

THE MISLEADING PERCEPTION OF THE PURPOSE OF THE PROTECTION AGAINST MISLEADING ADVERTISING BY THE EU LAW AND ITS IMPACT ON THE CZECH REPUBLIC

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Abstract: For over three decades, the EU, along with EU member states, has recognized the vital importance of the protection against unfair competition as well as the recognition of the significance of intellectual property. Despite strong rhetoric and developed policies, it appears that the Directives trio - Directive 84/450, Directive 2006/114 and Directive 2005/29 – is neither consistent nor reconciling the involved concepts and priorities with respect to the regime of the protection against misleading advertising. Consequently the national transpositions are struggling and do not lead to easily interpretable norms, e.g. the Czech endeavors in this respect, along with the massive Czech private law re-codification adding even more confusing elements, such as the definition of the average consumer. Certainly, the tension between competition law, unfair competition law, consumer protection law and intellectual property law makes it very challenging to reach a well-balanced harmonized protection against misleading advertising. However, the critical historical study of these Directives and statutes and key interpretation instruments, along with the involvement of the teleological approach, Meta-Analysis and Socratic questions, points to one strong cause of the confusion, if not inconsistency, of the current misleading advertising regime in the EU law, and consequently as well in the Czech law – the misleading perception of the purpose. Thus, it is crucial to finally cross the Rubicon and become clear about the very fundament – about the very purpose of the protection against misleading advertising.

Keywords: European Union, EU directives, Czech Civil Code, misleading advertising, average consumer

INTRODUCTION

The recently blooming protection against unfair competition and the recognition of the critical importance of the intellectual property (“IP”) and the recently even more blooming consumer protection, belong to the priorities of the EU and EU member states which are directly linked to fundamental values recognized by Western civilization, based on Christianity. The EU and its member states often use a similar rhetoric regarding policies, norms and cases related to the situations when allegedly unfair commercial practices, via misleading or comparative advertising, can mislead consumers in their market choices. Naturally, this applies to situations involving the use of modern technologies, in particular modern means of communication with all their advantages and disadvantages, such as spam.² Indeed, globalization and virtualization magnify and complicate many

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² MATEJKA, J. Anti-Spam Legislation in Consideration of Personal Data Protection and Other Legal Instruments. *The Lawyer Quarterly*. 2016, Vol. 6, No. 2, pp. 90–114.

issues related to advertising. At the same time, it must be emphasized that EU member states follow different legal traditions, the dichotomy of the common law and continental (civil code) law family comes in picture, and the regulation of commercial practices and advertising has been done in each jurisdiction in an autonomously different manner (e.g., law against unfair competition vs. torts, conservative v. liberal approach to advertising touching IP rights, etc.).

Ambitiously, the EU clearly crossed the Rubicon, and for three decades has been approximating, harmonizing and perhaps even slightly unifying rules regarding unfair commercial practices and misleading and/or comparative advertising and protection against these undesirable phenomena. Nevertheless, a deeper study reveals that, despite all of these endeavors of the EU, including the alleged full harmonization of the protection against unfair commercial practices, the state of law regarding misleading commercial practices, especially confusing marketing, has become neither much clearer³ nor dramatically more effectively and efficiently synchronized. Indeed, even the internal European tandem, the European Commission (“Commission”) and the Court of Justice of the EU (“CJ EU”), have reluctantly admitted that some issues remain, such as e-business, including misleading e-advertising, for vulnerable consumers.⁴ However, even the very purpose of the flagship representative, protection against misleading advertising, has always been more than complex and, with slight exaggeration, it can be stated that there is a misleading perception of this purpose or these purposes.

Indeed, the underlying concepts, employed criteria and ultimate goals of the protection against unfair commercial practices or other situations linked to misleading advertising are far from being consistently, similarly and even compatibly perceived and applied across the EU member states, and their enforcement reaches a dramatically different intensity. Even the EU itself does not appear to be fully consistent and clear in this respect. The result of these misleading puzzle elements is a rather confused and blurred picture of the fundamental point of this legal framework, which is open to methodological confusion and not reconcilable interpretation.

It is beyond the scope of this paper to fully explore this highly significant and complex issue in both the EU law and EU member states’ laws. However, there is sufficient space to analyze a narrowed sub-issue in the EU, i.e. to identify and discuss the dynamics of the evolution of the perception of the purpose of the protection against misleading advertising and to discuss reasons for this confused inconsistency in the EU law, as well as that transposed to the Czech national law.

³ TRZASKOWSKI, J. Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive. *Journal of Consumer Policy*. 2011, No. 34, pp. 377–392.

⁴ European Commission. UCPD – EC Guidance. In: *European Commission* [online]. 1. 10. 2015 [2017-03-26]. Available at: <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.show> and https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.browse&elemID=74#article_62>. European Commission. Communication from the Commission on the application of the Unfair Commercial Practices Directive – Achieving a high level of consumer protection Building trust in Internal Market. In: *European Commission* [online]. 14. 3. 2013 [2017-03-26]. Available at: <http://ec.europa.eu/justice/consumer-marketing/files/ucpd_communication_en.pdf>.

Firstly, this qualitative and comparative analysis is closely linked to the literate critical interpretation of secondary EU legislation and primary national legislation, along with case studies and projection of secondary data such as published academic writings. Secondly, it is complemented by the Socratic questioning method and investigative Meta-Analysis. Indeed, it is extremely instructive to research the official and/or unofficial main purpose of the protection against misleading advertising. The yield data can bring new light, explains a great deal and assists with understanding and interpretation of the true legal meaning of not only the protection against misleading advertising, but as well about the single internal market operation, unfair competition, consumer protection and unfair competition on the EU, as well as EU member states, level.

Hence the leitmotif of this article is centered around the chronological legal and historical-contextual line of the misstated purposes of the protection against misleading advertising. Boldly, even the most suitable methodological approach (except the literate rule) desperately needs a purpose and without knowing the purpose, the interpretation and application are impaired. We need to know what the law and legislature wanted to achieve. We can learn a lot by overviewing this evolution, explaining its reasons and appreciating the inconsistent hesitation of the EU law and national laws, such as Czech law, with respect to misleading advertising, namely the main purposes of rules for protection against misleading advertising. The assessment of these purposes teaches a lot not only about the interpretation of current legislation but as well about the EU and EU law as such and about the eternal balancing of various priorities coming from several legal branches – Intellectual property law, competition (antimonopoly and antitrust) law, unfair competition law, consumer protection law. The conviction of the authors and thus the two key hypotheses of this article to be confirmed is that (i) it is possible to identify and explain the main purpose(s) of protection against misleading advertising by not only the EU law and that (ii) this allows us to understand more deeply and interpret more correctly the given legal framework and its application. Indeed, the over three decade long inconsistent hesitation of the EU and EU member states, such as the Czech Republic, over the main purpose of protection against misleading advertising can be presented as a step-by-step search process often changing its orientation, reflecting a preference struggle. It is an Odysseus journey through both foggy and murky waters, done perhaps with good intentions, but definitely without a perfect, clear and transparent GPS navigation system.

1st step – the initial approximation by Directive 84/450/EEC

Modern political and economic European integration was launched after the Schuman Declaration⁵ based on three treaties creating three European Communities in the 1950's.⁶

⁵ The Schuman Declaration was presented by French foreign minister Robert Schuman on 9 May 1950. It proposed the creation of a European Coal and Steel Community, whose members would pool coal and steel production. See http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm.

⁶ Initially created to coordinate the Member States' research programmes for the peaceful use of nuclear energy, the Euratom Treaty today helps to pool knowledge, infrastructure and funding of nuclear energy. It ensures the security of the atomic energy supply within the framework of a centralised monitoring system. See http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_euratom_en.htm.

One of the institutions established, and recognized by all three Communities, the European Court of Justice (“ECJ”, newly CJ EU), managed to transform the Treaty of Rome establishing the EEC into a constitution *sui generis* and laid down the legal foundation for European integration, especially in the economic field.⁷ This is very important, especially considering that an important reason for European integration was the reinforcement of economic cooperation between Germany and France, two countries not sharing identical visions of state and social and other policies,⁸ in order to avoid conflicts in Europe.⁹ A number of further treaties followed¹⁰ and culminated with the 1986 Single European Act reforming Treaties by extending the qualified majority voting and by increasing the power of the European Parliament via co-operation procedures and the 1993 Treaty of Maastricht establishing the EU with a single market or internal market, revised by the 1999 Treaty of Amsterdam and the 2003 Treaty of Nice, and ultimately reformed by the 2009 Treaty of Lisbon ultimately shaping the Treaty on EU (“TEU”) and the Treaty on the Functioning of EU (“TFEU”).¹¹ Relying on the literal approach working with the very wording of the primary sources of the EU law, such as TEU and TFEU, as well as secondary sources of the EU law such as directives and even via the Lisbon Treaty, introduced legislative acts and delegated acts,¹² would be superficial and dramatically misleading. Indeed, the spirit of the EU law is ephemerally reflected in the written outcome of these sources and the CJ EU has enthusiastically accepted the challenge to interpret it in an almost revolutionary manner. As *Costa Enel*, *Van Gend en Loos* and *Les Verts*, along with academic and scientific presentations demonstrate,¹³ the CJ EU does, and perhaps even must, in so far as possible, interpret the law with a view to filling any normative lacunae, either in primary or secondary EU law, whose persistence would “lead to a result contrary both to the spirit of the Treaty ... and to its system.”¹⁴ The EU is a subject *sui generis* with an autonomous legal system reflecting the EU law, which is interpreted by all judges in the EU. The ultimate coordinator and reconciliator of these interpretations is the CJ EU, which must strike the right balance between the principle of effective judicial protection and the principles of separation of

⁷ BURLEY, A. M., MATTLI, W. Europe Before the Court: A Political Theory of Legal Integration. *International Organization*. 1993, Vol. 47, No. 01, pp. 41–76.

⁸ KAUFMANN, F. X. *Variations of the Welfare State: Great Britain, Sweden, France and Germany Between Capitalism and Socialism*. German Social Policy. Vol. 5. New York, NY: Springer, 2012.

⁹ MacGREGOR PELIKÁNOVÁ, R., PAČLÍK, M. European Integration Odyssey – the Ship Sails on ... but Where? *Journal on Legal and Economic Issues of Central Europe*. 2013, Vol. 4, No. 1, pp. 40–48.

¹⁰ 1965 Treaty of Brussels merging institutions of Communities; 1970 Treaty amending Certain Budgetary Provisions, which replaced the system whereby the Communities were funded by contributions from Member States with that of own resources and which put in place a single budget for the Communities; 1975 Treaty amending Certain Financial Provisions gave the European Parliament the right to reject the budget and to grant a discharge to the Commission for the implementation of the budget.

¹¹ MacGREGOR PELIKÁNOVÁ, R. *Selected current aspects and issues of European integration*. Ostrava, CZ : Key Publishing, 2014, 186 p.

¹² SVOBODOVÁ, M. On the Concept of Legislative Acts in the European Union Law. *The Lawyer Quarterly*. 2016, Vol. 6, No. 4, pp. 256–267.

¹³ LENAERTS, K., GUTIÉRREZ-FONS, J. A. *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*. EUI Working Papers, AEL, 2013, 9, [2017-03-26]. Available at:

http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1.

¹⁴ C-294/83 *Les Verts v. Parliament*.

powers and competencies and mutual sincere cooperation.¹⁵ In other words, the CJEU departs from the common strict meaning of words and in the name of the spirit of the EU and EU law can embrace the teleological or similar methodological approach while observing the rule of law and separation of powers principles. Boldly, the application of the EU law as ultimately interpreted by the CJEU must proactively reflect the legal meaning shared by the EU legislature and one of the indicators, if not the most important indicator, is the purpose as expressed by the legislative act. It is important to know the circumstances of the enactment, the historical, legislative and political context and to study the proclamations regarding the purpose of the legislative act, because this is the key to its interpretation and application. This is true for the entire EU legislation, and the legislation on misleading advertising is not an exception.

The starting point of the internal EU legislation with respect to misleading advertising is the Council Directive 84/450/EEC on approximation laws of the Member States concerning misleading advertising (“Directive 84/450”). Although the Directive 84/450 was a piece of secondary EU law reflecting primary EU law, established by EU member states, *masters of the treaties*¹⁶, it might be suggested that its setting and shaping was strongly influenced by events and issues in the 1980s and that its concept, underlying philosophy and perhaps even its very wording reflect the internal pro-integration drive of the Commission enjoying the support of the ECJ. It cannot be stressed enough that oil, energy and other crises in the 1970s were extremely challenging for the European integration and that the prosperity parabola drawn by the Welfare State in the European countries has begun its declining phase.¹⁷ The Commission of Gaston Thorn desperately tried in 1981–1985 to overcome this crisis period and was ultimately replaced by the Commission of Jacques Delors. Certainly, Thorn’s Commission faced economic and other crises, issues linked to Greece, Spain, and Portugal, problems related to British vetoing power over the Community budget, but still managed to prepare the Single European Act and, among else, the Directive 84/450. Hence, it is quite understandable that Directive 84/450 was an outcome of a Commission fighting for integration in difficult times and that the pragmatism and political will superseded strict legal theories and perfect delimitation of competencies and branches. This logical and can-do approach may seem *prima facie* positive, but at the same time it brings seeds of imperfection and confusion which over time have grown to unclear, if not misleading, rules on misleading advertising in the EU.

It is highly illustrative to quote a part of the Preamble of Directive 84/450, indeed it reveals that misleading advertising was perceived in a very large and cross-disciplinary manner: *Whereas the laws against misleading advertising now in force in the Member States differ widely; whereas, since advertising reaches beyond the frontiers of individual Member*

¹⁵ ALBORS LLORENS, A. The European Court of Justice, More than a Teleological Court. *Cambridge Yearbook of European legal Studies*. 1992, No. 2, p. 357.

¹⁶ BÖRZEL, T. A., DUDZIAK, M., HOFMANN, T., PANKE, D., SPRUNG, C. Recalcitrance, Inefficiency and Support for European Integration: Why Member States Do (not) Comply with European Law, *CES Working Paper, Harvard University*. 2007 [2017-03-26]. Available at: <<http://www.unc.edu/euce/eusa2007/papers/borzel-t-02a.pdf>>.

¹⁷ ESPING-ANDERSEN, G. (Ed.). *Welfare State in Transition. National Adaptions in Global Economies*. Sage Publications, Ltd. 1996, 288 p.

States, it has a direct effect on the establishment and the functioning of the common market; Whereas misleading advertising can lead to distortion of competition within the common market; Whereas advertising, whether or not it induces a contract, affects the economic welfare of consumers; Whereas misleading advertising may cause a consumer to take decisions prejudicial to him when acquiring goods or other property, or using services, and the differences between the laws of the Member States not only lead, in many cases, to inadequate levels of consumer protection, but also hinder the execution of advertising campaigns beyond national boundaries and thus affect the free circulation of goods and provision of services ... Thus, the Thorn Commission correctly realized that misleading advertising was an omnipresent issue throughout Europe, that national laws dealt with it differently and that this diverse setting and enforcement of protection against misleading advertising negatively impacted competition within the common market, the economic welfare of consumers, consumer protection, etc. However, after the general and rather declaratory preamble comes Art. 1, which boldly states *“The purpose of this Directive is 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.”* The Directive 84/450 continues in this multi-tasking minimal standard vein, while remaining silent regarding the criterion of the (average) consumer.

Indeed, the goal and leitmotif of the Directive 84/450 consists of a protection triad – (i) protecting consumers, (ii) business and trade persons, and (iii) the interests of the public. The burning question emerges immediately – is this possible? Or put it more precisely – are these interests and protections reconcilable? Moving from practical and political aspects to those of a more academic and legal bearing, we can ask whether the unfair competition, consumer protection, competition (antimonopoly and anti-cartel) and IP law can perfectly cooperate and interact on the European level, and thereafter the national level? And if this balance is to be made while using the consumer criterion – how this criterion should be defined (what kind of consumer?)? Well, conceptually as well as regarding the key criterion, the Directive 84/450 appears as a step into the unknown. Naturally, the future was to indicate if this step was done in the right direction. Since primary sources with field searches and questionnaires, as well as cases, can be very subjective, and fractional and secondary sources with published academic opinions are rather contradictory, it seems that the following study of the internal EU legislation can serve as the most objective and concise feedback.

2nd step – the continuing approximation by Directive 2006/114/EC

Two decades later, the EU again faced serious crises, such as the public rejection of the already signed Treaty establishing a Constitution for Europe by referenda in the Netherlands and even in France! In these troublesome times, the Prodi Commission was replaced by the Barroso Commission and right away José Manuel Barroso faced significant opposition and was forced to reshuffle his initial Commission team. Nevertheless, José Manuel Barroso passed the initial scrutiny and became individually active in finding compromises and completing legislative projects, such as the Bolkestein Directive, the REACH directive, and also Directive 2006/114/EC concerning misleading and comparative advertising (“Directive 2006/114”) and Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (“Directive 2005/29”).

According to Part A of Directive 2006/114, Directive 2006/114 explicitly repealed Directive 84/450. However, the term “repeal” is rather misleading in this context. A comparison of the wording of these two Directives, Directive 84/450 and Directive 2006/114, is very similar, if not identical. Indeed, regarding misleading advertising, the Preamble of Directive 2006/114 is a true copy of the Preamble of Directive 84/450 and the only difference consists in the use of “within internal market” instead of “within common market”. This inevitably leads to a strong question – why? Indeed, how it is possible that, after two decades of approximation by Directive 84/450, the same problems remain and the “*law against misleading advertising in force in the Member States differs widely*”? This, at least, suggests that the approximation aimed by Directive 84/450 was not very, if at all, successful. Logically, after two decades, some approximation should have been completed and issues indicated in preambles should not be identical. Well, something should have been completed and accomplished in 20 years, shouldn't it?

As well, even the further legislatively-literate comparison is highly indicative. Unlike preambles, Art. 1 of Directive 2006/114 differs from Art. 1 of Directive 84/450, i.e. the preamble is the same, but the purpose is different, see the below table with the underlined difference.

Art.1 of Directive 84/450/EEC

The purpose of this Directive is 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.

Art.1 of Directive 2006/114/EC

The purpose of this Directive is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.

Although the appreciation and understanding of that cannot be examined in isolation,¹⁸ it seems already from the simplistic wording comparison, that not only the legal framework extends from misleading as well as to comparative advertising, but as well after two decades the ultimate purpose appears to move its focus from the protection of consumers to protection of traders. At the same time, both Art.7 of Directive 84/450 and Art.8 of Directive 2006/114 stipulate in favor of the optional national stronger protection, naturally along with the differently stated objectives, i.e. purposes (protection of consumers, traders, general public v. protection of traders and competitors). Hence the gold-plating, i.e. a transposition exceeding the minimal requirements of this EU Directive (possibly increasing regulatory burdens in a not justifiable manner),¹⁹ is allowable in this arena.

¹⁸ LENAERTS, K., GUTIÉRREZ-FONS, J. A. *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*. EUI Working Papers, AEL, 2013, 9, [2017-03-26]. Available at: <http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1>.

¹⁹ KRÁL, R. On the Gold-Plating in the Czech Transposition Context. *The Lawyer Quarterly*. 2015, Vol. 5, No. 4, pp. 300–307.

Art.7 of Directive 84/450/EEC

This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public.

Art.8 of Directive 2006/114/EC

This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for traders and competitors.

Well, the focus seems to have been narrowed and the move from the consumer protection law branch to the unfair competition law branch seems to be accomplished. Logically, the need for a legislative, i.e. Directive, definition of the consumer in a detailed manner evaporated and was pushed to the case law arena.

However, before scrutinizing the case law and the impact on EU member states, especially the Czech Republic, there should be pointed out one more instrument of EU secondary law – Directive 2005/29, which has a direct overlap with Directive 2006/114.

3rd step or bystep – the Directive 2005/29/EC concerning unfair B2C commercial practices

Since Directive 2005/29 is an instrument of the complete harmonization,²⁰ its meaning and impact on the EU as well as EU member states is clearly very strong. The preamble of Directive 2005/29 differs from the quasi similar preambles of both Directive 84/450 and Directive 2006/114. Nevertheless, a single and clearly expressed key interest and *raison d'être* of Directive 2005/29 is neither explicitly expressed nor implied by the preamble. A study of the preamble of the Directive 2005/29 reveals *prima facie* a mixture, if not a heterogeneous conglomerate, of (alleged) priorities from various legal branches and following diverse regimes. A short quotation of selected parts of this preamble is self-explanatory. The preamble kicks-off with a fairly notorious statement about the chronic and persistent problem of differences hurting the (worshipped) internal market, i.e. *“The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market.”* This can hardly be objected to, yes, this is true. However, does this belong in the leading line of a directive targeting private law (unfair competition)? Can we agree to the mix-and-match approach regarding the public and private law and at the same time selectively pick some (but not all!) stakeholders, as suggested further by the preamble? The preamble goes for it vigorously by stating the following and explicitly mentioning advertising and consumers, i.e. *“These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers’ economic interests and create many barriers affecting business and consumers... This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harms consumers’ economic interests and thereby indirectly*

²⁰ STUYCK, J. Réflexions sur une meilleure intégration du droit de la concurrence et du droit des pratiques commerciales déloyales. *Revue internationale de droit économique*. 2011, No. 4, pp. 455–479.

harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity." This is more puzzling and confusing, instead of simplifying and clarifying. Therefore, the ultimate explanation is to be found in the very body of Directive 2005/29. This is legislatively correct and hence Art. 1 should indicate the top priority or the rank of priorities. Is the most fundamental purpose of Directive 2005/29 to protect the internal market, competing businesses and traders or consumers? Which and whose interest leads? The comparative table below, confronting Art.1 of Directive 2006/114 and of the Directive 2005/29 is highly illustrative and to stress it even more, critical parts are highlighted.

Art.1 of Directive 2006/114/EC

The purpose of this Directive is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.

Art.1 of Directive 2005/29

The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.

Well, the misleading perceptions keep triumphing and, as a consequence, confusion takes pride of place in the judiciary and academic sphere as for the fundamental purpose and ultimate perspective in which Directive 2005/29 should be interpreted and applied. Boldly, the top EU law interpretation method, the special purposive approaches²¹ taking the shape of *sui generis* contextual and teleological approach,²² strictly requires both the awareness and appreciation of the purpose and spirit, as many times confirmed by the CJ EU.

Indeed, a myriad of academic, professional and even laic opinions regarding the main purpose of Directive 2005/29 has been presented and published. Often, the experts have mentioned that consumer protection is the leitmotif of the Directive 2005/29. However, there were, even at that time, various Czech authors who took a moderately literate approach, and correctly interpreted Directive 2005/29 as having for it's main goal, instead, the creation of better conditions for all 4 freedoms on the internal single market, while one of the pre-requirements of such movements is the trust of consumers in the fairness of commercial practices,²³ see Art.1.

²¹ HOLLAND, J., WEBB, J. Learning Legal Rules. 9th Edition. Oxford, UK: Oxford University Press. 2016, 423 p.

²² LENAERTS, K., GUTTIÉREZ-FONS, J. A. To Say What the Law of the EU Is? Methods of Interpretation and the European Court of Justice. *Academy of European Law*. 2013, No. 9, pp. 1–55.

²³ ČECH, P. Nedotažená revoluce v právní úpravě nekalých obchodních praktik. *Právní zpravodaj*. 2008, No. 3, p. 1.

The burning “why” question entered into play. Why are purposes mixed and exchanged? Why isn't a consistent and unique top purpose offered up for each type of Directive? Why are various legal branches and regimes mixed-and-matched without any further explanation? Why do the issues and problems remain despite a two or three decades long (allegedly) solving via special rules and approximation? Is this an honest hesitation and errant Odyssey in the Golgotha neighborhood? Or do we have an issue with integrity? It would be extremely distressful and sad if this confusion could match the sarcastic expression by the legendary comedian, George Burns, who said “Acting is all about honesty. If you can fake that, you've got it made!”²⁴ However, the post-crisis EU in the second decade of the 21st century needs to be more responsive,²⁵ consistent and transparent in order to regain its legitimacy, i.e. conceptually confusions are highly undesirable.

Going back to the wording of Directive 2005/29, its fundamental ruling heart lies in Art.5 which prohibits unfair commercial practices, and even refers to the heavily discussed concept of the average consumer, by stating: “1. *Unfair commercial practices shall be prohibited.* 2. *A commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.* 3. *Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.*” Following sections define more clearly these misleading practices in the form of misleading actions and misleading omissions and Annex I provides a black list of commercial practices considered always unfair. However, the objective-subjective/general-special average consumer test is not further addressed.

Further, it needs to be pointed out that Directive 2005/29 explicitly deals with two types of unfair commercial practices – (i) misleading actions and omissions and (ii) aggressive commercial practices. Misleading practices deform the truth and its perception while aggressive practices impair a consumer's freedom by harassment, coercion and undue influence. It is rather surprising that Directive 2005/29 addresses them in a similar manner, because in the common law universe various torts (defamation, fraudulent misrepresentation, wrongful invasion of privacy, nuisance, trespass, and even battery!)²⁶ are employed

²⁴ Codswallop! In: *Cranbrook Operatic & Dramatic Society* [online]. 2013 [2017-03-26]. Available at: <<http://www.cranbrookods.org.uk/news/codswallopaug13.pdf>>.

²⁵ ŠMEJKAL, V. Social or Highly Competitive Europe? EU Law Solution to Conflict of Social Security and Competition Law. *The Lawyer Quarterly*. 2016, Vol. 6, No. 1, pp. 18–27.

²⁶ FRANKLIN, M. A., CARDI, J. W., GREEN, M. D. *Torts – Gilbert Law Summaries*. 24th Edition. Chicago, IL, US : West, Thomson, 2008, 546 p. and KIONKA, E. J. *Torts in a nutshell*. 6th Edition. St. Paul, MN, US: West Publishing Co., 2015, 625 p.

and in continental (civil code) universe different Acts are used and the dynamic of the inexistence, absolute nullity and relative nullity is employed. Boldly, intimidation and harassment is generally taboo, while exaggeration and slight misleading, especially in the field of marketing and advertising, is common and generally tolerated. But not for the EU law which is aiming at wiping off this distinction.

However, it cannot be ruled out that Directive 2005/29 will overcome all these differences and it needs to be positively pointed out that the Commission maintains a Database on the Unfair Commercial Practices Directives Database²⁷ and this Database should be integrated into the e-Justice Portal. This Database is definitely a useful tool, but it needs to be kept in mind that its content is currently no longer updated and that it can only provide static comparative information about the wording of primary, secondary and supplementary legislation along with the selection of cases. In other words, if updated, it can assist in overcoming minor discrepancies and misunderstandings.

With a touch of exaggeration, it can be suggested that this Directive trio has only two absolutely clear and conceptually undisputable features – to ambitiously (perhaps over ambitiously) over-harmonize and to be transposed by a certain date in to the national laws of all EU member states, including the Czech Republic. Hence, the next question is, how this challenge, especially regarding (perhaps most complex of this trio) Directive 2005/29 was addressed in the Czech legal environment.

4th step or another bystep – the Czech transposition or mistransposition?

This Directive trio needs to be transposed in the national laws along with other Directives, including Directives on IP, which have undoubtedly a strong impact on the perception and regulation of the (un)fair competition and on the consumer protection. Well, when trying to search for a right link leading from mentioned Directives to the IP law, things get even more complicated. If we start with an enforcement of intellectual property rights, one of the purposes of Directive 2004/48/EC on the enforcement of intellectual property rights (“Directive 2004/48”) is *“to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.”* As a main purpose of IP law is to protect right holders, mainly (like, but not only, in the Directive 2004/48) to *allow the inventor or creator to derive a legitimate profit from his invention or creation*, another point of view comes to our wide-ranging purpose. If we accept this link between unfair competition law and IP law, so that we have not only a protection of consumers and protection of traders, but also a protection of right holders, we can add the next level: E-Commerce and copyright. Whereas Art. 9 of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (“Directive 2001/29”) excludes unfair competition law from its scope, one of its purposes requires a common implementation of Directive 2001/29 and Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the

²⁷ European Commission. Database on the Unfair Commercial Practices Directive. In: *European Commission* [online]. 2017 [2017-03-26]. Available at: <http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm>.

internal market, just because “*liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks*”. Does it bring more clearness? Even if links between purposes of different directives do not lead automatically to one common purpose, such links can bring more interpretation problems than solutions. Well, national legislatures and judges need to accept this challenge and make more than their best endeavors and efforts to transpose Directives, regardless if these are about IP and unfair competition and regardless if they have unclear or even contradictory purposes and/or wordings. National legislatures and judges need to take one step at a time, and logically start with the most certain – transposition of definitions included in Directives.

Definitions from Directive 2005/29 are taken on by the Czech Act No. 36/2008 Coll. which changes the Czech Act No. 634/1992 Coll., on consumer protection (“Czech Consumer Protection Act”), especially Art.4. Thus the EU legislation targeting public and private law aspects of competition, i.e. antimonopoly/antitrust and unfair competition law, is partially transposed by the Czech consumer protection legislation. In addition to this conceptual “form/classification” difference, there is one significant “content” difference.

Despite all criticisms and suggested inconsistencies, especially regarding the purpose, Directive 2005/29 undoubtedly relies on the criterion of the average consumer and his behavior and represents a codification sui generis of the famous case-law of the CJ EU on this topic, see point 18 of the preamble of Directive 2005/29: “*It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase. The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case....”*

Hence, beyond any reasonable doubt, Directive 2005/29 relies on and explicitly refers to the average consumer and the behavior of the average consumer. However, the Czech Consumer Protection Act keeps considering the behavior of a consumer and according to its Art.4, *the commercial practice is unfair, if it is in contradiction of the requirement of the professional care and fundamentally disturbs and is able to disturb the economic behavior of a consumer, to whom is designated or who is exposed to its effect, in relation to a product or service. If this commercial practice is aimed at a certain group of consumers, then it is assessed according to an average member of that group.*”

Therefore, according to the Czech national law, except orientation of practice on a certain group, the (un)fair commercial practice is assessed based on the criterion of a consumer and his/her behavior. The omission of the word “average” in relation to a consumer plants the seeds of uncertainty and it is unclear what is the intent of the Czech legislature and ultimately the legal meaning of the Czech Consumer Protection Act. Indeed, it is ambiguous whether the Czech Consumer Protection Act perceives each individual consumer as the average consumer or not.²⁸ The Explanatory Report to this Act describes “*the consumer as an on average reasonable person, who has sufficient information and is to a reasonable extent attentive and vigilant considering social, cultural and language factors.*”²⁹

Further, the Czech law allows an overlap, or more precisely a concurring existence of several law regimes in this arena. Thus, in addition to the consumer protection law, consumers are participants on the market, benefit by the law protecting against unfair competition and even have the active legitimacy for the protection against unfair competition.³⁰ The protection against unfair competition was traditionally included in Act. 513/1991 Coll., Czech Commercial Code (“Czech Commercial Code”), but the recent massive Czech re-codification led to a substantial and widely encompassing Private law Code perhaps misleadingly called just the Civil Code, i.e. Act. 89/2012 Coll. (“Czech Civil Code”).

Interestingly, Act. 2976 of the Czech Civil Code, which defines the common features of unfair competition behavior and provides a demonstrative list of the unfair competition practices, has basically taken over the regulation previously included in the Czech Commercial Code. The only exceptions are the provision regarding misleading and comparative advertising and the provision regarding inadequate annoyance.³¹ Hence, the legal regulation of unfair competition is a relatively stable part of the Czech Private Law,³² and possible particularities and exceptions to this are embodied by the ephemeral sphere covered on the EU level by the trio discussed Directives – Directive 84/450, Directive 2006/114, and Directive 2005/29. Hence the conceptual and purpose ambivalence and perhaps even inconsistency is even growing and getting more confused on the Czech national level. The struggle regarding the ultimate criterion, i.e. test based on the (average) consumer, magnifies this complexity.

Czech perception and regulation of unfair competition is transposing and reflecting EU law and the Czech law against unfair competition protects the economic interests of consumers against unfair practices which directly hurt the economic interests of consumers and, by that, indirectly hurt the economic interests of justified competitors. The general provision of Art.2976 of the Czech Civil Code sets a trio of conditions to classify a certain behavior as unfair practice – (i) behavior of competitors, (ii) in breach of *bonnes*

²⁸ ČECH, P. Nedotažená revoluce v právní úpravě nekalých obchodních praktik. *Právní zpravodaj*. 2008, 3, 1.

²⁹ Důvodová zpráva k zákonu č. 634/1992 Sb., o ochraně spotřebitele [Explanatory Report to the Act. No. 634/1992 Coll., on consumer protection].

³⁰ TELEČ, I. Duševní vlastnictví a ochrana spotřebitele. *Právní rozhledy*. 2012, No. 18, p. 619.

³¹ ELIÁŠ, K. et al. *Nový občanský zákoník s aktualizovanou důvodovou zprávou*. Ostrava: Sagit, 2012, 1053 s.

³² SEHNÁLEK, D. Vliv práva Evropské unie na interpretaci občanského zákoníku a ustanovení o nekalé soutěži. *Obchodněprávní revue*, 2016, No. 11–12, p. 318.

mores, AKA good morals, of competition and (iii) capable to cause damage to other competitors or consumers. Hence, the protection against unfair competition is the first possibility for private protection against misleading advertising performed via spam³³ and other types and methods as suitable.

As mentioned above, the demonstrative list of unfair commercial practices includes among else the misleading advertising, the misleading labeling of goods and services and the induction of the risk of exchange. This version of the list included previously in the Czech Commercial Code and newly in the Czech Civil Code differs in one single provision. The old regulation identified the comparative advertising as unfair, however the new regulation states unfair is “*comparative advertising, unless it is allowed as admissible*”. In other words, perhaps the most practical EU change brought in the Czech law is the possibility of admissible comparative advertising. The advertising is understood as a persuasion process targeting users of goods, services or ideas via communication media and since the comparative feature of this process became a part of a full harmonization, even the Czech legislature had to take over the regime, including conditions and prohibition, set by Directive 2006/114. Therefore, even in the Czech law, a comparative advertising satisfying strict criteria and meeting set conditions is admissible. In other words, a comparative advertising comparing fundamental, significant, verifiable and character features without being misleading is perceived as a legitimate instrument for the information of a consumer and thus rightly serves the consumer's interest. Can we stop here? Is not the main purpose of allowing comparative advertising something else, i.e. something closer to integration and competition in the public dimension? Or even something else? Boldly, what is the top priority? Who decides it? Does he/she know it? In the light of these questions, the suggestions that there the relevant provisions including especially in this trio of Directives generate contradictions,³⁴ appear at least partially founded.

Well, it seems that we have reached a stop at the stations cross journey, we have completed one of the many stages of the Odyssey journey ... or perhaps we are going for over three decades through the desert and the clear and well recognized leadership is not manifest. No wonder that we struggle with the misleading perception of the purpose of the protection against misleading advertising by the EU law and its impact in the Czech Republic. Do we have one more decade to go? Do we know where and how to go?

CONCLUSION

The teleological method of interpretation plays a key role in interpretation and application of the EU law for many reasons, including the fact that Treaties, such as TEU and

³³ MATEJKA, J. Anti-Spam Legislation in Consideration of Personal Data Protection and Other Legal Instruments. *The Lawyer Quarterly*. 2016, Vol. 6, No. 2, pp. 90–114.

³⁴ STUYCK, J. Réflexions sur une meilleure intégration du droit de la concurrence et du droit des pratiques commerciales déloyales. *Revue internationale de droit économique*. 2011, No. 4, pp. 455–479.

TFEU, are imbued with teleology.³⁵ Therefore, firstly, strict textualism and narrow literate rules do not and should not paralyze the understanding of the EU law, and secondly, the perception of each and every piece of the EU law needs to be done in a multitude of contexts and while paying special attention to the purpose. Indeed, the identification of the purpose of a statute or other legislative act is indispensable for its understanding and a misleading statement and/or perception of such a purpose plants seeds for misunderstanding, confusion, and even inefficiency and inconsistency. Without knowing the purpose, no interpretation approach can lead to a satisfactory result, and this is true even for the regulation assigned to the unfair competition and misleading advertising sphere. The perception of the purpose of the EU secondary legislation dealing with the protection against misleading advertising is challenging and the Czech perspective makes it even more challenging.

The performed search for its official and/or unofficial main purpose as reflected by the trio of Directives, Directive 84/450, Directive 2006/114 and Directive 2005/29 and its critical and comparative assessment answered few questions and brought many other questions. There always has been a tension between the competition law, unfair competition law and consumer protection law,³⁶ and undoubtedly their reconciliation, while reflecting as well among else the intellectual property, is challenging. However, this is not an excuse to give up, and the EU legislature, along with the CJ EU, and even with EU member states as ultimate “Masters of the Treaties”³⁷ and addressees of this legislature, should work more towards their reconciliation without being paralyzed by the fear if this is best for the economic integration. Indeed, the single-minded determination to do anything for the internal single market can be contra productive and producing misleading and confused rules, such as in the case of misleading advertising. Perhaps Commissions have not been fully aware of it, but the CJ EU has been, as can be demonstrated via its wise acceptance of the fact that a competition-driven solution is not the best one for absolutely every competition solution.³⁸ Well, in any case, we have an enigma entailing the purpose of the mentioned Directives, and this leads to the misled Czech transposition which added further puzzling elements, such as the (average) consumer test. The true legal meaning of these Directives and Czech national statutes was and remains obscure, contradictory and inconsistent, while the key to it (knowledge of the true purpose) was and remains unavailable.

The EU is a mixed system shaped by social democratic, liberal and conservative welfare states and neoliberal tendencies, which are not easily reconciled.³⁹ Consequently, the EU

³⁵ LENAERTS, K., GUTIÉRREZ-FONS, J. A. *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*. EUI Working Papers, AEL, 2013, No. 9, [2017-03-26]. Available at: <http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1>.

³⁶ STUYCK, J. Réflexions sur une meilleure intégration du droit de la concurrence et du droit- des pratiques commerciales déloyales. *Revue internationale de droit économique*, 2011, 4, p. 455–479.

³⁷ SVOBODOVÁ, M. On the Concept of Legislative Acts in the European Union Law. *The Lawyer Quarterly*. 2016, Vol. 6, No. 4, pp. 256–267.

³⁸ ŠMEJKAL, V. Social or Highly Competitive Europe? EU Law Solution to Conflict of Social Security and Competition Law. *The Lawyer Quarterly*. 2016, Vol. 6, No. 1, pp. 18–27.

³⁹ BLAHOŽ, J. The Welfare (Social) State, European union and Globalization. *The Lawyer Quarterly*. 2014, Vol. 4, No. 3, pp. 178–194.

is often presented as disunited and confused about its goals,⁴⁰ and the misleading perception of the purpose of the protection against misleading advertising contributes to it. The evolution of the legislative wording along with the case law of the CJ EU suggests a mixture of inconsistency and priority shifting. The misleading advertising has an overlapping effect and can easily be in reach of several law branches and each of these branches has different priorities and leads to a different regime. On the EU law this struggle has a two dimensional dynamic due to the continental (civil code) and common law dichotomy. On the national law, there is the EU vs. national dichotomy.

The yield data and suggestions, along with freshly posed questions, reluctantly and conditionally confirm the first hypothesis. Indeed the authors of this paper shared an conviction that it is possible to identify and explain the main purpose(s) of protection against misleading advertising. Well, this identification and explanation was partially suggested by this paper but tremendously more research needs to be done in this respect. The authors of this paper humbly admit that the task to find and overcome the misleading perceptions and to state in a crystal clear manner the purpose of the protection against misleading advertising is much more complex than expected. At this point in their research, they witness an omnipresent focus of the EU on the proper functioning of the internal market in the belief that this is ultimately the best for the integration, market, traders, and consumers. However, the authors do not share this optimistic point of view and, in contradiction to the Commission, they believe that it should be one single key purpose of the protection against misleading advertising and this purpose has to serve primarily only one single goal and one single type of stakeholder. The issue of misleading advertising is perceived differently in EU member states and the determination to both overcome these differences and serve all stakeholders seems over ambitious and unrealistic. Nevertheless, this is a preliminary opinion of the authors and it will be very good news for the EU if they are wrong and if there is one key purpose and this purpose is realistic and can be met.

This rather not glorifying and pessimistic conclusion regarding the first hypothesis fully opens the door to the confirmation of the second hypothesis. The authors expected that the identification and explanation of the key and leading purpose would allow one to understand more deeply and interpret more correctly the given legal framework and its application. And this is already obvious. Indeed, the study of the over three decades long inconsistent hesitation of the EU and EU member states, such as the Czech Republic, over the main purpose of protection against misleading advertising and the resulting confusion and inconsistency is manifest. This is as well a source for encouragement, yes the search for the purpose is difficult, but this task needs to be done in the name of the effectiveness and efficiency of the EU law and national law of EU member states. The misleading advertising is the tip of the iceberg and the EU with its member states should not encounter this task as did the Titanic. Well, a good GPS navigation system is desperately needed for the drive through the agitated waters of the current global markets and, for sure, steering

⁴⁰ COLLINS, H. Harmonisation by example. European laws against unfair commercial practices. *Modern Law Review*. 2010, Vol. 73, No. 1, pp. 89–118.

the wheel from right to left and from left to right without clearly stating the purpose has the same effectiveness as rearranging the deck chairs on the Titanic. Misleading advertising needs to be regulated and this regulation has to have one single and feasible top purpose generally accepted by the European stakeholders!