Harmonised Protection of Consumer Behaviour: The Holistic Comparative Message About Its Effectiveness and Efficiency from Legislative and Judicial Perspectives

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Abstract The keystone of European consumer protection, the Unfair Commercial Practices Directive (UCPD), was enacted to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating the laws of EU member states. The EU, via the UCPD, explicitly banishes unfair commercial practices which could potentially harm consumers and implicitly protects certain types of consumer behaviour. Evidence from over 10 years of the application of this harmonised regime allows one to holistically explore the targeted actions and omissions and the impact of the UCPD on commercial practices and consumer behaviour in the EU. The purpose of this study is to explore the UCPD legislative and judiciary perspectives vis-à-vis consumer behaviour and protection. It is founded upon the comparative mapping of (1) the UCPD and (2) case law generated by its ultimate judiciary authority, the Court of Justice of the EU (CJ EU). The information yielded is assessed by focusing on whether the UCPD regime (3) effectively and (4) efficiently protects consumer behaviour. This generates a message about consumer behaviour genuinely or allegedly boosted by the (semi-)harmonised legislation and case law, and indicates both positive and negative viewpoints. The study culminates in conclusions and proposed improvements.

Keywords EU · UCPD · CJ EU · Consumer protection · Unfair commercial practice

1 Introduction

Regardless of the inherent blurred distinction between historical truth and the reality of modern European integration (Chirita 2014), undoubtedly the sustainable concept (MacGregor Pelikánová 2019a) of the famous four freedoms of movement and

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competition on the single internal market (MacGregor Pelikánová 2019b), along with the emphasis on inventions and innovations (MacGregor Pelikánová 2019c), are absolutely critical to the EU. Indeed, eager—and at the same time fair—competitiveness, especially within the digital setting, should have a symbiotic, if not synergetic, relationship with the current Europe 2020 strategy and its drive for smart, sustainable and inclusive growth (EC 2010) across all sectors (Sroka and Szanto 2018). Consequently, EU law focused on the protection of competition on both levels (MacGregor Pelikánová and MacGregor 2015), i.e. to provide regulatory quantitative protection for the existence of competition via Public Law antimonopoly and antitrust measures, and to provide harmonised qualitative protection for fair play in competition via Private Law measures against unfair competition (MacGregor Pelikánová 2018a). Therefore, the focus entails not only interaction between businesses and states and/or the EU, but clearly interaction between business and consumers, i.e. B2C, as well. Thus, there is a clear overlap between (unfair) competition and the consumer protection setting and an obvious drive to harmonise the regime involving consumers, consumer behaviour and their protection. Nevertheless, it must be emphasised that this harmonised protection is an integral part of EU law, and its objectives and goals are not restricted merely to the protection of (certain) consumer behaviours.

Indeed, economic and political integration, with the dominance of technocratic institutions over political institutions (Lianos 2010), along with the intensification of the supranational approach over the intergovernmental approach, have shaped both the pre-Lisbon EU and post-Lisbon EU and resulted in the Europe 2020 strategy (MacGregor Pelikánová et al. 2017). Undoubtedly, the Europe 2020 strategy is a reaction to, in particular, the internal integration tandem (Burley and Mattli 1993), the European Commission and the Court of Justice of the EU ("CJ EU") reacting to the crises from 2007–2008 (MacGregor Pelikánová 2018a). This tandem has often made its reasoning based more upon the goals and spirit of the primary law incorporated by treaties rather than upon the positive wording of primary or secondary legislation of these provisions (Burley and Mattli 1993).

The Europe 2020 Strategy has five main targets—(i) to raise the employment rate to 75%, (ii) to invest 3% GDP in R&D, (iii) to reduce greenhouse gas emission by 20%, (iv) to increase the share of the population who have completed tertiary education to 40% and (v) to reduce the number of Europeans who are living at or below the poverty level by 25%. These five targets translate into seven flagship initiatives, of which at least five are related to CSR—(i) Innovation Union, (ii) Digital agenda for Europe with the high-speed Internet and the Digital single market, (iii) Resource-efficient Europe, (iv) Industrial policy for the globalisation era and (v) Agenda for new skills and jobs. As with any other element of the EU setting, the Europe 2020 strategy needs to be in compliance especially with the primary EU law represented by the Treaty on the EU ("TEU"), Treaty on the Functioning of the EU ("TFEU") and the Charter of Fundamental Rights ("Charter") as well as with the secondary EU law represented by Regulations and Directives. Consumer protection is chiefly established by a set of Directives, including Directive 2011/83/EU on consumer rights which provides for full harmonisation regarding contracts entered

into between businesses and consumers, and a pair of Directives dealing with possible unfairness, i.e. Council Directive 93/13/EEC on unfair terms in consumer contracts and Directive 2005/29/EC concerning unfair B2C commercial practices in the internal market ("UCPD"). Interestingly, the UCPD is exactly at the intersection between EU competition and EU consumer protection law (Durovic 2016). Consequently, the UCPD is the part of EU competition law with the most Private Law features, and at the same time the part of EU consumer protection law with the most Public Law features (MacGregor Pelikánová 2018a).

National laws of EU member states have addressed unfair commercial practices in a dramatically different manner (MacGregor Pelikánová 2017a); these differences typically reflected the roots of common law and continental law traditions and the related cultural, historic, economic and other particularities. The common law tradition does not focus on the term 'unfair competition' and is rather liberal vis-à-vis the interplay of competition. The original common law approach toward the problem of deceptive, misleading, parasitic and other similar behaviour originally consisted of the choice between tolerance of softer forms and criminal law punishment of harder forms (Thünken 2002). The wrongs of unfair trading are covered by general tort law and in particular its "most protean" subpart, the law of passing off (Ng 2016); rules against unfair trading are not included in a statute, but instead they are, as is typical for torts, products of a mass of case law based on the operation of the doctrine of binding precedent (MacGregor Pelikánová 2018a). In contrast, in continental law jurisdictions, the same goal is achieved via a legislatively set general clause with a broad invitation extended to judges. Therefore, judges are here to fill legislative gaps, i.e. to create, in some cases, the foundations as to what constitutes the essence of unfair competition (MacGregor Pelikánová 2019b). Indeed, the continental law tradition targets behaviour considered to contravene the "honest usage" or the "*bonos mores*" (aka *gute Sitten*) of trade (Thünken 2002). They use the term 'unfair competition' and recognise a special branch of law called either unfair competition law or law protecting against unfair competition, which is covered by explicit legislation via statutes—either general (via Codes) or special (via *lex specialis*) (MacGregor Pelikánová 2018a, b). Typically, these statutes prohibit unfair commercial practices which may affect the interests of competition stakeholders, i.e. competitors, consumers and other participants (Henning-Bodewig 2006). Provisions regarding unfair competition are thus included in a *lex generalis* such as the French *Code de Commerce* ("French Commercial Code") or the Czech *Civil Code,* or in a *lex specialis* such as the German *Gesetz gegen den unlauteren Wettbewerb* ("German Act Against Unfair Competition"). These norms typically protect both honest businesses and consumers and include a general clause and a demonstrative list of prohibited unfair commercial behaviour; judges do not decline this invitation to create a precedent in case law with general applicability (MacGregor Pelikánová 2018a, b). Their decisions often refer not only to these statutes but also to general principles of law (MacGregor Pelikánová 2015), values (Málovics 2013), and concepts at the boundary between law, philosophy and ethics, while struggling to find the ultimate answers to what is, and what is not, fair (MacGregor Pelikánová and Císařová 2014).

Although the general principle of fair trading, especially fair trading in B2C relations, had not been fully considered before the twentieth century in Europe (Durovic 2016), by the turn of the millennium each and every EU member state had established a means of dealing directly with unfair commercial practices, to protect consumers against them, and to indirectly influence consumer behaviour. Thereafter, the European Commission decided to bridge differences and autonomously prepared the UCPD as a tool for the protection of both competition and consumers, without engaging in any deeper discussion about such differences and strategies and without considering probably the only common tradition point—Christianity—and its integration potential (MacGregor Pelikánová 2017b). In sum, the UCPD basically replaced any previously existing diverse national regimes with one set of rules to help the internal market and to achieve a high level of consumer protection against unfair commercial practices based on the principle of full, aka maximum, harmonisation (Durovic 2016). However, what exactly does (1) the UCPD and (2) the case law of CJ EU testify to, concerning the harmonised protection of consumer behaviour? Indeed, what business behaviour is prohibited and what consumer behaviour is protected? Is the resulting UCPD regime (3) effective and (4) efficient?

2 Harmonisation Pursuant to UCPD: Prohibited Unfair Commercial Practices and Protected Fair Consumer Behaviour

The UCPD was enacted in 2005, and brought forth a general clause about prohibited unfair commercial practices accompanied by less abstract clauses and a number of specific examples (MacGregor Pelikánová 2018a, b). According to the UCPD, commercial practices, such as marketing and advertising, play a fundamental role in a market economy (Trzaskowski 2011). The UCPD covers misleading and aggressive commercial practices and operates alongside other Directives, such as those dealing specifically with misleading and comparative advertising, labelling, etc., and fully fits into the Europe 2020 Strategy. The EU member states' high level of divergence (Balcerzak 2015) in their approaches to the law on unfair commercial practices was suppressed (Durovic 2016) and the regime protecting the existence of competition was complemented by a full harmonisation consumer protection directive, the UCPD. The mixture of purposes, the move from minimal to full harmonisation, from B2B to B2C protection, from legality concerns to fairness concerns, along with the controversial average consumer test, etc. represent a battery of challenges for the UCPD (MacGregor Pelikánová and Beneš 2017). This naturally has an impact on consumer behaviour and the framework thereof.

2.1 One or a Myriad of UCPD Purposes: Are Customers Included or Excluded?

The UCPD does not have a clear single ultimate purpose (Durovic 2016); instead it is a result of legal conceptual compromises which have progressively been changed due to political concerns, i.e. political factors led to modifications of the original drafts and resulted in such a wording of the UCPD that the original drafters often cannot easily interpret it (MacGregor Pelikánová et al. 2016). Indeed, objections to the UCPD have emerged, including the concepts, such as the full harmonisation or the average-consumer test, as well as the practical details. Perhaps the most fundamental objection involves the purpose(s) and goal(s) of the UCPD (MacGregor Pelikánová et al. 2016).

The literate interpretation of the UCPD points to the wording of Art. 1 of the UCPD which states "*The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.*" However, the EU and EU law prefer teleological and purposive approaches to the interpretation (Holland and Webb 2016) which focus on the systematic and contextual spirit. Consequently, the purposes indicated by the Preamble and Art. 1 of the UCPD should only function as the initial information leading to a true understanding of the key purpose(s). To recapitulate, the UCPD preamble indicates two potentially contradictory purposes: (i) the proper functioning of the internal market and (ii) a high level of consumer protection. This leads to a veritable Sophie's choice—which of the two prevails? A myriad of academic, professional and even lay opinions regarding the main purpose of the UCPD have been presented and published, often stating that consumer protection is the leitmotif of the UCPD which needs to be understood and appreciated in light of the Europe 2020 strategy (MacGregor Pelikánová et al. 2017). Indeed, the Europe 2020 strategy is concerned with "*structural weaknesses in Europe's economy*" in the context of diversity (Balcerzak 2015); its second priority, sustainable growth, requires a *"more competitive economy"* (MacGregor Pelikánová and Beneš 2017). Some authors propose that the main goal of the UCPD has a closer link to competition and markets than to competitors or consumers, i.e. consumers and their behaviour are merely auxiliary, while the pro-integration command and the market as such are the principal (MacGregor Pelikánová 2018a). Consequently, the discussion emerges about (the feasibility of) the EU's (alleged) desire to combine consumer protection and unfair competition protection in order to synergistically support, or even protect, European integration based on the single internal market (MacGregor Pelikánová 2017a).

Perhaps even more challenging is the burning question of "why?" Indeed, why—unlike other EU law instruments—does the UCPD state no single purpose? The post-crisis EU in the second decade of the twenty-first century needs to be more responsive (Šmejkal 2016), consistent and transparent in order to regain its

legitimacy (Munir 2011); as such, conceptual confusions are highly undesirable, especially if complete harmonisation is involved (MacGregor Pelikánová 2018a).

2.2 The UCPD and Full Harmonisation: For or Against Consumers and Consumer Behaviour?

The UCPD was enacted to contribute to the proper functioning of the internal single market and achieve a high level of consumer protection by approximating laws (Art. 1), and so "*Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive"* (Art. 4). This implies that the EU opted for a very strongly unifying form of harmonisation, i.e. full or complete harmonisation (Stuyck 2011), despite the strong conceptual disparities in the laws of EU Member States (Osuji 2011). Therefore, the UCPD is one of many strongly pro-integration tools employed by the EU within the framework of its policies towards fair digital business (MacGregor Pelikánová 2013), going much further than contract and general consumer protection mechanisms (MacGregor Pelikánová 2018a).

Full harmonisation by the UCPD must be supported by EU primary law, i.e. in the fundamental treaties. According to the TEU and TFEU, there are three sets of competences to be exercised by the EU and/or EU Member States—conferred exclusive, conferred shared and not conferred. Regarding the functioning of the internal single market, the EU has conferred exclusive competence for the establishment of competition rules and conferred shared competence for other issues, such as internal market and consumer protection. The EU can choose between minimum and full harmonisation only where harmonisation is intended to contribute to the completion of the internal market (Loos 2010). This conclusion is backed up by the case law of the CJ EU, such as *C-183/00 González Sánchez/Medicina Asturiana SA*, where the CJ EU made it clear that the requirement of minimum harmonisation only pertains to measures which were not taken in the context of the internal market. The move to full harmonisation is justified not so much by consumer protection *per se*, but rather by the objectives of the internal single market and its operation (MacGregor Pelikánová 2018a). The UCPD has brought radical changes to EU law, and ultimately to the laws of EU Member States, and represents an aggressive approach toward harmonisation (Collins 2010) entailing both a maximum harmonisation character and horizontal effect approach (Durovic 2016). But what is truly evil based on the UCPD and how exactly does this full harmonisation impact consumers and consumer behaviour?

2.3 UCPD Prohibition of Unfair Commercial Practices: How Far Does Consumer Behaviour Protection Go?

The unfair competition law should protect the fairness of the already existing and functioning market by prohibiting certain behaviour which is perceived as being contrary to "honest usages" or "*bonos mores*" (aka *gute Sitten*) of trade (Thünken 2002). However, despite Art. 10bis of the Paris Convention for the Protection of Industrial Property, and in contrast to continental law jurisdictions, common law jurisdictions are specific in their strong legislative and judicial reluctance to "draw a line between fair and unfair competition, between what is reasonable and unreasonable" as stated in the precedential case *Mogul v. McGregor* (MacGregor Pelikánová 2018a). Since the EU wants to overcome this hurdle and even meet additional purposes, it implies that the target(s) of the UCPD might easily be blurred and mutually conflicting. Nevertheless, the UCPD quite clearly states that it applies to B2C (Art. 2) and that prohibited unfair commercial practices are those which are *contrary to the requirements of professional diligence, and materially distort or [are] likely to materially distort the economic behaviour with regard to the product of the average consumer* (Art. 5). This especially entails (i) practices which mislead and/or deceive an average consumer by action (Art. 6) or omission (Art. 7) and (ii) practices which aggressively impair the choice of an average consumer (Art. 8). Annex I of the UCPD includes a blacklist of commercial practices which are considered unfair in all circumstances (MacGregor Pelikánová et al. 2016).

Therefore, it is obvious that the UCPD wants to support the freedom of choice, and perhaps even the choice itself, of the average consumer. Although misleading practices deform truth and the perception thereof, while aggressive practices impair consumer freedom by means of harassment, coercion and undue influence, the UCPD addresses them more or less identically. Although exaggeration and slightly misleading actions, especially in the field of marketing and advertising, are common and generally tolerated, while harassment is generally taboo, the UCPD wants to protect the average consumer - and consumer behaviour - with the same intensity (MacGregor Pelikánová et al. 2017). The actions and omissions against which a consumer is always protected are included in Annex I, aka the blacklist, which includes 31 always unfair commercial practices, 22 which are misleading and 9 aggressive.

This is further magnified by explanatory and interpretation instruments, such as COM (2013) 138 Communication on the application of UCPD ("Communication") (EC 2013a) and COM (2013) 139 Report ("Report") (EC 2013b) adopted by the European Commission in order to explain and enforce efforts to guarantee a high level of consumer protection in a national context, and particularly in the context of the cross-border travel and transport industry (MacGregor Pelikánová 2017a). More importantly, in 2016, the European Commission issued a new explanatory document, COM (2016) 163 Guidance on the implementation/application of UCPD ("New Guidance") (EC 2016), and it appears that finally the Commission is readjusting and embracing a more informed and modest approach to the

understanding of unfair commercial practices as the target of the UCPD: see the confirmation of *C-559/11 Pelckmans* and its case-by-case approach to the finding of unfair commercial practices indicated in the blacklist of Annex I (MacGregor Pelikánová 2018a). The New Guidance proclaims that "*The Directive is horizontal in nature and protects the economic interests of consumers. Its principle-based provisions address a wide range of practices and are sufficiently broad to catch fast-evolving products, services and sales methods*". However, the (alleged top) target—unfair commercial practices—still has some limits; the New Guidance clearly repeats that the "*UCPD does not cover national rules intended to protect interests which are not of an economic nature. Therefore, the UCPD does not affect the possibility of Member States to set rules regulating commercial practices for reasons of health, safety or environmental protection. Also, existing national rules on marketing and advertising, based on 'taste and decency' are not covered by the UCPD.*" Hence, it can be stated that the UCPD protects the economic interest of an average consumer against various misleading or aggressive practices of businesses. The freedom of behaviour of the average consumer seems to be the mantra. Yet this inevitably leads to the question—who is the average consumer and what is average consumer behaviour?

2.4 Average Consumer and Average Consumer Behaviour in Light of the UCPD

The UCPD prohibits unfair commercial practices, while referring to the concept of the average consumer, and basically codifies the pre-existing case law of the CJ EU pursuant to which the average consumer test is not a statistical test (MacGregor Pelikánová et al. 2017). This is underscored by the CJ EU drive for the "*Homo Economicus*" (Trzaskowski 2011).

Indeed, cases decided by the CJ EU with reference to the "average consumer" or even the "average internet consumer" are mushrooming, and interesting trends can be observed (Gongol 2013). Typically, the CJ EU understands the "average consumer" as a reasonably well-informed, observant and circumspect consumer, see *C-210/96 Gut Springenheide and Tusky*. The European Commission states in its New Guidance that "*The average consumer under the UCPD is in any event not somebody who needs only a low level of protection because he/she is always in a position to acquire available information and act wisely on it. On the contrary, as underlined in Recital 18, the test is based on the principle of proportionality. The UCPD adopted this notion to strike the right balance between the need to protect consumers and the promotion of free trade in an openly competitive market. Therefore, the average consumer concept under the UCPD should always be interpreted having in mind Article 114 of the Treaty, which provides for a high level of consumer protection. At the same time, the UCPD is based on the idea that, for instance, a national measure prohibiting claims that might deceive only a very*

credulous, naive or cursory consumer (e.g. 'puffery') would be disproportionate and create an unjustified barrier to trade. As explicitly mentioned by Recital 18, the average consumer test is not a statistical test. This means that national authorities and courts should be able to determine whether a practice is liable to mislead the average consumer exercising their own judgment by taking into account the general presumed consumers' expectations, without having to commission an expert's report or a consumer research poll." The CJ EU replies via its case law which embraced the approach to the (average) consumer as more qualitative than quantitative; consequently, the CJ EU in *C-388/15 Nemzeti v. UPC* based on the UCPD rejected commercial misleading practices even if only one single consumer victim exists (MacGregor Pelikánová et al. 2016).

3 The Harmonised Protection of the Consumer and Consumer Behaviour Against Unfair Commercial Practices in Light of CJ EU Case Law

Arguably, despite the UCPD wording and the European Commission's rhetoric, the UCPD regime is not so much in the interests of consumers but rather of competitors (MacGregor Pelikánová 2018a). In addition, the case law of the CJ EU demonstrates that neither consumers nor consumer organisations have made much use of the UCPD, as opposed to competitors (Loos 2010). Indeed, the CJ EU has always been (more) aware of national differences regarding unfair competition issues and for over four decades has been developing rather strong case law demanding an advanced level of justification by EU Member States in the case of prohibited unfair commercial practices, see *C-120/78 Rewe Zentral v Budnesmonopolverwaltung für Branntwein (Cassis de Dijon), C-126/91 Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH, C-405/98 Konsumentombudsmannen (KO) v Gourmet International Products AB*, etc. The ultimate message of this case law was that the free movement of goods and services should prevail over national rules and thus protect both the market and the consumers, i.e. the CJ EU has pushed the market-oriented approach to consumer protection (Durovic 2016). As indicated above, the European Commission has always been on the same page and so gladly moved towards the (re)codification of this case law, along with the concept of the average consumer by the UCPD.

3.1 CJ EU Case Law on Full Harmonisation and Scope: Not Necessarily More Choices

The reaction of the CJ EU was not surprising, and consequently the CJ EU vigorously confirmed full harmonisation under the UCPD. As a matter of fact,

C-261/07 and C-299/07 Total Belgium were the very first cases pertaining to the UCPD; the CJ EU held therein that the Internal Market clause in (Art. 4) means the full harmonisation effect and prohibits the EU Member States from deviating in either direction, see Report. Consequently, no EU Member State is allowed to adopt rules stricter than those in the UCPD, even if such a stricter rule benefits consumer protection, see *C-261/07 and C-299/07 Total Belgium* (MacGregor Pelikánová et al. 2016). Indeed, the CJ EU has demonstrated immense resourcefulness and consistency in supporting full harmonisation, see *C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerb eV v. Plus Warenhousegesellschaft mbH*, etc. (MacGregor Pelikánová 2017a).

Furthermore, the CJ EU in *C-59/12 BKK v. Zentrale* opted for a large and broad reach regarding subjects covered by the ban on misleading commercial practices. It states that *it must be held that, for the purpose of applying the Unfair Commercial Practices Directive, the terms 'business' and 'trader' have an identical meaning and legal significance. Moreover, 'trader' is the most frequently used in the provisions of that directive. … . Directive 2005/29/EC . . . must be interpreted to the effect that a public law body charged with a task of public interest, such as the management of a statutory health insurance fund, falls within the persons covered by the directive.* Therefore, misleading commercial practices, including confusing marketing and *copycat* techniques, are prohibited vis-à-vis basically everybody who is able to do so or accomplish such an effect (MacGregor Pelikánová et al. 2016).

The affirmation of full harmonisation in *C-261/07* and *C-299/07 Total Belgium* and the affirmation of large reach *in C-59/12 BKK v. Zentrale* were confirmed *by C-421/12 EC v. Belgium* in which the CJ EU ruled that "*Since . . . Directive 2005/29 has affected a complete harmonisation of the rules concerning unfair commercial practices, the national measures at issue must therefore be assessed solely in the light of the provisions of that directive and not of Article 28 TFEU, . . ., by excluding members of a profession and dentists and physiotherapists from the scope of the Law of 14 July 1991, transposing in national law Directive 2005/29; . . . the Kingdom of Belgium has failed to fulfil its obligations under Articles 2(b) and (d), 3 and 4 of Directive 2005/29*. Hence, regardless of the nature of public or private law, the type of business activities or of the dichotomy between trade and businessman, the UCPD has to be applied (MacGregor Pelikánová et al. 2016) even if there is only one single victim. Namely, in *C-388/15 Nemzeti v. UPC*, the CJ EU surprisingly held that the UCPD misleading commercial practices regime even extends to situations when the confusion of a single consumer occurs, i.e. *the communication, by a professional to a consumer, of erroneous information, such as that at issue in the main proceedings, must be classified as a 'misleading commercial practice', within the meaning of that directive, even though that information concerned only one single consumer*".

The limits of this approach to a broad and full reach in terms of harmonisation can be detected in *C-559/11 Pelckmans*, where the CJ EU confirmed the non-application of the UCPD to national provisions prohibiting traders from opening their shops 7 days a week by requiring them to choose a weekly day of closing, i.e. the scope of the UCPD does not extend to national legislations preventing a business from being open on Sunday, because such national provisions do not pursue objectives related

to consumer protection (MacGregor Pelikánová 2017a). Consequently, full harmonisation is presented as a tool to protect consumers and their behaviour but not as a tool necessarily for extending consumer choices or allowing a broad scope of consumer behaviour.

3.2 CJ EU Case Law for the Average Consumer: Ephemeral and Universal European

Well before the UCPD, the CJ EU started its crusade in the name of the "average customer"; hence, the ephemeral concept has been pushed to become a benchmark for business law and customer protection law issues. For the CJ EU, the average consumer was, is, and shall be "*Homo Economicus*", despite strong extrinsic and even intrinsic criticism (Trzaskowski 2011).

Such an "average consumer" seems to be harmonised if not unified and, pursuant to the CJ EU, exhibits little if any national particularities worthy of judicial or legislative consideration. For example, in *C-544/13 and 545/13 Abcur AB*, the CJ EU emphasised the duty of uniform interpretation across the EU and the direct reference to the teleological approach. The ruling stated: *According to the Court's settled case-law, the need for a uniform application of EU law and the principle of equality requires the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope normally to be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account not only its wording but also its context and the objectives pursued by the rules of which it is part.* It even added that the UCPD *is characterised by a particularly wide scope ratione materiae which extends to any commercial practice directly connected with the promotion, sale or supply of a product to consumers.*

Fortunately, the CJ EU does not push this audacious and not truly realistic vision of a one-size-fits-all "average consumer" to the edge. A sign of self-reflection and recognition of limits can be detected in *C-201/96 Gut Springenheide* or *C-313/94 Elli Graffione,* where the CJ EU left it up to national courts and experts to decide on the existence of consumer confusion in IP matters, e.g. whether the use of a trademark or its imitation or a certain reference to it is misleading or not. Another set of limits can be detected in the abovementioned *C-559/11 Pelckmans* in which the 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, as shown above. As a matter of fact, the abovementioned *C-544/13 and 545/13 Abcur AB* dealt with the confusing marketing and recognised the inherent particularism and the need for a case-by-case approach by stating that "*a commercial practice is to be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the*

average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. Information requirements established by EU law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, are, in accordance with Article 7(5) of Directive 2005/29, to be regarded as material". This approach is also embedded in further cases, such as the clothes shop case *C-288/10 Wamo* and the e-commerce case *C-13/15 Cdiscount SA* (MacGregor Pelikánová 2018a). As mentioned above, the quantification is irrelevant; thus, following *C-388/15 Nemzeti v. UPC*, the "average consumer" benchmark applies even if only the behaviour of one single customer is involved.

3.3 CJ EU Case Law on Unfair Commercial Practices Prohibited per se*: Inherent Evilness in Intangible Matters*

The UCPD prohibits unfair commercial practices (Art.), which includes misleading commercial practices (Art. 6 and Art. 7), and the blacklist of always prohibited practices is included in Annex I of the UCPD which names commercial practices that are considered unfair in any and all circumstances. The Communication underlines that "*The benefits of the Directive mainly stem from two of its specific features, namely, its horizontal "safety net" character and its combination of principle-based rules with a "Black List" of specific prohibitions of certain unfair practices*". The black list includes 31 always unfair commercial practices, 22 which are misleading and 9 aggressive, part of which entail IP issues. Therefore, the "eternal" evilness is to be appreciated in the light of conceptual guidelines provided in *C-252/07 Intel*, *C-487/07 L'Oréal*, *C-559/11 Pelckmans*, etc. Interestingly *C-252/07 Intel* is presented as quite tough on superbrands, while *C-487/07 L'Oréal* is presented as a proponent of a very broad concept of unfair advantage. Indeed, the CJ EU held in *C-487/07 L'Oréal* that taking unfair advantage of a mark does not require the likelihood of confusion or the likelihood of detriment to the distinctive character or the repute of the mark (Seville 2011). Nevertheless, basically during the same period, a set of CJ EU rulings dealing with Advertising Words, aka AdWords, were passed, see *C-236 to C-238/08 Google*, pursuant to which "*the fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign*" (Gongol 2013). Clearly, the UCPD regime is here to catch cases and situations that fail to pass this legislative net or, more precisely, this legislative strainer. It might even be argued that the UCPD is here to address modern digitalised advertising and trading (Thünken 2002).

The CJ EU's teleological and purposive approach, magnified by the drive for an expansive interpretation in order to support integration, is visible even in the spheres where the UCPD and sustainability matters or IP labelling matters overlap

(MacGregor Pelikánová 2018b). This can be illustrated by the quasi-copycat case *C-195/14 Bundesverband v. Teekanne* by which the CJ EU enforces an honest and truthful labelling in the largest sense, *precluding the labelling of a foodstuff and methods used for the labelling from giving the impression, by means of the appearance, description or pictorial representation of a particular ingredient, that that ingredient is present, even though it is not in fact present and this is apparent solely from the list of ingredients on the foodstuff's packaging*. This case law about labelling has to be understood in light of the context of trademark regulation and national practices while keeping in mind that modern trademarks perform many functions (Long 2013) and are leads for customers (Dědková 2012). Pursuant to the CJ EU ruling in *C-403/08 Football Association Premier League v. QC*, sports events do not qualify as works which are protected by EU copyright; consequently the unfair competition rules, with the misappropriation doctrine and the UCPD regime, are becoming instrumental in affording much-needed flexible protection for sporting events and related investments (Margoni 2016).

4 The (In)effectiveness of the UCPD in Harmonising the Protection of Consumer Behaviour

The UCPD banishes unfair commercial practices which harm consumers and implicitly protects certain types of consumer behaviour. Namely, by creating a wide definition of prohibited commercial practices and creating the black list of eternally evil practices, the EU indicates several categories of consumer behaviour via UCPD and related interpretation instruments, such as Communications, Reports and New Guidances and the CJ EU case law. Namely, sorting is done by indicating which category will be subject to harmonised UCPD protection and which will not. Is this correct, i.e. is this an effective approach?

From a positivistic and strictly legal point, the EU did not violate any fundamental treaties and principles and so the legitimacy and validity of the UCPD is beyond any reasonable doubts, as explained above. Therefore, from a legal perspective, the harmonised protection of consumer behaviour via UCPD appears prima facie right and correct, i.e. effective. However, the social and economic perspective leads to a different picture.

Indeed, the UCPD brings a rather rigid vision of what is good and what is bad; both the Commission and the CJ EU seem to be opting more for conclusive interpretations than for allowing national case-by-case approaches. Hence, they are ultimately inclined to influence, if not make, customer choices.

There has always been interplay, perhaps even tension, between the EU and national approaches to competition law, unfair competition law and consumer protection norms (Stuyck 2011). The demands of integration and the single internal market led to the harmonisation of business practices and consequently even to consumer behaviour. This is logical and correct, but the intensity and manner

generated by the UCPD raises a set of questions and issues. Firstly, economically and socially, the legal determination of the UCPD to aim for a myriad of purposes seems hardly understandable, leading to the burning question of whether customers are the top priority or not in the case of an inevitable conflict between these purposes, as seen above. Secondly, the UCPD is a full harmonisation legislative instrument, but the EU could opt for less radical measures. Naturally, both ways are in compliance with primary EU law, but if the EU should be closer to its citizens and "united in diversity", then it seems the combination of full harmonisation and the unified benchmark of the average consumer, aka *Homo Economicus*, is a problem undermining the effectiveness of the UCPD. Thirdly, the UCPD defines the distinction between good, sometimes bad and always bad, but often this distinction is motivated by extrinsic motivations, such as an exclusive focus on B2C. As a matter of fact, after 14 years, the EU attempted to correct this and improve its effectiveness in this respect by introducing the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. Indeed, the means by which to fulfil the development goals of the food industry have to be created from measures designed to contribute to the fulfilment of the strategic goals and objectives of the food industry as effectively as possible, and to identify the positive impacts on food security, food safety and quality (Pakšiová and Lovciová 2019).

5 The (In)efficiency of the UCPD in Terms of Harmonised Protection of Consumer Behaviour

The UCPD is legislatively correct and legitimate, and thus effective, but its effectiveness from other perspectives is rather problematic. Regarding the correctness and rightness of its operation and application, i.e. its efficiency, close scrutiny regarding individual aspects is necessary. Naturally, this scrutiny must address the co-operation of the internal tandem, the European Commission and the CJ EU, while considering fundamental, as well as special and partial, aspects of performance concepts (Melecký and Staníčková 2019).

Prima facie, the tandem seems to speak with the same tenor regarding the UCPD. However, a deeper study, as seen above, reveals that the single-minded determination of the European Commission to do whatever it can for the internal single market can be counterproductive and produce misleading and confused rules, and that the CJ EU is not so radical. Indeed, the CJ EU has wisely accepted that a competition-driven solution is not the best for every solution pertaining to the issue of competition (Šmejkal 2016), but rather that it has to focus on making the application of the UCPD efficient (MacGregor et al. 2016).

As a matter of fact, the European Commission, with its much too general and not truly binding Communication, Report and New Guidance, did rather too little too late, and has not vigorously supported the effectiveness of harmonisation by the

UCPD. However, the CJ EU stepped in by means of case law and dramatically influenced this efficiency. Each case decided pertained to something important and with a direct impact on consumer behaviour, and the CJ EU provided the ultimate answers. Perhaps these answers might be perceived as not fully correct (not perfectly effective), but the correctness of this action (efficiency) is beyond any doubt, i.e. nobody can accuse the CJ EU of avoiding its rulemaking responsibilities when it comes to harmonised protection via the UCPD. With a touch of exaggeration, it can be proposed that the CJ EU, with its proactive approach, partially offset the passive approach of the European Commission and consequently led to a sufficient level of efficiency of the UCPD.

The list of these cases should start with *C-261/07 and C-299/07 Total Belgium* which went for "no more no less" protection of consumers in the EU and aimed to make the vigorous application of the UCPD in the entire EU a reality. In *C-59/12 BKK v. Zentrale,* it added that the UCPD extends even to public law businesses and that the UCPD regime applies even if one single customer is involved, see *C-388/15 Nemzeti v. UPC*. This extremely broad (long-arm) reach of the UCPD is further magnified by the unified concept of the universal European "average consumer", see *C-544/13 and 545/13 Abcur AB.* Hence, the message generated by the CJ EU is crystal clear and could be reduced to the conclusion that there is a standardised (if not unified) European consumer behaving in a standardised (if not unified) manner, and such behaviour must be protected against commercial practices which would impair it through confusion or aggression. Although the effectiveness of the UCPD in this respect is vast, it is still not absolute.

Paradoxically, some limits to this massive effectiveness are set with respect to increasingly popular consumer behaviour. Indeed, consumers very often demonstrate the drive to shop "whenever and however they want", i.e. consumers develop various behaviours from traditional to high-tech and do not reduce themselves to certain forms or certain times. However, in *C-559/11 Pelckmans*, the CJ EU remarkably did not use the UCPD to strike down national provisions prohibiting traders from opening their shops seven days a week and remain immune to significant demand by businesses and consumers to be free to conduct business and when they wish, rather than beholden to the opinions of the state or labour unions. Other limits to the mass effectiveness seem more logical and appropriate, such as the case law on the overlap of the UCPD and IP (MacGregor Pelikánová 2018b), e.g. *C-252/07 Intel*, *C-487/07 L'Oréal*, *C-544/13 and 545/13 Abcur AB* and *C-195/14 Bundesverband v. Teekanne*.

6 Conclusions

The keystone of European consumer protection, the UCPD, was enacted to contribute to the proper functioning of the internal market and to help achieve a high level of consumer protection by approximating the laws of EU member states. The exploration of the UCPD legislative and judicial perspectives vis-à-vis consumer behaviour

and its protection, i.e. the wording and interpretation of the UCPD by the European Commission and the CJ EU, provides a colourful picture of varying degrees of effectiveness and efficiency.

From a strictly legal perspective, the UCPD is correct and has a legitimate right to explicitly banish misleading or aggressive unfair commercial practices which harm consumers and to implicitly protect certain types of consumer behaviour. The economic, social and other perspectives point to certain weaknesses of the presented solutions and potentially challenge the determination for such a full harmonisation, especially when matters which can hardly be reconciled are presented as common purposes, and meanwhile national particularities are underestimated.

Over 10 years of experience with the application of this harmonised regime allows one to address the correctness of its interpretation and application. This study points to a large gap between the determination and eagerness of the pro-integration tandem. The weak and not truly active approach of the European Commission can be contrasted with the casuistic activism of the CJ EU, which enthusiastically makes ultimate rulings. Protection via the UCPD, including consumer behaviour which benefits from the UCPD regime, is real and applied in practice. Exceptions due to IP particularities are well founded. However, certain criticisms might target the CJ EU denial to protect the free "timing and form" of consumer shopping behaviour, i.e. the CJ EU could send an even stronger message about efficiency by supporting freedom of choice regarding the opening hours of shops.

In sum, the protection of consumer behaviour is provided in a rather effective and efficient manner by the UCPD. Nevertheless, more than a decade of experience leads to several recommendations for improvements in effectiveness and efficiency. Regarding effectiveness, a deeper, open-minded and bottom-up review should be done and the EU should be more modest and realistic with respect to national particularities. EU member states and their businesses and consumers are more different than the UCPD admits, and the drive for full harmonisation in order to protect a standardised average consumer should definitely be reviewed. Regarding efficiency, the recommendation is obvious: the European Commission should be much more pro-active and should prepare the interpretation instruments faster and in more detail. Further, it should engage in pro-active dialogue with all stakeholders. After all, the effective and efficient protection of consumer behaviour must be done in the interest of real European consumers, must be clearly understood by them and benefit them by means of prompt enforcement. So far, we are only halfway, or perhaps slightly further, so we need to continue working on the improvement of effectiveness and efficiency.

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