

RESPECT OF EU LAW? SUPRANATIONAL ASPECTS OF CORPORATE SOCIAL IRRESPONSIBILITY

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Abstract

Harmonized EU Law constitutes a sensitive field for a specific “test” of corporate social responsibility of transnational corporations (TNCs). These usually carry out their business activities within the territory of several EU Member States. Therefore, TNCs possess a strong legal background. Yet, TNCs adopt different behaviors with respect to consumers in different EU Member States. They act precisely in a way which is authorized by national law striving for maximizing the benefit thereof. TNCs do not aim at pursuing unified practices with respect to consumers. Nevertheless, an almost uniform way of protecting consumers throughout the EU is a declared objective of EU Law and of its harmonization. TNCs do their best to make use of every single mistake and a more liberal transposition of EU directives into national law. Such a practice raises doubts as to the efforts of TNCs to influence a more liberal transposition of EU Law in some Member States, so as benefit from such a legislative failure at the detriment of consumers. The authors demonstrate the problem of a lacking central corporate social responsibility of TNCs on a case study of advertising vaccines in EU Member States. They have arrived at the conclusion that the current practice of “respectful invaders”, which is being used by TNCs, is not compliant with the principles of Corporate Social Responsibility.

Key words: EU Law; Unfair commercial practices; Consumer protection; Regulation 2006/2004; Corporate social responsibility

JEL Code: K23, K33, K42

Introduction

“Corporations are not responsible for all the world’s problems, nor do they have the resources to solve them all. . . . [but], a well-run business . . . can have a greater impact on social good than any other institution or philanthropic organization.” (Porter & Kramer, 2006).

“Corporate codes of conduct are self-imposed, self-regulated, and voluntary, and therefore lack a definitive enforcement mechanism. There is no separate standard for deep-pocketed mega-corporations, even if a sense of morality tells us there ought to be.” (Revak, 2012).

The significance of self-regulation in terms of its advantages and disadvantages has been widely discussed in scholarship (Zimmermann, 2008; Gavin, Greenwood & Schapper, 2012). Self-regulation of advertising is a specific field which concerns limiting one of the key tools for obtaining profits and a business success (Boddewyn, 1985). It is a very sensitive area of regulation, where an effort to achieve even stricter rules and more responsible conduct seems less trustworthy for the above reasons. Different writings point out at the failure of self-regulating advertisement in specific fields and with respect to specific objectives (Zetterquist, Mulinary, 2013). In particular, the regulation of internet advertising is challenging lately. Neither competition (law suits initiated by competitors) nor the supervisory activities of administrative authorities seem to display a sufficient capacity to place advertisers at risks of sanctions (Grmelova, 2012). The diversity of internet advertisement includes various atypical forms. Some essential legal issues have not received established responses as yet (Gongol, 2013). Self-regulation of advertising can thus offer a suitable solution in particular since another systemic solution is missing.

An important feature of Corporate Social Responsibility – ideologies as patterns or frameworks of ideas (Ghoshal, 2005), which constitute a basis for far-reaching impacts on societies and societal institutions, can be implemented in the field of advertising in a limited way only. Often, they can be at variance with the natural objectives of advertising, i.e. promotion of sales of goods and services. Ideology in the field of advertising and long term advertising strategies thus need to be amended, abandoned, or selectively chosen to keep advertisement effective. This ideological “filtration“ decreases the trustworthiness of motivation, on the basis of which it was created.

The extent of corporate social irresponsibility with respect to justified interests of consumers can be nicely demonstrated by the attitude of TNCs towards the rules of regulating advertisement. A clear diversity in advertising practices (in particular with respect to the rules of the EU internal market) leaves room for many critical questions.

Methodology

In terms of methodology, this paper combines individual analysis and data obtained from law suits waged by consumer organizations, and those contained in information materials by experts dealing with consumer protection on the EU's internal market. Also, it is based on comparative studies which refer to substantially different transposition, implementation and application of EU law by the Member States. TNCs follow the interpretation of different contents of national laws with respect to consumers (Global Legal Group Ltd., 2010). These secondary information resources serve as a background for the proposals, discussion and conclusions drawn by the authors of this paper.

1 Regulating advertisement versus ideal regulation of consumer protection in a transnational context

The regulation of advertising strives for achieving an appropriate level of consumer protection with respect to high-risk marketing communications. The needs of competitors in the field of regulating advertisement concern particularly the stipulation of rules of fair competition. The regulation of extreme advertising practices, which some competitors would not use for moral reasons, is rather rare.

The rules of regulating advertisement thus constitute an ideal state for the consumer. Significant differences in regulating advertisement are thus difficult to justify. Taking into account different social and cultural aspects, minor distinctions between consumers can be perceived and can justify some diversity in regulating advertisement across more national states. In general, the hypothesis can be defended, that differences in regulation are made in favor and not at the detriment of achieving an ideal state of consumer protection. This general hypothesis, however, cannot hold true if it is critically juxtaposed to very specific differences in regulating advertisement in terms of its contents.

As indicated above, different states provide for different levels of consumer protection while regulating advertisement. An objective ideal state of consumer protection demonstrated by national law in contrast to the huge regulatory differences across states becomes clearly converted into a politically claimed ideal state. If a Member State bans certain advertising practices, however, a neighboring state does not, one could rarely justify such a difference with respect to a high level of protection of consumers. A social and cultural proximity, a similar economic and political setting of two neighboring states and an affinity of consumer "cultures" naturally lead towards a similar level of an ideal regulatory state of consumer protection.

Different regulation in different Member States provides creative marketing room for TNCs. It is obvious that TNCs have to abide by the differences in national laws. On the other hand, it is also obvious that any significant differences in regulation in countries having a similar consumer culture are at variance with achieving an “ideal state“ of consumer protection. TNCs may adopt and apply two legal marketing strategies worldwide with respect to consumers:

- a) A decentralized strategy of maximizing benefit. This can also be referred to as the strategy of “respectful invaders“. This strategy is characterized by using all the advertising possibilities which are still in line with national laws. Subsequently, the advertisement of identical products and services by TNCs in different states will be as different as authorized by the national law governing advertisement. This strategy does not take into account the objective ideal state of consumer protection by the trader. This practice becomes identical with the politically claimed ideal state, which is different across different states. In sum, this is a strategy of making a maximum commercial use of non-ideal national laws.
- b) A centralized strategy of a voluntarily limited benefit. This strategy is characterized by the existence of central regulatory rules developed by the trader. These rules are respected and complied with by the respective TNC on a voluntary basis and provide for the same level of consumer protection in countries having a similar consumer culture. Where national law is less strict, TNCs apply their own stricter rules. Where national law is stricter, the trader follows these conditions, even though they are stricter than those it would normally apply. This strategy may be identified as a corporate self-determination of a trader with respect to a subjective definition of an ideal state of consumer protection with respect the trader’s products and services. This strategy perceives a unity of the ideal state of consumer protection across national state borders. These are systems of self-regulating advertisement consisting in codes of conduct having a transnational scope of application. Self-regulation of advertising developed within the corporate social responsibility, however, displays certain significant shortcomings. In practice, they may not constitute an objective benefit for the consumer. On the contrary, they may bring about adverse social effects (Vavrečka & Štěpánek, 2014).

2 The common market and the regulation of advertising in the EU

The common market is specific in this field. 28 Member States have given up parts of their sovereignty in favor of the European Union and its common policies, including the common market. Consumer protection is one of the priorities of the EU and constitutes one of its main policies pursuant to Article 4 (2) f) and Article 12 of the Treaty on the Functioning of the EU. In EU Law, a high extent of harmonization has been achieved *i.a.* in the field of regulating advertisement (Vavrečka, 2011) and business practices with respect to consumers. EU as a whole has expressed its effort to achieve and enforce a unified ideal state of consumer protection in this way.

All TNCs operating in the common market of the EU are acquainted with the scope of harmonization of EU Law in the field of advertisement. Often, advertisement is regulated as full harmonization of EU Law. Any derogation from common EU rules which may be adopted by the Member States must be explicitly provided for and authorized by the wording of the corresponding directives. Nevertheless, these are rather exceptional cases. Based on the knowledge of EU Law one could surely expect to witness identical rules of regulating advertisement in all EU Member States, unless the wording of directives does not provide for adopting derogatory measures.

Even though, the EU aims at reaching a unified ideal state of consumer protection on the common market, some Member States implement Union Law in a significantly different way (see below). It is the Member States and their legislative bodies which ignore the harmonization objectives of EU Law, since national legislation does not have the same regulatory effect if compared across several Member States. In theory, the question arises whether a state at variance with EU Law was more liberal at the detriment of consumers or whether it was at variance with EU Law and stricter with respect to traders. This dispute cannot be resolved in an objective way without the interpretation of Union Law provided by the judiciary. It is the Court of Justice of the EU which is called upon deciding on the interpretation of EU Law in reply to preliminary references made by national judges (Bobek, 2004).

In terms of the harmonization objectives of EU Law, it is clear that the EU legislator foresees identical needs of a European consumer. The EU legislator does not consider any significant differences between the needs of consumer protection across the individual Member States. The term of “average consumer“ in EU Law provides for sufficient room for considering some national differences when interpreting the misleading of a consumer. However, this term does not allow for such differences as to expose consumers in some Member States only to certain types and forms of advertisement.

2.1 Socially controversial attitude of TNCs to European consumers and EU Law and Policies

If sufficient differences (governing rules not explicitly foreseen by EU directives) in regulating advertisement persist on the common market, we can arrive at the following conclusion: At least one Member State failed to meet its obligations under EU Law and either reached an illegal lower consumer protection or an illegal higher restriction of the advertising possibilities of the traders.

TNCs constitute mature entities in terms of economy and law. Hence, they can effectively protect their rights if they have been restricted at variance with EU Law. TNCs may use litigation to sue the Member States concerned for illegally stricter national rules. They can do so if Member States restrict their advertising at variance with EU Law (see the judgment of the Court of Justice of the EU in case C-432/05, *Unibet, per analogy*).

If there is a clear regulatory difference among Member States, we shall raise the following legitimate question: Why do harmed traders fail to litigate for relaxing the regulation of advertisement in Member States with stricter rules? Perhaps it is precisely those Member States which respect EU Law and those Member States with a more liberal regulation are in breach of EU Law. If traders started initiating such law suits against Member States having stricter advertising regulation, the following effects could be produced. The Court of Justice of the EU would interpret the EU Law in such a way which would confirm the breach of EU in all Member States having a more liberal regulation of advertising. Traders in their capacity as plaintiffs would be deprived of their possibility to misuse the illegally more liberal legislation in their own benefit and at the detriment of consumers in the Member States concerned. Respectful invaders would limit their own room for advertisement into legally and politically more vulnerable Member States.

TNCs are aware that some EU Member States have a different regulation of advertising since they dispose of this information provided by their salespeople and subsidiaries. If they actively do not fight for their rights and do not strive for deregulation in stricter Member States, such a strategy seems suspicious. It is suspicious since it is the Member States having a more liberal regulation that breach EU Law at the detriment of consumers and of achieving an ideal state of consumer protection. To be able to benefit from these national legislative shortcomings, TNCs keep being silent. Socially responsible traders that would find out that some Member States have deprived their consumers of the Union level of protection either by ignorance or intentionally, would have to act. They would not be

able to remain indifferent with respect to this situation. In particular, they would try not to discriminate between consumer protection unintended by EU Law and that created by certain Member States. That is why they would provide such a level of consumer protection which has been granted by the EU legislator, but which has been taken away by the national legislator. TNCs can achieve these effects in two different ways:

- a.) They shall follow the same stricter rules of advertising in all Member States. This option constitutes a lower level of corporate social responsibility since it cannot protect consumers from the practices pursued by other traders.
- b.) TNCs can extend the option described in a) by launching law suits against Member States having stricter regulation. The aim of such an action would not consist in obtaining benefits for the traders. On the contrary, European consumers as a whole would benefit from a voluntary loss in a law suit by a TNCs. This procedure enables TNCs to face political arbitrariness of some Member States and to reach a more liberal legislation of an unfavorable interpretation of EU Law. This procedure is capable of remedying consumer protection within the entire territory of the Union. TNCs could become a highly socially responsible force in this way. They would directly participate in enforcing EU Law and consumer protection on the common market despite politicking and national lobbies in some Member States.

TNCs have all the necessary data and they can easily arrive at these legal conclusions. Their inactivity in similar situations is a dominant way of their practices. Such an attitude may be labeled as a socially irresponsible behavior in a supranational context. However, from a limited perspective not exceeding the borders of a single Member State, such a practice is legal and cannot be challenged.

3 Transnational pharmaceutical companies – respectful invaders

The above general conclusions can be demonstrated on very specific cases. For this purpose, the authors have selected a case of advertising within the territory of the Czech Republic by transnational pharmaceutical companies manufacturing vaccines. The advertising of medicinal products for human use (also referred to as “medicinal products“) has been governed by EU Directive 2001/83/EC (Code of Medicinal Products) within the territory of the EU. The Court of Justice of the EU made already clear that Directive 2001/83/EC

constitutes a fully harmonized regulation within the entire territory of the EU “Directive 2001/83 brought about complete harmonization in the field of advertising of medicinal products and lists expressly the cases in which Member States are authorized to adopt provisions departing from the rules laid down by that directive“ (CJEU: C-374/05, *Gintec International*, at point 39). The EU legislator thus strives for achieving a unified regulatory ideal state of consumer protection in the field of advertising medicinal products.

3.1 Promoting vaccines, their properties and substitute results to consumers in the Czech Republic

Directive 2001/83/EC codifies a general ban on advertising all medicinal products, which may be administered upon medical prescription only, to a wide public. The advertisement of the trademarks of these medicines and their pharmacological properties may not be aimed at consumers. Only medical doctors may be informed of these medicines and offer them to consumers based on their professional assessment of their need and expedience on a case by case basis. The EU legislator has had good reasons for banning advertisement to lay consumers within the territory of the EU with respect to medicinal products administered upon medical prescription only.

The EU Directive provides for a single exception from this general ban on advertising medicinal products with respect to all vaccines. The Directive allows traders to advertise “vaccination campaigns“, which had received a prior authorization by the national authority in the field of public health. This exception has been interpreted in a contradictory way by many Member States. This different interpretation has given rise to dramatic contrasts in the effects of regulating advertisement in national laws of different Member States.

The first group of states, such as the Federal Republic of Germany, and Austria, authorized traders to advertise vaccination campaigns within the territory of their respective states if they are conceived as scientifically defined projects and have the backing of recognized capacities of population projects. Consequently, advertisement aimed at consumers may only be made to inform consumers that it is advisable to have a vaccination against a specific disease, why, when and in which region or for which age groups. This advertisement does not contain the trademarks of specific vaccines and it does not inform the consumers about the properties and biological effects of these vaccines. To sum up, the so called “brand“ advertising of vaccines is prohibited by these states under EU Law.

The second group of states, which comprises *i.a.* the Czech Republic and Slovakia, authorized traders to advertise specific vaccines and their properties directly to consumers

within their territory. National authorities of these states limit themselves to authorizing advertising vaccines, but they do not authorize population epidemiological projects aimed at professionals, which is the case of the first group of states. The mutual discrepancies between these practices of Member States are not only clear, but have a significant impact on consumers and on the consumption of vaccines. In some Member States, it is only medical doctors who convince their clients to get vaccinated and chose the right vaccines as well. In other Member States the same activities are being performed by traders by means of a wide scale advertisement aimed at the lay public.

The reason for this crucial difference in regulating the advertisement of vaccines can be inferred from the rules of Directive 2001/83/EC implemented into the national law of the Czech Republic. When preparing the transposition of EU law there was an intentional confusion in the scope of the derogation. Article 88 (4), Directive 2001/83/EC says: „The prohibition contained in paragraph 1 (i.e. the general ban on advertising vaccines) shall not apply to vaccination campaigns carried out by the industry and approved by the competent authorities of the Member States.“ Act No. 45/1995 Coll., on the regulation of advertising transposes the above article of the Directive in its Article 5a (3) in a clearly incorrect way: „The provision of paragraph 2 (i.e. the general ban on advertising vaccines) does not refer to medicinal products for human use employed in a vaccination campaign approved by the Ministry of Health.“

It is easy to find out and to prove that many TNCs manufacturing vaccines carry out “brand“ advertisement for vaccines (not compulsory in the Czech Republic) including information on the properties of these vaccines aimed directly at consumers. Some manufacturers abuse the lack of scientific knowledge and background of consumers in these complex medical issues. GlaxoSmithKline, for instance, promotes the Cervarix vaccines without informing the consumers of the value of its preventive effect with respect to the targeted disease – uterus cancer. This property constituting the very effectiveness of the vaccines has not been scientifically proved as yet. The manufacturer limits itself to informing the consumer about the so called substitute result. GlaxoSmithKline states only a 93% efficiency of the vaccine against advanced changes to the uterus (CIN 3), which do not constitute the very target disease yet. In 2010 the French supervisory body fought against a similar advertisement by the vaccine manufacturer Gardasil/Silgard stating substitute effects only, even in the case of an advertisement aimed at medical doctors and experts (see the decision of the Director General of the French Agency for Sanitary Security of Health Products (AFSSAPS) of 31 August 2010, NOR: SASM1020221S).

A correct and critical assessment of true information and substitute results with respect to the properties and the utility value of medicine may be disproportionately difficult for a consumer. This is due to the information which may be true, but difficult to assess. That is one of the reasons why the advertisement of medicine administered under medical prescription aimed at consumer has been generally banned. Nevertheless, the failure of national legislators of some Member States authorizes such banned advertising. Respectful pharmaceutical invaders benefit from legislative imprecision both in the Czech Republic and in other EU Member States to maximize their sales and profit at the detriment of an ideal protection of consumers. TNCs operating in Member States having a strict regulation for advertising vaccines do not initiate any law suits to achieve de-regulation. In this way they demonstrate their unexpressed prerequisites about the correct meaning and interpretation of EU Law.

Conclusion

TNCs do not approach consumer protection in a sufficiently centralized way. Their actions do not support achieving an ideal regulatory state in the field of advertisement. On the contrary, they maximize the room for maneuver provided by the national legislation on a regular basis. TNCs do so even if international comparison of transposing EU Law raises justified doubts as to the ideal manner of consumer protection. Within the common market of the EU, on which the Union legislator unambiguously declared its intention to achieve a unified ideal state of consumer protection, the strategy of “respectful invaders“ is clearly unjustifiable. Such a practice cannot be reconciled with the principle of corporate social responsibility. The headquarters of TNCs are aware of misusing the failure of national legislators of EU Member States in terms of transposing EU directives correctly. They use their room for maneuver despite a conscious clash between their practices and EU law and its objectives.

Yet, TNCs can achieve an ideal state of consumer protection on a voluntary basis. They are free to adopt and apply centralized supranational advertisement strategies. They may even consciously back the consumer against the failure of the Member States and the legislative influence exerted by national lobbies and politicians. In this way TNCs could significantly assist in enforcing EU law and promote EU’s objectives and policies in the field of consumer protection. Unfortunately, they act quite in the opposite way on a regular basis.

Hence we cannot ignore a significant risk of the strategy of “respectful invaders“. If TNCs opt for a strategy of a maximum use of room for maneuver provided to their advertisement by the law of the individual states, they have a much stronger motivation to influence this law at their own benefit. Subsequently, we cannot rule out that it is precisely the TNCs which contribute to the failure of national legislators. Yet, the use of this room for maneuver within the limits of national law is legal, since TNCs manage to adapt the national rules to their needs at the detriment of consumers.

Acknowledgment

This paper was drafted within the framework of a research project carried out by the Department of Business and European Laws, Faculty of International Relations, University of Economics, Prague, targeted at consumer protection in Public Law.

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The 9th International Days of Statistics and Economics, Prague, September 10-12, 2015

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