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European myriad of approaches to parasitic commercial practices

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Abstract
Research background: The Post-Lisbon EU aims at smart, sustainable, and inclusive growth on the single internal market, as indicated by the Europe 2020. The interplay of the competition and consumer protection on such a market is subject to harmonization. The Unfair Commercial Practices Directive has been made in order to achieve a full harmonization in this respect in 2007. However, EU member states share different social, political, legal and economic traditions and their approaches to unfair competition, in particular if committed via parasitic commercial practices, are dramatically diverse. In such a context, is it feasible, effective and efficient to install a full harmonization?
Purpose of the article: The primary purpose of this article is to describe and assess approaches to unfair competition, in particular if committed via parasitic commercial practices, by the EU law and EU member states law. The secondary purpose is to study and evaluate possibilities for the feasible, effective and efficient harmonization, or their lack.
Methods: The cross-disciplinary and multi-jurisdictional nature of this article, and its dual purposes, implies the use of Meta-Analysis, of the critical comparison of laws and the impact of their application, to the holistic perception of historical and national contexts, and to case studies. The primary and secondary sources are explored and the yield knowledge and data are confronted with the status quo. The dominating qualitative research and data are complemented by the quantitative research and data.
Findings & Value added: The EU opted for an ambitious challenge to install via the Unfair Commercial Practices Directive a full harmonization of the regime against unfair commer-

cial practices, including parasitic ones. The exploration pursuant to the duo of purposes suggests that the challenge is perhaps too ambitious and that the EU underestimated the dramatic diversity of approaches to unfair commercial practices, especially parasitic ones.

Introduction

Regarding the overlap of business and law, our world is full of contradictions (Vivant, 2016). Conventional economic studies and searches confirm the common notoriety that humans are rational and follow the principle of utility maximizing. However, psychological and social studies and searches suggest that humans, and their behavior as well, are socially oriented (Hochman *et al*., 2015). In any case, the competitiveness and inclination to economic selfishness are generally recognized as strong factors, which can lead to the paralyzing and deforming of fair competition, and ultimately even to its destruction. Generally speaking, humans are inclined to altruistically punish free-riders violating social norms and to reward norm-abiding acts (Diekhof *et al*., 2014), but in the parasitic context their awareness is diminished. Interestingly, even if parasitic commercial practices represent selfish, reckless, and unethical commercial behavior taking unfair and/or unjust advantage of somebody´s else efforts, property, or assets, and have negative consequences for the entire market and society, they are not automatically rejected by the society, the competition and the public-at-large.

The EU and the EU law as well as EU member states laws fully match this trend. Modern European integration is based upon the doctrine of the famous four freedoms of movement in the single internal market (Cvik & MacGregor, 2016) and undoubtedly commercial parasitism is a real threat for it. Similarly, each and every EU member state has rules in its national law against unfair competition, or at least against parasitic commercial practices. Although the EU is not alone in being known for the permanent blurred distinction between historical truth and reality (Chirita, 2014), still clearly both public and private law aspects of competition in the single internal market are one of the top concerns of the EU and on national markets of the EU member states. Boldly, the EU and each and every EU member state had to take an approach to parasitic commercial practices and really they did it. However, due to the different social, political, social and economic traditions, these approaches are dramatically different.

This is the very context of Europe 2020 as well as 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 was adopted to contribute to the proper functioning of the internal single market and achieve a high level of consumer protection by approximating laws (Art.1 UCPD) and this should be achieved by a full harmonization (Art.4 UCPD). Hence, the EU opted for the very strongly unifying harmonization, the full harmonization, despite strong conceptual disparities in EU member state laws (Osuji, 2011). UCPD generally prohibits unfair commercial practices which are misleading and aggressive (Art.5 et foll. UCPD) and in its blacklist names specified commercial practices which are always considered unfair (Annex I of UCPD). Since the UCDP set the transposition deadline as 12th June, 2007 (Art.19 UCPD), we benefit by ten years experience in interpreting and applying the harmonized regime of the UCPD in the entire EU. Naturally, the UCPD is one of the instruments covered by the EU´s growth strategy, Europe 2020, and should contribute to smart, sustainable, and inclusive growth, to the single internal market and to R&D leading to innovations on the national, as well as the entire single internal market. It should assist in expanding the technological potential of EU member states, especially those with a low synthetic index of technological potential (Balcerzak, 2016). If not directly the EU´s and State´s support, then at least the creation of an appropriate legal framework supporting fairness and innovation seems indispensable for smart, sustainable, inclusive and fair development (Żelazny & Pietrucha, 2017). Nevertheless, it is questionable to what extent the UCPD and Europe 2020 and the UCPD and national jurisdictions are in symbiosis.

Parasitic commercial practices are a typical example of misleading practices traditionally prohibited by basically all EU member states' laws, as well as by the UCPD. However, these approaches and the ultimate classification, wording and application differ significantly, do they not!? Can they be harmonized? If yes, is the UCPD the right instrument to do so? Hence, the primary purpose of this article is to describe and assess approaches to unfair competition, in particular if committed via parasitic commercial practices, by the EU law and EU member states' law. The secondary purpose is to study and evaluate possibilities for the feasible, effective and efficient harmonization, or their lack. The duo of purposes demands the use of primary and secondary sources and of predominantly qualitative data and methods.

Research methodology

In order to scientifically and academically address the duo of purposes requires an open minded selection and search of primary and secondary

sources. This involves a myriad of instruments and processes going from a field search and observation over the literate description and teleological interpretation of acts and commentaries to academic materials from several EU member states.

The cross-disciplinary and multi-jurisdictional nature suggests that the data yield by the indicated search is to be processed by Meta-Analysis (Silverman, 2013), while using a critical comparison of laws and their interpretation and applications to parasitic commercial practices. This needs to be supported by the holistic perception of historical and national contexts and by case studies. The primary and secondary sources are explored and the yield knowledge and data are confronted with the real status quo. Since this article covers legal and economic aspects, it focusses more on qualitative data and methods than quantitative, and includes deductive and inductive aspects of legal thinking (Matejka, 2013) as legal theoretic orientation reflects legal science which is argumentative, not axiomatic (Knapp, 1995). As a result, 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. The selected methods reflect the presented perspectives and determine the structure of this article.

The approach of the EU to parasitic commercial practices

Although basically each and every European jurisdiction has been dealing with parasitic commercial practices, they have followed different approaches and ultimately the resulting regulations are very diverse. Therefore, until the arrival of the UCPD, no general harmonization or reconciliation of the laws against unfair competition, and in particular parasitic commercial practices, were in the EU (Margoni, 2016).

The UCPD prohibits unfair business-to-consumer commercial practices (Art.3 and 5 UCPD). The blacklist of commercial practices that are always considered unfair (Annex I of the UCPD), expressly prohibits displaying a trust, quality or other mark without the authorization and promoting similar products in a manner to deliberately mislead consumers. Therefore, misleading actions to create confusion or even mistrust regarding the trader, his affiliation or connection, or even his intellectual property rights ("IPRs") are undoubtedly prohibited by the UCPD and, due to the effect of full harmonization (Art.4 UCPD), along with the expiration of the transposition deadline (Art.19 UCPD), have to be prohibited as well by national laws. This undesirable and not only competition hurting behavior is typically in violation of IP laws. In addition, in common law jurisdictions, the

unfair trading wrongs are covered by the general tort law and in particular of its "most protean" subpart, the law of passing off (Ng, 2016), while in continental jurisdictions it is rather labelled as "parasitism" and punished via unfair competition regulation *stricto senso*. The labelling and law branch differences are just the tip of the iceberg, but the EU decided to fully harmonize even this particular form of unfair commercial practices and came with its harmonized, if not unified, perspective via the UCPD.

This can be understood as the demonstration of the EU strategic decision to deal with parasitic commercial practices under the auspices of the consumer protection law branch, while attempting to achieve objectives of consumer protection as well as competition protection in the sense of the protection of the European integration, based on the single internal market. This is both ambitious and untypical, perhaps even experimental. In other words, the EU, via the European Commission ("Commission"), opted for a legal mechanism tackling parasitic commercial practices from an untypical angle, basically unknown in many EU member states. Arguably, this can be interpreted as a move in a new right direction with the justification that, after decades of an excessive focus on competition (antimonopoly and antitrust) law, finally there has arrived a day where fine-tuning of protection of the daily operation of the single internal market is considered and harmonized while keeping in mind consumers (Tesauro & Russo, 2008). Nevertheless, legal scientists especially from the continental law family, IP and other experts share an opposing view and reject the attempts to mix IP, consumer protection, competition and unfair competition regimes (Chronopoulos, 2014).

This hesitation about the EU approach to the parasitic commercial practices is further magnified by the lack of strong and consistent explanatory notes or statements by the very author of the UCPD, the Commission. After years of silence, in 2013, the Commission adopted COM (2013) 138 Communication on the application of UCPD and COM (2013) 139 Report in order to explain and enforce efforts to guarantee a high level of consumer protection in a national context, and particularly at a cross-border level. These two documents definitely do not help to clarify protection against parasitic commercial practices and their preoccupation only with economic interests of consumers, namely detriments of consumers in the travel and transport industry is almost contra-productive. More positively should be considered the underlying study on the application of UCPD in the EU while focusing on unfair commercial practices regarding financial services (Civic Consulting, 2011), which was prepared for the Commission. This study demonstrated the high frequency of product mis-describing and quasi-parasitic practices in EU member states and issues with the application of

the regime. Well, years later, the Commission presented a fresh and updated explanatory document, COM(2016) 320 Guidance on the implementation/application of UCPD ("New Guidance") and it appears that finally the Commission is readjusting and embracing a more informed and modest approach. After strong rhetoric about the full harmonization, there came the key statement *"The assessment of whether a commercial practice is unfair under the UCPD must, except in the case of the practices listed in Annex I to the Directive, be performed on a case-by-case basis. The power to make this assessment rests with the Member states."(!)* Another limitation of the EU approach and support of a national approach can be seen in the fact that the New Guidance underlines that the UCPD is *"horizontal in nature and protects the economic interests of consumers … the UCPD does not cover national rules intented to protect interests which are not of an economic nature …"*. The New Guidance continues by referring to *C-559/11 Pelckmans* in which the Court of Justice of EU ("CJ EU") accordingly confirmed the non application of the UCPD to national provisions prohibiting traders from opening their shop seven days a week by requiring them to choose a weekly closing day, i.e. the scope of the UCPD does not extend to national legislations preventing a business to be open on Sunday, because such national provisions do not pursue objectives related to consumer protection. This judgment is very correct on both accounts — about the sticking within the scope of the UCPD and about clearly stating that various state prohibitions against business decisions to be open and conduct business are not done for the sake of consumers. Sarcastically, national legislatures forming such legislation under pressure by labor unions should be forced to address in their Explanatory note to such an Act this case, i.e. *C-559/11 Pelckmans*! Furthermore, the New Guidance does not only correctly follow the scope of the UCPD but as well its level of intensity, and this by referring to *C-261/07 Total Belgium*, in which the CJ EU held the full harmonization by the UCPD means no more no less. The appropriateness of such a full harmonization can be questionable, and the Commission, UCPD and the New Guidance should definitely explain more about why and help to make it more legitimate. The CJ EU has the opportunity to show its resourcefulness and willingness to accept this challenge and to truly go for the full harmonization, as can be seen in *C-261/07 Total Belgium NV, C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerb eV v. Plus Warenhousegesellschaft mbH*, etc. However the help and role of the CJ EU is limited, because this is clearly not a rule making issue, but a much higher policy making issue. In sum, the New Guidance should be complemented by shortly summarizing many real life and judicial cases and demonstrating several aspects. However, it is not fully systematic and does not go in much depth, despite

its impressive length. After one decade of the UCPD, it is perhaps too little, too late.

Can this ambitious, over-reaching and zealous attempt of the EU generate positive outcomes? Maybe regardless of the highly discussable feasibility of the intense integrative, full harmonization, concerning parasitic commercial practices, there are perfect domains for its application, such as sporting events, since the CJ EU ruled in *C-403/08 Football Association Premier League v. QC.* Indeed, since sports events do not qualify as works for the EU copyright protection, the unfair competition rules, with the misappropriation doctrine, become instrumental to provide the needed protection. In this casuistic setting, it can be suggested that, despite the absence of a dedicated special and mono-conceptual regime, the current EU legal framework is flexible and well equipped to provide protection to sporting events and investments (Margoni, 2016) against various undesirable behaviors, including parasitic practices of both a commercial and non commercial nature. However, so far, despite few judgments, *C-667/15 Loterie Nationale — Nationale Loterij NV van publiek recht C-562/15 Carrefour Hypermarchés SAS,* etc., a stable case law has not yet been established, but considering the large amount of UCPD applications filed (approximation cases to be decided), there is a strong potential, see C-*357/16 Gelvora, C-356/16 Wamo and Van Mol,C-295/16 Europamur Alimentación, C-269/16 Barbara Giménez, C-146/16 Verband Sozialer Wettbewerb, etc.*

The approach of EU member states to parasitic commercial practices

Since just certain unfair competition aspects are harmonized, generally unfair competition is regulated in a rather autonomous manner by national laws of EU member states. The level and object of protection against unfair competition varies significantly across the EU (Margoni, 2016) and, in particular, conceptual differences emerge between common law and continental law traditions.

The UCPD targets a set of unfair competition aspects and attempts to harmonize their regulation, but its wording is rather general and short, the Guidance with Reports does not provide further details and the case law of the CJ EU has not yet been established. In such a context, the conceptual differences between states and their jurisdictions reappear and consequently even the aspects to be harmonized continue to be impacted by national law particularities. Parasitic commercial practices have been covered for hundreds of years by national laws of current EU member states and each of these laws figured out how to address them, especially how to protect other

competitors and consumers against them. Each of these laws followed its own tradition, fundaments and law methodology linked to the fundamental and conceptual differences between the continental law v. common law.

Common law systems have been traditionally rather liberal, vis-à-vis a regulation and protection against unfair competition, due to their rather sceptical approach to the involvement of the state power in these matters, i.e. they have not generated special rules against unfair competition (Margoni, 2016) and let subjects deal with it based on the closest general law provisions. These closest general law provisions were and still are provisions covered by the tort law, which is basically judge-made law, i.e. law made rather by precedents than statutes. Indeed, the common law tradition does not know the term unfair competition and modern common law jurisdictions perceive commercial practices which are unfair and/or trespassing private rights of other competitors as torts and possibly as well violations of IP law, i.e. they go above and beyond the free riding theory.

In contrast, the majority of continental legal systems have established, via statutes, a special law or a set of law provisions addressing explicitly the unfair competition. These statutes prohibit unfair commercial practices, including parasitic ones, if they are likely to significantly affect the interests of competition stakeholders, i.e. competitors, consumers and other participants (Henning-Bodewig, 2006). Therefore, there is no need to empower general provisions about extra-contractual liability (continental equivalent to common law torts). At the same time, even here judges have a certain law shaping power, see the judicial foundations of unfair competition acts and omissions, and of course IP law provisions are relevant.

Nowadays, in the years prior to the UCPD or even right now, parasitic commercial practices are considered, all across Europe, as wrong and often they are classified as brand abuse, which leads even to the conclusion that the brand image constitutes 'a good' by itself that is demanded by consumers as a complement to the product (Chronopoulos, 2014). In other words, the economic value consists of both the product and its label, which does not need to be a trademark protected by the IP law, and each of them deserves a strong protection which needs to be reflected by a legal evaluation and law setting. Hence the UCPD is going in the right direction, but is it effective and efficient to do so?

The law of England and Wales did not regulate per se parasitic commercial practices and the UCPD came almost to a *tabula rasa* legislative setting so far operating based on special tort and IP law cases. However, for many years before the UCPD, in Germany there existed the *Gesetz gegen den unlauteren Wettbewerb*, Act Against Unfair Competition, and in the Czech Republic special unfair competition regulations were included in

a special section of the old Commercial Code (which later on were transferred in the Civil Code). Parasitic commercial practices have been for decades within the reach of general clauses of both German and Czech unfair competition regulation. In addition, the German Act Against Unfair Competition specifically deals with the misappropriation of goods and services in Sec. 4(9) and targets in particular the confusion as to the source and taking unfair advantage or damaging a competitor´s goodwill or related confidence. It reduces the protection against parasitic commercial practices by the concept "*freedom to imitate"* (Ohly, 2010). The Czech Civil Code covers the parasitic commercial practices not only via the general clause but as well by the special prohibition of misleading labelling, inducing the risk of confusion and parasitizing on a good reputation. The Czech protection based on the unfair competition is perceived as a typical plan B, or even the last resort. Even in France, provisions for protection against unfair competition are included in a Code, it is the French Commerical Code, *Code de Commerce,* but in a kind of atypical manner in the continental law environment, these provisions (L.440 et foll. French Commercial Code) are preceded by provisions dealing with another branch of the competition law, i.e. the Public law antimonopoly and anti-cartel provisions (L.420 et foll. French Commercial Code) (see Table 1).

This overview demonstrates the diversification of approaches and their belonging to legal traditions. However, it does not imply the best or worst approach. It merely shows that each law found its way.

Firstly, even a cursory overview of jurisdictions in the EU reveals that the understanding and regulation of parasitic commercial practices, regardless whether in common law or continental law systems, is done via various law branches and definitely more by adjudication than legislation. In common law jurisdictions, it is due to the doctrine of the binding precedent, while in continental law jurisdictions, it is achieved via a legislatively set general clause with a broad invite extended to judges to "create judiciary unfair competition essences".

Secondly, there are continental law jurisdictions, such as the Netherlands, without a specific law regulating unfair competition (Gielen, 2007). Thirdly, and most importantly, there has not yet been established a methodology, or at least criteria, to assess the appropriateness, effectiveness and efficiency of the domestic regulation of parasitic commercial practices.

Consequently, it can be merely holistically stated that the EU member states have kept dramatically different conceptual approaches to the parasitic commercial practices, and they are similar neither in the form nor in the content of this regulation. Parasitic commercial practices are omnipresent and often manage to escape the strong, but rather rigid and narrow, reach of

the IP law. Hence, each jurisdiction struggles with it according to its own tradition, preferences and policies, and ultimately finds its particular solution. These solutions offer a richness of approaches and their sharing or import in other jurisdictions cannot be done en block. The EU should act according to its motto "united in diversity", because the underestimation of national particularities and inclination to fast one-size-fits-all solutions mixing various approaches and methods can have "exit-arian" consequences. The variety of approaches is an asset and the EU should work smartly, sustainably and inclusively towards innovations!

Conclusions

The internal single market with the famous four freedoms is at the very heart of the modern European integration and represents a strategic priority. The EU competition policy, dealing with the very existence of competition, is not the only one that is vital for the single internal market and its operation. In addition, to these public law concerns related to monopolist, cartelist practices, and state aids practices, there are very strong concerns regarding the daily competing and its fairness opening the venue to the technological potential of EU member states (Balcerzak, 2016) and European businesses, and the possibility incremental and radical innovation openness. Indeed, the internal operation of the single internal market is to be protected by private law tools and methods. Hence, the EU discovered the same need as basically all EU member states way before, i.e. that unfair commercial practices, especially those achieving the ethically repugnant dimension of parasitism, are highly undesirable and that it would be illusory to expect the public-at-large, especially consumers, to analytically recognize them and cognitively reject them (Hochman *et al*., 2015).

Indeed, each and every EU member states laws deals with it and provides some protection, or at least methodological and legal tools. However, this alike motivation and drive to deal with the identical problem is materialized in dramatically different manners. Common law jurisdictions took a general tort case law approach while continental law jurisdictions oscillate between Codes and special acts to provide a foundation for their commercial practices specific case law. It is highly inspiring to study these approaches and carefully consider whether they could be partially shared or transposed in other jurisdictions. This could be further magnified by asking not only what these approaches are, but how we want them to be. Similarly as it was suggested regarding building a common culture and law of trademark (Vivant, 2016), we should not only ask what are parasitic commercial

practices and their law, but as well what we want to do with/against them and where and how we want to have them in the future.

Sadly, the Commission has not engaged in a deeper discussion about such strategies and regarding parasitic commercial practices missed this analytical and comparatist opportunity and much too quickly crossed the Rubicon and decided to impose a full harmonization via Art. 4 of the UCPD, while explicitly dealing with unfair commercial practices and impliedly targeting their special type, parasitic commercial practices. The Commission wants to bridge different perceptions and approaches to parasitic commercial practices and uses for it a directive labeled unfair competition, which ironically (but fully logically due to the legal historical context) is unknown to common law jurisdictions. It appears that the Commission does not fully appreciate the existing differences and is staying somewhere in the middle way and that does not provide any clear guidelines, i.e. allows ambiguity and shifts the difficult interpretative and reconciliation task to the CJ EU. Indeed, the complete harmonization requires the clarity of concepts, definitions and sanctions (Osuji, 2011). At the same time, it must be admitted that all over in the EU the case law strongly shapes the protection against parasitic commercial practices and all supreme courts struggle in this respect. However, generally they have more guidelines than what they received from the CJ EU from the Commission.

It looks slightly bizarre that the EU imposes the full harmonization via a new regime different from the majority of regimes existing based on a long evolution in EU member states without any further explanation. The Commission decided to legislatively regulate something that, basically, all over in the EU, has been shaped by decades of case law. It appears that the Commission with its UCPD, perhaps unintentionally, created a big challenge for the CJ EU. However, the CJ EU has already many times proven that via a teleological approach and the "spirit of treaties" it can bridge and overcome many integration deficiencies, and the Commission even suggests the involvement of state case laws, see the New Guidance. Perhaps the lack of instructions from the Commission regarding the UCPD, especially parasitic commercial practices, is good, because it leaves a space and offers an opportunity to the CJ EU to catch-up to case law about parasitic commercial practices of all supreme courts in the EU and, with more time, can prove that it can do, based on the UCPD, at least as good a job as did these supreme courts based on their national legislation or merely general judge made law. It will be highly instructive and perhaps even exciting to see how the CJ EU will handle this challenge, whether the Commission will interact and generally speaking whether the EU will manage to engage in a true discussion, to accept the bottom up approach and so to ultimately hit

right strategies to resolve strategic issues, in particular in the (un)fair competition arena.

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Annex

Table 1. National legislation on the unfair competition (parasitic commercial practices) and selected cases

National regulation of parasitic commercial practices and cases	
CZ – Czech Civil Code (until 2014 Commercial Code)	*Czech Supreme Court 32 Odo 1125/2006 Recycling*
DE – Special Act MPA	*Danish Supreme Court U 1982 179 H*
GE – Special Act GgduW (general clause, missappropriation)	*German Federal Supreme Court Hartplatzhelden.de 2010*
FR – French Commercial Code (L.441 et foll.)	
NL – only case law (civil cases – unlawful acts from Civil Code)	*Dutch Supreme Court Holland Nautica 1986*
UK – only case law (tort cases – passing off)	*Reckitt & Colman v. Broden 1990 RPC 340 HL*