

To B2C or Not to B2C. Some Reflections on the Regulation of Unfair Commercial Practices from a Polish Perspective

Monika Namysłowska

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Abstract The article addresses the issue of whether EU consumer law and national implementing laws require the distinction between business-to-consumer (B2C) and business-to-business (B2B) relationships. The Polish experiences with the implementation of the Unfair Commercial Practice Directive supply this well-known discussion with new arguments. In Poland, the near copy–paste implementation of this directive was done in nearly timely fashion. The outcome, however, is far from being nearly unproblematic, as the new act is disconnected from the old system in a simplistic way. Subsequently, the institutional choice for enforcement creates both an inconsistency with EU law and enforcement deficiencies that undermine the directive's policy aimed at achieving a high level of consumer protection. Notwithstanding the imperfect Polish law-making and law enforcement, a success story may have been unlikely in any event. While in its inception it was announced as a consumer law instrument, the Unfair Commercial Practices Directive operates in a field dominated by competitors. Therefore, the correct transposition of this peculiar directive into national law, as well as its application, was and still is a challenging task. It is questionable if it is feasible at all. Ultimately, the tangible incoherencies and the existing desynchronization of protection against unfair commercial practices, both at the EU and national level, raise fundamental questions not only about the necessity of separate B2C and B2B regulations but also about the interplay between the laws of the EU and the Member States, in particular the new Member States, and about the way they mutually affect and interfere with each other.

Keywords B2C relations · B2B relations · European consumer law · Polish law · Unfair commercial practices

The discovery of the consumer and the creation of a separate branch of consumer law (see, e.g., Stuyck 2000) may be one of the most remarkable features of European law. It may be debated whether it should be perceived as a success or just a characteristic. There are signs,

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M. Namysłowska (✉)

Faculty of Law and Administration, University of Lodz, Lodz, Poland
e-mail: mnamyslowska@wpia.uni.lodz.pl

however, which point to the fact that European consumer law may have become the hostage to its own evolution, while European law has become its victim.

To shed some further light on this issue, this paper focuses on just one consumer law directive and its (mis)transposition into one national legal system. Paradoxically, even the most basic principle of European consumer law, such as the separate regulation of B2C relations and the full harmonisation concept it applies, constitutes a condition that can bring about significant and complicated consequences in the legal systems of the Member States (see also, e.g., Gomez 2006; Howells et al. 2006; Anagnostaras 2010; Collins 2010; Mak 2012). Moreover, the inadequate labelling of the Unfair Commercial Practice Directive (“UCP Directive”) as a consumer law directive increases the problems. Each national regulation has to develop its own solutions. Nevertheless, the basic question for the European lawmaker remains whether a European B2C law may be transposed at all in a correct and unproblematic way. This leads to the more general issue about the scope and standard of consumer protection imposed by the EU on national legal systems.

Conditions or *Enterprises of Great Pitch and Moment [Whose] Currents Turn Awry and Lose the Name of Action*¹

The UCP Directive is a special piece of regulation. Since its purpose is to provide consumers with protection from unfair practices used by traders, it is a part of consumer law. Nevertheless, it does not protect the interests of each consumer, but only those of the (at least) average consumer, which design is meant to balance the interests of consumers and traders. An exception from this rule is set out in Annex I to the UCP Directive—the prohibitions of the blacklisted commercial practices, which generally protect every consumer as they exclude a case-by-case assessment of whether a given commercial practice meets the conditions of Articles 5 to 9. These provisions provide that a B2C commercial practice can only be considered unfair if it infringes the requirements of professional diligence, i.e., the misleading or aggressive character of a practice, and is followed by a material distortion of the economic behaviour of the average consumer. Even if the concept of the average consumer must in practice be reflected in some provisions contained in the black list, and even though the prohibition of 31 B2C commercial practices should not be considered an insignificant exception, this does not change the fact that the UCP Directive, which aims at creating a high level of consumer protection, essentially protects only certain consumers.

The UCP Directive story, however, is not only a story about consumer law. The nature of unfair commercial practices lies in the fact that the exploitation of consumers is almost always only a side effect, as traders' real intention is to gain advantage over other traders. As a result, the UCP Directive may also justifiably be considered as part of unfair competition law. The UCP Directive has even evolved from the idea of national unfair competition laws originally meant to protect the interests of competitors. The necessity to protect consumers was added later, after accepting that the nature of the market behaviour of the traders is to use consumers in the battle against one another. A well-known example of such an understanding of unfair competition at the EU level is Directive 84/450/EEC on misleading advertising, amended by Directive 97/55/EC on comparative advertising. The purpose of Directive 84/450/EEC was “to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted” (Article 1). This legislative

¹ The quotations and paraphrases in the titles come from Shakespeare, *Hamlet*, Act 3, scene 1.

approach was especially common in Germany, where it was named the *Schutzzwecktrias* (e.g., Fezer 2009, p. 1165) to emphasize the threefold aim of the regulation on unfair competition law.

The 2005 UCP Directive abandoned this concept. Contrary to the character of the competition itself and without regard to its historical evolution, the UCP Directive left the B2B relations aside and simplified the market reality by distinguishing B2C commercial practices as separate from B2B commercial practices. Therefore, the UCP Directive defines its purpose as contributing to the proper functioning of the internal market and aiming to achieve a high level of consumer protection through the approximation of the laws, regulations, and administrative provisions of the Member States on unfair business-to-consumer commercial practices harming the economic interests of consumers.² Although controversial, this legal separation of B2C commercial practices from B2B commercial practices was not entirely unexpected, especially taking into account the declarations contained in the Green Paper on EU Consumer Protection (2001) and the proposal for the UCP Directive (Commission of the European Communities 2003), where an urgent need for a B2C regulation was presented in detail. The influence of the further evolution, or even expansion, of consumer law, as well as the practical dimension of limiting the law-making process to B2C relations, in light of the division of competences between the DG SANCO and DG Internal Market, may likely be considered as the most significant reason for choosing this approach.

After the harmonization of B2C relations had been completed, the existing EU rules had to be changed. As a result, both advertising which misleads businesses and comparative advertising in general fall within the scope of Directive 2006/114/EC on misleading and comparative advertising (MCA Directive) replacing Directive 84/450/EEC that was itself amended by Directive 97/55/EC and the UCP Directive. Consequently, the evaluation of the misleading content of comparative advertising is based on the UCP Directive when it misleads consumers and on the MCA Directive when it misleads businesses.

Finally, it should be noted that the discontinuation of the *Schutzzwecktrias* concept went beyond the differentiation of B2C and B2B relations. The interests of the public in general shared the sad fate of the traders' interests and cannot be found in any of the new directives.

It is a straightforward and monotonous phrase: The UCP Directive applies to unfair B2C commercial practices. The B2C character seems on the surface to be clear and convincing. It may be clear that the UCP Directive covers relationships between businesses and the consumer. It may be convincing that consumers need a separate regulation. But it turns out that neither one nor the other proves to be correct.

Hence, the fundamental and the core question concerns the scope of the UCP Directive. The meaning of the notion “business-to-consumer commercial practice” seems relatively transparent. It would seem evident that it is to be interpreted as encompassing relationships between traders and consumers or even practices directed by traders to consumers. This is, however, not adequate. Business-to-consumer commercial practices are not only commercial practices specifically addressed to consumers, but also those reaching consumers,³ since the intention of the trader is not a criterion of unfairness. As a result, the definition in Article 2(d), according to which a B2C commercial practice is “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers,” when read in conjunction with Article 3(1), which provides that the UCP Directive applies to unfair business-to-consumer commercial practices before, during or after a commercial transaction relating to a product, ultimately proves to be insufficient. To clarify the scope of the UCP Directive, it is also essential to take into account

² See, e.g., Articles 1, 2(d), and 3(1) of the UCP Directive.

³ See Article 5(2)(b) of the UCP Directive.

its purpose, whereby under Article 1 the UCP Directive aims at the harmonization of laws on unfair commercial practices harming consumers' economic interests. Recital 6 seeks to limit this to commercial practices directly harming consumers' economic interests, which may also cause an indirect harm to the economic interests of legitimate competitors. Simultaneously, it is emphasized that the UCP Directive neither applies to nor affects national laws on unfair commercial practices harming only competitors' economic interests or those which relate to a transaction between traders. Subsequently, at least theoretically, not only does the UCP Directive not cover B2B transactions but also it inconsistently fails to cover a part of B2C relations, namely those indirectly harming the economic interest of consumers.

Taking these vague principles into account, a Member State might presume that the national regulation transposing the UCP Directive must protect consumers not from all unfair commercial practices directed to consumers or reaching them but only from those that directly, and not necessarily exclusively, harm the consumers' economic interests. From a practical perspective, the designation whether a given practice is a B2C commercial practice falling within the UCP Directive could be difficult, as the distinction between direct and indirect harm is ambiguous, not to mention the confusing exceptions contained in Article 3. It is, moreover, problematic to delineate the scope of those B2C commercial practices which only harm competitors' interests, and it is not clear whether this should be determined by the national legislator beforehand or decided on a case-by-case basis, nor which regulation should form the basis for carrying out such an assessment.

The understanding of the scope of this B2C directive seems therefore rather particular. Yet, the Court of Justice of the EU ("CJEU") employs only the definition of B2C commercial practice contained in Article 2(d) and regards it as "particularly wide."⁴ The CJEU has judged the following to constitute a B2C commercial practice: the offering of three-week long free breakdown services to consumers in Belgium who are cardholders of particular filling stations and purchase a defined amount of fuel for a car or motorcycle (*VTB-VAB and Galatea*); a voucher in a magazine entitling its holder to a price reduction on products sold in specified lingerie shops in Belgium (*VTB-VAB and Galatea*); a promotional campaign of a German retailer inviting consumers to purchase goods sold in its shops in order to collect points, entitling the customers to take part free of charge in draws organized by the national association of 16 lottery undertakings (*Plus Warenhandelsgesellschaft*); a voting slip in an Austrian newspaper enabling readers to participate in a "Footballer of the Year" competition where the prize was dinner with the footballer chosen (*Mediaprint Zeitungs- und Zeitschriftenverlag*); an indication of the annual percentage rate in a Slovak consumer credit agreement (*Pereničová and Perenič*); a three-day long (*Wamo*) and six-day long (*Inno*⁵) price reduction for the owners of loyalty cards in a Belgian chain of clothes stores; a sale of goods to consumers in Austria on advantageous terms or at advantageous prices (*Köck*); selling at a loss by a Belgian trader (*Euronics Belgium*); and, although not directly stated by the CJEU, the conclusion of a contract for the provision of broadband internet access services contingent on the conclusion of a contract for telephone services in Poland (*Telekomunikacja Polska*⁶), as well as promotions in the UK including individually addressed letters, scratch-cards, and other advertising inserts placed into newspapers and magazines informing the consumer that he is entitled to claim a prize (*Purely Creative and Others*⁷).

⁴ C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, para. 49; C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217, para. 36; C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909, para. 17; C-288/10 *Wamo* [2011] ECR I-05835, para. 30; C-453/10 *Pereničová and Perenič* [2012] nyr, para. 38; C-206/11 *Köck* [2013] nyr, para. 26; C-343/12 *Euronics Belgium* [2013] nyr, para. 21

⁵ C-126/11 *Inno* [2011], nyr

⁶ C-522/08 *Telekomunikacja Polska* [2010] ECR I-2079

⁷ Case C-428/11 *Purely Creative and Others* [2012] nyr

It seems noteworthy that the CJEU extends the scope of the UCP Directive to every commercial practice, including those which appear only indirectly to harm consumer interests. This brings the UCP Directive closer to a regulation protecting competitors' interests. And indeed, after *VTB-VAB and Galatea*, and after the Advocate General's opinion in *Plus Warenhandelsgesellschaft*, and with the case *Mediaprint Zeitungs- und Zeitschriftenverlag* pending, the Commission published guidance on the implementation and application of the UCP Directive, according to which only those commercial practices not affecting consumer economic interests do not fall within the scope of the UCP Directive (European Commission 2009). The requirement of direct harm seems therefore to have become redundant.

Nevertheless, not only is the B2C character of an unfair commercial practice essential for the assessment by the CJEU but also the aim of the national law that restricts such a practice. To escape from the scope of the UCP Directive, it is usually claimed in the proceedings before the CJEU that a national prohibition in fact protects competitors or even the pluralism of the press. The CJEU has rejected this and has clearly confirmed that, in order for a commercial practice to fall within the scope of the UCP Directive, it suffices that a national provision partly protects the interest of consumers from unfair B2C practices, even if it does so in parallel with other aims. However, a prohibition against keeping a shop open seven days a week does not fall within the scope of the UCP Directive, as it does not pursue objectives related to consumer protection, but only those related to the protection of workers and their family life.⁸

The consequences for the implementation of the UCP Directive are additionally exacerbated by the fact that the UCP Directive aims at approximating the laws through full harmonization. This means that Member States cannot regulate an issue involving consumer protection against unfair commercial practices to a greater or lesser degree. In other words, the UCP Directive shall achieve the harmonization or even, as it states, the establishment of uniform rules for a test of unfairness in B2C commercial practices. Accordingly, the unfairness of a commercial practice is to be assessed in light of the criteria set out in Articles 5 to 9 of the UCP Directive. Yet, it is the black list contained in Annex I that constitutes the utmost expression of full harmonization, overshadowing other aspects of the UCP Directive before the CJEU. If a B2C commercial practice is not listed in Annex I, it cannot be prohibited by a national provision without the requirement of a case-by-case assessment. Thus, some national regulations have been judged by the CJEU as contrary to the UCP Directive owing to their per se prohibition of a commercial practice not listed in Annex I. Hence, the key issue for national regulations is the interpretation of a per se prohibition which the CJEU again understands in an extremely wide sense. Neither do numerous and detailed exceptions change the per se character of a prohibition, as they do not eliminate the necessity to analyse the unfairness in a particular case,⁹ nor may a national court prohibit a commercial practice not covered by Annex I because the practice has not received prior authorization by the competent administrative authority.¹⁰ Consequently, since the black list establishes an exhaustive list of 31 commercial practices, Member States are not allowed to prohibit in all circumstances an additional 32nd B2C commercial practice, even if such a prohibition is to the advantage of consumers.

But the foregoing is only one aspect of the problem. It should be taken into consideration that only the substantive regulations on B2C unfair commercial practices

⁸ Case C-559/11 *Pelckmans Turnhout* [2012], nyr

⁹ C-261/07 and C-299/07 *VTB-VAB and Galatea*, paras. 64–65; C-304/08 *Plus Warenhandelsgesellschaft*, para. 53–54; C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag*, paras. 39–40

¹⁰ Case C-206/11 *Köck*, para. 50

have been harmonized, not the procedural ones. According to Article 11 of the UCP Directive, Member States have to ensure that adequate and effective means exist to combat unfair commercial practices so as to enforce compliance with the UCP Directive in the interest of consumers. These measures include the possibility of taking legal action against unfair commercial practices and/or bringing such unfair commercial practices before an administrative authority competent either to decide on complaints or initiate appropriate legal proceedings. It is up to a Member State to decide to whom these means of enforcement will be provided. They may be available to a person or to organizations regarded under national law as having a legitimate interest in combating unfair commercial practices, which may include competitors. However, no matter who is entitled to take legal action, which is a non-harmonized issue, the substantive rules are always those set forth in the UCP Directive. This leads to new questions about the place of its transposition and is directly linked to the last—but in the light of market reality definitely not least—important issue concerning the protection of traders' economic interest.

After the adoption of the UCP Directive, it might be said that because this directive aims to protect consumers does not in itself mean that the interests of traders are less worthy of protection. It only means that the regulation covers consumers, but that competitors are still protected, since through combating unfair B2C commercial practices the market position of a legitimate competitor is automatically strengthened. As an additional indirect form of protection, one might have pointed out the fact that the UCP Directive did not exclude the possibility of a Member State granting protection to a competitor by enabling him to take legal action against unfair B2C commercial practices. The actual practice with respect to the UCP Directive proves that this issue is not merely of theoretical importance—in 12 preliminary rulings covering 13 proceedings before the national courts only one (!) main proceeding was initiated by a couple of Slovak consumers, one (!) by the Swedish Consumer Ombudsman, and one (!) by the Office of Fair Trading which is responsible for enforcing consumer protection laws. In six cases, it was the competitor who brought the case before the national court, in two cases—associations founded to combat unfair competition, and in the Polish case—the President of the Office for Electronic Communications. Thus, contrary to the most basic presumption of the UCP Directive, it is actually the consumer interest that is protected indirectly!

It remains uncertain if the European legislator was aware of the extremely far-reaching effects of the UCP Directive. In any case, it seems justifiable to re-examine the question of the legitimacy and rationale of a separate set of rules for B2C and B2B protection, combined with full harmonization, an approach which may not convince at all in a regulation on unfair competition law such as the UCP Directive. But at present, the outcome of a renewed discussion is, bluntly speaking, without significance with respect to the Member States' obligation to correctly transpose and apply the existing rules. The consequences of this are nevertheless illuminating.

Consequences or the Undiscover'd Country, from Whose Bourn No Traveller Returns

Poland may still be perceived as a new Member State, even though more than eight years have already passed since it joined the EU. Being a Central European country, Poland is at least a new Member State when it comes to consumer law, as a result of the long absence of a free market economy. The efficient protection of the Polish consumer is additionally complicated by the interaction between European law and the relatively new national regulation of consumer protection in general, but particularly by national laws regulating unfair competition.

In Poland, the protection against unfair competition began in 1926 with the first Act on Combating Unfair Competition¹¹ which was at that time a progressive regulation, compliant with international obligations. Due to the socialist planned economy implemented after the Second World War, the courts did not apply this regulation even though the Constitutional Court had left it in force as it was, except for its criminal provisions. Over time, it naturally lost its relevance, and after the reintroduction of a market economy since 1989, it was recognized as obsolete and incomplete, i.e., as not protecting consumers. The new law, again under the title of Act on Combating Unfair Competition¹² (“Unfair Competition Act”) was adopted in 1993. This act respected the integrated approach of covering both B2C and B2B relations in line with the European solution at that time. Therefore, it explicitly protected the interests of the general public, traders, and clients, and in particular those of consumers.¹³ Inspired by the parallel German regulation, the Unfair Competition Act was founded on a general clause, according to which the notion “act of unfair competition” encompasses any act contrary to law or to *bonos mores* (*dobrze obyczaje, Gute Sitten*) which impairs or infringes the interests of another trader or of the clients. The general clause was followed by a catalogue of prohibitions of acts of unfair competition, such as trademark confusion, disclosure of trade secrets, and unfair advertising. The Unfair Competition Act provided traders with private law remedies. Similar rights were also given to national or regional organizations protecting the interests of traders, and from 1997 also to the President of the Office of Competition and Consumer Protection (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*), an authority dealing with both anti-monopoly and consumer protection issues. However, the provisions on enforcement for consumers were insufficient. Consumers had no individual redress, and the right to take legal actions to organizations protecting consumers and regional consumers' ombudsman was withdrawn in 2002.

Since that time, the impact of EU law on unfair competition law during the arduous accession process has become noticeable. The Polish lawmaker has achieved a smooth implementation of both minimum and full harmonization directives. The prohibition of misleading advertising in accordance with Directive 84/450/EEC was included in the Unfair Competition Act from the start, and the exhaustive list of rules on comparative advertising from Directive 97/55/EC was transposed in 2000 (see more on Polish unfair competition law Nestoruk 2013).

Yet, at the moment of implementation of the UCP Directive, the plot thickens.

In August 2007, the Act on the Prevention of Unfair Market Practices¹⁴ (“Unfair Market Practices Act”) was adopted. Poland decided to implement the UCP Directive through a separate legislation which could be viewed as praiseworthy since it employed a transparent transposition method advocated by the Commission and the CJEU, even though it multiplied national regulations on the same subject matter. The Unfair Market Practices Act copies the provisions of the UCP Directive and retains its threefold structure. Nevertheless, some differences have been introduced. The core term has been changed into “market practice” although its definition does not differ from that of “commercial practice” from the UCP Directive. What immediately catches the eye is the fact that the general clause does not demand that an act is contrary to the requirements of professional diligence, instead making

¹¹ Act on Combating Unfair Competition (*Ustawa o zwalczaniu nieuczciwej konkurencji*) of 2 August 1926, Dz.U. 1926 Nr 59, poz. 59

¹² Act on Combating Unfair Competition (*Ustawa o zwalczaniu nieuczciwej konkurencji*) of 16 April 1993, Dz.U. 2003, Nr 153, poz. 1503 consolidated text

¹³ Article 1 of the Act on Combating Unfair Competition (1993)

¹⁴ Act on the Prevention of Unfair Market Practices (*Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym*) of 23 August 2007, Dz.U. 2007 Nr. 171, poz. 1206

it dependent on its inconsistency with *bonos mores*. Although this notion, known for almost a century from the acts combating unfair competition, has usually been interpreted in accordance with the requirements of professional diligence, a considerable risk exists that an unfair market practice may be understood as contrary to moral requirements, which would not incorporate the concept of economic unfairness established by the UCP Directive. The black list has been transposed in two separate pieces, following the provisions concerning the misleading and aggressive market practices respectively, which slightly reduces the transparency achieved by Annex I, but is still a clear technical solution.

Since the aim of the new Unfair Market Practices Act was the prevention of unfair market practices in the interest of consumers and, unlike at EU level, the general public, the Unfair Competition Act has been left in force for B2B relations. The Polish legislator intended to achieve this separation by a simple amendment to the old unfair competition law. By deleting the phrase “in particular those of consumers”, the purpose of the Unfair Competition Act would become the protection of the interests of the general public, traders, and clients.

A distortion of the functioning of the Polish market can therefore currently occur both through an unfair market practice and through an act of unfair competition. This linguistic and regulatory differentiation seems to be a sophisticated solution, but it remains as such only at first glance. Unsurprisingly, even the precise transposition that respected the reasonable intention of the lawmaker has caused specific difficulties in practice, imposing a second unfairness test for B2C commercial practices which is parallel to and therefore not necessarily consistent with the requirements of the UCP Directive. It is, moreover, noteworthy that serious problems for EU policy arise not only with respect to the harmonized substantive provisions but also from the procedural rules which can be regulated individually by the Member States.

At the substantive level, the Unfair Market Practices Act is clearly applicable to B2C relations. Yet, in accordance with the requirements of the UCP Directive, the Unfair Competition Act should regulate only those practices that harm the economic interests of competitors or that relate to a transaction between traders. This could have been theoretically achieved by excluding consumers from the category of clients. Nevertheless, at least three obstacles stand in the way.

First, the former understanding of the notion “client” also included consumers which was expressly stated in the regulation. Presumably, it is this issue, originating from the historical application of the unfair competition law to B2C and B2B relations, that explains why three new commentaries to the amended Unfair Competition Act still perceive this regulation as aimed at the protection of consumers and prohibiting B2C acts that also harm the consumer (Nowińska and du Vall 2013; Szwaja 2013; Sieradzka and Zdyb 2011). The obvious outcome of this interpretation may be an incorrect application of the law by the courts and administrative bodies.

Secondly, even if the notion “clients” was to be always understood as not referring to consumers, some special provisions of the Unfair Competition Act still prohibit B2C practices harming, even directly, the economic interest of consumers. An example of this is Article 16, which bans different forms of unfair advertising, such as advertising that appeals to consumers' emotions or draws on the credulity of children, and advertising through sending products that were not ordered at a clients' expense, or Article 17a that prohibits the sale of products to consumers accompanied by an award, to all or some purchasers of products, of free bonuses in the form of products or services different from the ones sold. Only a few of the listed prohibitions cover typical B2B practices, such as the prohibition on the disclosure of business secrets in Article 11, or the ban on hindering market access in Article 15. Retaining the previous provisions, while adding new ones, results in the

possibility that one practice may be at the same time an unfair market practice and an act of unfair competition! The overlapping scopes of the regulations may lead to weighty conceptual confusions and misguided decisions.

The third impediment leads to and stems from the Polish enforcement system. It was up to Poland to decide who would be entitled to take legal action against a trader acting unfairly. The law implementing the UCP Directive confers the right upon the consumer. The consumer has available the typical action for an injunction, and an additional remedy is to demand the cancellation of the contract. This leaves open the question about the factual impact of the UCP Directive on contract law and, in particular, on the rules on the validity of a contract, which Article 3(2) of the UCP Directive has theoretically excluded. In Poland, however, the boundaries between the law on unfair commercial practices and contract law are blurred. Moreover, due to social and economic factors, the right to pursue an individual action in reality poses a significant challenge for Polish consumers, who are not sufficiently accustomed to taking advantage of the law individually. Even in the proposal for the Unfair Market Practices Act, it was acknowledged that consumers rarely attempt to file claims against traders. Taking into account the vague formulations of both the substantive and procedural provisions on unfair commercial practices, not to mention the meanderings of EU law, for Polish consumers the Unfair Market Practices Act remains just law in the books (see on the disconnection of law in the books from reality in the new Member States, Micklitz 2010). Alternatively, the new act gives a right to take legal action to the Ombudsman, the Insurance Ombudsman, to national or regional consumer protection organizations, and to the district (municipal) consumer ombudsman. Since consumer organizations play a marginal role in the enforcement of consumer law in Poland, and the Ombudsman is not the most effective enforcer in combating unfairness, the protection of the consumers' individual interests is of little importance.

Importantly, competitors have not been empowered to enforce the Unfair Market Practices Act. This is even more surprising because, as stated above, Polish law has always given the right to take legal action principally to the trader. Taking into account that the UCP Directive ought to establish the sole standard for consumer protection against unfair trading, a Polish trader has in theory no right to take legal action against his competitor acting unfairly in B2C relations. Hence, the prior Unfair Competition Act is used as a basis for competitor claims against unfair B2C market practices which directly leads to the application of a second unfairness standard! It is therefore justified to assume that while the two Polish acts do differentiate between B2C and B2B relationships, they mistakenly base it on procedural and not substantive considerations. Therefore, one B2C practice may be at the same time an unfair market practice and an act of unfair competition. In other words, it is possible to impose a prohibition on B2C commercial practices within the meaning of the UCP Directive through two separate pieces of Polish legislation, both of which are based on different principles.

As the UCP Directive fully harmonizes B2C commercial practices, the Polish solution is difficult to maintain for at least two reasons. First, it is not possible to have an additional unfairness test, especially if the application of the alternative test leads to an assessment that varies from the one introduced by the UCP Directive. Consequently, the national legislation may not provide a general ban on B2C commercial practices other than those contained in Annex I. Secondly, the Polish consumer cannot successfully obtain protection by a competitor who is entitled to claim on the basis of a regulation which shall not be applied at all. Giving a competitor the right of redress might, however, reach beyond an indirect effect on consumer protection—the trader might ultimately cease the unfair commercial practice because of the substantial penalties. Private enforcement is, therefore, unjustifiably

neglected, as it could significantly support public administrative enforcement. It is the President of the Office of Competition and Consumer Protection who can protect consumers' collective interests, being empowered by Article 24(2)(3) of the Act on the Protection of Competition and Consumers¹⁵ to impose fines on traders who have infringed collective consumer interests through an unfair market practice. It is quite remarkable that the infringement of a collective consumer interest through an act of unfair competition is also prohibited by this provision, which provides a supplementary argument for the thesis that the Unfair Competition Act is also after all a consumer-oriented regulation.

The existing Polish law cannot be considered efficient neither for consumers nor for traders, i.e., competitors, because it creates a number of irregularities and uncertainties. This shortcoming may result in an application of the law that stands in contradiction to EU law. At any rate, it is undoubtedly imprecise and not entirely comprehensible for actors on the market and legal practitioners. As a consequence, the act transposing the UCP Directive into the Polish legal system may not work in the interests of consumers! Even if the UCP Directive was incapable of correct and consistent implementation, the Polish method of implementation definitely does not enhance EU consumer policy as it does not contribute to a high level of consumer protection. Nor can this be an encouraging experience for a new Member State, not yet sufficiently accustomed to dealing with EU law. However, identifying the weakness of unfair competition law and consumer law, or the weakness of law in general, does not remedy this troublesome situation. Some possible should be explored.

Solutions or *Rather Bear Those Ills We Have than Fly to Others that We Know Not of?*

It may thus be necessary to acknowledge that neither the EU institutions nor the Member States could have foreseen in what way and to what extent the UCP Directive and its implementation would affect national laws. And thus it may also be necessary to resolve the problems that have occurred and will continue to occur. As discussed above, even a cursory examination of the EU and Polish laws shows that something went wrong. Since a mutual failure both at the European and national level may be accepted, a common solution should be sought to achieve effective integration. In any assessment of existing or future remedies, it is essential to remain realistic, taking into account at a minimum the amount of time and the goodwill that will be required to modify the legal approach.

Short-term solutions may be found at the level of national law alone. The most urgent problem in Poland is that, by excluding the possibility for competitors to take legal action against unfair B2C practices on the basis of the regulation implementing the UCP Directive (Unfair Market Practices Act), the legal separation of B2C and B2B transactions leads to a situation where the regulation on unfair B2B practices (Unfair Competition Act) needs to be used for claims against B2C practices. Since a second set of standards to establish unfairness in relation to consumers is thus created, this is problematic from an EU perspective. A non-intrusive solution would be to interpret the Unfair Competition Act as providing traders with the right to take legal action against B2C practices that are identified as unfair in accordance with the provisions of the Unfair Market Practices Act and the UCP Directive. The general clause from Article 3(1) of the Unfair Competition Act may serve as a tool supporting this solution. It defines an act of unfair competition as any act contrary to the law or to *bonos mores* when it impairs or infringes the interests of another trader or clients. An infringement

¹⁵ Act on the Protection of Competition and Consumers (*Ustawa o ochronie konkurencji i konsumentów*) of 16 February 2007, Dz. U. 2007 Nr 50, poz. 331

of the Unfair Market Practices Act could thus be considered as being contrary to the law. As an alternative way of achieving the same result, each unfair B2C practice prohibited by the UCP Directive may be evaluated as being *contra bonos mores*. Such an interpretation is facilitated by the use of the same notion in the general clause contained in Article 4(1) of the Unfair Market Practices Act. Even though the UCP Directive does not require an infringement of the interests of another trader, it may be understood as expressing a requirement for a potential claimant to have a legitimate interest in taking action against unfair practices.

Nonetheless, under this solution the prohibitions on B2C practices, with respect to actions brought by competitors, would remain based on the Unfair Competition Act, which results in an overlap of some provisions of both acts. As they are not identical, their interpretation in the light of the UCP Directive is a complicated, if not impossible, task. It may even lead to the conclusion that these provisions should not be applied at all. Therefore, the mid-term solution would be the precise clarification of the scope of the Unfair Competition Act and the Unfair Market Practices Act. An adequate amendment should result in an act definitively prohibiting unfair B2B practices and ensuring the protection of competitors' interests at the same time. Simultaneously, the right for competitors to take legal action should be added to the B2C regulation. A return to the system of one act governing both B2B and B2C relations, which is well known and accepted in Poland, should not be excluded from consideration, although it may be unrealistic in current circumstances.

The various solutions presented above require more than merely technical improvements aiming at a perfect implementation of the UCP Directive. However, even some small modifications could significantly enhance the protection of Polish consumers which would be consistent with the aim of offering a high level of protection to all EU consumers.

The EU law on unfair competition may need some reconstruction as well. Unfortunately, the First Report on the application of the UCP Directive from March 2013 excludes the amendment of Directive 2005/29/EC (European Commission 2013b). However, there are some signs that the potential changes in the field of unfair competition law may materialize. Although the surveys demonstrated that 162 out of 272 respondents to the public consultations on the revision of the MCA Directive were in favour of an extension of the UCP Directive so that it would cover certain B2B relations, while only 20 disagreed,¹⁶ a new regulation or even regulations addressing B2B transactions may be expected. In November 2012, the Commission presented a communication with proposals for the regulations against misleading marketing practices in B2B relations envisaged as amendments to the MCA Directive (European Commission 2012), and in January 2013, the Commission in a Green Paper introduced the concept of a general regulation on B2B unfair trading practices but limited only to B2B vertical relations (European Commission 2013a).

The present actions of the EU, which may result in a double regulation on B2B unfairness separate from the B2C regulation in the UCP Directive, should necessarily be accompanied by a comprehensive discussion on the scope of the future act which should also take into account the experiences with the implementation of the UCP Directive. One should again ask the simple and fundamental question whether consumers and traders need autonomous regulations on unfair commercial practices, or whether it is time to rethink the issue of re-establishing a unified protection of B2C and B2B relations.

The answer was and still is anything but simple. The evaluations of the UCP Directive have varied from extremely positive, calling it a wise choice creating a new European model of protection and favouring no particular Member State (Bernitz 2007, p. 34), to completely the opposite assessment of the European approach as a step backward (Köhler and Lettl 2003,

¹⁶ <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=MisleadingAd>

p. 1033). Furthermore, some practices are very difficult to define as a B2C or B2B practice, as they affect both consumers and traders. In reality, commercial practices always affect relationships between traders even if the consumers are often used as targets (see also, e.g., Szwaja & Tischner 2007; Collins 2010; Hesselink 2010; Keirsbilck 2011; Stuyck 2011; Wadlow 2012). The distinction between B2C and B2B regulations seems to be of an illusory nature.

The discussion does not mean a simple return to old arguments. Meanwhile, there are fewer and fewer convincing arguments to further distinguish between B2C and B2B relations. The B2C approach may not be convincing, as the European legislator is not able to deal with the consequences—the rules on misleading and comparative advertising in the MCA Directive mix up the protection of B2C and B2B relations. Moreover, national cases before the CJEU clearly indicate that old Member States are also surprised by the leverage of the UCP Directive, and that the enforcement of the rules mostly by competitors undermines the logic of the B2C and B2B distinction. It is this practical dimension that emphatically demonstrates that the European lawmaker may have ignored market realities.

The final and decisive argument in the discussion on whether to B2C or not to B2C derives from the national experiences with the implementation process and during the application of new rules. Assessing the Polish legislation suggests that the process of reconciling the new regulations with the old ones failed. The negative answer to the question whether to B2C or not to B2C unfair competition law arises from the critical assessment of the Polish procedural confusion caused by limiting the substantive rules of EU law only to B2C relations. Therefore, it is the national enforcement of the UCP Directive that exposes the disadvantages of a division into B2C and B2B rules. The enormous intricacies of the UCP Directive, which are not discussed in this paper, only additionally undermine the efficiency of EU policy-making. The procedural and substantive uncertainties and inadequacies do not aid in protecting consumers and decrease the legal certainty of both consumers and traders. Consequently, the question may be posed: why wade further into the swamp instead of assuming a more holistic approach to unfair competition law? This is not a claim for a uniform EU law, but for a coherent one, even if it is too early to predict the impact and difficulties of an autonomous or complementary regulation of B2B unfair commercial practices.

The examination of the Polish experiences with the UCP Directive forcefully raises the general question about the interrelationship between the law of the EU and that of the Member States, and more specifically of new Member States. The EU action in the field of consumer protection should have endowed new Member States, which do not always have a long history of consumer protection, with simple and effective rules.¹⁷ Instead, the European rules on unfair commercial practices are not simple and may therefore be ineffective; hence, they have clearly failed to attain their overall aim. The UCP Directive has apparently caused unexpected confusion in all Member States. The difficulties in reorientation are quite the same for old and well established legal systems. Moreover, some complex problems may arise also in legal systems in which unfair competition law has not, historically, been aimed at protecting consumers' interests. European integration of law and through law nowadays forces a reassessment leading to common solutions, not only from the European perspective but also from national perspectives. Thus, the effects at both levels should be constantly analysed and reassessed.

Bridging the differences between the EU regulations and the laws of new Member States may, however, be even more problematic. The perspective of Central and Eastern European Member States is different, primarily due to their relatively modest experience with EU law,

¹⁷ Green Paper (2001), at 10

in particular in fields that are new in their domestic legal systems such as consumer law. The effect thereof is a more cautious approach. The EU law may be transposed too literally without a deeper consideration of its impact on the national legal system, resulting in a system that is evidently inconsistent with EU law and EC policy. As the ratio between the old and new Member States is 15 to 12, and recently 13, the problems of the new Member States—primarily from Central and Eastern Europe—are not of minor importance. EU law should evidently be implemented more carefully but the problems encountered by the new Member States as well as the diversity of national solutions should serve as an impulse for the future development of the law (Bakardjieva Engelbrekt 2007). Obviously, the establishment in Poland of the concept of specific consumer protection provisions has been a major contribution of EU law. Yet, it is equally desirable that the lack of a successful implementation should not influence the future development of EU law, since at present the responsibility for resolving the problems caused by the demanding UCP Directive is only placed on the Member States, who have at the same time lost their legislative competence in this field.

Even after taking into consideration the experiences of only one new Member State based exclusively on one directive, the temptation arises to make a plea for a change in direction in EU law and policy-making since, currently, the problems caused by the export of the European ideas, norms, and solutions seem enormous, if not overwhelming. At the end of the day, it is definitely not much ado about nothing.

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References

- Anagnostaras, G. (2010). The unfair commercial practices directive in context: From legal disparity to legal complexity? *Common Market Law Review*, 47, 147–171.
- Bakardjieva Engelbrekt, A. (2007). An end to fragmentation? The unfair commercial practices directive from the perspective of the new Member States from Central and Eastern Europe. In S. Weatherill & U. Bernitz (Eds.), *The regulation of unfair commercial practices under EC directive 2005/29. New rules and new techniques* (pp. 47–90). Oxford: Hart.
- Bernitz, U. (2007). The unfair commercial practices directive: Its scope, ambitions and relation to the law of unfair competition. In S. Weatherill & U. Bernitz (Eds.), *The regulation of unfair commercial practices under EC directive 2005/29. New rules and new techniques* (pp. 33–46). Oxford: Hart.
- Collins, H. (2010). Harmonisation by example: European laws against unfair commercial practices. *The Modern Law Review*, 73, 89–118.
- Commission of the European Communities. (2001). *Green Paper on European Union Consumer Protection*. COM (2001), 531 final.
- Commission of the European Communities. (2003). *Proposal for a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)*. COM (2003), 356 final.
- European Commission. (2009). *Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices*. SEC (2009) 1666.
- European Commission. (2012). *Communication “Protecting businesses against misleading marketing practices and ensuring effective enforcement. Review of Directive 2006/114/EC concerning misleading and comparative advertising.”* COM (2012) 702 final.
- European Commission. (2013a). *Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe*. COM (2013) 37 final.
- European Commission. (2013b). *First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/*

- 65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), COM (2013) 139 final.
- Fezer, K.-H. (2009). Der Dualismus der Lauterkeitsrechtsordnungen des b2c-Geschäftsverkehrs und des b2b-Geschäftsverkehrs im UWG. *Wettbewerb in Recht und Praxis*, 1163–1175.
- Gomez, F. (2006). The unfair commercial practices directive: A law and economics perspective. *European Review of Contract Law*, 2, 4–34.
- Hesselink, M. (2010). Towards a sharp distinction between b2b and b2c? On consumer, commercial and general contract law after the Consumer Rights Directive. *European Review of Private Law*, 18, 57–102.
- Howells, G., Micklitz, H.-W., & Wilhelmsson, T. (2006). *European fair trading law: The unfair commercial practices directive*. Aldershot: Ashgate.
- Keirsbilck, B. (2011). *The new European law of unfair commercial practices and competition law*. Oxford: Hart.
- Köhler, H., & Lettl, T. (2003). Das geltende europäische Lauterkeitsrecht, der Vorschlag für eine EG-Richtlinie über unlautere Geschäftspraktiken und die UWG-Reform. *Wettbewerb in Recht und Praxis*, 1019–1057.
- Mak, V. (2012). Full harmonization in European private law: a two-track concept. *European Review of Private Law*, 20, 213–235.
- Micklitz, H.-W. (2010). Consumer Law. In F. Cafaggi, O. O. Cherednychenko, M. Cremona, K. Cseres, L. J. Gorywoda, R. Karova, H.-W. Micklitz & K. Podstawa (Eds.), *Europeanization of private law in Central and Eastern Europe Countries (CEECs): preliminary findings and research agenda* (pp. 35–46). EUI LAW Working Paper No. 2010/15. Available at <http://dx.doi.org/10.2139/ssrn.1699145>.
- Nestoruk, I. B. (2013). Country report. Poland. In F. Henning-Bodewig (Ed.), *International handbook on unfair competition* (pp. 423–455). Munich: C H. Beck.
- Nowińska, E., & du Vall, M. (2013). *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz (Commentary on the act on combating unfair competition)*. Warszawa: LexisNexis.
- Sieradzka, M., & Zdyb, M. (Eds.). (2011). *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz (Commentary on the act on combating unfair competition)*. Warszawa: Wolters Kluwer.
- Stuyck, J. (2000). European consumer law after the Treaty of Amsterdam: Consumer policy in or beyond the internal market? *Common Market Law Review*, 37, 367–400.
- Stuyck, J. (2011). Unfair competition law in the EU in the years to come. In R. Schulze & H. Schulte-Nölke (Eds.), *European private law—current status and perspectives* (pp. 107–131). Munich: Sellier.
- Szwaja, J. (Ed.). (2013). *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz (Commentary on the act on combating unfair competition)*. Warszawa: C. H. Beck.
- Szwaja, J., & Tischner, A. (2007). Implementacja dyrektywy 2005/29/WE o zwalczaniu nieuczciwych praktyk handlowych do prawa polskiego (Implementation of directive 2005/29/EC on unfair commercial practices to the Polish law). *Monitor Prawniczy*, 1117–1122.
- Wadlow, C. (2012). The emergent European law of unfair competition and its consumer law origins. *Intellectual Property Quarterly*, 1, 1–24.