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Harmonization of the protection against misleading commercial practices: ongoing divergences in Central European countries

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Abstract

Research background: Modern European integration focuses on competition in the internal single market, embracing both competitiveness and consumer protection, and it aims at full harmonization in this arena. The hallmark, the Unfair Commercial Practices Directive from 2005, aims to overcome diverse social, political, legal and economic traditions. Is the implied protection against misleading practices an opportunity or a threat for Central European Regions?

Purpose of the article: The primary purpose is to comparatively describe and critically assess the transposed legal frameworks. The secondary purpose is to study and evaluate their coherence in the light of the case law and their impact in Central Europe, in particular whether it represents an opportunity or a threat for the smart, sustainable and inclusive growth, i.e. boosting competitiveness and innovation along with consumer welfare.

Methods: The cross-disciplinary and multi-jurisdictional nature of this paper, and its dual purposes, implies the use of Meta-Analysis, of various interpretation techniques suitable for legal texts and judicial decisions, of the critical comparison and of a holistic assessment of approaches and impacts. Legislation and case law are explored and the yielded knowledge and data are confronted with a field search and case studies. The dominating qualitative research and data are complemented by the quantitative research and data.

Findings & Value added: For over one decade, the Unfair Commercial Practices Directive has required full harmonization of the protection against, among other items, misleading commercial practices, by legislatures and judges in the EU. The exploration pursuant to the two purposes

suggests that this ambitious legislative and case law project entails a number of transposition approaches with varying levels of coherence, importance and impacts on the competitiveness and innovation of business and consumer welfare in Central Europe. Therefore, full harmonization should be either readjusted or relaxed.

Introduction

Two decades ago, the European Commission presented a legislative package regarding the promotion of integration, competition and consumer protection, including the Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, i.e. Unfair Commercial Practices Directive (“UCPD”). The UCPD is a full harmonization instrument of the protection against unfair business-to-consumer commercial practices matching with the EU ten-year long strategy, Europe 2020, for smart, sustainable and inclusive growth in the context of the single internal market (Staníčková, 2017; MacGregor Pelikánová, 2019a). It is relevant and legitimate to ask about the UCPD full harmonization regime and its application. The primary purpose is to comparatively describe and critically assess the transposed legal frameworks. The secondary purpose is to study and evaluate their coherence in the light of the case law and their impact in Central Europe. Both purposes are interrelated and require the exploration of legislative, academic and other sources while focusing on both qualitative and quantitative aspects. The need to overcome this fragmentation and diversification leads to the selection of the holistic approach and Meta-Analysis.

Firstly, a Literature review will be presented to consolidate the already available knowledge. Secondly, the research methodology will be described. Thirdly, the generated results will be comparatively presented. Next, a critical discussion will be offered. Last, propositions will culminate in conclusions assessing the UCPD project and its impact and addressing its short-comings. The exploration pursuant to the two purposes and around both hypotheses suggests that the UCPD is an ambitious project which entails a number of transposition approaches with varying levels of coherence, importance and impacts on competitiveness and innovation of business and consumer welfare in Central Europe.

Literature review

The global society is marked by vigorous, often aggressive, competition, advanced complex integration (Piekarczyk, 2016), human development

(Polcyn, 2018), progressive digitalization (Vivant, 2016), and enhanced innovations (Pohulak-Żołądowska, 2016) and standardized reporting (Jindrichovska & Kubickova, 2017). The modern European integration mixes supranational and intergovernmental approaches, while building upon both common law and continental law traditions (MacGregor Pelikánová, 2012; 2014; 2017) and oscillating between political desire, historical truth and economic reality (Chirita, 2014). Normative and other characteristics are centered on the concept of the single market (Cvik & Pelikánová, 2016) with significant institutional features and impacted by competing interest groups (Damro, 2012), differences in income distribution (Landmesser, 2019) and in general competition awareness (Rogalska, 2018; Flisikowski & Kucharska, 2018).

Europe 2020 aims at the smart, sustainable and inclusive growth (EC, 2010) which should take advantage of the technological and other potentials of the European economy (Balcerzak, 2016a) and lead to responsible stability (Pakšiová, 2016). It depends upon the commitment of all stakeholders (MacGregor Pelikánová, 2019c; Jindrichovska & Purcarea, 2011) and upon the success of the single internal market, which can be achieved only in the case of a certain degree of homogeneity (Melecký, 2018). A strong academic stream suggests that Europe 2020 goes beyond EU competencies (Erixon, 2010) and has potentially contra-productive effects, such as an increase of divergences between EU member states (Çolak & Ege, 2013), both on a macro-economic level (Lajtkepova, 2016; Balcerzak, 2016b) and micro-economic level. It is argued that both the setting and its application are far from perfect, and that insufficient efforts are made, especially by the most important EU institutions and EU member states (Balcerzak, 2015). The disparity between EU member states exists, and especially the EU 2020 R&D target aka “3% of GDP for R&D” (Bočková & Meluzín, 2016) seems a “mission impossible” for the vast majority of the EU member states (MacGregor Pelikánová 2018; 2019b).

The need for sustainability and competitiveness is a notoriety, such as the fact that EU member states, their businesses and individuals, share and follow different social, legal, political and economic traditions (MacGregor Pelikánová, 2017), particularly regarding the issue of the (un)restrained and (un)fair competition (Margoni, 2016; MacGregor Pelikánová 2019a; Turečková & Nevima, 2017). Continental law jurisdictions tend to be more formalistic and to directly legislate, either via codes or special Acts, to protect against unfair competition, while common law jurisdictions do not perceive unfair competition as a special matter and hence deal with it under the umbrella of general protection, e.g. torts, or via near legal mechanisms such as passing off and misrepresentation (Ng, 2016; MacGregor Pelikáno-

vá, 2014; 2017; 2019c). Although the EU law penetrates into national laws of EU member states (Azolai, 2011), still the reach and effect of the EU is not absolute. Misleading commercial practices are an example that the EU has limited competencies and capacities. The EU primary law has intergovernmental features, serves as the constitutional foundation of the EU and includes a trio of documents making it clear that there are conferred exclusive, conferred shared and not conferred competencies and that the EU recognized fundamental rights and liberties. This trio of documents includes the Treaty on EU (“TEU”), Treaty on the functioning of EU (“TFEU”) and Charter of fundamental rights of the EU (“Charter”). Both the EU secondary law, such as Regulation and Directive, and EU supplementary law, such as the case law of the CJ EU, have rather a supranational nature and must be in compliance with the EU primary law (MacGregor Pelikánová, 2017). The EU law is projected in the EU strategies, such as Europe 2020, which are typically prepared by the European Commission and are influenced by both formal and informal institutions (Pasimeni & Pasimeni, 2016) and shaped as a policy for the economic dominance of the EU on the global market (Stec & Grzebyk, 2017).

In such a context, the UCDP was conceived as a key instrument concerning unfair business-to-consumer commercial practices in the internal market. The UCPD was adopted to contribute to the proper functioning of the internal single market and to achieve a high level of consumer protection by approximating laws (Art.1 UCPD) by a full harmonization (Art.4 UCPD) (MacGregor Pelikánová, 2017). Misleading commercial practices are perceived as unfair commercial practices (Art.5 et foll. UCPD). It is argued that UCPD conflicts with strong conceptual disparities in EU member state’s laws (Osuji, 2011) and is undermined by the ambiguity of its purposes (MacGregor Pelikánová *et al.*, 2017) .

Research methodology

The cross-disciplinary and multi-jurisdictional nature of this paper, and its dual purposes, implies the use of Meta-Analysis (Silverman, 2013), of various interpretation techniques suitable for legal texts and judicial decisions, of the critical comparison and of a holistic assessment of impacts and consequences. Due to the focus on legal and economic aspects, it focuses more on qualitative data and methods than quantitative, and includes deductive and inductive aspects of legal thinking, as legal theoretic orientation reflects legal science which is argumentative, not axiomatic (Knapp, 1995).

The primary purpose of this paper is to comparatively describe and critically assess the transposed legal frameworks. The underlying hypothesis is that the full harmonization of the protection against misleading commercial practices is manifestly set, but it is legislatively transposed in a disperse manner (H1). In order to address the primary purpose and H1, sources such as EurLex are to be explored and holistically examined.

The secondary purpose is to study and evaluate the coherence of these transposed legal frameworks in the light of the case law and their impact in Central Europe, particularly whether it represents an opportunity or a threat for smart, sustainable and inclusive growth, i.e. boosting competitiveness and innovation along with consumer welfare. The underlying hypothesis is that the UCPD full harmonization regime partially clashes with national particularities in Central Europe (H2). Hence the information offered by the processing of the primary purpose and checking H1 will be complemented by the case law study done while using curia.eu and nsoud.cz databases using the key word identifying UCPD “2005/29”. The dominating qualitative research and data are complemented by the quantitative research and data, and their discussion is refreshed by Socratic questioning (Areeda, 1996) and glossing (MacGregor Pelikánová, 2017). The principal strength of the paper is its inherently building upon previous deep observations and meticulous research, pioneering work with data from various jurisdictions published in different languages and the assessment of the co-relationship between EU legislation and national legislative transposition and EU case law and national case law. The principal weakness of the paper is linked to the feasibility and broadness of the data reach and objectivity of the assessment. It is to be followed by work with hundreds of other law cases and with more robust indicators about the coherence, positive and negative impacts, and ultimately consequences, for integration, competitiveness, innovation and consumer welfare.

Results

The full harmonization of the regime for protection against unfair commercial practices, including misleading commercial practices, took full effect in the entire EU on the transposition deadline day — 12th June, 2007 (Art.19 UCPD). Hence, for over ten years, judges from the CJ EU, as well as all national judges from the EU member states, should be generating decisions based on the UCPD, and thus building a case law which should support this full harmonization and making the private law setting against misleading commercial practices, complementing the public law concerns regarding

antimonopoly, antitrust and consumer protection matters. This should contribute to smart, sustainable, and inclusive growth (Želazny & Pietrucha, 2017), to the single internal market and to R&D leading to innovations (Balcerzak, 2016a) and higher competitiveness.

Rules protecting the fairness of competition belong merely to the shared conferred competencies of the EU (Art.4(2)a TFEU — internal market, Art.4(2)f TFEU — consumer protection). Therefore, misleading commercial practices are covered by both the EU law and EU member states' laws and the key instruments of the EU law regarding misleading commercial practices are Directives (MacGregor Pelikánová, 2019a). Until 2005, the protection against misleading commercial practices was set in each EU member state in a particular manner reflecting national features and legal traditions (Margoni, 2016). However, since 2005, it seems that the EU focuses not only on the protection of the existence of the competition in the single internal market (MacGregor Pelikánová, 2019a), but as well on its daily operation while keeping consumers in mind (Tesauro & Russo, 2008) and opting for a legislative trend mixing IP, consumer protection, competition and unfair competition regimes (Chronopoulos, 2014). Indeed, the UCPD came to change previous approaches in a radical manner by having a multitude of purposes and objectives (MacGregor Pelikánová *et al.*, 2017) and opting directly for full harmonization (Art. 4 UCPD) of the prohibition of unfair business-to-consumer commercial practices (Art. 3 and 5 UCPD), especially if they are misleading or aggressive (Art. 5 UCPD) (MacGregor Pelikánová, 2017). Misleading commercial practices can be done either by action (Art. 6 UCPD) or by omission (Art. 7 UCPD). *A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise* (Art. 6 UCPD) The blacklist of always unfair and thus prohibited practices is included in Annex I of the UCPD. An explanation regarding the legislative intent, and thus the tool for the teleological interpretation of the UCPD, including regarding misleading commercial practices, was provided by the European Commission via three documents: (i) COM (2013) 138 Communication on the application of UCPD and COM (2013) 139 Report, (ii) SWD (2016) 163 final Guidance on the implementation/application of UCPD and (iii) COM(2016) 320 Communication about a comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses (MacGregor Pelikánová, 2017; 2019a).

Central European states share a similar legal tradition and their regulation of misleading commercial practices has foundations in Civil Codes from the 19th century and often led to a *lex specialis*. The emergence of the UCPD has manifestly shaken the *status quo* and has led to various types of legislative revolutions, as shown in Table 1. Certain central European states perceived the UCPD as an impulse to change their *lex specialis* and a few other Acts, possibly to issue new Acts. Other states moved to make a massive inventory of their statutes leading to a legislative update of many of them. The first group is presented by Austria, Germany, Poland and Slovakia. In Germany, only the unfair competition *lex specialis* was changed, i.e. 1896 *Gesetz gegen den unlauteren Wettbewerb*. In Austria, 7 national Acts were changed including the unfair competition *lex specialis*, 1984 *Gesetz gegen den unlauteren Wettbewerb*. In Slovakia 4 pre-existing Acts were updated, while in Poland one Act was updated, i.e. Act 2007 combating unfair commercial practices, and one new Act was enacted, Act 2015 on the display of prices of goods and services. The second group is represented by the Czech Republic and Hungary. In the Czech Republic, an unbelievable number of Acts was amended in order to achieve full compliance with the full harmonization by the UCPD, i.e. 64 national statutes were changed, including Act No. 634/1992 Coll., on consumer protection and Act No. 89/2012 Coll., the Czech Civil Code which deals with unfair competition. In Hungary, the transposition of the UCPD required the change of 33 national Acts.

The agitated legislative move due to the UCPD brought a new harmonized regime for the protection against misleading commercial practices into national regimes. National judges have, by the operation of the EU law, namely TEU and TFEU, decided cases based on their national law, fully harmonized regarding the protection against misleading commercial practices, and in the light of the EU law and case law generated by the CJ EU. Also, they ask the CJ EU for preliminary rulings when in doubt about the interpretation.

Consequently, the coherence of these transposed legal frameworks in the light of the case law and their impact in Central Europe is to be studied and evaluated. Pursuant to the underlying hypothesis, UCPD transposition and case law approaches partially clash with national particularities in Central Europe (H2). The search regarding the case law of CJ EU is critical because it encompasses the most important national cases regarding which national judges did not know exactly how to apply the UCPD based national regime. CJ EU posts its cases on the portal curia.eu, which allows a search by key words. Therefore, the case law of the CJ EU database was accessed via portal curia.eu and explored by the search mask indicating key

words and the time span 2009–2019. It generated 157 closed cases including the term „Uniform Commercial Practices Directive”, 113 closed cases with „2005/29” and 172 closed cases with „misleading commercial practices”. The most relevant group appears to be case law indicating its official identification, i.e. „2005/29”. Thus these 113 closed cases are to be further examined and in particular how many were referred from the Central European jurisdictions and why, see Table 2.

All these 24 closed cases were based on a request for preliminary rulings entailing an interpretation issue linked to the interpretation of the transposed UCPD regime. The majority of them came from Germany. All of these 10 German closed cases addressed a particular issue linked to unfair commercial practices, and a majority of them involved a German entity engaging in the protection against unfair competition, i.e. *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*, *Verein für lauterer Wettbewerb eV*, *Verband Sozialer Wettbewerb eV*. Six of these cases came from the German *Bundesgerichtshof* — German Supreme Court, i.e. C-146/16 DHL, C-476/14 Citroen, C-391/12 RLVs, C-59/12 BKK Mobil, C-304/08 Plus and C-215/08 Fritz.

On the other side of the spectrum are Czech courts which have not submitted any requests for preliminary rulings. A search of the case database of the Czech Supreme Court available at nsoud.cz while using the key word “2005/29” leads to a list of 11 closed cases decided by three Senates 23 Cdo and 32 Cdo and 32 Odo (23 Cdo 2205/2012, 23 Cdo 2960/2012, 32 Cdo 3978/2011, 23 Cdo 4384/2008, 32 Odo 229/2006, 23 Cdo 2500/2010, 23 Cdo 4044/2009, 32 Cdo 4661/2007, 32 Cdo 3895/2007, 23 Cdo 3868/2011, 23 Cdo 2415/2017) (MacGregor Pelikánová, 2019). These cases entail product and service pricing and labeling (pharmaceutical, food, hardware items, beer, stock-exchange and financial, insurance and funeral services) and often they address the overlap of unfair competition and intellectual property rights, especially trademarks and copyrights. Some of these cases covered entities active even beyond the Czech borders. Nevertheless, in none of these cases did the Czech Supreme Court find the need to present a request for a preliminary ruling.

Discussion

Across the EU, the regime for the protection against misleading commercial practices is the subject of full harmonization by the UCPD, which means that “no more, no less” protection can be given. In Central Europe, where the jurisdictions share a very similar law tradition and approach to

unfair competition, the transposition of the UCPD has occurred in a dispersed manner. Legislative approaches were abundantly heterogeneous. On one side of the spectrum is Germany, where the UCPD full harmonization regime was projected exclusively into one single statute, unfair competition *lex specialis*, while on the other side of the spectrum is the Czech Republic, where the UCPD seems to be transposed in “almost” all statutes, i.e. 64 Acts of Parliament have been amended due to the UCPD. This, along with the other above provided arguments, seems to support the confirmation of H1. The full harmonization of the protection against misleading commercial practices is set by the EU via UCPD and explanatory documents from the European Commission, but even after one decade of operation it is legislatively transposed in a dispersed manner. Indeed, the national transposition in Central Europe seems rather Byzantine, and national legislations dramatically differ in their attitude to the UCPD.

Based on the study of transposition and case law approaches and strategies, the UCPD full harmonization regime for misleading commercial practices appears to still partially clash with national particularities in Central Europe. Not only do legislative transpositions differ, but even more does the attitude of national judges, and it can be hardly proposed that they proceed in a harmonized manner. There is very little coherence and many paradoxes emerge. Perhaps the most flagrant is revealed by the comparison of Germany and the Czech Republic. In Germany, only one statute was changed due to the UCPD and the national judges from the Supreme Court, as well as lower courts present very good and highly relevant questions to CJ EU about the understanding, interpretation and application of concrete provisions of the UCPD, especially about misleading commercial practices. In contrast, in the Czech Republic, the UCPD transposition caused a so-called “legislative tornado” and led to updating 64 statutes and to many cases (some of them involving businesses operating in the entire EU and big EU issues) linked to the UCPD and to be decided by national judges. However not one single request for a preliminary ruling went to the CJ EU. This supports the confirmation of H2.

Conclusions

The full harmonization of the protection against misleading commercial practices is a well established reality in the EU.

Namely, the comparative description confirms that the legislative transposition was achieved, but in a dispersed manner (H1). Although central European jurisdictions share the same legal tradition, some of them trans-

posed the UCPD merely by updating one *lex specialis* (Germany) or just a few statutes (Austria, Slovakia, Poland), others engaged in atrophic “legislative tornadoes”, entailing changes of many statutes due to the UCPD (Czech Republic, Hungary). Even more interestingly, the study confirms that the UCPD entails not only a number of transposition legislative approaches, but, in addition, its case law testifies about varying levels of coherence, importance and impacts (H2). This full harmonization is very far from providing a unified support for the competitiveness and innovation of business and consumer welfare in Central Europe. Jurisdictions with minimal legislative changes are inclined to take the UCPD full harmonization regime for misleading commercial practices much more seriously than jurisdictions which engage in massive legislative moves and which have formalistic courts showing little interest for the UCPD and its understanding, interpretation and application under the auspices of CJ EU.

The UCPD is an ambitious project entailing a number of transposition legislative approaches and resulting in a system without robust coherence in the light of case law. This cripples its capacity to be a general opportunity for smart, sustainable and inclusive growth, i.e. boosting competitiveness and innovation along with consumer welfare. Thus, the full harmonization should be either readjusted or relaxed, and the awareness should be enhanced in order to gain a stronger and less heterogenous commitment from all stakeholders throughout the EU, including Central European regions. A broader and deeper study of case law could reveal issues and concerns of the UCPD ultimate stakeholders and thus convey a message which should be taken very seriously and lead to the change of the current regime to make it more harmonized, effective and efficient and so to become a true opportunity for the Central European regions.

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Annex

Table 1. UCPD transposition — impact on the legislation in Central Europe

EU member state	Acts	Comments
Austria	7	7 Acts updated due to the UCPD
Czech Republic	64	64 Acts updated due to the UCPD
Germany	1	Only one Act updated, i.e. <i>lex specialis</i> changed
Hungary	33	33 Acts updated due to the UCPD
Poland	2	1 Act updated, 1 Act newly enacted
Slovakia	4	4 Acts updated

Source: own work based on <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32005L0029>.

Table 2. UCPD transposition — 2009–2019 CJ EU closed case “2005/29” of 113

EU member state	Cases	Issues
Austria	6	Misleading advertisement price winning; offering bonuses; prior authorization of clearance; sales brochures with false information; framework contracts with payments; NA
Czech Republic	0	
Germany	10	Real property funds; lottery linked to deal; misleading information on health insurance; misleading omission in advertisement; misleading price information; information about health food; intellectual property; misleading advertisement; payment services — gaming arcades; labeling of textiles
Hungary	2	Package radio-tv programs; erroneous information by telecommunication providers
Poland	1	Telecommunication services
Slovakia	5	Incorrect statement of annual % rate; no adequate information; Security for credit; Financial Services, NA.

Source: own work based on curia.eu.