board, plenary session 09/16/2008. The Consumer Complaint Board had already on March 1, 2007 been renamed the Consumer Dispute Board. *See* Section 26 of the Act on the Consumer Dispute Board (8/2007).

non-profit organization would be considered a business undertaking. There the Board stated:

“The concept of business undertaking should be interpreted broadly so that the concept applies to companies, including public corporations, voluntary associations, other private corporations, etc., if the party seeks economic benefits from its activities.”⁹⁰

I have difficulty interpreting the justification of the Consumer Dispute Board in any way other than that all the various forms of companies *per se* fall within the concept of business undertaking. It is therefore assumed that at least all companies are business undertakings in the CPA's sense. It has been argued in the scholarship that the concept of business undertaking in the CPA is more extensive than in the Trade Register Act. According to Section 3 of the Finnish Trade Register Act, “general partnerships, limited partnerships, limited liability companies, mutual insurance companies, cooperatives, savings banks, housing companies, insurance associations, commercial enterprises within the meaning of the Act on State Enterprises (627/87) and housing cooperatives” are those legal persons which must make due notification to the Trade Register.⁹¹ Of these, all are designed to receive revenues. One could imagine that housing companies and cooperatives are outside the concept of a business undertaking in the CPA, but this is not the case. In the *travaux préparatoires* concerning an amendment to the Act on housing cooperatives, there is a categorical statement that a housing cooperative whenever it enters as a landlord into a tenancy agreement with a natural person is acting as a business undertaking.⁹² The same must apply to any housing company which rents an apartment or other space inside the company's building to a consumer.⁹³

90 Author's translation. See Kuluttajansuoja 5/2000, p. 20. The cases decided in a plenary session were dnr 99/35/431, 99/82/1177, 99/82/1366, 99/82/1197 and 00/39/938.

91 The non-profit organizations and individuals are obliged to submit a notification according to Section 3 of the Trade Register Act, if they are engaged in business.

92 RP 100/2002 till Riksdagen om fritt finansierade bostadsrättsbostäder och annat utvecklande av bostadsrättssystemet, p. 41: “Rights to use an apartment on the basis of housing contracts are also subject to the Consumer Protection Act, as the provider of the advantage is a business undertaking and the person using the advantage is a natural person. The contracts are thus *always consumer contracts*.” Italics added, author's translation.

93 This I claim, despite it being categorically stated on the Consumer Complaint Board's website (author's translation): “For example, a housing company is not a business undertaking, and disputes between a shareholder and the housing corporation are not dealt with.” See “www.kuluttajariita.fi/kuluttaja-asiat/tavarat-ja-palvelut/?language=%20fi&linkID=1&subLinkID=1” (visited 09/09/2011). The latter part of the quoted text is obviously correct, as the company's legal relationship between a shareholder and housing corporation is not affected by the CPA. See Consumer Dispute Board 2713/39/08 where the subscription of golf shares in a company fell outside the competence of the Board. However, I consider it misleading to categorically assert that housing companies are not traders, as the company in relation to third parties (including *lessees*) may well be engaged in the role of a business undertaking. I would also stress that this is a different thing compared to situations where one may equate a housing company with a consumer. About this, see Bärlund 2003, p. 33 note. 76.

As discussed above in Section 4.2, the different types of companies exist for cases where a party wants to carry on business. Therefore, a limited company always meets the criteria of a business undertaking in Section 5 of Chapter 1 of the CPA, if the counterparty is a consumer and consumption utilities are involved.

I will now turn to the question of whether the range of activities aimed at consumers has an independent significance. The question is not explicitly discussed in the literature. Despite this, authors have indicated that they perceive that the range of professional activities targeted at the consumer is irrelevant.

In his textbook on consumer law, Thomas Wilhelmsson, on the question of the applicability of the CPA on merchants other than those business undertakings which are in close contact with consumers, states namely:

“[A]s sellers in the CPA's view, can serve not only retailers of consumer goods. The law can be equally applicable to wholesalers, importers, producers, advertising agencies, etc., *to the extent that they take measures that are targeted directly at consumers.*”⁹⁴

The term “to the extent that” implies that as soon as such measures are aimed at consumers, the CPA is applicable. There is no requirement that an activity must separately be considered professional.

I have argued that the area of the business undertaking's activity is not decisive for the applicability of the CPA. The decisive factor is whether the party is a consumer and if consumer goods are involved:

“The concept of business undertaking is in that way comprehensive in that the sales of such consumer goods not directly falling into the scope of the trader's normal activities do not relieve the seller of his position as a business. *E.g.* the Consumer Complaint Board concluded that a construction company acted as a business undertaking when the company sold a boat to a consumer.⁹⁵ This means that it is usually not necessary to establish what the area of the business's activity is before applying the CPA.”⁹⁶

94 Author's translation, italics added. Wilhelmsson 1989, p. 103.

95 Consumer Complaint Board 87/33/3077. The area of the business activity is thus not relevant to the application of the CPA in a particular case. That was also the case in 87/33/2967, where a chemical company sold a car.

96 Author's translation. Bärlund 2002, pp. 44B45. *See also* Herre 2009, p. 69, Tverberg 2008, p. 87 and Madsen & Bruun Nielsen 1986, p. 56. Vinding Kruse & Clausen & Edlund & Ørgaard 2009, p. 67, indicates that there is no requirement that the sale of goods would be the vendor's main business. Even the commentary to the DCFR mentions the example, where a “bookshop sells old computers and office equipment to a private person”. According to the commentary: “It is irrelevant that the goods sold are not of the kind normally sold by the business.” von Bar & Clive 2009, 93. It is thus true that the example contains a business undertaking that normally sells consumer goods. Would it not have been appropriate to have an example where a business undertaking normally not selling consumer goods sells something to a consumer? In my opinion the CPA will also apply here.

There was thus no need for me – or for the Consumer Complaint Board – to assess whether the construction company's activities in general were aimed at consumers or not.

Brita Herler is perhaps the author who most clearly articulates that all types of companies focusing on making business are business undertakings in the CPA's sense:

“The definition of a business undertaking applies in fact to all companies regardless of corporate form as limited liability companies, limited partnerships, general partnerships as well as co-operatives in general. Also private firms and others engaged in commercial business belong to the category of business undertakings.”⁹⁷

Herler does not mention that there could be a relationship between a business undertaking and a consumer where the business undertaking is seen as a non-business in the CPA's sense.

This perception, that there basically is one group of businesses, is also described in the draft legislative bill to the Consumer Protection Act, where there was no legal definition of a business undertaking. I find it difficult to imagine that the drafters would have had in mind a two-tier concept of business undertaking in such a way as the FSC imagines the situation, where the legislative bill states:

“The act can only apply if the goods or services are offered by business undertakings. When the seller is a private individual, the contractual relationship, which exists between the parties, usually cannot be compared with the corresponding relationship between business undertakings and consumers. One cannot always require of non-businesses that they can take into account the details of this act at the conclusion of a sale, for example. It would therefore not be appropriate to put them in the same position as business undertakings.”⁹⁸

In the draft legislative bill, other than business undertakings are here considered equals to individuals. In neither the *travaux préparatoires* nor the legal scholarship can any trace be found of the possibility that we could think of categories of persons that under ordinary language are called business undertakings, but would not be considered as business undertaking according to the CPA when the other party is a consumer.⁹⁹ This division of the business

97 Author's translation. Herler 2007, p. 29.

98 Author's translation. Kivivuori et al., LJP 12/1974, p. 24.

99 It is important to note that Lainlaatijan opas, Edita, Helsinki 1996, p. 75, stresses that the words of the general language must not be defined in legal text in a way that deviates from the general language. The interpretation of the FSC would lead to a situation where there would be such businesses under common language and under other legislation that are not traders in the sense of the CPA. It is worth comparing with the solution chosen in Section 26 of Chapter 2 of the Finnish Land Code (540/1995). The concept of business undertaking is not defined, but instead the application of some provisions are restricted to “business undertakings which professionally develop or sell real estate and which in the purpose mentioned above have transferred the property to the vendor or his predecessor.” The

collective – as the consumer’s counterparty – in business undertakings that fall within and others that fall outside the concept of business undertaking in the CPA is consequently a new construction in the court’s reasoning in the case FSC 2008:107.¹⁰⁰

The FSC’s ruling is diametrically opposed to the one in the Swedish case NJA 2001 p. 155, where the Swedish Supreme Court extended the concept of business undertaking beyond its wording.¹⁰¹ Even if the seller explicitly was a private person, the Consumer Sales Act would apply, as the selling of the boat in practice “had a closer connection to Torbjörn O’s business than to his private life.”¹⁰² The Swedish Supreme Court gives a broad interpretation of the concept “in his professional activity” so that it also includes property that the seller has bought for his private life, but for some reason has been used in the business.

It becomes clear from the above that the Finnish courts in the case FSC 2008:107 have resorted to a literal interpretation¹⁰³ of the concept of business undertaking, ignoring almost all other arguments.¹⁰⁴ I have argued that the FSC

interpretation of the FSC in case 2008:107 would have been more understandable if the provision in the CPA would have been designed differently and if the scope of the CPA would have been limited to such businesses “that, in order to obtain income or other economic benefit, offer, sell or otherwise transfer consumer goods or services on a professional basis and for consideration.” The wording would then have clearly shown that the law maker intended that there may be other business undertakings that deal with consumers. Compare with Aulis Aarnio, *Laintulkinnan teoria - Yleisen oikeustieteen oppikirja*, WSOY, Juva 1989, p. 76, who apparently claims that a departure from normal language is possible, if the legal definitions are expressed in the form: “In this Act, by x is meant y.” According to this reasoning, Section 5 of Chapter 1 of the CPA would show that there is a desire to deviate from the normal language.

100 However, a scenario with two competing set of rules for consumer contracts has been described in the legal scholarship: the Sale of Goods Act (355/1987) instead of the rules in Chapter 5 of the CPA on consumer sales shall apply to a relationship between a seller and a consumer. This is because the scope of Chapter 5 of the CPA is narrower than the scope of the entire CPA as Chapter 5 only deals with the purchase of consumer goods. See Wilhelmsson, Thomas, Sevón, Leif & Koskelo, Pauliine, *Huvudpunkter i köplagen*, Talentum, Hämeenlinna 2006, p. 11.

101 The judgment was unanimous regarding the concept of business undertaking.

102 Author’s translation.

103 Peczenik 1995, p. 330, speaks of literal interpretation, while Lars Erik Taxell, *Rätt och demokrati*, Åbo akademi, Turku 1976, pp. 279-280 posits as a basis for interpreting legal norms the wording of the norm. Hellner, Jan, *Metodproblem i rättsvetenskapen - Studier i förmögenhetsrätt*, Jure, Stockholm 2001, p. 195, indicating that not even the linguistic level is easy to master: “It is surprising how often skilled analysts, although they are well versed in the subject, are reading the same text differently. *Travaux préparatoires* and historical factors may give guidance, but it is always important to examine the exact wording” (author’s translation). Hellner emphasizes that after reading the text carefully, a distinction must be made (author’s translation) between “a deliberate nuance and a coincidence of wording”, as guidance is available from the legislative history and scholarship. It seems in case FSC 2008:107 that the FSC simply read the text of the provision and ignored the *travaux préparatoires* and scholarship.

104 According to Aulis Aarnio, the Supreme Court makes an exception to the more elaborate reasoning models when it reasons with only a reference to the wording of a provision.

has ignored both the indications in the *travaux préparatoires* and in the legal literature that the concept should be applied broadly. My question therefore becomes whether the FSC should have justified its restrictive interpretation in any way. Can one expect the court to justify why it departs from the interpretation which so clearly has been reflected in both the *travaux préparatoires* and the legal scholarship? My answer to this is in the affirmative.

5.2 *The FSC Appears to Ignore the European Context*

My firm belief is that the European context cannot be ignored in this case, as the scope of the Consumer Sales Directive also covers the case. Without comment, the FSC overlooks the fact that Finland has implemented the EC Directive on consumer sales and that the implementation of the directive was carried out under the assumption that the legal definitions in Chapter 1 of the CPA were at least as broad as the definitions of the Directive.¹⁰⁵ The definition of seller in article 1(2)(c) of the directive covers both natural and legal persons, who through contracts and as a part of their business or profession, sell consumer goods. We find that instead of the expression “sells or otherwise transfers consumer goods or services on a professional basis” as in Section 5 of Chapter 1 of the CPA, the directive uses the expression “sells consumer goods in the course of his trade, business or profession”.¹⁰⁶ A linguistic interpretation of the directive does not in my opinion support the view that the provision explicitly requires that the sale of consumer goods separately has to have such an extent that such sales, regardless of the trader's other activities, should be considered as professional.

The wording of the directive corresponds in my mind to the traditional view of the Finnish legal literature analysing the extension of the concept of business: every sale of consumer goods in the business undertaking's activities will normally mean that the criteria of the concept of business undertaking in Section 5 of Chapter 1 of the CPA are met when the other party is a

The Bielefelder Kreis in the 1980s compared the various ways of reasoning by a number of Supreme Courts in different countries. Aarnio has found that this reasoning model (“single argument pattern”) could be observed in the cases of the Finnish Supreme Court. See Aarnio, Aulis, *’Oikeussäännöksiä tulkitsemassa’ Interpreting Statutes. A Comparative Study* in *Korkein oikeus 75 vuotta – Högsta domstolen 75 år*, Lakimies-liiton kustannus, Jyväskylä 1993, pp. 262-263. It is obvious that this reasoning model is still used by the Supreme Court in 2008, although Aarnio indicates between the lines that open pro et contra-arguments are characteristic of good jurisprudence.

105 This, in my opinion, is not a jack-in-the-box argument, but the court should simply consider EC law in the areas which are clearly influenced by it. As to jack-in-the-box-arguments, see Wilhelmsson, Thomas, *Vieteriukkoteoria EY-oikeudesta*, Oikeustiede - Jurisprudentia XXX, Suomalainen lakimiesyhdistys, Helsinki 1997, pp. 357-374.

106 In English, the phrase is “sells consumer goods in the course of his trade”, in German “*im Rahmen ihrer beruflichen oder gewerblichen Tätigkeit Verbrauchsgüter verkauft*”, and in French “*vends des biens de consommation dans le cadre de son activité professionnelle ou commerciale*”.

consumer. In fact, this is a pervasive feature of the EC legal directives, that the criterion for the business role is that the person must act within the limits of his trade or profession. The extensive comparative study of the consumer law *acquis* describes the situation as follows:

“[T]he main purpose of the notion of business is merely to make clear that the directives apply to B2C transactions, not to C2C relationships.”¹⁰⁷

It is clear that the company in case FSC 2008:107 cannot be described as a private individual or a consumer. For me, it is obvious that the FSC in its interpretation does not take into account the scope of the directive, so that the interpretation becomes too narrow and therefore stands in breach of Finland's obligations to implement the EC Directive on consumer sales.¹⁰⁸ The FSC has not rendered a correct decision.¹⁰⁹

5.3 *Should not the FSC Assess the Impact of its Ruling?*

That which is also surprising in the FSC's judgment is that the court does not make any impact assessment as to its interpretation. What are the implications of the new interpretation for consumers? These impacts are being ignored by the FSC itself, but two published comments on the case refer to the likely consequences.

Significantly, the FSC finds that which is indicated as the company's activity in the Trade Register is irrelevant. This means that consumers should investigate the actual operations of a company in order to insure which law becomes applicable to the relationship.¹¹⁰ However, this can be an

107 Schulte-Nölke m.fl. 2008, p. 470. The DCFR only strengthens this view.

108 In late June 2011, the EU Parliament and the EU Council reached an agreement as to the content of the new, wider directive on consumer rights. In the most recent proposals, the business undertaking concept has had the same extent as in the previous directives. *See* Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM (2008) 614 final, Article 2(2): “‘trader’ means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.” In the latest version from the European Parliament, the concept of business undertaking is nearly equivalent to the concept in the DCFR. *See* Report on the proposal for a directive of the European Parliament and of the Council on consumer rights (COM(2008)0614 – C7 0349/2008 – 2008/0196(COD)) Committee on the Internal Market and Consumer Protection, Rapporteur: Andreas Schwab. Art 2(2) reads: “‘trader’ means any natural or legal person who, irrespective of whether privately or publicly owned, is acting for purposes relating to his trade, business, craft or profession and anyone acting on behalf of a trader in relation to contracts covered by this Directive”.

109 Herre 2009, p. 68 *note*. 37, gives a brief comment about the Finnish case FSC 2008:107. He concludes: “It is doubtful whether the outcome would be the same in Sweden.”

110 Toivola-Rekola, Päivi, *Kuluttajansuojalain soveltamisalasta*, Oikeustieto 1/2009, p. 7. Jaana Norio-Timonen, *Elinkeinonharjoittajan käsite ja kuluttajansuojalain soveltamisala*, in Timonen, Pekka (ed.), *KKO:n ratkaisut kommenttein*, Talentum, Helsinki 2009, p. 254,

overwhelming task for a consumer who will have difficulty establishing which rules apply.¹¹¹ This does not seem to worry the FSC, as it indicates that it is of no relevance whether the consumer may not be able to determine the other party's status.¹¹² Is this allocation of risk even reasonable?

Another factor that the FSC neglects in its ruling is the question of what the consumer's legitimate expectations are when he or she enters into a contract with a corporation, and whether the principle of protecting the weaker party is relevant when the agreement is concluded between a corporation and an individual. These circumstances have played a major role in the outcome of the case in other judgments of the FSC.¹¹³

Of course, the FSC should have carefully considered the consequences of its ruling in order to assess the correctness of the judgment. Olaus Petri's judging rules are still included in the statute book, which in Section 10 states that law should be applied cautiously (*all Lagh bör medh Beskedelighet driuffin warda*). If the judge therefore finds that the judgment culminates in a final result that has unfair consequences, this should give reason to consider whether the outcome of the judgment is correct.

6 Closing Words

The results of this article are twofold. Firstly, the concept of business undertaking in Section 5 of Chapter 1 of the CPA as it stands is in need of revision. In my opinion, the wording should be adjusted so that the likelihood of misinterpretation is reduced. The easiest way is to simplify the definition.

indicates that this way of interpretation may result in the consumer suffering an unpleasant surprise if his or her assessment of the business's status does not hold.

111 In an uncertain situation, the consumer has an interest to agree that the CPA will be applied, while the business undertaking, in contrast, has an interest not to conclude such an agreement, since it is usually more favorable for it if the CPA does not apply.

112 It appears that the FSC has a diametrically opposite view on the protection of the weaker party in connection with the consumer concept and the question of the existence of the "visibility criterion". With reference to the consumer being the weaker party, the opinion in the scholarship and case law is that it is the task of the business undertaking to show that a person has acted outside the consumer role. See Bärlund 2002, pp. 33-34, and the sources quoted there.

113 In recent court cases, the legitimate expectations of consumers have been given importance. In the household deduction case FSC 2008:91, the FSC gave two consumers the right to compensation, when the business undertaking failed to disclose that the company was not introduced in the prepayment register, and as a consequence of this, the consumers could not make household deduction in their taxes. The protection of the weaker party was highlighted in the service station case FSC 2010:69, where a cooperation agreement between the gas station chain, *i.e.* Neste, and a small limited partnership had been terminated by Neste despite the fact that the termination rights of Neste had been limited in the contract. As a result of the limited partnership being the weaker party, the FSC considered that there was no reason to broadly interpret the grounds for termination of the contract, and consequently Neste did not have the right to terminate the agreement.

The provision could read: “The business undertaking referred to in this Act, is an individual or a private or public legal person who professionally acts in order to receive income or other economic benefits.” The income criterion and the criterion of professionalism are thus the two criteria I have found to be relevant, whereas the relevance of the other three criteria in a general concept of business undertaking in the CPA is dubious. Therefore, the definition could be shortened.

Secondly, the following conclusion can be drawn from the case FSC 2008:107: The courts, including the FSC, have misinterpreted the proper extent of the concept of business undertaking in the CPA.¹¹⁴ I have argued that the FSC has interpreted the professionalism criterion in a way alien to the earlier views in the literature. The FSC has without any justification chosen a strictly literal interpretation that is not consistent with earlier views. Since the FSC’s interpretation is also not in tune with underlying EC law, its interpretation cannot be accepted. This view is further strengthened by the fact that Nordic law would obviously not reach the same result.

The FSC’s unsuccessful interpretation gives the legislator reason to intervene. In my opinion, the wording of Section 5 of Chapter 1 of the CPA should be adjusted to reduce the likelihood of similar misinterpretations. The reform of the EU directive on consumer rights will be timely so that the Finnish legislator can amend the wording of the current concept of business undertaking in the CPA in order to hinder future unsuccessful rulings by the courts.

A further harmonization of consumer law certainly means that there is a need to review how the concept of business undertaking should be developed at the EU level. However, it is far easier to avoid national peculiarities by interpreting concepts in a uniform way throughout Europe than by applying complicated general clauses in a homogeneous way. I do not think that the cultural differences between different member states will to any greater significance affect the interpretation of one of the fundamental notions of European consumer law, *i.e.* the concept of business undertaking. The starting point is, however, that the national courts have sufficient enough knowledge about the provisions on the European level to influence the national provisions.

Without doubt, case FSC 2008:107 in my opinion is a good example of the clash between the old world that the FSC still believes exists, and the new factual situation we experience as EU member states. National (Finnish) legal thinking must be adjusted to the new situation with a more complex, and perhaps therefore a more uncertain, legal situation in many fields of law. One of them is also without doubt consumer law.

114 It is regrettable that the case FSC 2008:107 is now cited in the book on Finnish legislation in connection with Section 5 of Chapter 1 of the CPA. This means that the case will be seen as guiding in practice, although the final outcome cannot withstand a critical review.