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Institutional Design in Hungary: A Case Study of the Unfair Commercial Practices Directive

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Abstract The adoption of the Unfair Commercial Practices Directive (UCPD) and its implementation in the EU Member States raised many academic and policy discussions on substantive issues such as the fairness notion, the substantive test of material distortion, as well as the concept of the average consumer. However, its influence on the Member States' enforcement regimes is equally far-reaching. This paper analyses on the one hand, how EU law, i.e., the UCPD, affected the traditional enforcement models of the Member States and on the other hand, how the allocation of enforcement powers to institutions who enforce the UCPD and the organizational design of these enforcement institutions influence the actual enforcement of EU law in the national legal context. This paper conducts a case study on Hungarian law and examines how Europeanization of unfair commercial practices has changed the Hungarian model of law enforcement. The paper finds that the changes in the Hungarian institutional framework had significant impact on how substantive rules are applied by the various enforcement agencies due to their different enforcement legacies. This case study shows that looking at institutional design provides a deeper understanding of local enforcement modalities, and it offers new insights for Europeanization strategies.

Keywords Europeanization · Unfair commercial practices · Enforcement · Institutional · Design · Hungary

This article analyses the enforcement of the Directive on Unfair Commercial Practices (UCPD) in the Hungarian legal system. More specifically, it examines the allocation of

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enforcement powers to institutions which enforce the UCPD and the organizational design of these enforcement institutions under Hungarian law. The aim of the paper is twofold. On the one hand, it analyses how EU law, in this case the UCPD, affects the endogenous enforcement models of the Member States. On the other hand, it examines how the Member States' organizational design of the enforcement institutions influences the actual enforcement of EU law in the national legal context. Institutional design has been recognized as a critical dimension of law enforcement in the new Member States located in Central and Eastern Europe. This is due to the fact that administrative capacity is now seen as a cornerstone of credible enforcement of EU law since the enlargement of 2004. Institutional integrity in these Member States had to be persistently developed in the course of and after their accession to the EU. Accordingly, it is the analysis of institutional capacity that helps to reveal and evaluate local enforcement strategies.

The adoption of the UCPD and its implementation in the Member States raised numerous academic and policy discussions on substantive issues such as the fairness notion, the substantive test of material distortion, as well as the concept of the average consumer. However, its influence on the Member States' enforcement regimes is equally far-reaching. This is because the adoption of the UCPD was closely linked to law enforcement in the EU. The relevance of the UCPD was reflected in its message to improve cross-border enforcement of consumer law, and accordingly, it has also prepared the ground for Regulation 2006/2004. This Regulation obliged Member States to set up administrative authorities to enforce consumer laws cross-border. The impact of the UCPD on the Member States' traditional models of consumer law enforcement can be characterized as part of a process that departs from the EU law principle of procedural and institutional autonomy and endeavours to influence national enforcement systems. This raises the question: How effective and how legitimate is the Europeanization of national unfair commercial practices laws and enforcement? This article provides a case study on Hungarian law and examines how Europeanization of unfair commercial practices has changed the Hungarian model of law enforcement. It finds that the changes in the Hungarian institutional framework had significant impact on how substantive rules are applied by the various enforcement agencies due to their different enforcement legacies. This case study illustrates how looking at institutional design provides a deeper understanding of local enforcement strategies and offers new insights for future Europeanization strategies.

This article is organized as follows: First, it explains the relevance of institutions in law enforcement and examines how Europeanization of law enforcement in the Member States has developed from the 1990s on. The second section analyses the provisions of the EU Directive on Unfair Commercial Practices with regard to law enforcement and the way Member States implemented it in their local enforcement systems. While the Directive was aimed at maximum harmonization, its provisions on law enforcement leave a wide margin of discretion to the Member States on issues of sanctions, remedies, and the allocation of enforcement powers to institutions. The third section analyses the Hungarian legislative and institutional framework as it has been changed in the course of implementing the UCPD. Finally, the paper closes with conclusions.

The Relevance of Institutional Design

Political scientists have long underlined the significance of institutional design on government performance (Wilks, 1999). Lawyers would not tend to think of institutions as the rules

of the game such as North's definition (North, 1995)[1], but understand institutions as formal and informal bodies that are charged by a society with making, administering, enforcing, or adjudicating its laws or policies (Prado and Trebilcock, 2009). This paper will use *institutional design* to mean the organizational design of law enforcement that denotes the structures, processes, and procedures of law enforcement and application (Fox, 2010).

The question of institutional choice and design for the enforcement of the EU consumer *acquis* in the context of the new CEE Member States has been extensively examined in the work of Bakardjieva-Engelbrekt (2006, 2007, 2008, 2009), and the issue has subsequently been analysed in the enforcement of other areas of EU law (Cseres 2008, 2010).

It is now well recognized that institutions are a critical and underappreciated driver of public policy that interact in many subtle ways with substantive rules and decisions (Crane, 2011, p. xi). The relevance of institutions has been emphasized by Stiglitz, who argued that a country's stage of development indicates how advanced its economy is, and therefore how capable the country is of generating institutions necessary for a well-functioning market economy, as well as the capacity of the economy's institutional apparatus to generate wealth for its citizens (Stiglitz 2002).

It has been argued that the institutional embeddedness (Gerber 2009) of legal rules involves important procedural and institutional complexities and regularities that influence effective law enforcement. Substantive rules and policies are mediated through the institutions that investigate, enforce, and adjudicate legal issues and the decision-making processes that these institutions employ. Institutional and procedural differences are likely to generate widely different substantive outcomes, even with a similar legislative mandate (Trebilcock and Iacobucci 2010). The respective institutional contexts will each shape decisions in their own ways and may lead to differing functions of the legal rules and thus potentially very different outcomes (Gerber 2009).

The implementation, supervision, and enforcement of EU law are left to the Member States in accordance with the so-called national procedural and institutional autonomy. This "procedural competence" of the Member States means that the Member States have to provide remedies and procedures governing actions intended to ensure the enforcement of rights derived from EU law, provided that the principle of equivalence and the principle of effectiveness are observed (Van Gerven 2000).[2] Competence allocation in the European multi-level governance is politically sensitive (Bakardjieva-Engelbrekt 2009; Cafaggi and Micklitz 2009), and as such, it has been extensively discussed in the literature and in the case-law of the European courts (Jans et al. 2007).[3] This discussion has mainly addressed the competence allocation between the Member States and the EU and the increasing influence of EU law and policy with regard to procedural and remedial autonomy (Delicostopoulos 2003; Kakouris 1997; Lenaerts et al. 2006; Prechal 1998; Reich 2007; Trstenjak and Beysen 2011; Van Gerven 2000). It has, however, not addressed the question to which authorities the

[1] The basic idea that institutions matter for economic development is based on North's assumption that institutional frameworks create incentives for behaviour, leading to different outcomes. North defines institutions as the rules that determine the behaviour of individuals and organizations. He distinguishes between formal rules such as laws and regulations and informal rules such as constraints on behaviour derived from culture, tradition, custom, and attitudes. Formal rules and informal constraints are interdependent and in constant interaction (North 1995).

[2] *Case 33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG* v *Landwirtschaftskammer für das Saarland (Rewe I)*, [1976] ECR 1989, para 5.

[3] Case C-410/92, *Johnson* [1994] ECR I-5483, para. 21; Case C-394/93;, *Unibet (London) Ltd and Unibet(International) Ltd.* [2007] ECR I-2271, para 39; Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen* [1995] ECR-i4705; Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR para 62.

Member States allocate regulatory powers for the enforcement of EU law and how they organize and structure these enforcement agencies in their national administrative law system.

Institutional autonomy may be regarded as the Member States' competence to design their own institutional structure and allocate regulatory powers to public administrative agencies that enforce EU law (Verhoeven 2010). In *International Fruit Company II*, the CJEU has stated that

"[A]lthough under Article 5 of the Treaty the Member States are obliged to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty, it is for them to determine which institutions within the national system shall be empowered to adopt the said measures. […] when provisions of the Treaty or of Regulations confer power or impose obligations upon the states for the purposes of the implementation of Community law, the question of how the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each state."[4]

In the EU Member States highly convergent and harmonized substantive rules are implemented through diverging procedures and enforcement bodies. This decentralized enforcement framework challenges the coherent and uniform application of EU law across various fields of EU law. In an enforcement system where Member States apply divergent procedures may impose a variety of sanctions and remedies administered by various actors the effectiveness of EU law, effective judicial protection[5] and effective law administration may be at risk. In EU competition law, for example, it has been questioned whether consistent policy enforcement and the effective functioning of the European Competition Network requires a certain degree of harmonization of procedures, resources, experiences, and independence of the NCAs (Cengiz 2009; Frédéric 2001; Gauer 2002).

Europeanizing Law Enforcement

The influence of EU law on Member States' procedures and remedies of law enforcement has been gradually growing since 1992 (de Moor-van Vugt, 2011) and has been intensified following enlargement to the CEECs in 2004. According to Nicolaides, enforcement became a priority area of EU policy with the process of enlargement due to three factors. First, the CEECs emerged from many years of communism, and they had to build institutions that were accountable to citizens and functioned in very different environments than in the past. Second, EU integration has progressed and the impediments in the internal market were found in administrative weaknesses and incorrect implementation of EU law. Third, the legal body of the *acquis* expanded considerably, especially in the area of internal market, and it made proper enforcement key to make the single market work (Nicolaides 2003, pp. 47–48).

De Moor-van Vugt has identified similar patterns in the Europeanization of law enforcement. She shows that as from the early 1990s the Commission began to monitor the Member States' enforcement of EU law due to insufficient implementation of EU law resulting in fraud with EU structural funds (de Moor-van Vugt 2011). As a result, the Commission implemented a stricter policy which limited the Member States' procedural autonomy and obliged them to comply with the principles of sincere cooperation, non-discrimination, and

[4] Joined cases 51-54/71 *International Fruit Company II* 15 December 1971: [1971] E.C.R. 1107. paras 3–4.
[5] Articles 6 and 13 of the ECHR, Article 47 of the Charter of fundamental rights of the European Union which has now been reaffirmed in Article 19(1) TEU.

effectiveness (de Moor-van Vugt 2011).[6] The CJEU's judgment in *Greek Maize* opened the way for the Commission to lay down obligations for the Member States in consequent Directives and Regulations that concerned subsidies in order to take appropriate measures in case of infringements of EU law.[7] De Moor-van Vugt demonstrates that the same pattern of Europeanizing national enforcement models has been followed by the EU in several other sectors such as agriculture, environmental law, financial services, and sector regulations such as telecomm and energy (de Moor-van Vugt 2011, p. 72).

This increased awareness of the enforcement of EU law was the most visible in the modernization of EU competition law, where Regulation 1/2003 entered into force in 2004. The improvement of cross-border enforcement laid also at the heart of the Regulation 2006/2004 on consumer protection cooperation.[8] This Regulation has set up an EU-wide network of national enforcement authorities and enabled them to take co-ordinated action for the enforcement of the laws that protect consumers' interests and to ensure compliance with those laws.

Despite this, the institutional autonomy of the Member States has remained largely untouched by the EU. The EU has actually began to address the issue of administrative capacity of enforcement institutions in the course of the CEECs' accession process. The notion of "administrative capacity" was introduced by the Madrid European Council and later established by subsequent accession meetings as a requirement to accession. For example, transposition of the competition and state aid *acquis*, effective enforcement of the competition and state aid rules, and strengthening of the administrative capacity through well-functioning competition authorities were among the obligations of the candidate countries.[9] The White Paper,[10] which{ XE "White Paper"} was drafted in order to assist the Eastern European countries in their preparation for accession to the EU, required the "setting-up of an adequate institutional structure in charge of consumer affairs" and "the granting to consumers of efficient redress mechanisms enabling them to make their rights effective" (European Commission 1995, pp. 427–428). It added that "consumer legislation […] tends to remain a *dead letter* (emphasis added) where consumers do

[6] Since the CJEU's judgment in C-68/88 *Greek Maize* the Member States are required by Article 4 (3) TFEU to take all measures necessary to guarantee the application and effectiveness of EU law. While the Member States remain free to choose the appropriate enforcement tools, they must ensure that infringements of EU law are penalized under conditions, both procedural and substantive ones, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty *effective*, *proportionate*, and *dissuasive*. Case 68/88 *Commission v Hellenic Republic*, Judgment of the Court of 21 September 1989, I-2965, paras 23-24.

[7] Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission to protect the European Communities' financial interests against fraud and other irregularities. When this proved insufficient to stop fraud in the Member States, the Commission supported the setting up of national associations to protect economic interests of the EU and invited these associations to conferences to discuss the barriers of effective enforcement. At the same time, the Commission revised EU legislation and obliged the Member States to issue administrative sanctions in cases of infringements. Infringements had to be registered in an EU database and Member States had to annually report their enforcement efforts. As a final move, the EU set up an EU agency, OLAF for monitoring Member States' enforcement. Regulation 1260/1999 lays down general provisions on the Structural Funds. OJ 1999 L 161.

[8] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection, O.J. L 364/1, 9.12.2004.

[9] See for example Articles 62 of Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, [1993] OJ L347/1, See chapter 2 of the White Paper.

[10] White Paper: Preparation of the associated countries of Central and Eastern Europe for integration into the Internal Market of the Union, COM (95) 163, May 1995 see 4.34 and 2.30 of the White Paper.

not understand their rights and/or the mechanisms do not exist for exercising them." It continued that "[T]he law must not only exist but it must also be applied and -above all- be expected to be applied." (European Commission 1995) The European Commission has also provided substantial financial and technical assistance to the candidate countries through the PHARE programme that was among others aimed at strengthening public administrations and institutions to function effectively inside the European Union.[11] Later accessions of Bulgaria and Romania confirmed the EU's increased intervention with regard to reinforcing administrative capacity in these countries to enforce future EU law.[12] Therefore, the Commission proposed to make a special transition facility for institution building available. Additionally, certain EU financed instruments which have proven their usefulness, such as twinning programmes, continue to be used.[13] Similarly, in the on-going accession process with countries from the Western Balkans[14] the Commission confirmed that public administration reform continues to be a key priority under the political criteria in most enlargement countries. [15]

Comparably, *in the* liberalized network industries the EU gradually extended the EU principles of *effective*, *dissuasive*, and *proportionate sanctions* as formulated in the case-law of the European courts *to a broader set of obligations and criteria for national supervision in EU legislation.* The liberalization of state-owned enterprises has been accompanied by the obligation for Member States to create regulatory agencies in order to maintain elements of public control and to provide reassurance of independence from government in creating a level playing field for new entrants (Gorecki 2011; Scott 2004; Thatcher 2002). *This Europeanization of market supervision* (Ottow 2012) *in the* liberalized network industries among others obliged Member States to establish independent national regulatory agencies with core responsibilities for monitoring markets and safeguarding consumers' interests (Micklitz 2009). These independent NRAs act as representatives of consumers (Davies and Szyszczak 2010), but also as intermediaries between consumers and states (Micklitz 2009).

The next sections examine the Europeanization of law enforcement through the UCPD's implementation on the Member States' regulatory landscape by differentiating between two different areas of law enforcement: procedures and the institutional setting—i.e., who enforces what laws.

Unfair Commercial Practices Directive

Even though problems of unfair trade practices formed one of the driving factors behind the establishment of consumer authorities in the 1970s (Scott 2010), it was the Directive on Unfair Commercial Practices in 2005 that signalled the need to strengthen trans-border enforcement in consumer law (Cafaggi and Micklitz 2009). It also prepared the ground for

[11] http://ec.europa.eu/enlargement/financial_assistance/phare/index_en.htm accessed on 14 October 2007.
[12] Communication from the Commission, Strategy Paper of the European Commission on progress in the enlargement process, COM(2004) 657 final, p. 10, 14.
[13] Communication from the Commission, Strategy Paper of the European Commission on progress in the enlargement process, COM(2004) 657 final, p. 4 See also Comprehensive monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM (2005) 534 final.
[14] Enlargement Strategy and Main Challenges 2012–2013, COM(2012) 600 final.
[15] Adequate administrative procedures, including with respect to human resource and public financial management, including tax collection, and reliable and independent statistical systems are of fundamental importance for the functioning of the State and for implementing the reforms needed for EU integration. Countries need to increase their efforts to improve their public administrations at all levels on the basis of overall national strategies. Enlargement Strategy and Main Challenges 2012–2013, COM(2012) 600 final, p. 5.

Regulation 2006/2004, which obliged Member States to set up administrative authorities to enforce consumer laws cross-border. This Regulation intervened with national enforcement systems by imposing public enforcement[16] of the consumer *acquis*. Prime example of this institutional influence is the establishment of the Netherlands Consumer Authority in 2007 and the creation of a dual system of public and private enforcement based on a subsidiarity principle.

The aim of the UCPD was to achieve a high level of convergence by fully harmonizing national laws of unfair commercial practices in business-to-consumer relations and thus to give Member States little room for variations of implementation. The Directive is a legislation of maximum harmonization, and accordingly, the Member States cannot implement stricter rules and raise the level of protection for consumers. The Directive provides comprehensive rules on unfair trading practices and strives to provide precise guidance to national enforcement agencies and courts about the scope of its provisions as well as general rules and standards to determine its scope of application and formulate precise requirements to national legislators and courts.[17]

The effects of UCPD implementation in the Member States were analysed by the EU Parliament in 2010.[18] Among the most important problems was the transposition of UCPD into different national enforcement regimes. This finding was confirmed in 2013 when the EU Commission has published its first report on the functioning of the UCPD.[19] The Report established that the UCPD made it possible to address a broad range of unfair business practices, such as providing untruthful information to consumers or using aggressive marketing techniques to influence their choices. The legal framework of the UCPD proved effective to assess the fairness of the new on-line practices that are developing in parallel with the evolution of advertising sales techniques. However, the Commission's investigation has revealed that, in certain sectors such as travel and transport, digital and on-line, financial services and immovable property, enforcement should be improved both in national context and especially at cross-border level. These reports emphasize the relevance of the Member States' local enforcement strategies, which will be discussed in the next section.

Enforcement of the UCPD

The UCPD follows the approach of EU consumer law in earlier directives, and it has allowed the Member States to establish or maintain their own specific enforcement systems. These local national enforcement regimes are very diverse: some Member States have predominantly private enforcement, others rely predominantly on public bodies. In accordance with the

[16] See Article 3c on the definition of a competent authority: " competent authority' means any public authority established either at national, regional or local level with specific responsibilities to enforce the laws that protect consumers' interests;"

[17] See Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29 on Unfair Commercial Practices Directive SEC(2009) 1666 and the EU Commission's legal database on the application of the Directive: https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show&CFID=389966&CFTOKEN=8e1282c22ba4df9b-53E4BAFD-EA84-2521-0437E1DAE21082E2&jsessionid=a503a93bfd148af6bdbf501c1030145ff1f1TR

[18] Directorate General for Internal Policies, Policy department A: economic and scientific policy, State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation, prepared by the (IP/A/IMCO/ST/2010-04), available at http://www.europarl.europa.eu/document/activities/cont/201007/20100713ATT78792/20100713ATT78792EN.pdf

[19] First *Report* on the application of Directive 2005/29/*EC* concerning Unfair Commercial Practices (COM(2013)139) Commission Communication on the application of Directive 2005/29/EC on Unfair Commercial Practices (COM(2013)138) has been adopted on 14 March 2013.

principles of procedural and institutional autonomy Member States can entrust public agencies or private organizations with the enforcement of consumer laws, enabling those institutions to decide on the internal organization, regulatory competences, and powers of public agencies.

These principles are mirrored in Articles 11 and 13 of the UCPD that leave wide margin of discretion to the Member States with regard to enforcement. Article 11 UCPD requires that Member States ensure adequate and effective means to combat unfair commercial practices. Similarly, Article 13 UCPD leaves the Member States free to decide what type of penalties should be applied, as long as these are "effective, proportionate, and dissuasive." Three main enforcement systems can be identified in the Member States. First, the administrative enforcement carried out by public authorities; second, the judicial enforcement, and finally, systems combining both elements. Member States may choose from civil, administrative, and criminal remedies. For example, the Polish Unfair Commercial Practices Act introduced both civil and criminal remedies (Sikorski 2009, p. 54). Some jurisdictions combine elements of private and public enforcement. Sanctions vary between injunction orders, damages, administrative fines, and criminal sanctions, and many Member States combine all these sanctions in their enforcement system. [20] With regard to standing, Member States can choose to give individual consumers a right to redress but are not bound to do so. Article 11 of the Directive merely provides that remedies should be granted either to persons or national organizations regarded under national law as having interest in combating unfair commercial practices. Granting remedies directly to consumers was, however, a novelty in Polish unfair competition law and has recently been proposed in the UK.[21]

The possibility of collective consumer actions is of recent origin in some Member States like Lithuania, Latvia, Bulgaria, Poland, and Slovakia. While in these Member States collective actions can be brought by groups of individual consumers, in other Member States specific types of collective action have been introduced in order to strengthen the enforcement of unfair commercial practices law in a way that extends beyond the use of injunctions and allows compensation for damages.[22] Furthermore, a breach of unfair commercial practices law may qualify as a criminal offence that can be enforced either by public authorities or by the public prosecutor and the criminal courts. This is the case in Latvia and Hungary. In other Member States like Poland and Slovakia, only the most severe unfair commercial practices can be sanctioned by means of criminal law, in particular when they amount to fraud in the terms of criminal law (Civic Consulting 2011).

Lastly, the role of alternative dispute resolution varies significantly across the Member States. While ADR plays a central role in the enforcement model of some old Member States such as the United Kingdom, the Nordic countries, the Netherlands, and Spain, its role is more limited in other countries such as CEECs (Civic Consulting 2011).

[20] First *Report* on the application of Directive 2005/29/*EC* concerning Unfair Commercial Practices (COM(2013)139) p. 26 see also Commission Communication on the application of Directive 2005/29/EC on Unfair Commercial Practices (COM(2013)138) has been adopted on 14 March 2013.

[21] See the discussion in the UK on individual right of action: The Law Commission and The Scottish Law Commission

(LAW COM No 332) (SCOT LAW COM No 226) Consumer redress for misleading and aggressive practices, March 2012.

[22] In the UK, a limited reform has been proposed targeting the most serious cases of consumer detriment due to unfair trade practices. These are already criminal offences, but now it is recommended that a new right of redress for consumers, which would give them the right to a refund or a discount on the price. Also, damages may be recoverable where consumers have suffered additional loss. The Law Commission and The Scottish Law Commission (LAW COM No 332) (SCOT LAW COM No 226) Consumer redress for misleading and aggressive practices, March 2012.

The variety of national enforcement tools is remarkable in light of the far-reaching harmonization goal of the Directive. Moreover, the broader institutional framework comprising of locally developed enforcement strategies may further differentiate the Member States' enforcement models.

Institutional Setting of the UCPD

While the Commission has been closely monitoring the Member States' legislations, procedures, and remedies and maintains a database on recent cases, Member States' choices with regard to institutional arrangements between enforcement bodies are less scrutinized. This is surprising as the Member States' institutional design of enforcement agencies demonstrates a strikingly diverse picture on the allocation of regulatory powers. Table 1 below illustrates the allocation of regulatory powers in the CEE Member States.

Institutional design is a particularly critical aspect of law enforcement in the CEECs due to the fact that the EU's enlargement policy made boundaries between institutions more distinct (Engelbrekt 2009). The incorporation of the *acquis communautaire* assumed that institutional integrity[23] is purposefully developed in these countries and thus administrative capacity has become a cornerstone of credible enforcement of EU law since the enlargement of 2004. Accordingly, analysing institutional capacity helps to reveal and evaluate local enforcement strategies, also taking account of the communist legacy and the limited experience of accession states as societies that promote democracy, free enterprise, and the rule of law (OECD 1998).

The legal regime of the UCPD builds on enforcement through administrative authorities and courts. However, the allocation of the enforcement powers to public authorities is complex because many Member States have maintained regulatory trading laws that directly or indirectly relate to unfair commercial practices in the areas of financial services and immovable property. These trading laws are also enforced by public authorities by means of public law or criminal law (Civic Consulting 2011). Especially in the area of financial services Member States have established special authorities. Administrative models vary significantly between Member States concerning the supervision of financial markets, the activity of banks, and insurance companies. Member States as the Hungarian case will show divide the enforcement of unfair commercial practices law between a special financial markets supervisory authority responsible for the enforcement of the prohibition of unfair commercial practices in that area of financial services and a consumer authority competent in all other areas. In other Member States, there are overlapping responsibilities that have created the risk of either duplicated activities or redundancy where both enforcement bodies rely on the other to take action.

Most Member States have entrusted public authorities with the enforcement of the national implementation of the UCPD, such as most of the CEE Member States. In the CEECs, public enforcement has been dominant throughout the transition period, and the process of accession has further strengthened this institutional arrangement. This reflects the well-known characteristic of the enforcement model in the CEECs: the *weakness of civil society* (Falkner and Treib 2008).

[23] The notion of institutional integrity draws on a distinction between the "vertical" and "horizontal" consolidation of institutional systems, originally outlined by Claus Offe. Institutional systems can, according to Offe, be consolidated vertically through the subordination of each actor's decision making to "higher-order decision-making rules," and horizontally through the "insulation of institutional spheres from each other and the limited convertibility of status attributes from one sphere to another." See Offe, C. (1998).

Table 1 Institutional design for enforcing UCPD

UCPD	Administrative enforcement	Remarks
Bulgaria	Consumer Protection Commission with the Ministry of the Economy, Energy and Tourism	
Hungary	Hungarian Authority for Consumer Protection	GVH is entitled to act if the commercial practice can influence competition
	Hungarian Competition Authority (GVH)	
	Hungarian Financial Supervisory Authority (FSA)	Financial Supervisory Authority entitled to take action if such commercial practice is connected to the activity of the trader supervised by the FSA.
Poland	President of the Office of Competition and Consumer Protection	
Czech Republic	Czech Trade Inspection Authority (CTIA)	In certain cases commercial practices handled by other Czech authorities, such as State Agricultural and Food Inspection, regional hygienic stations, state or regional veterinary administration, trade offices or custom offices
Slovakia	Supervisory Bodies	Special bodies to whom a special field of consumer protection is assigned, e.g., the Slovak Postal Regulation Office.
		Provided the competence of the supervisory body cannot be determined, the supervisory body will be the Slovak Commercial Inspectorate.
Slovenia	Market Inspectorate	Market Inspectorate is a body within the Ministry of Economy, and other inspectorates in accordance with their respective jurisdictions.
Romania	National Authority for Consumer Protection	Specialised authority in the central administration, under Government authority and co-ordinated by the Ministry of Economy, Trade, and the Business En vironment
Latvia	Health Inspectorate (human medicinal products) State Food and Veterinary Service (veterinary medicinal products) Consumer Rights Protection Centre (for all other services and products)	
Estonia	Consumer Protection Board	Government authority within the area of government of the Ministry of Economic Affairs and Communications.
Lithuania	State Consumer Protection Authority Competition Council of the Republic of Lithuania	
Croatia	Consumer Protection Department, Ministry of Economy, Labour, and Entrepreneurship	

The SCI is a budgetary organization of the Slovak Ministry of Economy. It is responsible for controlling the sale of products and provision of services to the consumers and handles the complaints of the consumers. Source: EU Commission database (https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show&CFID=389966&CFTOKEN=8e1282c22ba4df9b-53E4BAFD-EA84-2521-0437E1DAE21082E2&jsessionid=a503a93bfd148af6bdbf501c1030145ff1f1TR)

However, in some Member States, both public authorities and consumer organizations operate alongside each other; with the consumer organizations obviously only being

able to bring law-suits in court, and the public authority also being able, in addition, to issue desist orders and fines. Bulgaria, Romania, and Poland are examples here (Civic Consulting 2011).

The Commission published a guidance[24] in 2009 to ease the problems of interpreting the provisions of UCPD; however, the guidance did not touch upon problems that the enforcement agencies face. For example, BEUC, the European consumers' organization, reported that several public enforcement agencies and private organizations claimed a lack of resources and consequently an inability to monitor all relevant commercial practices and to ensure an effective enforcement of the Directive. This has led to a limited number of cases being brought and/or a focus on the cases that are most likely to succeed. This includes cases that are normally clear cut, rather than those having greatest precedent value and/or cases that are likely to have the greatest impact on the market and trader behaviour as a whole (BEUC 2011, p. 17). Slovakia has been offered as an example of "the world of dead letters" (Falkner and Treib 2008), where the enforcement level of the UCPD is very low, and if fines are issued, they are far below fines in the other CEECs.[25] This specific "world of compliance" is characterized by politicized transposition processes and systematic application and enforcement problems (Falkner and Treib 2008). Accordingly, the true character of the CEECs' legal systems can be untangled when actual enforcement is studied (Cseres 2008, 2010). Such an analysis enables a deeper understanding of the question how the CEECs develop enforcement methods and institutional structure suitable for their local socio-economic circumstances.

The following sections discuss the enforcement of the UCPD in Hungarian law. It will examine how Hungarian legislation and institutional allocation of the enforcement powers for unfair commercial practices changed due to the implementation of the UCPD and the impact of these changes on the interpretation and the local enforcement approaches in Hungary.

The Enforcement of the UCPD in Hungary: Institutional Changes and Enforcement Challenges

Legislative Framework Before the Implementation of the UCPD

Before the implementation of the UCPD, the Hungarian legislative framework comprised three legal acts: the rules on misleading trade practices, advertising law, and other provisions on consumer protection. These acts were all enforced by one central body the Hungarian Competition Authority (Gazdasági Versenyhivatal "GVH").

This Hungarian legislative solution was partly a consequence of the tardiness of consumer protection in Hungary. Consumer law was late coming, and in the 1980s, consumer protection was limited to quality and price control. It was the first "modern" Competition Act in 1984 which introduced the first consumer protection rules. Consumer rules were thus also included in the Competition Acts of 1990 and 1996 (Miskolczi Bodnár 2002). Until 2008, the enforcement of misleading and deceptive practices was based on the of Act LVII

[24] Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, Commission staff working document, available at: http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf.

[25] https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.showCountry&countryID=SK, Fines imposed are around 300-500 EUR.

of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Hungarian Competition Act, HCA).[26] Articles 8 to 10 of the HCA prohibited the unfair manipulation of consumer choice. The enforcement of the HCA was entrusted to the GVH, which was given broad margin of discretion with regard to start investigations upon detecting misleading practices as well as to decide whether such practices infringed the HCA.

The definition of consumer in these provisions is broader than for example in EU law[27] and included customer, purchaser, or user irrespective of whether natural persons or legal entities are addressed by the practice. Accordingly, it embraces both B2C and B2B practices. Moreover, the HCA made it possible to enforce the law against practices that were *likely* to cause consumer harm without the need to prove actual consumer detriment. Articles 8 to 10 of the HCA also explicitly stated that the concept of unfairness should be analysed by taking into account the everyday meaning of the words used during the allegedly unfair commercial practice. However, as the concept of unfairness was based on the concept developed in the field of unfair competition law as laid down in Article 70 of the HCA, the GVH only had competence to act when the public interest was endangered by the misleading or deceptive practices. To put it differently, the GVH could enforce the HCA when consumer detriment also meant the distortion of the competitive process on the market.

Articles 8 and 10 of the HCA were located at the crossroads between competition law and consumer protection. They formed part of both areas of law and therefore in both areas they constituted specific rules with a special point of view. These rules are neither competition nor consumer protection rules. They reflect the double-edged relation of interests that exist between competition law and consumer protection. On the one hand, they mirror the significant role which free and fair competition plays in the protection of consumer interests and, on the other, they articulate the need to act against anti-competitive acts that harm consumers because these acts damage competition as well.

These rules were only applied when trade practices were capable of deceiving consumers as well as restricting competition. This was explicitly confirmed in a case where a weekly newspaper selected a certain brand of mobile phone to be raffled among people who successfully solved a crossword. The phone was said to be a gift from the manufacturing company. When the winner wanted to collect his award, he was told that he could only obtain the phone if he entered into a mobile phone subscription for 2 years. The GVH found that the advertisement was neither capable of increasing the sales of the newspaper nor affected the supply of the specific branded mobile phone. In other words, the advertisement had no illegal effect as the investigated behaviour neither affected competition nor

[26] Hungarian law, based on the German tradition, had a concept of unfairness embedded in the context of unfair competition since the beginning of the twentieth century. In a general clause in Act V of 1923 on Unfair Competition, unfair competition itself was declared to be an infringement of law. The roots of modern Hungarian competition law go back to 1984, when Act No. IV of 1984 on the prohibition of Unfair Business Activities was drafted. Hungary has adopted several Competition Acts since 1984, the structure of which resembled the first Act on Unfair Competition—besides a general clause, they all detailed unfair business behaviour, amongst which the unfair manipulation of consumer choice, or misleading/deceptive practices was one. The provisions of Act IV of 1984 on Unfair Competition had explicitly laid down rules for not only practices that harm competitors but also practices that harm customers. Act No. LXXXVI of 1990 on the Prohibition of Unfair Market Practices had a general clause which was applicable to the whole Act, equally to unfair competition rules as well as to the cartel rules.

[27] The notions of "consumer" and "professional" vary among different European directives. Most EU Directives on consumer protection have a narrower definition of consumers, and they refer to end-consumers, who are natural persons acting for purposes outside their trade, business, or profession. The narrow notion defines consumers as natural persons acting for purposes outside his trade, business, or professions, and professionals are defined as persons (legal or natural) acting for purposes related to their trade, business, and profession.

competitors. The GVH argued that the competition law aspect of misleading consumers did not apply and therefore it stopped the procedure.[28] This rationale of the GVH's decision making was confirmed by the Supreme Court that argued that only those practices should be investigated under the HCA that distort competition.[29]

With regard to advertising law after an initial attempt to incorporate EU Directive 84/450/EEC on misleading and comparative advertising into the Hungarian Competition Act of 1990 it was finally legislated into the separate Act LVIII of 1997 on Business Advertising Activity. However, the GVH was given the competence to enforce the provisions on misleading and comparative advertising. Again, the GVH applied these provisions on the basis of the above-mentioned legal concept developed in its unfair competition law practice. Thus, the provisions on misleading and comparative advertising were only enforced upon the need to protect the public interest using the test of "distortion of competition." Some other consumer protection-related provisions such as mandatory information in advertising have been laid down in sector-specific rules. The most important provision among these was Act CLV of 1997 on Consumer Protection.[30]

As to the institutional setting, the main enforcement agency for unfair practices, misleading or deceptive advertising was the GVH. The GVH established a rich body of decisional practice under the general clauses of the HCA concerning various types of unfair practices, such as bait advertising, misleading omission, superiority claims, and unfounded health claims.[31]

In sum, it can be said that the core concepts of the future UCPD have developed in the compound decisional practice of Hungarian unfair competition law, which traditionally protected both the interests of consumers and the interest of fair competition through an overarching concept of public interest. However, this meant that there might have been an under-enforcement of certain unfair practices that did not meet the condition for public interest protection.

The Implementation of the UCPD in Hungarian Law

Due to the lengthy implementation process, Hungary finally adopted the UCPD on September 1, 2008. The new legal framework was structured around a new Act on Unfair Commercial Practices, the Advertising Act, and the HCA. During the implementation process, the Hungarian legislator decided to break with the Hungarian legal tradition of protecting the interests of customers with regard to both B2C and B2B relations and the fairness of competition in the same piece of legislation. Instead, the legislator decided to transpose the UCPD in a single new act: Act XLVII of 2008 on Unfair Commercial Practices ("Act on Unfair Commercial Practices"). Section 1 of this Act explicitly states that the scope of the Act extends to only consumers in the B2C relations.

At the same time, the implementation of Directive 2006/114/EC on Misleading and Comparative Advertising took place in Act XLVIII of 2008 on Advertising (Advertising

[28] Vj-24/2000 http://www.gvh.hu/index.php?l=h&m=4&id=1591.
[29] Supreme Court Decision Kf.V. 28.425/1997/3., Vj-38/1995.
[30] Article 8 of the Consumer Protection Act stated that consumer information shall provide consumers a) with adequate knowledge for selecting such goods or service, furthermore with basic knowledge regarding the basic attributes and characteristics of the goods and services necessary for the use of goods and services and the maintenance of goods, the quality, price or fee of the goods and services, instructions relative to the use of goods and any hazards associated with such use, b) with basic information necessary for enforcing their rights.
[31] More details on the enforcement practice of the GVH is available in its Annual Reports, available at: http://www.gvh.hu/gvh/alpha?do=2&st=1&pg=54&m5_doc=2321&m90_act=26.

Act) that replaced the previous Act on Advertising Activities. The Advertising Act contains provisions on misleading and comparative advertising, and the GVH has the competence to enforce its provisions. As to misleading advertising, the Advertising Act confines its substantive scope to practices involving B2B advertising. As to comparative advertising, the Advertising Act is applicable regardless of the personal scope of the practice, whether it concerns B2C or B2B relations.

Articles 8 to 10 HCA were also amended and now they merely regulate B2B relations. Articles 8 to 10 HCA protect trading parties against unfair manipulation of business decisions if this occurs in the course of a practice that does not qualify as advertising.

In line with the legislative goal of the UCPD, the Hungarian legislator aimed to structure the legal framework concerning commercial practices in such a way that failing to give mandatory information according to Annex 2 of UCPD would constitute a breach of Article 7 of the Act on Unfair Commercial Practices. However, Article 7 states that misleading omission may only be established should a provision qualify as a breach on the basis of EU legislation. Misleading omissions that are based on other consumer legislation than that originating from EU law are not enforced due to the unfinished implementation of UCPD into the body of Hungarian consumer law. The above-detailed legislative framework is summarized in Table 2 below.

The Hungarian legislation reflects faithful adoption of EU law and breaks with traditional legacies of the legal framework and law enforcement. Literal transposition of the UCPD Directive implies a lack of adaptation to specific circumstances in this country as well as an absence of consultation of affected groups. Separating the enforcement of B2C and B2B relations is a strong example of Europeanization to the detriment of Hungary's tried and tested legislation and enforcement that were well embedded in local enforcement strategies and worked effectively in relation to local regulates. This questions the legitimacy of transplanting a piece of legislation in a way that may not organically be linked to the legal and enforcement environment of the receiving state.

Changes in Enforcement

During the transposition of the UCPD, Hungary decided to broaden the group of regulatory agencies that would enforce the provisions of UCPD. The legislator considered the UCPD not merely as a protective device of unfair competition but also as a legal tool to protect consumers—and as such, it conferred broad competence to the National Consumer Protection Authority (NCPA) to enforce the provisions of the Act on Unfair Commercial Practices. Since the financial services sector proved to be one of the areas most in need of consumer protection, the Hungarian Financial Supervisory Authority (HFSA) was also given competence to enforce the provisions on unfair commercial practices in the financial

Table 2 Legislative framework of the Hungarian implementation of UCPD

	Advertising	Other commercial practices
B2C practices	Act on Unfair Commercial Practices (Act on Advertising with regards to comparative advertising)	Act on Unfair Commercial Practices
B2B practices	Act on Advertising	Hungarian Competition Act

sector. Article 3 of the UCPD explicitly states that financial services are exempted from the maximum harmonization clause and due to the fact that the financial sector is characterized by a high demand for information provisions, it seems reasonable that all provisions related to financial regulation are enforced by one single enforcement body. Finally, the GVH is enforcing provisions on unfair commercial practices in those cases where the distortion of competition can be established.[32] Hence, the delineation of competences between these three agencies depends on the substantive test of material distortion of competition.

The substantive test of material distortion of competition was newly introduced in Articles 10 and 11 of the Act on Unfair Commercial Practices. As the new regulatory framework did not allocate specific regulatory powers to any of the enforcement agencies so as to intervene for the protection of public interest, they can all investigate unfair commercial practices—even if these would only harm a single consumer. The three enforcement agencies delineate their competences and have established a mechanism of cooperation merely on the basis of the requirement of material distortion of competition.[33] This concept was meant to ensure that the GVH—similarly to its earlier practice—would continue to investigate cases that also affect competition.

Material distortion of competition is approached by the means of a quantifiable "proxy:" the volume of the commercial practice is examined in order to establish the competences of the agencies.[34] There are certain types of commercial practices that are not covered by this list. With regard to these practices, Article 11(2) of the Act on Unfair Commercial Practices states that the question of competence allocation shall be decided upon either by (1) the volume of the specific commercial practice, taking into consideration the means of communication, the affected geographical area, the number of outlets where the commercial practice was used, the time period until the commercial practice was used, or the quantity of the goods in respect of which the commercial practice was used, or on the basis of (2) the net profit of the company using the commercial practice.

Two recent GVH cases illustrate why competence allocation is a crucial issue in the enforcement of the UCPD. Both cases followed the same pattern: the GVH investigated several websites that claimed that consumers could advertise real estate free of charge.[35] Although the websites did not attract particularly large number of visitors, the GVH decided to investigate a case as it considered the commercial practices used as distorting competition, partially due to the excessive number of complaints permanently received by the agency. While the GVH investigates such cases on the basis of examining whether consumer detriment leads to indirect consumer harm and thus distorts competition, the NCPA concentrates on consumer protection issues as its first and foremost priority, and the HFSA

[32] Article 10 of the Act on Unfair Commercial Practices.

[33] The Hungarian text of the Cooperation Agreement is available on the website of all three agencies. (http://www.pszaf.hu/data/cms2355459/egyuttmuk_megall_PSZF_GVH_120716.pdf).

[34] Article 11 (1) of the Act on Unfair Commercial Practices contains a list of cases that illustrate material distortion of competition shall be established:

(1) commercial practice made available through a media provider with national coverage

(2) commercial practice made available through print media available nationally, or at least in three counties

(3) commercial practice through direct marketing aimed in the direction of consumers at least in three counties

(4) point-of-sale commercial practice made available to consumers at least in three counties.

[35] See resolutions VJ-91/2009 and Vj-122/2010. The Hungarian text of the resolution of the HCA is available at: http://www.gvh.hu/gvh/alpha?do=2&pg=11&st=1&m5_doc=7450.

integrates the enforcement against unfair commercial practices into its sector regulatory practice.

The three agencies are also entitled to impose different sanctions upon establishing the infringement of the Act on Unfair Commercial Practices. The GVH may order the cessation of the commercial practice, it may order the trader liable for the unfairness to publish a rectification, and it may also impose a commitment on the trader. Shall the commercial practice constitute a serious breach of law, the GVH may impose a fine up to 10 % of the previous year's net income of the trader (Articles 77 and 78 of the HCA). If the trader agrees to comply with the legal provisions, the trader and the GVH may issue a commitment order that is appropriate to remedy the consumer detriment and the harm to public interest (Article 75 of HCA). The GVH has even published a Notice on calculation of fines specifically for unfair manipulation of consumer choice in 2007[36] that is still applicable and a separate Notice on commitments in the case of unfair commercial practices in 2012.[37] It also published a compliance programme for SMEs after having established that 80 % of the UCPD cases involve SMEs. These notices are soft-law instruments that give guidance to market actors on possible sanctions following the detection of an unfair commercial practice.

The NCPA may order the trader to cease the unfair commercial practice, or rectify the faults and deficiencies found. Moreover, it may impose conditions on the continuation of the sale of the goods at stake, or it may entirely prohibit the sale of the goods until lawful practices are restored. In case consumer health is at risk or the potential arising injury affects a large public, the NCPA is also entitled to order the provisional closure of an outlet. Further, it may impose a fine on a trader. The amount of fine shall be calculated upon the net income of the trader, and it shall also take into account the possibility of harming consumer health and the possible injury of the large public.[38]

In the financial sector, the HFSA may oblige the trader to comply with the legal provisions and the necessary measures taken, it may rectify the faults and deficiencies found, and it may order to cease the unfair commercial practice. Moreover, it may order the trader to cease its activities of the trader related to the unlawful commercial practice until lawful course of action is restored. The HFSA may also impose a fine. The rules on the amount of the fine are equivalent to those of the NCPA.[39]

These rules on sanctions and remedies show remarkable differences with regard to the possible outcome of the enforcing the unfair commercial practice depending on which agency is competent to act. All three agencies have the same powers with regard to injunctions and pecuniary fines. However, the GVH, due to its traditionally competition law-based enforcement practices, is entitled to issue commitment orders to wrongdoers. This has the effect that certain unfair commercial practices, that harm vast numbers of consumers and significantly distort competition, might be subject to a commitment offered by the trader. In a commitment, the trader offers certain remedies and the GVH imposes no sanctions, in particular, no fines. However, other similar practices, that have a smaller impact on consumers, can be fined by the NCPA or the HFSA who, unlike the GVH, do not have the power to issue commitments. At the same time, both the NCPA and the HFSA may cease

[36] http://www.gvh.hu/domain2/files/modules/module25/pdf/jogihatter_magyarpiac_kozlemenyek_2007_1_fogybirsag_m.pdf.

[37] http://www.gvh.hu/domain2/files/modules/module25/21589566B761BF934.pdf.

[38] There is an exception for SMEs—for SMEs and traders who do not fall under the above rules, the fine shall not exceed 500,000 Forints (approx. 1,750 EUR), or in case of the endangerment of the consumers health or the possible danger from an arising injury affecting a large public, 5 % of the previous year's net income. Articles 47 and 48 of the Act on Consumer Protection.

[39] Articles 71 and 72 of Act 158 of 2010 on the Hungarian Financial Supervisory Authority.

provisionally the practices of a certain trader, which, again, means that certain unfair practices with a smaller impact on consumers might be sanctioned more heavily than similar practices that may materially distort competition. This institutional division of law enforcement may lead to legal uncertainty for market players who face three different agencies with three different enforcement strategies and no clear division of competences, which may lead to institutional redundancy as well.

The procedures of the three agencies also differ in length, and the agencies have different financial and other means to enforce the provisions of the Act on Unfair Commercial Practices. Moreover, Article 17 of the Act on Unfair Commercial Practices states that the enforcement regime pursuant to the Act shall be applied in cases when sector-specific legislation so indicates. Accordingly, the above three agencies will act, for example, on the basis of Act 46 of 2008 on the Food Chain, Act 98 of 2006 on the Rules of Production and Sale of Pharmaceuticals and Medical Devices, Act 108 of 2001 on Electronic Commerce, or Act 86 of 2007 on Electricity.

"Inter-agency" Structure

The Hungarian legislative framework established a system where three competent agencies enforce the same legal provisions and where the competences of the agencies depend upon a complicated legal assessment. Article 12 of the Act on Unfair Commercial Practices explicitly calls for a cooperation between the agencies in order to safeguard uniform application. This cooperation includes among others the obligation to inform each other about each agency's enforcement practice and to avoid unnecessary debates over questions of competence. The Cooperation Agreement states that the agencies shall operate an internet-based database, in which they shall upload the material information on each consumer complaint received. They shall also inform each other about their decisions to launch an investigation and their decisions. The agencies, moreover, shall appoint contact persons who shall continuously discuss with each other competence allocation and the interpretation of the provisions of the Act on Unfair Commercial Practices for the sake of uniform application. Additionally, the agencies state that they will, if possible, cooperate not only with regard to legal matters, but they will coordinate their communication and education projects.

For example, in 2010 the three agencies launched a joint communication campaign concerning unfair commercial practices of so-called buyers' clubs. Buyers' clubs are groups of consumers that are operated by a company offering credit or the possibility to buy a high-value good to vulnerable consumers who have no access to credit or financial services from the financial sector. The rationale of these clubs (paying an initial sum of money and then a monthly membership fee with an organized lottery to choose the consumer who will get the advertised good) is based on seriously unfair commercial practices. Therefore, besides launching investigations, the three agencies also decided to jointly engage in a consumer education campaign that included statements on each agency's websites, joint press conferences, joint press releases, and advertisements in the printed media.[40]

There are, however, other cooperation agreements between the three agencies concerning other legislation, and the agencies also set their own enforcement priorities based on the basis of their traditional enforcement tasks. Consequently, priority setting with regard to the enforcement of the Unfair Commercial Practices Act may differ. Moreover, the Hungarian

[40] For the press release, see: http://www.pszaf.hu/hirek_ujdonsagok/GVH_NFH_PSZAF_fogycsop_100326.html.

government also defines enforcement priorities in consumer policy and strategy that may be implemented by the agencies; note however that the GVH and the HFSA are independent supervisory agencies and as such may define their own enforcement priorities and are accountable only to the Hungarian Parliament.[41]

Enforcement After the Implementation

Practice of the GVH

According to its Annual Reports, the GVH brings approximately 80–120 unfair commercial practices cases per year, mainly in the areas of telecommunications, health claims, and the financial services.[42] After the new Act on Unfair Commercial Practices entered into force, the GVH developed an interpretation of the Act in line with the CJEU's interpretation of the UCPD. [43] This interpretation serves as the basis of the decision whether a certain practice should be investigated under the list in Annex 1 of the Act, or the "Black list." If the investigated practice cannot be described as one of the practices on the Black list, it should be investigated whether it qualifies as a misleading or an aggressive practice. Only in a case where the practice is neither on the Black List nor it involves comprises misleading or aggressive conduct can the GVH use the concept of unfairness as described in the general clause of the Act.

As mentioned above, the GVH enforces the Act on Unfair Commercial Practices on the basis of its traditional concept of unfair competition, which means that it only intervenes in markets when it can prevent or restore the possible distortion of competition. Even though the GVH brings the least unfair practices cases amongst the three agencies, due to Hungarian law enforcement traditions it is the practice of GVH that is generally taken as a guidance for companies in order to comply with the law. This can be explained by the fact that the GVH has 22 years of experience in the field of unfair commercial practices; it has a Consumer protection Unit since 2004 which houses one third of the GVH's case handlers. The GVH has established an enforcement strategy which nicely corresponds to Baldwin and Black's *really responsive* regulation, which argues that the actions of a regulatory agency, for instance, are strongly shaped by the distribution of resources, powers, and responsibilities between that body and other organizations, including those that oversee it (Black and Baldwin 2010).

However, due to the above interpretation of the Act on Unfair Commercial Practices, GVH is yet to define the concept of unfairness. Today most of the detected unfair commercial practices are either to be found on the "Black list," or they qualify as misleading or aggressive. Very few practices fall under the general clause of unfairness under Article 3 of the Act on Unfair Commercial Practices. The following case exemplifies how the GVH institutional legacy influences its law enforcement. In an investigation against Lidl in 2009, GVH examined whether Lidl engaged in bait advertising when it offered two types of milk products in its advertising materials, one with 2.8 % fat content and the other with 3.5 % fat content. However, in most outlets, either one or the other product was available to the

[41] Act 43 of 2010 on the Central Administrative Agencies and on the Status of the members of the Government and State Secretaries.

[42] The Annual Reports prepared for the Hungarian Parliament of the HCA are available at http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=99&m5_doc=2321&m174_act=8.

[43] Joined Cases C-261/07 and C-299/07 VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV judgment of 23 April 2009, ECR I-02949.

consumer, but not both. GVH closed the investigation without imposing sanctions because it could not establish that the two products were not equivalent. The GVH, being a competition authority, interpreted the word "equivalent" within the text of Article 5 pursuant to the concept of substitutability used in competition law, and it stated that from a consumer's point of view, it did not find any sufficient evidence that the two products were not substitutable.[44]

This case also illustrates that the agencies enforcing the UCPD rely on the traditional Hungarian approach based on the use of general clauses instead of closely following the interpretation of the "Black list." Accordingly, the enforcement of the UCPD forms an important challenge for enforcement agencies, especially concerning the burden of proof.[45]

Practice of the NCPA

Due to the fact that the NCPA has competence with regard to all kinds of unfair commercial practices that are outside the scope of the financial sector and that do not distort competition materially, the NCPA deals with a large number of consumer complaints. As the NCPA's enforcement actions are not conditioned on affecting the larger public, it may enforce the provisions of the Act on Unfair Commercial Practices in all kinds of cases, even if only one or a few consumers are harmed. According to publicly available data, most actions of the NCPA are launched concerning the price, the discount, or the availability of certain goods.[46] This is also in line with the traditional approach and enforcement history of the NCPA. In Article 14 of the Act on Consumer Protection, the NCPA was given strong competence over the presentation of prices, especially the obligation of traders to indicate the price per unit on every good sold. It therefore seems logical that the NCPA has widened those enforcement areas that it already has a strong enforcement record in.

Practice of the HFSA

According to the institutional framework detailed above, the HFSA has competence to enforce the provisions of the Act on Unfair Commercial Practices when the material distortion of competition cannot be established. Taking into consideration the characteristics of the financial sector, when well-established financial institutions engage in commercial practices, the scope of those may very well reach the threshold based on the material distortion of competition. Hence, most major commercial practices in the financial sector would in fact fall in the competence of the GVH. Consequently, the practice of HFSA mainly concerns commercial practices on the point-of-sale, such as oral information given by the financial institution to the consumer, or information retrieved from call centres.

The financial crisis naturally strengthened the role of HFSA in the area of consumer protection; however, amongst the new tasks obtained by HFSA, enforcement of the provisions of unfair commercial practices is not the foremost enforcement priority.[47]

[44] Vj-013-021/2009.

[45] Article 5 of the "Black list" on bait advertising states that it is unfair to make an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product, and the price offered.

[46] The publicly available reports of the NCPA are available at: http://www.nfh.hu/data/cms29761/ucp_09.pdf.

[47] The Annual Reports of the HFSA are available at: http://www.pszaf.hu/bal_menu/jelentesek_statisztikak/eves.

Public Action for Consumer Redress

The main method for enforcing legal provisions on unfairness is based on public enforcement and the implementation of the UCPD did not change this fundamental tradition of the Hungarian legal framework. However, all three enforcement agencies may also bring public interest actions in court in the interest of consumers.[48] Despite the fact that all three agencies have filed such public interest actions,[49] this enforcement avenue has a limited relevance in the overall enforcement framework. It should be noted that none of the agencies is empowered to claim damages on the basis of the UCPD, but they may file damages claims on the basis of unfair contract terms legislation. This means that all public interest actions are in fact cases where the agencies either investigated a specific unfair commercial practice within their administrative law procedure, but the public action had to be based on the unfair contract terms provisions of the Hungarian Civil Code and Government Decree 18/1999 on Unfair Contract Terms. In the very first public action of the GVH, the agency acted against several companies operating a real-estate database and website. These practices fell within the GVH's competence on the basis of the Act on Unfair Commercial Practices[50] and at the same time the GVH could launch a public action in the same case but on the basis of unfair contract terms legislation. Within the course of the public interest action, the GVH asked the Budapest Metropolitan Court to establish the nullity of certain stipulations of the companies' general contract terms with an effect that extended to all the contracting parties. This led to a somewhat strange institutional situation where the administrative court's judicial review of the GVH's decision was still pending when the same case became subject to the GVH's public interest action against the unfair contract terms used by the same companies it has investigated. [51]

This example shows that administrative law enforcement is far more dominant in Hungary than judicial enforcement. While public enforcement has advantages and the established patterns of administrative law enforcement in Hungary support this, still such an over-reliance on public enforcement and under-enforcement by the courts brings questions the extent to which public authorities should be empowered to protect consumers and what would be a more effective balance between public and private enforcement (Cseres and Schrauwen 2013).

Conclusions

The Hungarian implementation of the UCPD is a clear example of Europeanization through faithful transposition of EU law. However, this meant discontinuing Hungary's long established, tried and tested legal framework and law enforcement of unfair commercial practices in one single act by one single agency that existed since the 1990s until 2008.

[48] Paragraph 1 Article 92 of the HCA and Article 19 of the Act on Unfair Commercial Practices, HCA explicitly states that GVH is entitled to bring public action upon the breach of the provisions on unfair commercial practices.

[49] Reports on the filed suits and court cases are available at: http://www.gvh.hu/gvh/alpha?do=2&pg=72&m5_doc=7596, http://www.nfh.hu/magyar/hasznos/jogi_kalauz/itelkezes/kozerdeku1/kozerdeku_120312.html, http://www.pszaf.hu/topmenu/apszaf/jogorvoslati_eljarasok/kozerdeku_keresetek.html.

[50] Vj-122/2010.

[51] The first instance decision has been delivered, in which the Metropolitan Court stated that the contractual terms challenged by the GVH are in fact unfair and therefore invalid. Since there is still possibility for appeal, the decision does not have the force of res iudicata and therefore is not publicly available, only the communication on lauching the public action can be found publicly. (http://www.gvh.hu/gvh/alpha?null&m5_doc=7596&pg=72).

Separating the enforcement of B2C and B2B relations in the Hungarian legislation and accordingly extending the enforcement powers to three agencies proved to make the enforcement system more complicated and less predictable for market actors.

One of the main characteristics of the present Hungarian institutional framework is that all kinds of unfair commercial practices—regardless of their magnitude and the number of consumers reached—are now investigated as the NCPA intervenes irrespective of the threshold of intervention which is otherwise maintained by the GVH. However, this may result in the fact that a lot of resources are put into the investigation of individual complaints and less time into setting clear enforcement priorities. This also illustrates the different enforcement styles and strategies of the three agencies. The GVH has a long established enforcement strategy, where it makes use of various enforcement techniques in accordance with the enforcement pyramid of responsive regulation (Ayres and Braithwaite 1992) consisting of guidelines, commitment procedures, compliance programmes and education, as well as deterrent fines if necessary. The other two agencies do not have similar enforcement strategies and such a fine-tuned package of enforcement tools.

In the Hungarian enforcement system, cooperation between agencies proved to be crucial as all three enforcement agencies enforce the same legal provisions, but they have different traditional enforcement strategies and apply different sanctions and remedies. In such an institutional setting, enhanced cooperation is crucial to ensure the uniform interpretation of the provisions on unfair commercial practices in the interest of the consumers. The Hungarian example shows that even within a maximum-harmonized legal framework and strong inter-agency cooperation, agencies tend to keep their traditional approaches and develop different law enforcement practices. This phenomenon could compromise the initial goals of the UCPD and create ambiguity on the market concerning "best practices." Joint guidelines and joint actions are commonly used tools that could ease this tension. While this article does not take stock of increased harmonization of procedures and institutional design, it does signal the need to persistently research the institutional design of law enforcement and deepen the understanding of local enforcement strategies.

This case study also highlights that institutional frameworks lend themselves even less than substantive rules to be copy pasted from EU law to national law, as there is often a mismatch between the EU-designed legal framework and the specific national enforcement environment. Hungary's case proves that administrative capacity of enforcement agencies is crucial in order to guarantee credible law enforcement. While this article does not take stock of increased harmonization of procedures and institutional design, it does signal the need to persistently research institutional designs of law enforcement and deepen the understanding of local enforcement strategies. Moreover, linking back well-established and effective local enforcement strategies vis-à-vis local regulatees can improve the transplantation of EU legislation in a way that is better linked to the legal and enforcement environment of the receiving state as well respond to questions of legitimacy.

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