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The Ephemeral Concept of Parasitic Commercial Practices in the EU

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**The Ephemeral Concept of Parasitic Commercial Practices
in the EU**

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The Ephemeral Concept of Parasitic Commercial Practices in the EU

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Abstract

Research background: It has been one decade since the transposition deadline regarding the Unfair Commercial Practices Directive. The EU's growth strategy, Europe 2020, and all EU member states are committed to smart, sustainable, and inclusive growth, to the single internal market and to R&D leading to innovations. These positive priorities, however, often conflict with one another. The EU crossed the Rubicon and decided to harmonize the protection against parasitic commercial practices hurting intellectual property and consumers. Is this appropriate, effective and efficient?

Purpose of the article: The primary purpose of this article is to assess the appropriateness, effectiveness and efficiency of the EU harmonization of the ephemeral concept of parasitic commercial practices. The secondary purpose is to assess approach(es) of the EU and EU member states to this overlap of the competition and intellectual property regimes. The third purpose is to assess the feasibility of the integrative harmonization in this arena.

Methodology/methods: The multi-disciplinary nature of this article, and its three purposes, leads to the employment 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 sources (field search) and secondary sources (literature) are explored and the yield knowledge and data are confronted with the explored cases. The dominating qualitative research and data are complemented by the quantitative research and data.

Findings & Value added: The Unfair Commercial Practices Directive harmonizes the protection of various issues, including the ephemeral concept of parasitic commercial practices. The set trio of purposes leads to a conclusion that this overlap of competition and intellectual property protection is highly sensitive and nationally particular. EU integration in this sphere is needed, but the undertaken harmonization is not fully effective and efficient, and perhaps even not appropriate.

Introduction

Economic studies generate models suggesting that individuals are rational and follow the principle of maximizing utility, while psychological and social studies suggest that individuals are as well socially oriented (Hochman et al., 2015). Economic selfish motives are strong and have the capacity to paralyze and deform fair competition. Indeed, bad practices attempting to parasitically take advantage of a competitor's reputation, good-will, origin or quality guarantees and other IP, or even to parasite on symbolic references guaranteed by the state, are very common in the post-modern highly competitive global society and market. They present many threats of both a public and private law nature, and generally are perceived as unethical.

Parasitic commercial practices are a form of commercial behavior driven by the selfish, reckless, unethical and unjustified gratification with a potential for negative consequences for the entire market and society. Humans tend to altruistically punish free-riders violations of social norms and reward norm-abiding acts (Diekhof et al., 2014), but in the parasitic context their awareness is reduced.

Modern European integration is based upon the four freedoms on the single internal market (Cvik & MacGregor, 2016) and commercial parasitism is a real threat for it. Despite the blurred distinction between historical truth and reality (Chirita, 2014), public and private law aspects of competition on the single internal market are one of the top concerns of European integration endeavours. This is the context of the Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ("UCPD"), which 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). It attempts to achieve a full harmonization (Art.4 UCPD) despite strong conceptual disparities in national laws (Osuji, 2011). The prohibited unfair commercial practices can be misleading or aggressive (Art.5 et foll. UCPD) and a blacklist of specified commercial practices which are always considered unfair is included in Annex I of UCPD. Since the transposition deadline for the UCPD expired on 12th June, 2007 (Art.19 UCPD), we benefit by ten years experience in interpreting and applying the harmonized regime of the UCPD in the EU. This regime is an integral part of a system dominated by the EU's growth strategy, Europe 2020, and by all EU member states commitment to smart, sustainable, and inclusive growth, to the single internal market and to R&D leading to innovations. These positive priorities, however, often conflict

with one another and even the UCPD itself bears seeds of contradictions and discrepancies.

There are many aspects and forms of unfair commercial practices covered by the UCPD, such as parasitic commercial practices, which are often hard to describe and conceptually anchored but still they are intuitively hated both by honest businesses and consumers. The primary purpose of this article is to analyze the EU harmonization of parasitic commercial practices. The secondary purpose is to indicate approaches in the EU members states. The third purpose is to assess the feasibility of the integrative harmonization in this arena. These purposes require the use of primary and secondary sources and of predominantly qualitative data and methods.

Method of the Research

The triad of purposes requires the use of a myriad of primary and secondary sources, ranging from a field search and observation over the literature description and teleological interpretation of acts and commentaries to academic materials from several EU member states. This multi-disciplinary study needs to be processed by a critical and comparative Meta-Analysis (Silverman, 2013), along with Socratic questioning (Areeda, 1996) and glossing. 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). The selected methods reflect the presented perspectives and determine the structure of this article.

The parasitic commercial practices in the EU perspective

In Europe, there is no general harmonization of the law against unfair competition, except for a few specific aspects (Margoni, 2016), such as commercial parasitism via UCPD. The UCPD prohibits unfair commercial practices (Art.5 UCPD), with an emphasis on misleading commercial practices, both active misleading actions (Art.6 UCPD) and passive misleading omissions (Art.7 UCPD). The blacklist of commercial practices that are always considered unfair (Annex I UCPD) explicitly includes displaying a trust, quality or other mark without authorization, and promoting similar products in a manner to deliberately mislead consumers. 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 (not only competition damaging) behavior is typically in violation of IP laws. In addition, in common law jurisdictions, it is often labelled “passing off” and punished as a tort, while in continental jurisdictions it is rather labelled as “parasitism” and punished via unfair competition regulation *stricto sensu*. The labelling and law branch differences are just the tip of the iceberg in this arena.

Conceptually, the EU made a 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.

Such a legal mechanism is experimental and can be understood as a step in a new right direction with the justification that, after decades of an excessive focus on competition (antimonopoly and antitrust) law, finally a day has dawned where the 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, IP experts in particular share a completely opposing view and reject the attempts to mix IP, competition and unfair competition regimes (Chronopoulos, 2014).

In addition, the EU Commission is silent in their Guidance and Reports on this issue and leaves the Court of Justice of EU (“CJ EU”), along with all Europeans, in doubt about how exactly these parasitic commercial practices are defined and regulated via the UCPD.

The resulting ambiguity about the EU perception, classification and regulation, and based on the ephemeral concept of parasitic commercial practices, appears *prima facie* as an example of insufficient, ineffective and inefficient EU harmonization. However, this perhaps too ambitious and over-reaching attempt by the EU can generate positive outcomes. Despite the highly discussable feasibility of the intense integrative harmonization regarding parasitic commercial practices, there are perfect fields of its application, such as sports events. Due to the ruling of the CJ EU in *C-403/08 Football Association Premier League v. QC Leisure*, the unfair competition rules, with the misappropriation doctrine, are instrumental to provide the needed protection. It is argued that even in the absence of a dedicated special and mono-conceptual regime, the current EU legal framework is flexible and well equipped to provide protection to sports events and investments in them (Margoni, 2016). A stable case law has not 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 Golvora*, *C-356/16 Wamo and Van Mol*, *C-295/16 Europamur Alimentación*, etc.

The parasitic commercial practices in the EU member states' perspective

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

The UCPD is the exception, i.e. it attempts to harmonize several aspects of unfair competition and explicitly prohibits unfair commercial practices (Art.5 UCPD), including misleading actions (Art. 6 UCPD) in the form of the unauthorized use of marks and labels and of the misleading promotion, fooling consumers into believing in a fake origin or manufacturer of the product (Annex I UCPD). However, the 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.

Common law jurisdictions scrutinize such behavior not just in the light of torts and IP law, i.e. they go above and beyond the free riding theory. Criticism of parasitic competition done via brand abuse 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). The economic value consists of both the product and its label and each of them deserves a strong protection which needs to be reflected by a legal evaluation and law setting. These and other discourses are taking place in all jurisdictions within the EU. Common law systems have a rather sceptical approach to the unfair competition law and do not regulate it in particular (Margoni, 2016). Unfair commercial practices, including parasitic ones, are covered only by the general rules emerging from the tort law and some special provisions of IP law. In contrast, continental legal systems have, in addition to the IP law, a special law or a set of law provisions addressing explicitly the unfair competition and they 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).

Parasitic commercial practices are not, per se, regulated by the law of England and Wales and the UCPD is coming almost to a *tabula rasa* setting, while in Germany there already is the *Gesetz gegen den unlauteren Wettbewerb*, Act Against Unfair Competition, and in the Czech Republic special unfair competition regulation was included in a special section of the old Commercial Code and newly was transferred in the Civil Code. Parasitic commercial practices are within the reach of general clauses of

both German and Czech 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. At the same time, 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 preying on a good reputation. The Czech protection based on the unfair competition is perceived as a typical plan B, or even the last resort. There are many regimes and legal instruments in this respect, there is not conclusive evidence which one is more effective or efficient.

Table 1. National regulation of parasitic commercial practices and cases

National regulation of parasitic commercial practices	
Czech Republic	Czech Civil Code (until 2014 Commercial Code)
Denmark	Special Act MPA
Germany	Special Gesetz gegen des unlautern Wettbewerb (general clause, missappropriation)
France	French Commercial Code (the section on unfair competition preceded by the section on competition)
Netherlands	only case law (civil cases – unlawful acts from Civil Code)
United Kingdom	only case law (tort cases – passing off)

Source: Author's own processing

Firstly, even a cursory overview of jurisdictions in the EU reveals that the understanding and regulation of parasitic commercial practices, both in common law or continental law systems, is done via various law branches and definitely more by adjudication than legislation. In common law countries, it is due to the doctrine of the binding precedent. In continental law countries, a similar effect is achieved via a legislatively set general clause with a broad invitation extended to judges to "create judiciary unfair competition essences". Secondly, there are continental law jurisdictions, such as in the Netherlands, without a specific law regulating unfair competition (Gielen, 2007). Thirdly, there has not yet been established a methodology, or at least criteria, to assess the appropriateness, effectiveness and efficien-

cy of domestic regulation of parasitic commercial practices. EU member states maintain widely differing conceptual approaches to parasitic commercial practices, and they are similar neither in the form nor in the content of this regulation. These practices are omnipresent and often manage to escape the strong, but rather rigid and narrow, reach of the IP law. Each jurisdiction struggles with it according to its own tradition, preferences and policies, and relies on case law. Exactly in these settings landed the full harmonization UCPD.

Conclusions

Considering the modern European integration and Europe 2020 with their focus not only on the existence but as well the internal operation of the single internal market, it is obvious that unfair commercial practices, especially those achieving the ethically repulsive dimension of parasitism, are highly undesirable, and it would be illusory to expect the public-at-large, consumers in particular, to analytically recognize them and cognitively reject them (Hochman et al., 2015). Basically each and every EU member state has laws dealing with it and provides some form of protection, or at least methodological and legal tools, which are very different. 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.

The EU imposes a full harmonization via UCPD and thus impling targets parasitic commercial practices. The EU wants to bridge different perceptions and approaches to the ephemeral concept of parasitic commercial practices and uses for it a directive labelled unfair competition. However, it seems that the EU does not fully appreciate the existing differences and is staying somewhere in the middle way. The EU wants full harmonization and still does not clearly deal with the parasitic commercial practices, yet it also wants to legislatively regulate something, what basically all over in the EU has been shaped by decades of case law. It appears that the European Commission with its UCPD, perhaps unintentionally, created a big challenge for the CJ EU, which has to catch-up to case law about parasitic commercial practices of all supreme courts in the EU and 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 instructive and intriguing to see how the CJ EU will handle this challenge.

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