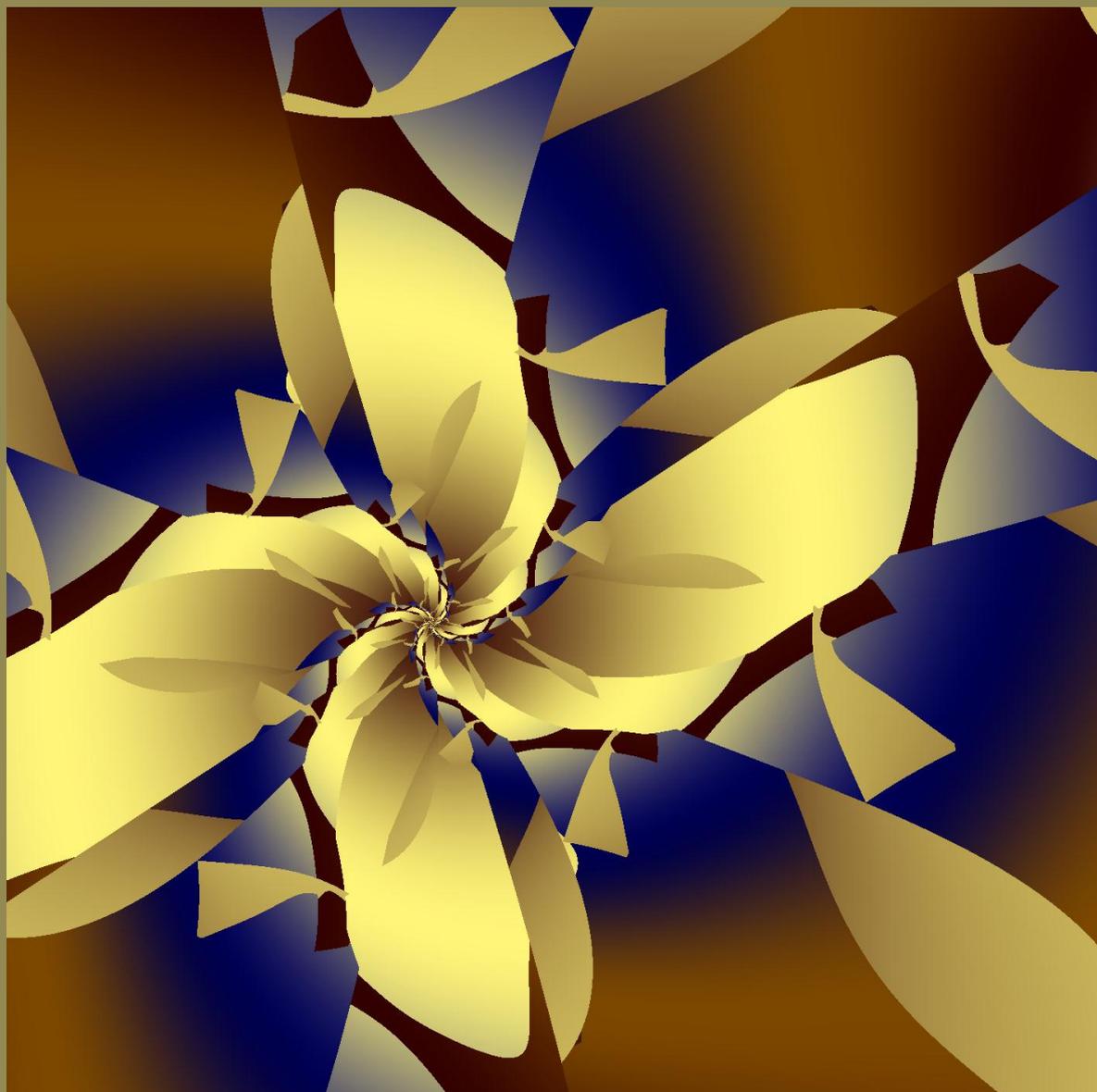


Ünnepi^e könyv

*Herczeg János professzor
70. születésnapjára*



*Szeged
2012*

Ünnepi e könyv

Herczeg János professzor

70. születésnapjára

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ELŐSZÓ

Prof.Dr.Szabó Imre, dékán, SZTE, ÁJTK.....1

HERCZEG JÁNOS A BARÁTOM

Prof.Dr.Dobozy Attila, akadémikus, Szeged Város Díszpolgára, SZTE.....8

KÖSZÖNTŐ LEVELEK

Dr.Altmayer Pál, ny.o.vez.főorvos.....35

Dr.Atif Iskander, főorvos, SZTE, Női Klinika.....38

Prof.Dr.Apró György, o.vez.főorvos, Hódmezővásárhely.....42

Dr.Bazsa Sándor, PhD, o.vez.főorvos.....43

Prof.Dr.Falkay György, DSc, SZTE, Gyógyszerhatástani és Biofarmáciai Intézet.....45

Dr.Kis Csitári István, PhD, megyei főorvos, Salgótarján.....49

Prof.Emer.Dr.Kovács László, DSc, SZTE, Női Klinika.....54

Dr.Körmendy Mária, főorvos, SZTE.....56

Prof.Emer.Lampé László, DSc, DE OEC, Női Klinika.....64

Prof.Ziva Novak, MD, PhD University Medical Centre, Ljubljana.....67

Prof.Emer.Dr.Resch Béla, DSc és Prof.Dr.Szóllósi János
SZTE, Női Klinika.....69

Dr.Szabó Kornél, SZTE
és Dr.Bánfalvi Attila, docens, megyei főorvos, Kecskemét.....72

Zoltan Szabo, PhD, F.I.C.S., MOET Institute, San Francisco.....87

Dr.Tuska Mariann, titkár, Szegedi Városi Bíróság.....96

Dr.Ugocsai Gyula, PhD, Berlin.....98

Prof.Dr.Ungár László, Onkológiai Sebészet, Budapest.....103



ORVOSI TANULMÁNYOK

- Prof.Dr.Borsos Antal, DSc, DE OEC, Női Klinika
Gyermekek-nőgyógyászati helyreállító műtétek
elvi és gyakorlati kérdései.....105
- Prof.Marc Bygdeman, Karolinska Hospital, Stockholm
Termination of pregnancy. A historical review.....122
- Dr.Kis Csitári István, PhD és Dr.Márkus László, Salgótarján
A méh és a hüvely teljes előesésével kombinálódott
stressz inkontinencia együttes, egyidejű műtéti megoldása
Kolpokleizis mediána és TVT.....137
- Prof.Dr.Papp Zoltán, DSc, igazgató, Maternity Magánklinika, Budapest
Szervkímélő és szervmegőrző műtétek
az uterus sebészetében. Gondolatok az elmúlt évtizedekben
bekövetkezett szemléletváltozásról.....145
- Prof.Dr.Szabó István, DSc, POTE, Női Klinika
A koraszülöttek életkilátásait javító
új intrauterin terápiás beavatkozások.....164
- Prof.Emer.Dr.Szilárd János, SZTE, Pszichiátriai Klinika
Jogi kérdések – pszichiátriai dilemmák.....185
- Dr.Tarnai László, PhD, és Prof.Dr.Ungár László
Onkológiai Sebészet, Budapest
Complication of the laterally extended
parametrectomy (LEP) procedure.....202
- Prof.Dr.Tóth Zoltán, DSc, tanszékvezető, DE OEC, Női Klinika
Pándémiás influenza A (H1N1)v 2009 hatása a terhesekre.....208
- Prof.Dr.Ungár László és Dr.Tarnai László, PhD
Onkológiai Sebészet, Budapest
Early stage lymph node positive cervical cancer
treated with laterally extended parametrectomy (LEP).....216

JOGI TANULMÁNYOK

- Dr. Balogh Zoltán, kollégium vezető, Kecskeméti Törvényszék
Az egészségügyi szolgáltatást nyújtók kártérítési felelősségének
jogalkalmazási kérdései
Bács-Kiskun megye bíróságai gyakorlatának tükrében.....229
- Dr. Bakos Eszter, PhD-h, Polgári Jogi és Polgári Eljárásjogi Tanszék, SZTE
A jogi szabályozás kihívásai és alternatívái
a kiskorúak audiovizuális médiaszolgáltatásokkal szembeni
védelme területén.....269
- Dr. Bak Mihály, Amerikai jogi képzés, SZTE
és Dr. Szondi Ildikó, PhD, docens, Statisztikai és Demográfiai Tanszék, SZTE
Népességcsökkenés a közép- és kelet-európai EU-tagállamokban
(különös tekintettel hazánkra), a válság hatásai, prognózisok.....288
- Prof. Emer. Dr. Besenyei Lajos,
Polgári Jogi és Polgári Eljárásjogi Tanszék, SZTE
Az ingatlanforgalom néhány problémája,
elsősorban a gyakorlat oldaláról nézve.....308
- Dr. Bezdán Anikó Judit, tanársegéd,
tanulmány készült > Agrárjogi és Környezetvédelmi Jogi Tanszék, SZTE
A vadászat társadalmi szervezetei.....320
- Prof. Dr. Blazovich László, Európai Jogtörténeti Tanszék, SZTE
Entstehung, Verbreitung, Aufbau und Vorlagen
des Schwabenspiegels.....334
- Dr. Csatlós Erzsébet, PhD, tudományos segédmunkatárs,
Nemzetközi Jogi és Európa-jogi Tanszék, SZTE
Hajózási statisztikák hatása az Északnyugati-átjáró
nemzetközi jogi státuszára.....351
- Dr. Farkas Csamangó Erika, tanársegéd
Agrárjogi és Környezetvédelmi Jogi Tanszék, SZTE
A Helyes Mezőgazdasági és Környezeti Állapot előírásai.....372

Dr.Gellén Klára, PhD egyetemi docens, dékánhelyettes, Polgári Jogi és Polgári Eljárásjogi Tanszék, SZTE Consumer Protection in Media Law.....	388
Dr.Gombos Katalin, PhD docens, Nemzetközi Jogi és Európa-jogi Tanszék, SZTE A fogyatékkal született gyermek saját jogú kártérítési igényéről avagy egy jogegységi döntés margójára.....	398
Prof.Dr.Hajdú József, tanszékvezető, dékánhelyettes Munkajogi és Szociális Jogi Tanszék, SZTE Unemployment and self-employment.....	413
Dr.habil.Karsai Krisztina, PhD egyetemi docens, dékánhelyettes, Büntetőjogi és Büntető Eljárásjogi Tanszék, SZTE Consumer Protection by Criminal Law.....	455
Dr.Mezei Péter, PhD adjunktus, Összehasonlító Jogi Intézet, SZTE A digitális szocializmus és a telekommunizmus kritikája a szerzői jog szemszögéből.....	469
Dr.Nacsa Mónika, PhD-h, Magyar Jogtörténeti Tanszék, SZTE Az 1911. évi I. törvénycikk jogtudományi fogadtatásának részletei.....	483
Prof.Emer.Dr.Dr.h.c.Ruszoly József, DSc Bónis György Szeminárium Három választás, Károlyi Mihály belépése a politikába.....	495
Dr.Schiffner Imola, PhD adjunktus, Nemzetközi Jogi és Európa-jogi Tanszék, SZTE Az uniós polgárok védelme harmadik államokban a statisztikák fényében.....	506
Dr.Tóthné Prof.Dr.Fábián Eszter, Polgári Jogi és Polgári Eljárásjogi Tanszék, SZTE A házastársi vagyonszövetség legfontosabb új rendelkezései az érvényes, de nem hatályos Polgári Törvénykönyv „Családjog” c. III. Könyvében.....	533

KRISZTINA KARSAI

Consumer Protection by Criminal Law

Hortatio

The celebrated professor, **Prof. Dr. János Herczeg** is a man of curiosity, and besides performing his chosen profession as a gynaecologist with outranging achievements and huge efforts, he has a marked preference for innovation and for discovering new fields of life, whereby he is not hesitant to sacrifice any time for finding challenges in law, computer technologies or (almost) professional painting. This preference of him allows me to recommend him this paper, because of the fact, that consumer protection from the point of view of the criminal law is also a new, innovative research field.

Introduction¹

Despite the strengthening of consumer aspects in modern economic life and in the so-called „consumer society“, the relations between consumer protection and the criminal law do not have rich literature neither in Hungary nor in Europe, and the scientific work is really marginal on this topic. In this situation, the necessity arises, to look for principles, which establish a direct and substantial connection between consumer protection and criminal law.

The paper disserts on the essentials of criminal regulation concerning national consumer protection, in particular the possible limits of the protection, which are determined by the protected interests.

In this paper, I will answer the question what are, if any, the functions of criminal law in the field of consumer protection. Secondly I would like to show you some examples of Hungarian

¹ The paper is an edited version of the oral lecture held in Madrid at the General Assembly of the European Law Faculties Association (2012).

criminal law. At the end I will round up my presentation with addressing a special issue: the relation of criminal law to unfair commercial practices.

I. The Functions of Criminal Law in the Field of Consumer Protection

I.1. Generally

The primary task of criminal law is to protect social coexistence that postulates establishing and obeying rules and norms, the complexity of which forms the social order. The social order must be assured and reinforced by the legal order applying coercion by the power of the state. Several fields of law prescribe coercive measures if the essential rules of social coexistence are infringed, but it is criminal law that, by its nature, has the operation and enforcement of state coercion in its focus by providing the severest legal means in the entire legal system. On the other hand, criminal law does not entail the negation of human freedom. Rather, it restricts individual freedom to protect and assure that of others. In addition, criminal law – of a constitutional state based on the rule of law – also provides protection for the perpetrator against the anger and aggressive reaction of the community and against the arbitrary intervention of the state, as it is not only the perpetrator but also the community and the state that are bound by the rules of criminal law.

However, criminal law may not intervene in every – possibly petty – disorder of social life, its role is much rather the protection of fundamental social values. One of the essential questions of criminal legislation is to **decide which social values** should be the subjects of criminal protection. This issue can only be addressed by taking the scale of values of a constitution or fundamental law as a basis. Person-related interests (e.g., life, corporal integrity, personal freedom, property) and other interests related to the community (e.g., public order, public health, security of the State) are to be

protected by criminal law. They are called legally protected individual or collective interests in criminal law terminology.

The list of legally protected interests is not constant but changes from time to time. There are interests that shall not be protected by criminal law in the future (decriminalization), and new ones appear that shall be subject to criminal legal regulation (criminalization).

For instance in Hungary, the political and constitutional transition in the 1990s resulted in a criminalization wave, during which numerous new crimes were and continue to be introduced into the Criminal Code² (e.g., kidnapping, violation of the freedom of conscience and religion, violence against a member of a social group, crimes against nature and environment, computer crimes, money laundering, cruelty to animals, usury). Examples of decriminalization include homosexual activities with persons between fourteen and eighteen years of age, prostitution, and crimes against the security of the communist regime.³

I.2. Subsidiarity and *ultima ratio*

If we are looking for the justification of the criminal law intervention in the field of consumer protection, we need to define interests of consumers so valuable that even criminal law shall play an important role in their protection. In every modern democratic society the subsidiarity of the criminal law is acknowledged, which means that criminal law and responsibility based on criminal law shall apply only if the infringement of legal interests in question cannot be dealt with by way of measures of other – philosophically less severe – legal regulations. This principle is in strict connection with the **ultima ratio principle**.

Both the principles of subsidiarity and ultima ratio presuppose that the **same** social / individual interests be protected by different fields of law. It means that less severe injuries of the same (or

² The Act Nr. 4 from year 1978. It should be noted that there is an ongoing codification process in Hungary, that is estimated to terminate until summer 2012, when a fully new, modern Criminal Code will be released which will enter into force in 2013.

³ More about Hungarian criminal law and criminal justice: *Karsai, Krisztina – Szomora, Zsolt: Criminal Law. Hungary. International Encyclopaedia of Laws*, 36. Wolters Kluwer, 2010.

comparable) interest shall be reacted by less severe sanctions of severe regulations, but the most serious violation of interest by the harshest of sanctions. This flows also from the general acceptance of the principle of proportionality.

Therefore the criminal law as a last resort is the **severest measure** of the state **only in comparison with** other legal interventions countering the infringement of the same or at least comparable legal interests. Without pre-existent extrinsic protections outside of the field of criminal law for comparable interests, the criminal law cannot serve as the last means but the only one.

I.3. The Interests of Consumers

The interests to be protected by criminal law can stem from social need, from constitutional values, from international requirements and sometimes also from political importance. Consumer protection affects almost all fields of economy and it shall inevitably appear everywhere in the branches of law regulating the economy.

The system of law serves to protect the complex criteria of consumer protection in the most extensive branches of law: private law, competition law, administrative law. Therefore, it is important to define the limits of the criminal law action precisely because criminal law sanctions entail the most serious consequences, which are constitutionally only applicable in case of the most egregious infringements of the law.

The European Union (previously EEC) has established quite early, in 1975, the basic content of consumer protection – after the strategic decision of the meeting of heads of states and governments held in 1972. The decision of the Council on the “Preliminary program of the European Economic Community for consumer protection and information policy”⁴ has defined the “fundamental” consumer rights and set out an “ambitious agenda on assertion of the place of the consumer interests”.⁵ This program is named as the “Magna Charta” of consumer rights, even today it determines the consumer

⁴ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy. OJ C 92, 25.4.1975, p. 1.

⁵ *Weatherill, Stephen: EU Consumer Law and Policy*. Edward Elgar Publishing, 2005. p. 6.

protection policy for the community and even for Hungary and it has not only specified the fundamental rights, but started a large-scale legal harmonization within EEC as well. Point 3 of the program encapsulates consumer interests in a statement of five basic rights: a) the right to protection of health and safety; b) the right to protection of economic interest; c) the right to redress; d) the rights to information and education; e) the right of representation (the right to be heard).

The scope of the "fundamental rights" has not changed in the past almost 40 years, but it is true, that the member states slowly reach at the aimed consumer protection purposes. According to Art. 169 of the Treaty on the Functioning of the European Union, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.⁶

These internationally shaped consumer rights offer themselves to be used as basis for national criminal law interventions: if any consumer right is violated severely, it shall be analysed whether a criminal law reaction is necessary or not (because of subsidiarity and ultima ratio).

I.3. Transforming Consumer Rights into Legal Interests Protected by Criminal Law – an Elimination (Neutralisation)

"In Europe it was the concept of the welfare state that assumed an activist role in social relations and intervened in the interest of consumers. The welfare state's interventionist role was justified along three lines of thoughts. First, the arguments of welfare economics second, the need to correct and remedy market failures, and, third, the criticism of the caveat emptor principle of contract law regarded state intervention as a positive tool that is capable of

⁶ The Council of Europe has contributed to enhance the standards of consumer protection throughout Europe before the advent of consumer law and policy on Community level. In its Resolution 543 of 17 May 1973 on a Consumer Protection Charter the Consultative Assembly of the Council of Europe issued the first political statement on consumer policy on European level. The UN General Assembly released a resolution on consumer protection on 16 April 1985 (A/RES/39/248) with comparable content as well.

re-establishing the balance on the market.”⁷ The weak position of the consumer needs enhanced legal support and criminal law is also accounted for as one of the possible tools of protection.

Therefore the legislator shall decide whether all consumer rights will be protected under criminal law or only some of them. The decision depends on the underlying approach and therefore could be different in time and place as well. The decision of the legislator triggers a “transformation procedure”⁸ whereby the consumer rights acknowledged outside of criminal law will be accepted as legal interests within the criminal law as well.

This “transformation procedure” has a very important impact upon consumer rights: the criminal law eliminates the specificities of consumers’ status. Outside of the field of criminal law consumer rights suppose the position of consumer to be a “position of entitlement” i.e. that the consumer is entitled to claim his/her rights and is enjoying the “bright side” of protection in the market. In this sense this “special position” of the consumer has a system-constructing character or power which has its own definitions in respective fields of law different in every national regulation. It means that there are actors on the market who are specifically protected by law (the consumers) and others who are not protected – legally.

At the moment when a consumer interest is present at the core of a criminal law norm, the protected persons lose their special protection as consumers. The group of persons who are protected by the criminal law is not special anymore, because the criminal law does not distinguish between “consumers” in a sense of contract law or competition law and other subjects of criminal regulation. Therefore we can also say that criminal law protection neutralizes the specificity of consumer protection.

The same argumentation can be delivered to exclude the use of the notion “average consumer” for purposes of criminal law interventions.

The “**average consumer**” standard (constructed by the CJEU) is such an abstract category that serves the purpose of providing a set

⁷ *Cseres, Katalin Judit: Competition law and consumer protection. Kluwer Law International, 2005. p. 154*

⁸ Meaning the transformation of internationally recognized consumer rights into consumer rights protected by national criminal statutes.

of characteristics that define the consumers' susceptibility to deception by third parties.⁹ This standard helps those who apply the law in case of breaches of competition law (or consumer protection laws), moreover, it draws the line that creates an ample equilibrium in business regulation for the parties of opposing interests. Following the average consumer standard would be highly hazardous regarding criminal liability, as the category of the average consumer does not incorporate every individual; thus, the liability of the offender could be depending on the education, experience etc. of the victim. The core element in determining the susceptibility to deception revolves around the question what the victim could have thought, however, if this question is linked to the concept of the average consumer then the thoughts of the majority of consumers (i.e. their average) would be the only decisive factor. Consequently, this could result in disregarding the statutory protection of individuals thinking differently from the average. Ultimately, the protection of criminal law would be depending on whether certain individuals usually pay more attention or others usually pay less: being less informed than the average could be interpreted as a certain kind of "interaction by the victim". However, the protection of criminal law shall not differentiate by the above characteristics of the individuals – the concept of "average consumer" is neutralised by the criminal law.

The Protection of Consumers by Criminal Law in Hungary

II.1. General Outline

The protection of consumers by criminal law follows two different paths in Hungary. On one hand, there are 'normal' offences which

⁹ More to the topic see more in particularly: *Incardona, Rosella – Roncibo, Cristina*: The average consumer, the unfair commercial practices directive, and the cognitive revolution. *Journal of Consumer Policy* 2007. p. 21-38.; *Weatherhill, Stephen*: Who is the „average consumer“? In: *Weatherhill, Stephen – Bernitz, Ulf*: The regulation of unfair commercial practices under EC directive 2005/29: new rules and new techniques. Oxford, Hart Publishing, 2007. p. 1-12.; *Wilhelmsson, Thomas*: The abuse of the „confident consumer“ as a justification for EC consumer law. *Journal of Consumer Policy* 2004. p. 317-337.

protect the life, the health of anybody or protect everybody against fraudulent behaviour: these offences can involve violation of special consumer interest **in concreto** – during their factual commission.

The other path is to create **sui generis** offences for consumer protection. In the Hungarian Criminal Code (hereinafter HCC) the Deception of Consumers and Marketing Poor Quality Product are the special consumer protection offences.

If we project this criminal law matrix on the mentioned consumer rights, we can see the following criminalisation. The Hungarian criminal law protection extends to:

- the protection of the consumer's **health and security** through three 'normal' offences: Misuse of Harmful Goods,¹⁰ Bodily Injury,¹¹ Malpractice¹²),
- the protection of the **economic interests** only narrowly, namely only relating to the appropriate quality of the product. This narrow protection is realized through the regulation of two offences (Marketing of Poor Quality Product¹³, False Attestation of Quality¹⁴).

¹⁰ HCC Art. 279 (1) The person who prepares or keeps such article for public consumption with the purpose of distribution, which is noxious for health, commits a misdemeanour, and shall be punishable with imprisonment of up to one year. (2) The person who distributes noxious articles for public consumption, commits a felony, and shall be punishable for imprisonment of up to three years. (3) The person, who commits the crime defined in subsection (2) by negligence, shall be punishable for a misdemeanour with imprisonment of up to one year.

¹¹ HCC Art. 170. (1) A person who injures the bodily integrity or health of another person, if the injury or illness heals within eight days, commits the misdemeanour of simple battery, and shall be punishable with imprisonment of up to two years. (...)

¹² HCC Art. 171 (1) The person who exposes by negligence the life, corporeal integrity or health of another person or persons by the violation of the rules of his profession, or causes bodily harm, commits a misdemeanour, and shall be punishable with imprisonment of up to one year.

¹³ Art. 292 (1) A person who sells, transfers for use or places on the market poor quality products as though they were of good quality or takes measures for the performance of such actions, commits a felony and shall be punishable with imprisonment of up to three years. (2) A person who commits the crime out of negligence, shall be punishable for a misdemeanour with imprisonment of up to one year. (3) A person making preparations for the sale, transfer for use or placement on the market of poor quality products defined in Subsection (1), commits a misdemeanour and shall be punishable with imprisonment of up to one year.

As an additional protection of economic interests, the protection extends to the **price** as well, with regulating two offences (Profiteering¹⁵ and Fraud¹⁶)

- the right to inform through regulating two offences (Deception of Consumers¹⁷ and Fraud).

Art. 293 A person, who violates the rules governing the determination of the quality of a product, and thereby makes it possible for such product to be sold, transferred for use or placed on the market as being of a quality better than they actually are, commits a felony, and shall be punishable with imprisonment of up to three years.

Art. 294 (1) The product subject to a mandatorily applicable national standard is of poor quality, if it fails to meet even the lowest quality requirements defined in the standard. (2) Apart from the case defined in subsection (1), that product shall be of bad quality, which cannot be used for its designated purpose, or its usability has been considerably diminished.

¹⁴ HCC Art. 295 (1) The person who attests untrue data for the quality of goods of considerable quantity or value in a document attesting quality, commits a felony, and shall be punishable with imprisonment of up to three years. (2) The person, who commits the act by negligence, shall be punishable for a misdemeanour with imprisonment of up to one year.

¹⁵ HCC Art. 301 (1) A person who requests, stipulates or accepts a price higher than the official price or the price otherwise fixed obligatorily for him for goods, commits a misdemeanour, and shall be punishable with imprisonment of up to two years. (...)

Art. 302 Profiteering in accordance with Subsection (1) of Section 301 shall also be committed; if a price corresponding to the official price of goods of better quality than the actual quality is requested, stipulated or accepted for the goods.

¹⁶ HCC Art. 318. The person who - for unlawful profit-making - leads somebody into error or keeps in error and causes damage thereby, commits fraud.

¹⁷ HCC Art. 296/A (1) Any person who, in respect of any essential feature of a product, publicly states false facts, or true facts in a deceptive way, or provides deceptive information on any essential feature of the product for the purpose of rendering such more desirable, commits a misdemeanour and shall be punishable with imprisonment of up to two years. (2) For the purposes of subsection (1), the following shall constitute the essential features of goods: their composition, usability, impact on health and the environment, as well as their treatment, origin, whether they meet legal prescriptions, the national standards or the customary requirements for the goods, as well as where the utilization of the goods requires the satisfaction of conditions essentially differing from the customary ones. (3) For the purposes of subsection (1), the opportunity for winning, or any other advantageous outcome promised for the purchase of the goods, shall also constitute an essential feature of the goods.

The criminal law legislator has not created any criminal law statutory definitions in connection with the infringement of the following rights:

- the right to remedy,
- the right to be heard,
- the right to representation of interests, obviously because the infringements of these rights do not reach the margin of appreciation for the application of criminal law action, i.e. the appropriate level of danger to society.¹⁸

This matrix generates fragmented criminal law protection¹⁹: the threshold of criminal law intervention is different concerning the different consumer rights, therefore some violations are defined as offences while others are not. The differences of the threshold are closely related to the accepted approach on the state's function in the field of consumer protection.²⁰

II.2. Special Focus on Unfair Commercial Practices

The significant turning point of the development of EU consumer protection policy was to admit that on the one hand absolutely different conducts are considered as unwanted (unfair) by the member states and on the other hand the definitions of "consumer" are also significantly different in each state. So it is hardly possible to enforce a mutual consumer protection policy effectively and pursuant to this the adoption of the Directive 2005/29/EC concerning unfair commercial practices²¹ was really important.

The directive on the one hand defines these practices and the concept of "consumer" as a common European standard, and on the other hand it declares the adoption of the case law of the Court of

¹⁸ The addressee who shall guarantee these rights is primarily the state; its legislation shall secure the fulfilment of these rights for the consumers. However the right to remedy (to be heard) can be violated by market actors as well, if they obstruct the way of claiming against bad quality (etc.).

¹⁹ Concerning fragmented criminal law see more by *Hefendehl, Roland*: Der fragmentarische Charakter des Strafrechts. *Juristische Arbeitsblätter* 2011/6 p. 401-404.

²⁰ See a deep analysis by *Cseres* Ibid. p.151-191.

²¹ 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. OJ L 149, 11.6.2005, p. 22-39.

Justice of the European Union (CJEU) based on the standard of the average customer. Thereby the economic operators can provide their services under an essentially single regulatory system and the consumers thus receive equal protection everywhere.²²

Considering the content of the Directive it allows relatively small room for member state legislators in the implementation by requiring total or maximized legal harmonization, practically leading to an eventual legal unification. Also, no definitions relevant to the so-called black-listed actions may be subject to discretion – the national legislator may not vary the elements of the definitions during the implementation process.

The directive defines the prohibited conducts positively. The directive qualifies a commercial practice to be unfair only if the elements of the definition are present in said practice. Because of the afore-mentioned eventual total (maximum) legal harmonization realized, the conducts included in the directive shall be considered unfair and conducts disregarded by the directive are conceptually not considered as unfair. Thus, the member states cannot act against them, i.e. the member state law cannot prohibit such conducts that are not considered unfair under the directive.

The so-called black-listed actions carry the most serious infringements. According to consumer protection law, these conducts shall be held unfair without further examination. A part of the listed conducts shall be hereby further analysed due to the fact that some of them might have criminal law relevance. The question of criminal law protection arises whenever the performance of the unfair commercial practice (might) exhaust any of the statutory definition of any crimes.

However, there are some conducts that rightly point to the analysis of this question: in my opinion there are two categories concerning criminal law relevance. I have focused only the Hungarian criminal law, concerning other legal system there is a need for further comparative research.

One category includes the unfair practices which contain a misleading factor and the content of the misleading conduct is

²² The scope of the directive is the so-called B2C (business to consumer), i.e. the relationship between the company and the consumer, and the protection of the competitors is at the most indirectly provided.

specifically determined by national statutory regulation, such as the Deception of Consumers (Art. 296/A HCC).²³ In such a case two statutory elements, transform the unfair commercial practice into a crime: committing the action before the general public (as an objective element) and for a specific purpose e.g. increasing the demand for goods. It should also be emphasized here that committing the crime before the general public (e.g.: through advertising media) can be considered as typical within the area of unfair commercial practices.

In my view the following conducts shall be considered as relevant to criminal law protection:

- stating or otherwise creating the impression - as merely by the appearance of the goods in the commercial practice - that a product can legally be sold when it cannot (Black list 9),
- claiming that products are able to facilitate winning in games of chance (Black list 16),
- falsely claiming that a product is able to cure illnesses, dysfunctions or malformations (Black list 17).

The other category includes commercial practices which also might camouflage the commission of another crime. Consequently, comparison with the offence of Coercion under Article 174 of HCC²⁴ is necessary:

- Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product (Black list 12).
- creating the impression that the consumer cannot leave the premises until a contract is formed (Black list 24).

If the consumer's decision-making has been influenced by conducts reaching or crossing the criminal law threshold in case of violence or duress within the scope of the aggressive commercial practice then we might conclude that the offence defined above (coercion) has been committed and it simultaneously results in a considerable injury of interest on the part of the consumer.

²³ See Fn. 17.

²⁴ Art. 174 HCC: The person, who constrains another person with violence or menace to do, not to do, or to endure something, and thereby causes a considerable injury of interest, commits – unless another crime is realized – a felony, and shall be punishable with imprisonment of up to three years.

Such unfair commercial practices, therefore, might (objectively) meet the elements of the statutory definition of coercion, thus, they are relevant for consideration in criminal law.

Concerning the present issues I find it important to highlight that these black-listed actions partially or fully fit into the objective elements of statutory definitions of several offences, therefore considering criminal law action might be appropriate. The fact that the criminal law liability for these offenses is established in a subjective point of view is the decisive factor: i.e. if the intent (and also the special purpose required, as the case may be) can be established then the conclusion can be made that the offense in question has been committed. If this is the case, i.e. the elements of the statutory definition are matched up with elements of the conduct as part of the commercial practice, the necessary action to be taken is to report said action to the investigating authorities.

Summary

As a last remark: the Council of Europe has made its voice heard already in 1982 in connection with the criminal law protection of consumers.²⁵ The Council of Europe issued a recommendation in this context and offered criminal law actions as an alternative should there be no effective action provided by other branches of law for the protection of consumers. The recommendation calls upon the member states to investigate whether it is necessary to supplement the already existing legal actions. Furthermore, it recommends that the member states lay down common principles within the area of criminal law protection of consumers and it also calls upon the member states to enable the cooperation between consumer protection authorities and investigating authorities in an appropriate way and also to enable groups of consumers (organizations) to participate and get involved in the criminal proceedings. The recommendation hardly elicited any tangible resonance when it came to solidify protections for consumers but its adoption in 1982 made it clear that the idea of an inquiry into the area touched upon

²⁵ Recommendation (82) 15 of the Committee of Ministers to Member States on the role of criminal law in consumer protection. 24. September 1982.

in the present paper exists long ago and although time had lapsed legal regulation did not change, but more and greater abuses occurred. This makes it ever so clear that efforts are demanded to amount to meaningful change.

I would like to encourage all of my colleagues in criminal law, to take a look into their own system, how the criminal law protects consumer interests, and find out whether the eliminating effect of the criminal law protection can be "*caught in flagranti*" in their own system as well. I would also encourage my colleagues to check how the criminal law relates to the black listed behaviours, are there overlapping areas which could call for criminal investigations. Eventually, I would encourage all of my colleagues, to figure out together why Europe does not deal with criminal law issues concerning consumer protection.