The full harmonisation directives

For about as long as the founding treaties set the first steps towards a "unified Europe", there have been efforts to achieve a single European market. Market integration has in fact been nothing but pivot throughout the history of the EU. It should come as no surprise, then, that such an overarching goal has reverberated on all aspects of EU law, thus shaping, as of its very origins, the development of the EU legal order.

Clearly, market integration may follow very different paths; and in fact, as we all know, it did so in the EU. It suffices to recall here the difference between the "negative integration", brought forth mainly by the treaties and the case-law, and the "positive integration", fostered by the legislation on consumers, businesses and, more in general, cross-border trade.

In my speech today, I shall delve onto the "positive" aspect of market integration, focusing on the EU rules on the harmonisation of consumers' protection and unfair trading practices, to underline how the legislation in the field bore an impact on the Member States' legal orders and on the relevant national rules.

The eye of the needle through which I shall first pass, however, is the historical evolution of the discipline, offering an account of the well-known shift from minimum to maximum harmonisation. I shall subsequently move the attention onto the jurisprudence of the Court, analysing some key cases on consumer rights, and finally conclude with an overview of the current state of the art.

1. Consumer law and policy in the EU: A concise historical overview

The legal landscape of the founding treaties displayed few scattered references to consumers. Indeed, if one goes back to the Treaty of Rome, one can see them being mentioned only five times, namely at Articles 40, common agricultural policy, 85(3), exemptions for anticompetitive agreements, 86, abuse of dominant positions, and 92(2)(a) concerning state aids of social character. They were therefore merely incidental references.

The breakthrough in the evolution of primary EU consumer law did not occur before 1993 and the adoption of the Maastricht Treaty. Thereby, for the first time, the EU consumer policy was finally formally recognized by the drafters, thus granting the EU a constitutional backbone while acting in the field of consumer law.

That being said, the first steps down the path to harmonisation of consumer law were already taken between the 1980's and the 1990's, when the EU legislator enacted several directives concerning various aspects of trade, such as the 84/450 on misleading and comparative advertising, the 85/577 on doorstep sales, the 93/13 on unfair terms and the 99/44 on consumer sales.

Whilst those directives were supposed to tackle the disparities between the rules affecting the functioning of the internal market, they nonetheless left a wide margin of appreciation to the national legislators. Indeed, they provided for "minimum harmonisation" rules, leaving thus the Member States with the full right to depart from their provisions, increasing, for instance, the thereby enshrined levels of protections.

Yet, make no mistake: The Member States' competence was clearly not unbounded. On the one hand, they could not forgo the foreseen safeguards, meaning that they could not diminish the levels of protection ensured by the directives. On the other hand, any national measure liable to compromise the functioning of the internal market had to be tested against the principle of proportionality and the rules on free movement.

So, for example, in *Karner* case[1], a case dealing with national rules on advertising restrictions, the Court held that whereas there could not be no doubt as to the freedom of Member States to "*retain or adopt provisions aimed at ensuring more extensive consumer protection than that provided for*" in directive 84/450, that power had to be "*exercised in a way that is consistent with the fundamental principle of the free movement of goods, as expressed in the prohibition contained in Article 28 EC*".

In any event, it did not take long to realize that the wide competences retained by the Member States could not but run against the endeavours to build a predictable legal framework for cross-border trade. For this reason, the early 2000's saw a growing consensus about the idea that the single market needed more than just minimum harmonisation. In fact, as the Commission pointed out in its Communication on the Consumer Policy Programme for 2002-2006, "*variations in consumer protection rules across the EU* […] *create fragmentation of the internal market to the detriment of consumers and business*". The only real solution to these divergences was, said the Commission, full harmonisation.

In the wake of the mentioned U-turn, the EU legislator enacted several directives, abiding by the request for a more stringent – and pervasive – set of rules, fully harmonizing the Member States' laws. Thus, the policy shift from minimum harmonisation to full harmonisation approach announced in the 2002 Communication of the Commission was put into effect, essentially, with the 2002 *Directive on distance marketing of financial services* and was followed by the adoption of the *Unfair*

[1] Case number C-71/02.

commercial practices directive in 2005 ("UCPD"), the revised *Consumer credit directive* in 2008, the *Timeshare Directive* in 2009 and the *Consumer rights directive* ("CRD") in 2011.

Evidently, whilst this is neither the right place, nor the right time, to offer an in-depth analysis of each and every one of the full harmonisation directives, it is nevertheless worth focusing on the two admidst those which are probably the better suited to shed light on some of the intricacies of the field.

I shall, in particular, briefly depict the content and the purpose of directives 2005/29 on unfair commercial practices ("UCPD") and 2011/83 on consumer rights ("CRD"), with an eye to disentangle the main issues raised by their application, in the light of the case-law of the Court.

2. Directives on unfair commercial practices and on consumer rights: what does the harmonisation of consumer law implies (and what does the Court think about it)?

2.1. Directive 2005/29 on unfair commercial practices (UCPD)

The UCPD was notably the first example of full harmonisation of consumer law; it was in fact adopted only a couple of years after the Commission raised its plea in favour of a shift in the legislative approach. As per the very words of its preamble, the directive was enacted so as to bring an end to the inconveniences flowing from disparities between national laws on unfair commercial practices, for the sake of competition and consumers' welfare.

The structure of the UCPD is, no doubts, rather straightforward. The directive is composed by three parts: A general definition of unfair commercial practices (article 5(1) and (2)), followed by an enumeration of misleading and aggressive usages (articles 5(4), 6, 7, 8 and 9) and, last, a blacklist of practices that are deemed to be so tedious so as to leave no room for justification (Annex I).

So, essentially, if practices either fall under the definition of article 5, or they happen to be misleading or aggressive within the meaning of articles 6-7 and 8-9, they have to be assessed by the national authorities, according to the rules set in article 11. If, conversely, the practice is blacklisted by the Annex I, no assessment is needed: For it ought to be in any event prohibited, since it is deemed to be always unfair (Article 5(5)).

One might then argue, and understandably so, that the directive is well articulated and that the rules therein are self-explanatory. However, such claim would not stand an overview of the case-law. Truth is, in fact, that the application of the directive raised in practice several far from trivial problems, as it occurred, for instance, in the well-known *Plus* case[2].

[2] Case number C-304/08.

There, the Court was faced with a reference for preliminary ruling concerning the breadth of the harmonisation brought forth by the Annex I. The national judge asked, more specifically, whether a legislation providing for a *per se* prohibition of commercial practices in which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services, was compatible with the provisions of the UCPD.

The question boiled down to whether the list in Annex I was exhaustive and, if so, whether Member States had the right to provide, under their national legislations, that other practices than those enshrined in Annex I had to be deemed unfair in all circumstances, without there being the need for a case-by-case assessment.

The Court answered negatively, replying, in particular, that "[a]*nnex I to Directive 2005/29 establishes an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of the directive, are regarded as unfair 'in all circumstances'*" and "[c]*onsequently, as recital 17 in the preamble to Directive 2005/29 expressly states, those commercial practices alone can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the directive*."

A side mention goes to the recent *UPC Magyarország* case[3], where the Court, upon request of the Hungarian Kúria, ruled that the UCPD "*must be interpreted as meaning that the communication, by a professional to a consumer, of erroneous information, such as that at issue in the main proceedings, must be classified as a 'misleading commercial practice', within the meaning of that directive, even though that information concerned only one single consumer*" and, moreover, that "*if a commercial practice meets all of the criteria specified in Article 6(1) of that directive for classification as a misleading practice in relation to the consumer, it is not necessary further to determine whether such a practice is also contrary to the requirements of professional diligence, as referred to in Article 5(2)(a) of that directive, in order for it legitimately to be regarded as unfair and, consequently, prohibited in accordance with Article 5(1) of that directive*".

Turning the attention back to the *Leitmotiv* of my intervention, it ought to be stressed, if that is not yet clear enough, that whilst the UCPD provides for full harmonisation, Member States do retain a quintessential competence vis-à-vis the enforcement of its provisions. The directive, in other words, harmonizes the concept of unfair commercial practices, but it does not prevent the national authorities from assessing, on a case-by-case basis, whether an allegedly unfair practice is to be prohibited or not. Actually, the UCPD prescribes the opposite. As the Court explained in the *Plus* case, in fact, exception being made for the practices falling under the blacklist in Annex I, national authorities have the duty to carry out such an assessment.

[3] Case number C-388/13.

2.2. The directive 2011/83 on consumer rights (CRD)

The directive 2011/83 on *consumer rights* (CRD), which applies in all Member States as from 13 June 2014, replaces Directive 97/7 on the protection of consumers in respect of *distance contract*s and Directive 85/577 on the protection of consumers in respect of contracts negotiated away from business premises (*off-premises contracts*). It likewise amends Directive 93/13 on *unfair terms* in consumer contracts and Directive 1999/44 on certain aspects of the *sale of consumer goods* and associated guarantees.

According to article 1, the purpose of the CRD is to achieve a high level of consumer protection across the EU and to contribute to the proper functioning of the internal market by approximating certain aspects of Member States' laws, regulations and administrative provisions concerning contracts concluded between consumers and traders.

The directive sets the ambitious goals of consolidating and coordinating the existing minimum harmonisation directives, while further strengthening consumer rights and ensuring that a fair balance is struck between consumer protection and business competitiveness. In the legislator's mind, in fact, these goals are supposed not to be in conflict but mutually compatible.

The CRD is, "in principle", a full harmonisation directive as only full harmonisation of all consumer rights in the EU can bring to an end the fragmentation of the single market, as well as improve legal clarity, guarantee the same protection to all consumers and stimulate cross-border trade.

Thus, the directive specifies that Member States may not diverge from it by imposing, in their national laws, more or less stringent provisions to ensure a different level of consumer protection, unless a specific possibility to deviate from its rules is expressly provided for by the Directive itself (article 4). In this perspective, the directive in particular allows Member States to make use of some regulatory choices it provides.

This peculiar harmonisation approach is the result of the debate that followed the Commission's directive proposal of 2008 during which Member States contested the traditional full harmonisation approach to be the only option! In particular, they argued that complete harmonisation could not be applied, without distinction being made, to all matters that the proposed directive wished to cover. These arguments determined the legislator to opt for a "targeted" full harmonisation.

Regretfully, as the CRD's transposition delay expired quite recently, the Court thus far only made incidental reference to it.

3. Internal market and full harmonisation: Few conclusive remarks

Today, as we all know, the single market is still far from being fully realized. Whereas thus far many of the barriers to cross-border trade have been abolished, it could not be seriously denied that the road to a unified EU trading area is still long and paved with difficulties. Nevertheless, one ought not to overstress that: After all, obstacles are there to be overcome and the EU has a remarkable record in doing so.

No doubts, however, that full harmonisation should remain a key component of any effective strategy towards the establishment of the single market. It could hardly be otherwise since, without it, the disparities between the Member States' legislation could evidently not be solved. Consequently, as the Commission pointed out in the Communication on EU Consumer Policy Strategy 2007-2013, "*in order both to improve the internal market and to protect consumers, legislation should not, within its given scope, leave room for further rules at national level*"[4].

Moreover, the advantages of full harmonisation are self-evident. Common rules, applying no matter where in the EU transactions take place, ensure that consumers and traders are able to rely on a single regulatory framework based on clearly defined legal concepts. This, clearly, does not only protect consumers, but promotes a fair competition between the EU businesses.

As per conclusion of my intervention, allow me to clarify one point, that I am afraid some of my earlier words might have casted a shadow upon.

Yes, no doubts, the legal framework does display some *lacunae* (so to speak) and, moreover, the current rules restrict the Member States' powers in the field. It would be however wrong to read that as a liability.

On the contrary, after a more attentive consideration, I believe that it is the very existence of those *lacunae* that ensure that, on the one hand, the national legislator still retains a margin of manoeuvre, and, on the other hand, that the Court, especially thanks to preliminary rulings, can fill those gaps by providing for clarification and guidance for the application of EU provisions, and ensure that the legislation keeps up with the times.

In the end, I am convinced that Member States do maintain a fundamental role in applying the rules by striking the appropriate balance between consumer protection and business competitiveness. This is in particular the precious and fundamental task that national competition authorities are called to perform.

I wish thus to the *Gazdasági Versenyhivatalt* all the best success for the next 25 years.

[4] Page 7.