SWOT ANALYSIS ON THE IMPLEMENTATION OF ARTIFICIAL INTELLIGENCE IN THE HUMAN DIGNITY PERSPECTIVE

Prof. Dr. Stefan Koos[1],Amin Syukron[2], Ninik Agustin[3]
[1]Universität der Bundeswehr München
[2,3]Universitas Nahdlatul Ulama Al Ghazali

Abstract

We have seen the economic crisis in 1997 and felt the impact, especially for capitalist industry players, where capital is largely foreign debt (Tarmidi, L. T, 2003). The running of the ASEAN economic community in 2015 posed even more challenges to the SMEs in Indonesia, because competition was not only in the region of Indonesia but ASEAN. Baskoro, A. (2015) mentions that there are four things that will become the focus of MEA in 2015 which can be used as a good momentum for Indonesia. Artificial Intelligence (AI) is being integrated into systems influencing decisions, analysing complex situations and conducting processes, which may be dangerous for humans. Yet AI is not strong enough to be able to feel or suffer and maybe it never will. However, the complexity of AI deciding will grow with the technical progress and it should be discussed, how far we are willing to integrate future AI systems into important social processes such as legal decisions or teaching. The article seeks to give an overview over constitutional problems of an integration of strong AI systems into social deciding processes. It analyses the ability of AI to have similar legal positions as natural persons and corporations in the light of the question, whether AI can be an agent for ethic. Furthermore, it presents options of a liability for damages caused by the activity of AI systems.

Keywords: Artificial Intelligence, Human dignity, Personification, Legal Person, SWOT.

Introduction

The running of the ASEAN economic community in 2015 posed even more challenges to the SMEs in Indonesia, because competition was not only in the region of Indonesia but ASEAN. Baskoro, A. (2015) states that there are four things that will become the focus of MEA in 2015 which can be used as a good momentum for Indonesia. First, countries in the Southeast Asia region will become a market unit and production base. Second, MEA will be formed as an economic region with a high level of competition, which requires a policy that includes competition policy, consumer protection, Intellectual Property Rights (IPR), taxation, and E-

Commerce. Third, MEA will also be used as an area that has equitable economic development, prioritizing Small and Medium Enterprises (SMEs). The competitiveness and dynamism of SMEs will be enhanced by facilitating their access to the latest information, market conditions, human resource development in terms of capacity building, finance, and technology. Fourth, the MEA will be fully integrated into the global economy.

In the teleological virtue-philosophy of *Aristoteles* ethic exists because of the nature of the human being, which as a social being is longing for happiness from its nature. As the human being is rational and able to act according to rationality it is longing in all its acting to reach something good.[1] In the hierarchy of the goals of human acting the highest goal is εὐδαιμονία (*eudaimonía*), rather inexactly translated as ‚happiness'. *As the human being as a social being is happy in harmonic societies and as human societies can only work, if its members behave in a social way (instead of reckless egoism), it is therefore rational to act virtuous*.

This seems to me a useful approach to the problem of the business ethic. It is a social understanding of ethic, which on the other hand postulates a social responsible acting of the human not as altruistic but as in a way egoistic because it is in the own interest of the human being to behave in a social way. The order to comply with certain legal rules which are given in a truly democratic process and which aim to preserve a harmonic society is compatible with the human interest.
If we compare the *ethic* concept with the concept of *moral*, we find, that ethic in this social understood sense is not the same as general (social) moral rules and even less legal rules should be intermingled with moral rules. Moral rules are relative. Legal rules in the democratic pluralistic state are based on a decision of an elected pluralistic board representing the pluralism of the constitutive people and respect (in the ideal case) the values and interest of all groups of the people including minorities.[2] Moral norms compared to this are grown in cultural or religious defined social groups. They limit the freedom of others in the pluralistic constitutional state, while legal rules are protecting the freedom within the pluralistic society. Moral is definitively unsuitable to play a role in the law giving process. It can at its best only

[1] Aristoteles, Nicomachean Ethics, 1094a.
[2] This implies, that `Democracy` is *not* simply – and wrongly - understood as the `*domination by the majority over the minority*`.

be one of several considerable factors in the democratic law giving and law finding process.[3]

In the following considerations I will sharply separate moral and ethic from each other, because the concept of moral is not suitable as a scale for a business law compliance concept, whereas we may understand ethic rather in a functional way as a term understood in the sense of `social responsibility` and therefore – in contrary to moral – suitable to be used in this sense in legal topics. [4]

SWOT Analysis of Artificial Intelligence

Artificial intelligence (AI) isn't something out of sci-fi novel — it's here, being used right this second by technology experts, businesses, and the average person like you or me. Despite moving from fantasy to everyday reality, there's plenty of hang-ups regarding AI. For one, people fear the power of AI. What if it gets in the wrong hands? Can it be used nefariously? Others wonder if it's truly better to rely on machines to do tasks humans were once responsible for.

In this SWOT analysis of artificial intelligence, the strengths, weaknesses, opportunities, and threats of AI will be broken down for you to understand the pros and cons of using this advanced form of technology in varying instances.

The strengths of artificial intelligence

- **Increase workplace productivity.**

  Rather than spending hours of manpower on menial, repeatable tasks, employees can configure artificial intelligence to manage it instead. Although we've already used machines on the production lines before, AI allows us to manage a multitude of tasks more efficiently than before. This is beneficial for all companies. By having technology manage everyday tasks (rather than humans) companies save money. It lowers operations costs and even noncompliance fees.

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[3] Clearly *Wolff*, Getrennte Kreise: Moralität und Recht – Warum wir Recht und Moral unterscheiden müssen – und dürfen, in: Spektrum Universität Bayreuth, 4/2014, 10 (12).

[4] In the modern philosophy there is mostly no synonym understanding of moral and ethic. Here moral is the system of absolute norms for human behaviour, while the philosophical discipline of ethic is the science on the moral or the theory of moral. It can give answer to the question of what is the ‚right moral'. The answer may be that in a pluralistic society social responsibility and protecting spheres of freedom of the citizens is the ‚right moral' which should be the purpose of democratic given legal rules.

- **Adopted into many industries.**

  AI is now used in a variety of industries, ranging from digital marketing to healthcare. The type and sophistication of the AI needed depend on the task — you'll need less power to automate emails than sorting through a registry of patient information, for example. It's not just for sorting information either; we're also seeing AI used in facial recognition and academic research too.
- **Better quality of life.**

  AI is used outside of the workplace as well. Within the home, people who have smart speakers and light bulbs are using AI too. These devices make managing the home easier and can reduce the cost of electricity. You can even find AI in your car, so long as you're buying a brand like Tesla. In some ways, it's strange. Only a few years ago, artificial intelligence was found only in sci-fi books, games, and movies. Now it's commonplace, despite not reaching even its full capabilities yet.

The weaknesses of artificial intelligence

- **Artificial intelligence remains inhuman.**

  You know by now that artificial intelligence is a form of technology. It can be a machine or an algorithm. But of course, it's not human. And this last point remains a strength and a weakness simultaneously. As a strength, it means people working in jobs requiring a touch of "humanity" feel safe — their job isn't up for grabs by our technological overlords quite yet. But as a weakness, this means AI is limited. It's a tool but not necessarily a solution. AI can communicate, but it can't communicate *emotionally*. And so, although it can use information, it won't be able to grasp or react to the complexities of human emotion.
- **The chance to outsmart us.**

  Developers are always pushing to redefine the limits of AI. Right now, it's able to complete a task, learn, and retain information. But maybe, in the future, it'll get to the point of improving and redesigning without human input. It's this potential reality that makes people remember the robotic overthrowing in the movie *I, Robot*.

- **Governments are slow on the uptake.**

  Technological experts, like Elon Musk, have warned against artificial intelligence, believing that we need to be smart about how we use it. And how do we use it? This prompts the question of ethics. Is there a line for the ethical use of AI? Bills, regulations, and laws aren't keeping up with the rapid development of technology. Even Congress doesn't fully understand how the internet works, so what hope is there for the ethical use of AI? And yet, despite the fear caused by AI, it does come with a fair share of opportunities.

Opportunities of artificial intelligence

- **Combing AI with newer forms of tech.**

  Artificial intelligence is connected to other new forms of technology, including machine learning, deep learning, and the Internet of Things (IoT). It'll likely be adopted into programming, enabling developers to reverse problem solve. This allows for enhanced responses to problems, which may benefit other industries, like customer service.
- **Smart cars drive progress for people with disabilities.**

  Right at this moment, we're seeing the adoption of AI into the automobile market. Tesla car models use it to self-drive on the highway and park without human assistance. Obviously, this is something straight out of a science fiction novel (aka cool as heck) but it's also beneficial for people who have disabilities and has impacted their driving ability.
- **Less strain on employees.**

  And as I said in the strengths section of this SWOT analysis, AI allows us to automate boring, trivial tasks. This is perfect for people who dread taking care of these tasks and would rather focus on the "big picture". Entrepreneurs or startups who have employees wearing a lot of hats and are stretched thin will love AI for this. And although there are plenty of opportunities for AI, this technology has just as many (or more) threats.

The threats of artificial intelligence

- **Job stealing.**

People believe the adoption of artificial intelligence will lead to job loss. And honestly, this is happening at a small scale. Think about those self-checkouts at Walmart. There's several of them and only one or two employees stepping in whenever a customer has a problem. No more humans working the cashier is a viable future for corporations. This is one example of AI taking over simple human tasks, but also taking away job opportunities. To combat this, the job market will need to evolve. Rather than being replaced, humans will need to work alongside AI. Whether this is a viable future is yet to be determined.

People wonder — will AI become so intelligent, humans can't control it any longer? This seems like a far off fear, but it may be closer than you think. IBM has a supercomputer named Watson, who appeared on and won more than $5 million on the game show Jeopardy back 2011. Watson is hooked up to the cloud and uses machine learning and analytical software. It proved to be smarter than humans (at least in finding, using, and retaining information quickly) on the show eight years ago — and this is when artificial intelligence was "new". Is it possible for Watson (or similar supercomputers) to eventually become sentient? It's too soon to tell, and this is the threat people feel.

The Relation between Positive Law and Hyper-Positive Law (‚Naturrecht')

Every law done in a proper procedure is binding, regardless of its content.[5] The law given at the discretion of the legislator is not legitimated by a reference to any kind of divine law and not legitimated by a necessary connection to a „natural law". The binding character of a legal norm is therefore independent on extra-legal criteria, as namely moral or justice. The binding character of law is only dependent on a formal aspect. The „*Reine Rechtslehre*" („*Pure Theory of Law*") of *Hans Kelsen* is understood as

„eine reine, das heißt: von aller politischen Ideologie und allen naturwissenschaftlichen Elementen gereinigte, ihrer Eigenart weil der Eigengesetzlichkeit ihres Gegenstandes bewußte Rechtstheorie"[6]

[5] See *Hans Kelsen*, Reine Rechtslehre, 2. Aufl. 1960, 201.

[6] *Hans Kelsen*, Reine Rechtslehre, 2. Aufl. 1960, III („*a pure, which means: a law theory, purified of all political ideology and all natural-scientific elements, conscious of its characteristic, because conscious of the legitimate autonomy of its object"*)

The dualism between the ‚*what is*' (sociology) and the ‚*what ought to be done*' (purified legal science) corresponds with the *division between Moral and Law*. As a logical condition for the validity of all law *Kelsen* postulates a *fictive, Fundamental Norm'* which is not set by a legislator and which has no content.[7]

Nowadays, in consciousness of the experiences with the Nazi-Dictature, the German law tends to follow the positivism in the law. In a democratic system the law is given by a democratic legitimated legislator. It receives its ‚ethical quality' from the decision of this legislator, who is taking into account – due to the obligations coming from the constitution – also the rights of minorities. Positivism as formalized validity of law is necessary to avoid the disturbance of the democratic order by reference to hyper-positive law by parts of the pluralistic society.[8] In other words: exactly the pluralistic society needs a positivistic understanding of law to protect a social order in which not several parts of the society install their own rules based on separate absolute moral rules: No hyper-positive religious or political (see the national socialist law or `Juche` in the regime of North Korea) moral order alone is ‚law' in this sense. *This does not mean however that the lawmaker cannot follow an ethical concept within the legislative procedure.*

However in totalitarian political systems– as it was the Nazi-dictature - positivism is dangerous, due to the fact, that the law making procedure is not based on democratic legitimacy. The freedom of the legal rule of any moral value can be misused to dictatorial oppression, especially if this law itself is based on hyper-positive political values of the respective regime. According to the German law philosopher *Gustav Radbruch* the regulatory law is principally binding even if it is unjust. However it is not binding, if it's ‚wrong law', which is the case, if the rule is to that extent contradictory to the justice, that it is intolerable or if it is denying deliberately the equality of all humans.[9] In this case any judge would have to decide against the positive law and in favor of material justice (*Radbruch´sche Formel'*).

Here we have an ethical outer limit to legislation acknowledging the theory of law-positivism. The limit is to be found in the human rights, especially in the

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[7] *Hans Kelsen*, Allgemeine Theorie der Normen, 1979, 206 f.
[8] *Lepsius*, Von der Diktatur zur Demokratie – Überlegungen zum Verhältnis von Naturrecht und positivem Recht, in: Spektrum Universität Bayreuth, 4/2014, 6 (7).
[9] *Gustav Radbruch*, Gesetzliches Unrecht und übergesetzliches Recht, 1946, III.

human dignity based in the Naturrecht. However for the question of the business ethic this does not give us a clear picture. What we need is an understanding of business ethic within the tolerable range of law. What is ethical behavior of market actors in the competition?

Moral in the German Civil Law

To understand the meaning of fair competition and in which sense the unfairness of certain competitive behavior of market actors toward consumers and competitors can be understand as ‚unethical', it is necessary to take a look on the general clauses of the German Civil Code (BGB) and the term of Unfairness of Commercial Practices in the German Act against Unfair Competition (UWG). Competition law is economy law. Unfair competition law is private law. Economy and Private Affairs they seem – on the first view - to be two branches of egoism. Egoism is contradictory to altruism and it - maybe – can be an obstacle to ethical behaviour. We will see though, that competition law, especially unfair competition law has gone through a long evolution from a purely subjective-individual understanding of the law function to a social-institutional understanding in the modern European unfair competition law.

On the other hand (competition law) consumer protection same as other legal goals of business compliance such as environmental protection both are part of social justice.[10] In this case a strong consideration of consumer protection and environmental protection in the unfair competition law means in fact, that unfair competition law is directly serving as an instrument of ensuring social justice in a certain part of the law and therefore is combined with ethical goals of the legislator.

Can we state that business is generally contradictory to ethic? The answer is no. Especially the business competition process plays an important role to limit market power and must be understood as an instrument to limit egoistic market behaviour, although competition is naturally not driven by altruistic motivations.

[10] See also the lit b) Preamble of Law No. 8 Year 1999 concerning Consumer Protection

The Evolution of Unfair Competition Law to a Social-Institutional Law Concept

In the German law tradition the unfair competition law in the beginning of its development in the early 20th century was not more than a part of the individual personality law of the trader. The idea in the liberalistic economic and law system in Germany in the beginning of the 20th century was, that business activities are nothing else than part of the free personality in the economic surrounding. It was part of the individual right of the trader to do his business. The famous German law professor *Josef Kohler* wrote in his book „*Der unlautere Wettbewerb*" (tansl. *The Unfair Competition*) edited in 1914:

> *„The contemporary economy, which makes that the individuum as an individuum is a self-deciding bearer of production and traffic, must be defined through the personality right. After this the economy is in an individualistic way free, but in that way, that the personality must not be touched. Any economic activity of the one has to keep itself within the limits, that is required by the personality of the other. The Personality of anyone however demands that he is not harmed or suppressed by misleading indecent means."*[11]

In the modern view good working economy however is also within the common interest of the public and not merely within the individual personal interest of the business actors. The basic idea of the unfair competition law is, that a working competition is a main factor for a good distribution of welfare and therefore an important condition of an economic system which is socially equilibrated.

This leads to a different view on the idea of the purpose of unfair competition law: In the liberal economic system economy should work by the free play of competitive forces. This has not changed until now – it is part of the constitutional system in Germany with its guaranty of property (Art 14 Basic Law) and free profession (Art 12 Basic Law). The constitutional guaranties of the economic freedom are delimited by the fundamental rights of others and by the *Social State principle* of Art. 20[12] and Art 28 Basic Law):

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[11] *Kohler*, Der Unlautere Wettbewerb (Berlin 1914), p. 17.

[12] Art. 20 Basic Law: "*The Federal Republic of Germany is a democratic and social federal state."*

The Social State Principle imposes a *constitutional commitment of the state to social justice*. The equilibrated relation between freedom guaranties and social justice leads to the idea of maintaining a system in which the self-regulating powers of the market are strengthened and in which state interventions are to be avoided if the self-regulation is *working*. *Private enforcement* plays a big role in the fight against unfair competition. This also can be understood as a possible result of a liberalistic view.

The ´free play of forces´ however needs protection. If the market actors are able to influence their competition position by means that are not conform to a fair competition then the system gets unequilibrated. Very soon it was clear, that the main purpose of competition law is to avoid distortion of competition in a *functional interest*, rather than in an individual interest. This means that the purpose of the unfair competition law cannot be restricted to a merely individual-rights protection. So unfair competition law must be understood generally as *social law*. This applies to the competitor protection same as to the consumer protection.

The relation between individualistic and social functions of the law can be founded on a social law understanding of the subjective private rights of the law subject. Subjective rights are expression and instruments of the freedom of the individuum in the law. But the freedom given by the subjective law to the law subject - the individuum - is only one side of the medal. The second side is social responsibility that corresponds with the freedom. Theoretically this responsibility is bigger the bigger the freedom given to the individuum is – participation in welfare and freedom correspond with responsibility.[13]

In the classical competition law the protection of the competition is done by three branches of the competition law in the general sense:

1.) The protection of the freedom of competition by protecting the market structure against restrictions of competition by anti-competitive agreements or practices or by abuses of a dominant position in the market and against competition

[13] See *Fezer*, Teilhabe und Verantwortung – Die personale Funktionsweise des subjektiven Privatrechts (München 1986); about the Pluralistic Market Theory and the understanding of the competition as evolutional process of a „responsible market economy“ see *Fezer* in: Fezer (Ed.), Lauterkeitsrecht (UWG) (2. Ed. Munich 2010), Einl. Rn. 277 ff.

restrictions as a result of certain enterprise mergers or acquisitions (competition law).

2.) The protection of the competition by preventing unfair business practices (unfair competition law)

3.) The protection of the individual interests of owners of intellectual property rights as temporary monopolies in order to give incentives to create innovations and bring them to the market.

These three branches protect the competition process from different sides, although they are entirely compatible and from a theoretical view they come more and more nearer to each other. For example traditionally the competition law was overall a part of the public regulatory law while the unfair competition law and the intellectual property law are private law. This delimitation diminishes as there is more private enforcement in competition law on the one hand and the unfair competition law is more seen also as protection of the *market structure*.

To fulfill the purpose of avoiding distortion of competition the focus of the competition law system was in the beginning on the interest of the business actors. In the end of the 20th century though there took place a big change of paradigm in the European unfair competition law to a social-institutional function of the unfair competition rules.

This change of paradigm is overall characterized by tree aspects which are significant for the social function in the unfair competition law:

1.) „Socialization" of the individual economic interest of the market actors as an „instrument" of market control.

2.) Market control is not longer only in the interest of the economic "power" taking *indirectly* into account the interest of the consumers. In fact consumer protection is the direct and original purpose of the unfair competition law. Its relevance is same as the relevance of the protection of the business interest.

3.) Reduction of asymmetries of information between consumers and traders. Unfair competition law is market communication law with focus on the consumer information.

Concerning the first point – Socialization of the individual interest of the market actors – there cannot be any doubt, that only a well-informed consumer is

able to identify the best offer in the market, the best quality to the most reasonable price. If the consumer is deceived or influenced by misleading or aggressive business practices, the unfair acting competitor is getting an advantage in the competition process as a free „discovery process". Thus a competitor of the unfair acting trader has an individual interest that the law protects the competition against unfair competition behaviour. But at the same time this interest is also the interest of the public in a good working competition process.

The same happens with the interest of the consumer not to be influenced by misleading or aggressive business practices. This interest is not only individual. Protection of the consumer sovereignty means protection of the consumer in his function as „decider" in the market process. If the self-regulation of the market is the main instrument of competition protection, then private interests of consumers have to be „socialized" in the general interest of market protection.

In the European Unfair Competition Law this is called Trias of Protection Purposes. It means, that the three interests, that is a) consumer interest, b) competitors interest and c) interest of the public in the avoiding distortion of the competition, are depending on each other and influenced by each other in an integrative way. This protection purpose trias is a product of the change from the individualistic model to the social-law understanding in the unfair competition law in Germany in the 1950 and 1960 years, initiated by a famous publication of Eugen Ulmer in 1932.14 Modern unfair competition law has a functional orientation, which is based on a social-law and institutional understanding of the competition.[15]

Concerning the second point (consumer protection as a direct and equal purpose of the unfair competition law) in the last decade we saw in the European Union a significant change within the systematic of the unfair competition law. The protection of the competitors in the German Act Against Unfair Competition (AAUC) from the year 1909 was the only protection purpose of that law. The Protection Purpose Trias was finally and fully integrated into the AAUC in the year 2008 which marks an important step towards a social law unfair competition law. By establishing the Protection purpose the legislator integrated a European model

[14] *Eugen Ulmer,* Sinnzusammenhänge im Modernen Wettbewerbsrecht (Berlin 1932); see *Fezer* in: Fezer (Ed.), Lauterkeitsrecht (UWG) (2. Ed. Munich 2010), Einl. Rn. 27.
[15] *Fezer/Koos* in: Staudinger BGB-Internationales Wirtschaftsrecht (Munich 2010) Rn. 395.

of an unfair competition consumer protection which must be separated from the individual civil law consumer protection.

The European Union project of strengthening the consumer protection is one of the main politics of the European Union regulated within the *Treaty on the Functioning of the European Union* (see Art 4 II lit. f and 169 TFEU). The unfair competition in the B2C-area is harmonized conform to this competence of the EU, especially by the UCP-Directive of 2005.[16] With this directive the consumer protection in the European unfair competition law was not only strengthened. We got moreover a new dualism within the protection purpose triade, because there is only a partially harmonized concurrent protecting unfair competition law but a fully harmonized consumer protecting unfair competition law.[17] We have therefore two different definitions of what is unfair competition in the European unfair competition law, depending on who – consumer or competitor - is addressed by the respective commercial act. In the consumer protecting part of the unfair competition law the consumer interest is no longer equal to the interest of the competitors but it is *dominantly* weighted.[18]

Referring to the third point – reduction of asymmetries of information between consumers and traders – it seems that this is maybe the most important aspect of the change to a consequent social-law unfair competition law. The European unfair competition law is ruled by a `EU-Information Model`, which is focused to an adequate provision to the consumer with information as condition for working competition.

The scope of this is still discussed. Acknowledging that the consumer interest is a relevant aspect of the protection by the unfair competition law (see point 2) does not necessarily mean the same as acknowledging that the consumers have an active right of information against traders. And furthermore it must be cleared,

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[16] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

[17] The reason for that was actually not a systematic approach by the European legislator but rather the fact, that the consumer protection and the competition law belong to two different departments of the European Commission with various competences.

[18] *Fezer*, in Fezer (Ed.), Lauterkeitsrecht (UWG) (2. Ed. Munich 2010] § 1 UWG Rn. 26.

which character this right has: It is discussed whether the individual consumer has an individual subjective right against a trader, which could lead to an individual litigation against the trader in case of an infringement of the information duties.

The dominant opinion in Germany is that the consumer right of information does not lead to subjective claims of individual consumers.[19] As a reason for that it is said, that the consumer interest protected by the unfair competition law has an institutional character and not an individual character like the consumer protection of the general civil law, respective contract law.[20]

The EU-information model has the purpose to eliminate information asymmetries by imposing a duty to the traders to give all the relevant information of the product to the consumer.[21] It is one of the most important aspects of strengthening the social justice function of the unfair competition law and therefore part of an business ethical concept of the competition law.

Some Examples of Social Aspects in the Practice of the Unfair Competition Law

Now there should be pointed out some aspects in which the change of paradigm of the unfair competition law to a social-law instrument can be seen but also the limits of this instrument coming from its character as functional economy law. The first aspect is the European standard of the average reference consumer. It is related to the European information model on the one hand but also to the

[19] I am not of this opinion: In fact the European concept of consumer information which comes with the mentioned B2C-Directive of 2005 goes further. It can be shown, that the article of the directive concerning the withholding of certain consumer relevant information is imposing a *concept of an individual subjective right to information of the consumer*, *Koos*, in: Fezer (Ed.), Lauterkeitsrecht (UWG) [2. Ed. Munich 2010) § 9 UWG Rn. 3.

[20] See the regulation of competition consumer protection and individual consumer protection in the Indonesian consumer protection act – Law of Republic of Indonesia No. 8 Year 1999 concerning Consumer Protection. In this law no separation between competition motivated and individual consumer protection cannot be found.

[21] The concrete intensity of this information duty depends on the proximity of the commercial act to the final commercial decision of the consumer and on the importance for the decision of the consumer. The more information for example an advertisement for a certain product contains, the nearer it comes to the buying decision of the consumer and the more intensive is the duty of the advertiser to give relevant information to the consumer even without being asked for it by the consumer.

functional concept of the unfair competition law on the other hand. The European consumer model is used as a reference namely for misleading or aggressive commercial acts.

In the older German and Austrian unfair competition law the reference for what is ´misleading´ or ´aggressive was based upon a very strict consumer model. Reference could be a minority of quite stupid, unconscious consumers. Reference was the especially vulnerable and not very critical consumer.[22] This reference consumer model was an *empiric model*: If it was found in a survey that for example a very small part of the asked consumers (about 10-15 %) felt mislead by an advertisement this advertisement was considered as misleading and therefore unfair. That shows that the protection by the unfair competition law was aimed exactly at the most uncritical, most uninformed and therefore at the most vulnerable consumers. In a certain sense this was protection of the weaker ones within the group of the consumers.

In the middle of the 1990ths years the European Court of Justice (ECJ) established a new European model of the reference consumer, which is rather a normative consumer model. It is not the especially vulnerable typically bad informed consumer found out in surveys who is used as a reference for misleading or aggressive commercial practices. It is the fictive, typological model of an average, reasonably well informed and reasonably observant and circumspect consumer, which is relevant in this approach of the ECJ.23

Actually this means, that the protection effect of the unfair competition law is not longer generally aimed at the weak consumer but at an average consumer. Background of the reference consumer model is an economic concept of the so called Information Model. This Information Model has its basis in the economic

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[22] See *Emmerich*, Wettbewerbsbeschränkungen durch die Rechtsprechung, in: Festschrift für Gernhuber (Tübingen 1993), p. 857 (870): („*Leitbild dieser Rechtsprechung ist im Grunde der an der Grenze zur Debilität verharrende, unmündige, einer umfassenden Betreuung bedürftige, hilflose Verbraucher, der auch noch gegen die kleinste Gefahr einer Irreführung durch die Werbung geschützt werden muss*“).

[23] ECJ Case C-470/93 (*Mars*) see (10.03.2015) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0470 see especially ECJ Case C-210/96 (*Gut Springenheide*) see (10.03.2015) http://www.ippt.eu/files/1998/IPPT19980716_ECJ_Gut_Springenheide.pdf.

model concept of the homo oeconomicus.[24] It says that the consumer is in his own interest as economically reasonably acting market participant well informed or able to get informed adequately to be capable to decide rationally. The model of the homo oeconomicus is in the German law literature criticized as a mere fiction and it is – with good reasons, equally as the economic analysis of law - especially criticized in the area of the unfair competition law. There are studies coming out of the economic behavioural sciences research which try to show that the marked participants are in fact not always acting in a rational way. Whether this could also have impact on the model of the reference consumer cannot be discussed here.[25]

In general an empiric reference consumer model is a possible concept also for a functionally market orientated understood unfair competition law. It is finally conform with the modern functional orientated unfair competition law. A small minority of mislead consumers cannot be significant for the market functions. It would not be conform with the principles of proportionality and subsidiarity to forbid a certain market behaviour – which in fact is part of the constitutional entrepreneurial freedom - just because of non-significant disturbances.

The European reference consumer model based on the homo oeconomicus-concept is actually rather not a ´social justice` concept, at least if we understand ´social justice´ as protection of the weaker market participants.[26] Nor it is an ´unsocial´ concept. It simply doesn't work as a ´social´ concept in that sense. *It does not aim to ´moral`*. The European model of the average informed consumer is restricted to the function of the competition and the consumer is seen functional in his function as ´decider´ in the market. In a functional understanding within the idea of the interdependence of the market actors and the function of the competition for the society it is however ´ethical`.

Are there in the contemporary European unfair competition law and its application by the jurisdiction genuine `ethic` aspects in the classic meaning?

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[24] *Knops*, Verbraucherleitbild und situationsbezogene Unterlegenheit, VuR 1998, p. 363; *Doepner*, Anmerkung zu BGH 15.02.1996 – I ZR 9/94, GRUR 1996, p. 914 (916).
[25] *Podszun*, in Harte-Bavendamm/Henning-Bodewig (ed.), UWG (3. Ed. 2013), § 1 Rn. 73.
[26] Protecting the weaker as a purpose is stronger integrated in other legislature, such as for example *alimentary declaration law*, which aims at a very clear declaration of relevant information and which has the tendency to be based on a *model of a more vulnerable consumer*, who needs protection.

Since some years a paradigmatical change in respect to the role of social and over all environmental protection („protection of environment as social additional value“) in the application of certain unfair competition rules has taken place. In fact it was overdue to bring these aspects namely into the interpretation of the term of ´misleading´ commercial acts. Especially in § 5a AAUC, which says that consumers have the right to get all the relevant information of a product we have to integrate these aspects also in a global world market orientated dimension. Is a trader obliged to give – maybe also by himself, i.e. not being expressively asked by the consumer – information that his product is produced in a developing country by a non-certified enterprise where we cannot be sure that they effectively avoid to employ children workers?

This depends on the protectable information interest of the consumers on the one hand and on the protectable interest of the trader not to make „negative advertisement“ by making his product bad on the other hand. We have here an evaluation problem between the consumer and the traders interest. The more we consider for example environmental or fair trade aspects as relevant, the more likely is that information about these aspects should be considered as such to be revealed by the trader to the consumer.

Taking into account the view of the European average reference consumer it is clear, that these aspects are more and more relevant to the average consumer in the western markets. Moreover they can be determining for the business decision of the average consumer in these markets. Therefore it is not as easy as to reject a duty of the trader to reveal these aspects to the consumer considering the traders interest in positive advertisement higher than the consumers information interest.[27]

[27] See *Koos*, in Koos/Menke/Ring (ed.), Praxis des Wettbewerbsrechts (2009), Rn. I/475; contrary opinion *Köhler* WRP 2009, p. 109 (116); *Sosnitza*, in Ohly/Sosnitza (Ed.), Gesetz gegen den unlauteren Wettbewerb (6. Ed. 2014) § 5a Rn. 36. The German Federal High Court at least found in a sentence of the year 2010 that the B2C-Directive does not only protect the economic interest of the consumers but in general the *ability to make commercial decisions on a well-informed basis*. So a commercial behaviour indeed can be unfair also if it infringes an *idealistic interest of the consumers*, see BGH GRUR 2010, 852 Tz. 854 – Gallardo Spyder.

So we cannot say easily that idealistic social or environmental aspects are in general not relevant aspects in the sense of the unfair competition law information right of the consumers (see § 5a II AAUC). The tendency in the German literature however is rather against the obligation to inform about these aspects. We find very few or short opinions about this point in the respective commentary literature.

The standard of what exactly should be an ethical relevant aspect in the global sense however is maybe the most difficult question because we do not seem to have general global ethic standards.[28]

In a functional understanding unfair competition law is basically not a place for 'moral' in a classical sense – nor as social moral, nor as religious moral. This sounds problematic, as one could `translate` this to the sentence

However as (Business) Ethic is not the same as `Moral`, as moral – especially religious moral - cannot be a common standard in constitutional pluralistic societies (which is the reason for the preference of Normativism) this should not worry anyone as long as the limits of the fundamental rights are not exceeded. *The main standard is the functioning of the competition as a social process which itself is an instrument to limit unequilibrated market power*: `*Unfair Competition Law is (Business) Ethical Law*`. Very clear is, that those limits would be exceeded in cases of advertisement which contains `hate speech` against minorities. It is not exceeded if advertisement can only somehow insult the moral feelings of consumers. *It is not the purpose of the Unfair Competition Law to protect moral or religious feelings of certain groups of the society*.[29] The German constitutional court consequently allowed the advertisement of the fashion company `*United Colors of Benetton*` using morally provoking pictures of graves of soldiers, children workers or HIV-positive people.[30]

[28] See for further details my paper `*Global Responsibility, International Mutual Consideration in the Business Law - Theory and Reality*` - presented at Konferensi ke-6 di Kampus Universitas Pasundan, Bandung, 17-19 November 2016.

[29] It is in the German constitutional law part of the freedom of speech and negative religious freedom to express even hard critic or moderate insulting opinions on religions. Only if the insulting statement (which cannot be a fact) is able to disturb the "*public peace*" (it is not sufficient, that it may be just upsetting some especially sensitive persons) § 166 of the German Criminal Code is applicable.

[30] See examples in the presentation slides.

Conclusion

‘Business Ethic’ is not ‘Moral’. Business Ethic is a functional term, which refers to the socially favourable economic process (i.e. the workable competition). Compliance itself is primarily not `morally` or `ethic` but merely the acceptance of the positive law legitimated by the legislative process. Business Law politics is following `business ethic` in a functional sense – connected to social favourable economic interest. The goal to get compliance by the market actors to this law is parallel to the business ethical goal of the legislation.

Nor business interest of the market actors nor (less) competition itself is `unethic` in this sense. Business interests may be morally negative in the sense that it is driven by egoism. But this cannot be the question, the law has to answer to and it is not the business law which has to judge this behaviour in this moral sense unless it would by ignoring this tolerate constitutionally non tolerable behaviour. Mere ´tastelessness’ or unsocial behaviour is not enough for this judgement. Human egoism cannot be deleted by the law. It finds always its way through all obstacles.

Exactly because of this the legislator can and must integrate social aspects into legal rules (see Social State Principle); here it cannot be just relevant whether the rule is economically effective, it must also be ´socially effective´ in the sense, that freedom must be protected by limiting unequilibrated market powers. This social approach is a pluralistic concept. In a system following this approach the *economic analysis of law cannot be the only method to find the appropriate legal rule. Social responsibility cannot be calculated.* The EAL however is a legislative and judicative instrument under others.

The business law must develop a legal climate in which it is `profitable` for the market actors to behave `ethically` and fair: Compliance must be profitable or at least economically neutral to the competitors. Law should set incentives to make ´business ethical´ behaviour economically attracting to actors. In the antitrust law this may be for example diligence privileges for good compliance organization in companies. It is self-understanding that collusion of the politic or of the authorities with non-compliant companies is a reason for not achieving a `compliance profitable` business climate. `*Business ethical´* behaviour of companies must be

compatible with competition patterns, otherwise this sets incentives to ´business unethical´ behaviour of other market participant; it is not `profitable` to comply. Without effective flanking legislative measurements to support the competitive position of ´business ethical´ compliant companies there will be not ethical business surrounding. Non legal mechanisms to promote ethical business behaviour are social control ("mass-mediatized-economy") and self-control-mechanisms within the companies (good governance rules, which need themselves incentives to be effective). Social control through social media however must be controlled by the law to avoid the unfair misuse of media influence by certain interest groups and self-control-mechanisms within the company (good governance rules, which need themselves incentives to be effective).