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Legality of Political and Ethical Consumerism in Tourism: Considerations from an E.U. Competition Law Perspective

Abstract

Political or ethical activism associated with tourism consumption receives hardly any attention from a legal perspective. As such activities may constitute a legal infringement of competition, (potential) activists, particularly companies engaging in such activism, need to be aware of the potential risk of being subject to legal prosecution, undermining the actual goals of their activism. Vice versa, companies, destinations or other tourism entities negatively affected by activism may claim such a behaviour to be deemed illegal. Such illegality may originate from a competition's abusive behaviour or unfair commercial practice. For either of those to be applicable, actors taking part or calling for political or ethical induced consumption need at least to have an indirect economic interest in the tourism market and, similar to the activism targets, need to be considered an economic entity. This also applies to destinations not considering themselves economic entities, despite being commercially active. In general, consumption activism will be deemed illegal if used or called for by a dominant market position. Without market dominance, activism activities are deemed commercially unfair unless the originator of activism has a legitimate reason protected by constitutional rights.

Keywords: touristic boycott, competition law, unfair commercial practices, economic entities, destination competition, constitutional rights, European Union

1. Introduction

Political and ethical consumption and state-imposed sanctions are gaining an increasing level of importance for tourism activities, despite their differences in nature and justifications. Whereas political and ethical consumption is fuelled by considerations that may be individually justified on moral grounds, sanctions are foremost a traditional measure in politics on an international level and are not restricted to a tourism context (Seyfi & Hall, 2019a). As such, political decisions do not always need or have a justification on moral grounds. However, a sanction may get wider acceptance within the society of the sanctioning state if the population is buying into the ethical or moral values that justify the boycott (McLean & Roblyer, 2017).

Individual consumption activities that are considered as ethical or political consumption typically have a justification based on values. Such consumption within a tourism context may be fuelled by, e.g. violations of human rights, animal welfare concerns or other political, ethical and environmental aspects (Shaheer et al., 2018). From a tourism context, political or ethical consumption is triggered by media coverage (Luo & Zhai, 2017) and removes tourists' need to travel before making a consumption decision.

Although an individual consumption decision in this respect may be considered a boycott, it is essential to point out that such decisions by individuals themselves are difficult to attribute to ethical or political consumption in a broader sense, as it is lacking a 'visible' justification. Considering this a boycott requires at least some form of expression of protest or disapproval (Seyfi & Hall, 2019b). With this expression, the addressed also becomes aware of a decision that is directed at it. Therefore, a boycott becomes more successful the more the

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amount of expressed disapproval leads to a market activity harming the target of the boycott (John & Klein, 2003). Regardless if this expression is done directly by an adverse purchase decision or a call for others to execute such a decision, individuals enjoying media coverage can have a similar effect (Luo & Zhai, 2017).

Regardless of how justified the underlying values are from a moral perspective, they may still lead to illegal activities, whether they result in sanctions or political and ethical consumption decisions. This dilemma is common for the ever-evolving interchange between what is legally correct and morally right. There are instances where legal and moral values correspond, but also cases in which they differ due to different contexts, heritage and legal environments (Greenberg, 2014).

Evaluating sanctions from a legal perspective, they typically result in the requirement of consumers and other actors of the tourism value chain to adhere to the corresponding legal restrictions and conditions (Seyfi et al., 2020). Governmental actions that economically affect another country's industry are only partly regulated by international law. In theory, tourism-related sanctions imposed by states are either 'primary sanction,' in cases where the sanctioned activity is linked to the jurisdiction of the sanctioning state, or 'secondary sanction,' without such a connection. Prior sanctions are subject to the jurisdiction of the sanctioning state and provide appeal possibilities in the sanctioning state. In contrast, appealing secondary sanctions under the jurisdiction of the sanctioning country is doomed to fail in most cases as it is missing the link to the sanctioning country. An exception to this rule is Art. 215 of the Treaty on the Functioning of the European Union (TFEU), which includes a legal protection mechanism on secondary sanctions imposed by the European Union (E.U.) or its member states. Outside this specific ruling, secondary sanctions may be appealed by international bodies like the World Trade Organisation (WTO). However, both options of appeal on secondary sanctions have not been tested in a way to provide a reliable conclusion (Ruys & Ryngaert, 2021). With the absence of a global body actively capable of ruling on sanctions, it remains with political stakeholders to address legal challenges associated with sanctions based on politics (Pratt & Alizadeh, 2018).

In contrast, political and ethical consumption activities initiated by private entities or individuals may be legally challenged under the jurisdiction of those individuals or entities to which they must adhere. This also provides a lower hurdle for actors affected by activism, including destinations, to fight the activism and protect their rights, especially from a commercial perspective. This is additionally fostered by a more significant amount of trust in legal protection, as respective jurisdictions tend to enjoy greater legitimacy by the actors operating in them (Tyler et al., 2007; Tyler, 2011).

From a motivational perspective, political and ethical consumption activities differ in their goals, being either political (Copeland & Boulianne, 2020) or ethical. Similar to the dilemma of morals and law, ethics and politics face a corresponding relationship as ethics may be the basis of politics but also conflict with it. This complexity increases when incorporating law due to ethics and politics but also restricting the latter (Rosenfeld 1998).

The justification of ethical consumption as a starting point is associated with the idea of self-improvement by being concerned about individual purchase decisions (Burke et al., 2014). This applies to consumption-avoiding boycotts as well as actively consuming "buycotts". However, over time a clear distinction between ethical and political consumption tended to blur as most ethical decisions lead to questions regarding political consumption (Clarke, 2008) and vice versa. Hudson's (2007) descriptions serve as an indication of the ethical evaluations fuelled by political players.

According to Clarke (2008), even pure ethical consumer behaviours lead to social interaction and mobilization of consumer groups that may be considered a political activity. This aspect is of particular interest for the following: Whereas a tourist's individual consumption decision is primarily outside of legal control due to private autonomy and independency of purchasing decisions (Coester, 2014), activities affecting collective purchase decisions may be subject to a legal evaluation.

This is particularly true as an ethical or political decision like boycotting may be considered positive from an ethical, moral, or political perspective but results in negative consequences for market actors that have been actively neglected. Again, not the favourable purchase decision toward a specific tourism offering constitutes a legally relevant question but the adverse purchase decision against one particular alternative tourism offering. This adverse purchase decision requires a legal justification, as the 'moral legitimacy' does not automatically result in legality. Considering the potential discrepancies in perceived legitimacy by activists and affected actors, combined with a greater trust in individual jurisdictions (Tyler et al., 2007; Tyler, 2011), creates a theoretical likelihood of court cases.

As political or ethical consumption is geared towards economically harming the interests of addressed actors, the latter may legally fight such activism based on commercial law frameworks, claiming that such activism harms their competitive position or represents an unfair commercial action. A competition law framework governs both areas.

By nature, legal aspects are evaluated based on individual legislation, which may differ from country to country. They ultimately only cover boycotts where boycotting and boycotted actors are located within the same country, which results in the sole applicability to domestic tourism. This paper evaluates the aspects from a European Union perspective to provide a perspective that at least partly considers international tourism activities. Since the E.U. law applies not only to its member states but also to associated countries like Switzerland, Norway and post-Brexit Great Britain (Hall, 2020) and allows legal protection also on a cross-country level, it is suitable to reflect on the legal situation in multiple countries without individual country-specific regulations. Including the associated countries, the E.U. jurisdiction, in one way or the other, applies to the vast majority of European countries, which collectively also represent the most significant tourism destination (World Tourism Organization [UNWTO], 2022).

Within competition law, all activities resulting in an adverse purchase decision are traditionally defined as boycotts or other restraints (Jones, 2010). As the latter is more closely linked to price-fixing mechanisms, the paper also uses the term 'boycott' to summarise all activism activities resulting in adverse purchase decisions. This also includes 'buycotts', resulting in boycotts of choices, allowing improved readability. The legal perspective of tourism boycotts shall collectively address the characteristics associated with activities impacting the adverse purchase decision. Such activities may be collective boycotting decisions or the call for boycotts that lead to a collective purchase decision.

The paper's primary purpose, apart from partly closing the gap in attention to legal aspects of tourism activism, is to create an awareness of the framework and parameters that legally steer political and legal activism. It shall also equip activists, businesses and destinations with conceptual legal knowledge about their rights and obligations.

2. Literature review

Boycotts are a common topic in tourism research originating from both ethical and political reasons (Henderson, 2003; Hudson, 2007; Lovelock, 2008; Seyfi & Hall, 2019a). In the context of research, focus areas include the economic impact of a potential boycott (Herrera & Hoagland, 2006), justifications (Shaheer et al., 2021a), and reasoning (Shaheer et al., 2018). Also, the communicative aspects of boycott calls have been frequently addressed in tourism literature (Seyfi & Hall, 2019b; Shaheer et al., 2021b; Yu et al., 2020). The role of media and social media in consumer activism in tourism has been considered crucial for success and mobilization (Yousaf et al., 2021; Zhai et al., 2020). Still, the typical research lines include motivations and behavioural intentions. (Yu et al., 2020). From the perspective of this paper, the role of (social) media is essential as it provides a steering capability in orchestrating boycott activities to create an impact (Copeland & Boulianne, 2020), which is crucial for the success of collective actions.

In contrast to that, legal aspects concerning ethical or political consumption in tourism barely get any attention in academia apart from a call to a binding legal framework fostering ethical consumption (Caton, 2014), references to legal aspects of state-induced boycott possibilities (Herrera & Hoagland, 2006) and case study type of examples (Thomas & Jose, 2021). Focusing on the competition consequences of ethical consumption, one area of focus is directed towards the relationship between ethical consumers and their legal links to travel agents in selling tourist products (Lovelock, 2008). The same is true when looking into legal research, as this deals extensively with boycotts in the varying national legal systems. But from a tourism perspective, boycotts have only been addressed in the context of industry or company actions unrelated to political or ethical consumption (Mantovani et al., 2018; Metz, 2019; Rodriguez & Murdy, 2006).

3. Setting the stage part 1 –Actors and their legal status

Within a tourism context, it is possible to boycott either a territorial entity, like a state or destination, or an economic entity, like a company or service provider. Such entities may not necessarily be of a business nature or aim to make profits. Nevertheless, both entities will experience negative economic consequences if they are the subjects of boycott activity. However, they can only legally challenge boycott activities if they enjoy a corresponding entitlement by the legal system in which they operate.

States as a territorial entities do not enjoy such protection apart from international agreements that are difficult to enforce (Ruys & Ryngaert, 2021) and hence may only fight boycotts on a political level (Pratt & Alizadeh, 2018). In contrast, economic entities, regardless if they are companies or individuals, enjoy legal protection within the jurisdiction in which they operate or via international agreements. The only universal agreement that addresses legal issues in tourism globally is the General Agreement on Trade Services (GATS). As GATS, according to Art. 1, manages governmental activities, it may be used only to legally challenge state sanctions, but not political or ethical boycott activities. Therefore, without other universal international agreements dealing with boycotts, legal protection may only be provided by the economic entity's jurisdiction. Vice versa, entities that initiate or execute a boycott may only do this if it is legal under the jurisdiction in which they operate.

As already indicated, the consumption decision by an individual is protected by private autonomy and corresponding freedom of action. In contrast, consumption decisions by companies or professional entities may constitute a competitive activity subject to competition law within the jurisdiction in which they operate. Likewise, any calls for boycotts by companies or professional entities are also subject to competition law. By nature, this logic cannot be applied per se to boycott calls by individuals or non-professional organizations as those are generally protected by the freedom of speech. This results in the requirement of carefully assessing the constitutional freedom rights of boycott callers with those of boycotted institutions (compare, e.g. Alexy, 2003; Zucca, 2008).

4. Setting the stage part 2 – International law framework

The international law frameworks relevant to this paper consist of two primary components: international or bilateral agreements that are legally binding to the signing parties and private international law, also referenced as the conflict of laws. Outside the European Union, the evaluation depends on the respective legal systems in conflict. This is particularly important in tourism environments, given the service nature of the product. In contrast to tourism services, a boycott call on specific goods is evaluated under the following logic: a boycott call needs to address a specific market to succeed. The originator of the boycott tends to be at least a market participant, as otherwise, the market would not be relevant due to the required proximity that represents a component of personal involvement (Hoffmann, 2013). The boycotted actor also participates in the same market. Hence, all three elements of the boycott are 'located' in the same market, which defines

the jurisdiction. Within a boycott call in tourism, the boycott caller also addresses a specific market, but the boycotted actor might not actively participate. For example, a call to boycott travelling to a particular destination addresses the source market due to personal and social proximity. Still, it harms tourism activities in the destination, without having a geographical proximity requirement (Shepherd, 2021). Given this geographic discrepancy and its impact on a market definition, it is not always possible that claims can be brought to court (United Brands v Commission, 1976). Even in cases where there is an extraterritorial connection, legal costs and prospective gains are negatively imbalanced (Van den Bergh, 2013). This so-called rational apathy provides some hints of reasoning for the fact that cross-country boycotts seldom find their way into supreme courtrooms. Whether it means cross-country boycott activities in tourism are seldomly disputed in general cannot be digested, as, e.g. dismissals by courts or competition authorities are not published. Additionally, court decisions only have to be issued if the public has an objective interest in publishing decisions (Federal Administration Court, 1997).

5. E.U. competition law as a legal framework – Preliminary remarks

Based on the difficulties mentioned above and the resulting rational apathy (Van den Bergh, 2013), boycott actions in tourism are only likely to lead to court cases if the boycotting actor and the boycotted actor fall under the same jurisdiction. This typically requires them to be active in a domestic market or markets governed by international agreements or unified jurisdictions. As already mentioned, the applicability of the GATS may be ruled out as a universal legal scheme. Looking for unified jurisdictions, one of the E.U. member states and the associated countries represent the planet's most significant unified legal space. E.U. law is not only directly binding in its member states by the treaties and regulations but also shapes individual countries' jurisdiction by the implementation requirement of directives. Such implementation may leave room for country-specific variation. Still, it must consider the unified internal market of the E.U. as well as the guiding ideas of the Directive and E.U. law-making, including E.U. court decisions (Horspool, & Humphreys, 2012).

Boycott actions initiated by companies or other private initiatives are governed under competition law in most jurisdictions, including E.U. member states and associated countries (Rogers III, 2009). This particular law sector can be separated into antitrust law and law on unfair practices. The E.U. legal framework is comprised of the antitrust law regulated by the TFEU and the Directive 2005/29/E.C. on unfair commercial practices. In contrast to the Treaty, which applies to the entire European Union, the Directive must be transferred into the member state's legal system. Hence, the actual utilization might be impacted by individual member states' legal traditions and political goals, despite the purpose of a fully harmonized E.U. regime on unfair practices (Djurovic, 2015).

In general, both antitrust law and the law on unfair practice form a unified competition law, and both areas might apply to the same case and evaluation. However, depending on the individual member state's legal system, antitrust law regulations generally overrule unfair practices law to ensure that the results of both rules do not differ (Köhler, 2005; Ulrich, 2005).

Within antitrust regulations, boycotts may be considered an abuse of market power. According to Art. 102 TFEU, an undertaking or group of undertakings enjoying a dominant market position commits an illegal action if it abuses this market power to undermine trade between member states or the internal market. To fulfil the requirements, a party active in boycotts must be an undertaking, according to Art—102 TFEU, and enjoy a dominant market position. Despite a lack of a clear definition of the term 'undertaking', it is generally accepted that any form of economic activity that serves neither pure self-support (e.g. consumer activities) nor public governmental duties constitutes an undertaking (O'Donoghue & Padilla, 2020).

A dominant market position is assumed either by a significant market share or a market position that results in insufficient competitive constraints (Akman, 2016). For the evaluation, the European Court of Justice (ECJ) requires an assessment of the 'relevant market' based on geography, time, and relevant products and services (Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities, 1973).

As laid out in Directive 2005/29/E.C., the law on unfair practices requires an unfair commercial practice that can only be executed by a 'trader' towards a consumer. According to Art. 2 of the Directive, a commercial practice is any practice linked with promoting, supplying, and selling products, including services. As the Directive does not specifically address the originator of the products and services, both do not have to relate to the sphere of the addressed trader. Within the same article, a 'trader' is everybody acting for purposes relating to their trade, business, craftsmanship, profession, or anybody representing a person or entity. Like in antitrust law, the expression 'trader' enjoys a broad meaning, incorporating any economic activity that is perceived as a possible contracting counterpart to a consumer (Howells et al., 2009; van Boom et al., 2014).

6. Methodology – Applying legal science within the tourism context

Considering that political and ethical consumption in tourism may be subject to a competition law evaluation, it is essential to digest whether a boycott actor is fulfilling the requirements of an undertaking or trader. Once this is determined, the next task is to evaluate the action to determine if it is an abuse of a dominant market position or an unfair practice. In order to relate to a tourism context, the evaluation follows a multiple case study logic for this paper. The methodology is based on the following considerations: first, working with cases is a predominant source for creating legal knowledge (Hutchinson & Duncan, 2012; Ulen, 2002), and second, such an analysis allows a diverse evaluation of the legal context (Stake, 2006). A possible replication logic (Xiao & Smith, 2006) is another advantage that calls for the specific methodology setup applied. To present a variety of potential and probably most common legal scenarios, six cases of ethical and political boycotts have been selected to represent typical combinations of boycotting actors in a tourism context and provide a categorization (compare table 1).

Table 1
Boycott actor combination matrix

Boycott caller	Boycott actor	Boycotted actors	Case study	Source
Interest group	Various	Company	Southern Baptist Convention vs Disney	MacDonald & McDonald (2014)
Interest group	Various	Destination	Motorcyclist interest group vs Tyrol	Kriegelstein (2020)
Celebrities	Various	Company	Various celebrities vs Brunei-owned hotels	Holson & Rueb (2019)
Celebrities	Various	Destination	Celebrities vs Myanmar	Hudson (2007)
-	Company	Destination	Cruise companies vs Faroe Islands	Sea Shepherd UK (2019)
-	Company	Event / Company	French hoteliers vs Olympic Committee	Ledsom (2019)

The selected scenarios represent hypothetical cases. They have not been brought to court and shall only serve as illustrative examples for the categories. Working with hypothetical legal scenarios is a common approach in legal science to identify the systematic consistency of a set of regulations and to assess the likelihood of court decisions that might occur within the respective jurisdiction (Hurley, 1990). This approach assists in limiting legal uncertainties for companies and other participants in the legal arena alike, as it allows a prediction of a possible outcome in court. Within the selected cases in this paper, the legal evaluation follows a doctrinal research approach in conceptualizing and interpreting the framework for boycotting (Hutchinson, 2015).

The case "Southern Baptist Convention vs. Disney" addresses existing legal systems governed under U.S. jurisdiction. Though it is not an E.U. example, it sheds some light on specific issues in legal evaluation in

general. Pending cultural and historical background and subsequent constitutional assessment will be treated differently, affecting the likelihood of filing lawsuits. This case would hardly appear in a U.S. court, given 'freedom of religion' plays a more significant role under U.S. jurisdiction than in most E.U. countries (Barnett, 2013; Lepsius, 2006; Zucca, 2013). A European religious group would have to expect a higher likelihood of legal responses, which, together with the more substantial acceptance of secular legitimacy (Tyler et al., 2007; Tyler, 2011) may prohibit starting a similar boycott in the first place.

"Celebrities vs. Myanmar" lacks a clear governing jurisdiction described above. However, as both represent typical boycotting scenarios in a tourism context, they will be evaluated under European law for this analysis. Consequently, the evaluation tries to deliver results for similar cases in an E.U. context. The other remaining issues are geographically located in the European Union and subject to European law anyway.

Furthermore, evaluating all cases according to a continental European civil law system is proposed, as this allows a systematic analysis that evaluates principles and applies them to instances (Cooper, 1950). However, this approach considers the precedents from the European Court of Justice (ECJ) decisions that represent a standard law-induced scheme (Derlén & Lindholm, 2015). A traditional Savigny canon approach will be followed for the interpretation, utilizing the text as a primary source, expanded by the logic and systematic regulation method and the historical context (Savigny, 1840). This canon will be executed with a teleological interpretation and analysis (Riesenhuber, 2021), covering, in particular, the functional elements of competition law (Immenga, 2006). This approach oriented towards the goals of specific legislation also serves as a bridging element for countries with a common law tradition (Maduro, 2007; McLeod, 2004).

7. Interpretation of results and discussion

7.1. Boycott actors and callers as economic entities

As described earlier, each actor or caller of a boycott must either act as a trader or undertaking to qualify under the requirements of E.U. competition law. Given the reasoning similarities, trader and undertaking can be conceptually summarized as economic entities. For the scenarios in which companies become active in boycotting destinations or events and other companies, the definition of an economic entity is inevitable. Furthermore, cruise companies and hoteliers are economically active in the tourism market.

Celebrities are also definable as economic entities, given they capitalize on their fame and generate their income to a significant degree from their status and media presence (Hackley & Hackley, 2015; Jin et al., 2019; Kim et al., 2019; Kowalczyk & Pounders, 2016). Though they do not necessarily get active in tourism per se, this does not change the status, as the context of economic activity is irrelevant for the general evaluation (Höfner and Elser v Macrotron, 1991). Based on the same principle, interest groups are also considered economic entities when they offer a service or engage in an activity that can be classified as economically relevant despite the possible generous nature of the particular endeavour. This, in particular, is true for public interest groups but may be debatable for so-called hobby-related interest groups that bundle the interest of multiple individuals (e.g. the motorcyclist interest group in the proposed scenario) or religious groups (Binderkrantz et al., 2020).

A hobby-related interest group may be considered an economic entity if the activity is not only focused on organizing the hobby activities among the members internally but reveals relevance for other parties outside the group. For example, bundling member demand to achieve a pricing discount affects specific markets. In this respect, it can also be considered a direct economic activity in the broadest sense of the European Court of Justice (Höfner and Elser v Macrotron, 1991). On the other hand, a hobby-related interest group is only considered non-economic when its activity is exclusively social and hence non-economical (Poucet and Pistre v AGF and Cancava, 1993).

This evaluation is, in principle, applicable to religious groups as they have a similar focus and primarily serve the interest of their members (Binderkrantz et al., 2020). Likewise, if their activity is focused solely on their members' social or religious issues, they will not be classified as an economic entity. However, according to the accounting principles of the Southern Baptist Convention in the case study (MacDonald & McDonald, 2014), this religious group, in particular, may be considered an economic entity (Heier, 2016). To summarize all stated, it is fair to assume that virtually all interest groups that surpass a specific size may fall under the European competition law regulations as they, at least in parts, have an economic focus.

7.2. Boycotted actors as market participants

Following the previous review, the evaluation of boycotted actors as participants in the respective markets is in principle. In this respect, companies are commercially active in the markets affected by boycotts. However, it remains in question if the same applies to destinations. As no clear definition of a destination is available, it depends on the perspective used when evaluating it (Cooper & Hall, 2019). Concerning this paper, it is clear that pure consideration of a geographic location is not fruitful. For the proposed context, a destination is a blend of various elements relevant for tourists as they travel to a destination to pursue an intended touristic experience (Buhalis, 2000). This already indicates market participation as, depending on tourist perceptions and destination offerings, destinations enter into competition with each other (Dwyer & Kim, 2003). Buhalis (2000) already claimed that there is no definite market for a specific destination as the view of the market depends on the origin or perception of the tourists as a demanding party. Hence, a destination, regardless of size and appearance, is a market participant from a competition law perspective. This is particularly important as destinations might lack self-awareness concerning their legal status in competition law and focus more on competition law aspects within the destination (Rodriguez & Murdy, 2006).

7.3. Boycott as abuse of dominant market position

Boycotts have the most significant effect if initiated from a superior or dominating position. As a result, all boycotts' legality depends on whether or not this dominating position enables the boycotting actor to abuse it. This calls for two fundamental questions:

- (1) Does the boycotting party enjoy a dominant position in the market, where the boycott addresses the boycotted actor?
- (2) If the boycotting party is enjoying a dominant position, is it using it in an abusive way to the disadvantage of the boycotted actor?

The evaluation of the dominant market position, first of all, requires a definition of the affected market. The concerned market is called the "relevant market" in the E.U. context. As such, the market enjoys relevance by geography, offering products or services, and temporal reference. The purpose of this market separation is to focus on the possibility of an actor committing an abuse of its dominant position. However, such a separation by default is difficult to achieve, as it needs to consider possible product or service substitutions. In addition, markets evolve, and definitions have to adjust to that (Kauper, 1997).

In respect to "French hoteliers vs. Olympic committee", "Cruise companies vs. Faroe Islands" and "Motorcyclist interest group vs Tyrol" the separation of the market is comparably simple since the boycott is affecting either a geographically and temporal definable tourism business interaction on a destination or accommodation level. All actors do participate in the same markets respectively. For "Southern Baptist Convention vs Disney" and boycott calls by celebrities, the definition of the market is less clear, as both religious groups and celebrities do not directly interfere in the respective tourism markets.

In its ruling in the case "Michelin vs Commission", the European Court of Justice clarified that it is not required that all actors participate in the same market for the abuse of a dominant market position. It is

sufficient that the dominant actor can abuse its dominance (*Michelin v Commission*, 1983). In this respect, the dominated market is evaluated by the outcome of the abusive behaviour. Transferring this to celebrities and religious organizations requires them to be capable of imposing a dominant behaviour onto the specified tourism markets.

Thus, it needs to be determined whether or not both groups can dominate consumers' behaviour in the respective markets. From a legal perspective, this may only result from the behaviour of the boycotters or boycott callers that impacts and endangers effective competition in a market (*United Brands v Commission*, 05.04.1976).

Looking at the most precise market of the Tyrolean motorcyclists boycott, it is already concluded both the interest groups and the affected hotels do participate in the same market in which the motorcyclists are direct customers. The market dominance would have been confirmed if the motorcyclist interest group's action was endangering effective market competition. Considering that a large portion of the hoteliers or accommodation providers in Tyrol has specialized in motorcycle tourism (Kriegelstein, 2020), a specific boycott may lead to the destruction of this particular market, which is more than endangering. Likewise, the boycott call of the French hoteliers could threaten the market as the represented hotels represent a significant proportion of the French hotel market (*Union des Métiers et des Industries de l'hôtellerie [UMIH]*, 2021a, 2021b). Regarding the cruise companies boycotting the Faroe Islands, it depends on the balance the port calls of the boycotting cruise liners represent. It is difficult to indicate whether they are dominant, as it remains in question whether they can be replaced by other cruise liners wanting to operate to the Faroe Islands. In contrast to the pre-Covid Dubrovnik or Venice, where there was an excessive amount of cruise liners (Dodds & Butler, 2019), indicating a strong willingness of competitors to fill potential gaps, this seems not to be the case for the Faroe Islands. Hence, it is concluded that the boycott decision impacts the market and is potentially endangering the destination's competitiveness (Sea Shepherd UK, 2019).

Again, evaluating whether celebrities or religions dominate the tourism markets that shall be boycotted is difficult. First, both groups do not directly engage in the tourism market. Instead, they intend to influence their members' or followers' travel and purchase decisions. Hence, it must be possible for celebrities or religious groups as interest groups to "dominate" the behavioural elements of the decision process of its members. Such dominance could be achieved by promoting a role model regarding a desirable lifestyle or as an impactful negative endorsement. The impact of celebrity endorsements has been analyzed extensively, and it has been concluded that endorsements have an effect if there is a consistency between celebrity and destination or company image (Johns et al., 2015; Yang, 2018; Yen & Teng, 2015). Whether this indicates, dominance is debatable.

There is a clear link between being a role model and this model aspect being effectively transported through media. Whether through traditional media channels (Yang, 2018) or social media, that further increases the ability to influence choices, including refusing options (Mehraliyev et al., 2021). According to research already undertaken, the possibility of celebrities dominating decisions as role models show that their impact is either marginal or not recognizable (Furedi, 2010; Martin & Bush, 2000). Martin and Bush's (2000) research indicates that family members can create a more significant impact than celebrities. Family values and interactions may drive this.

This again draws attention to the possibility for religious groups to dominate decisions. Globalization and, in particular, global consumer culture and the increase in wealth mitigate the importance of religion for purchase decisions. In addition, there is no significant difference based on religious beliefs (Nwankwo et al., 2014). However, Nwankwo et al. (2014) indicate a correlation between education and the emotional reasoning of purchase decisions, which may lead to a different conclusion in specific cases.

Additionally, the decline of religion as an essential facet in life in general, only countered by the rise of the more fundamentalist evangelicals (Ineichen, 2019), leads to a conclusion that religious groups most likely do not dominate the decisions of their members. This particularly applies to consumption decisions. Considering

this, religion, due to its emotional importance, may substantially impact orthodox or fundamentalist members as their values are more aligned to religious beliefs (Novis Deutsch & Rubin, 2019; Novis-Deutsch, 2020). From a competition perspective, however, this should not have a noticeable impact as fundamentalist groups are still a minority in societies that speak against a dominating position in general.

To conclude, a dominant market position is only reachable by dominating the competitive environment by being present in the same market or in markets that depend tremendously on the goodwill of people belonging to a specific interest group. Celebrities and interest groups covering a diverse variety of members are not in a position to dominate a market by influencing purchase or boycott decisions.

In scenarios where a dominant position is present, like in the two company cases or the case of a Tyrolean motorcyclist interest group, it is crucial to analyze whether the boycott or boycott call constitutes an abuse of the dominant market position. Abuse is assumed if it negatively impacts the competition in a specific market (Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities, 1973). As such, this may become applicable to all business decisions. Hence, the question is whether or not a business decision is justified (United Brands v Commission, 1976). A factual justification for a boycott can be denied, as there is no objective reasoning for the companies or the motorcyclist interest group that forces them into a boycott.

In contrast, a boycott may be justified if it serves a higher purpose that is superior to the reasoning for the European Competition law or protects the competition itself. However, the latter can be ruled out as the justification for the boycott is not to preserve competition but to either save the self-related interests of hoteliers (Ledsom, 2019) and motorcyclists (Kriegelstein, 2020) or enforce a higher moral good by condemning whale hunting (Sea Shepherd UK, 2019).

Both reasonings do not justify boycotts under E.U. law. A boycott remains illegal even if it is intended to protect a higher good. The unlawful behaviour of a market participant does not grant a competitor the right to initiate a boycott or call for one (Kuhnert & Augustine, 2013). The reasoning for European competition law is the protection of competition and the market (Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s., 2013). With this in mind, the only "moral" justification may be the protection of competition itself.

In light of the above, it can be concluded that the boycotts initiated by the French hoteliers, cruise companies and the motorcyclist interest group have to be considered illegal as all actors abuse their dominant market position to the disadvantage of the boycotted actors. On the other hand, celebrity boycott calls and the Southern Baptist Convention do not conflict with Art. 102 TFEU, as the boycott callers, do not enjoy a dominant market position.

7.4. Boycott as unfair commercial practice

Due to the unified competition law system in Europe (Köhler, 2005; Ulrich, 2005), those boycotts are already illegal, according to Art. 102 TFEU are as well to be seen as an unfair commercial practice. However, in the context of this paper, they will be disregarded in this section as the results of the legal evaluation will be identical. Therefore, it remains of interest whether the boycott calls of celebrities and religious groups have to be deemed an unfair commercial practice without the direct market dominance of the boycott callers.

As indicated, both groupings may be considered economic entities that participate in a competitive market and engage in a commercial activity. However, the Directive on unfair commercial practice does not protect the boycotted actors as economic entities but the unbiased purchase decision of consumers as laid out in Art. 5 Directive 2005/29/E.C. Furthermore, the Directive does not provide a mechanism for boycotted actors to claim protection. Such mechanisms are subject to individual member states' implementations (Djurovic, 2015). In general, it can be assumed that most members included provisions that allow competitors or other

market participants to fight unfair commercial practices directly and claim damages if needed (Cristofaro, 2015; Jung, 2016; Nišević, 2021).

Despite the absence of any type of force or aggressive behaviour in calling for a boycott according to Art. 8 and 9 of the Directive. Therefore, the evaluation must consider the general clause of Art. 5. According to this, a commercial practice is considered unfair if it contradicts professional diligence. Furthermore, it is either distorting or likely to distort the economic behaviour of a consumer. In the context of this paper, the consumer is the actual tourist, and travel or the purchase of tourism products is considered an economic behaviour. Both definitions follow Art. 2 of the Directive. However, it needs to be noted that the Directive does not cover business travel activities as the consumer needs to act outside of their professional life.

Art. 2 section (h) defines professional diligence as a business behaviour that meets the standards of care of consumer interests, honest market behaviour, and good faith in general. In the boycott cases, it can easily be concluded that calling for a boycott is against professional diligence. It may be directed towards protecting consumers from a morally questionable purchase decision. However, it is not honest market behaviour as it intends to limit and restrict market access and for that reason is also working against consumer's interests (Djurovic, 2015).

The question of the likelihood of distortion is more challenging to answer. Conceptually an actual distortion achieved by boycott calls of celebrities and interest groups can be denied as research indicates the limited impact on fundamental decisions in general (Furedi, 2010; Nwankwo et al., 2014). However, it cannot be ruled that a distortion appears likely under specific conditions. From an individual recipient's perspective, such instances may be the accepted role model of a particular celebrity or religious group. As a result, all calls for a boycott constitute an unfair commercial practice according to European competition law.

7.5. Freedom of speech and freedom of religion as constitutional rights

Deeming all calls for boycotts by individuals or interest groups illegal appears unreasonable, considering such a result would conflict with the constitutional rights of the boycott callers. Such rights may be derived from the freedom of speech as well as the freedom of religion. With the increasing European legal integration, the topic of whether E.U. law supersedes member states' constitutions is becoming more and more pressing and sheds some light on the issue of constitutionalizing within the European Union (Gonzalez Cadenas, 2020; Kreuder-Sonnen, 2018). As constitutional rights in this research are only affected via Directive 2005/29/E.C., the conflict is less relevant. The Directive was implemented into the individual member states' law, which allows an evaluation according to constitutional principles (Engle, 2009).

Such an evaluation restricts the law's applicability on unfair commercial practice rules, where the authorities would limit a party's constitutional rights. Focusing on celebrities, there is an apparent conflict between Art. 5 of the Directive 2005/29/E.C. and the freedom of speech. A celebrity, as laid out previously, in most cases, is also acting commercially when making statements that could lead to illegal competition behaviour in various cases. Taking the boycott call as an example, the evaluation purely based on competition law aspects restricts the possibility of celebrities speaking out to fight injustice or social challenges. This right is protected by freedom of speech. For this reason, a call for a boycott may be acceptable in light of the freedom of speech if the caller is acting without economic interest and action. According to leading court cases (marktintern, 1982; Mietboycott, 1987), this can be ruled out in the following instances:

- (1) Addressing cultural, economic, political, and social aspects of the general public without having a genuine economic interest
- (2) Solely using methods of intellectual debate and does not apply economic force
- (3) Behaving appropriately towards the intended goal, inappropriately affecting the boycotted party's rights.

The same freedom of speech exceptions might also apply to boycott cases initiated by religious groups, as the law on unfair commercial practices might inappropriately restrict the freedom of religion. However, the constitutional protection of religion leads to a different result. Whereas freedom of speech is a direct link to the sphere outside of celebrities via communication, the freedom of religion protects the internal sphere of religious believers and institutions (Abdelkader, 2017; Spijkerboer, 2018; Tokrri, 2020). Prohibiting calling for a boycott of a commercial company does not infringe on this internal sphere, as all believers and religious groups still may execute and live their religion without interference. Individual tourism and travel decisions are exempt from this protection apart from, for example, pilgrimage trips.

8. Conclusion and limitations

Acknowledging that individuals perform most boycott activities, the concerted action or dominant positions of individuals drive a boycott's success (John & Klein, 2003). In this respect, any legal question is guided by market-shaping capabilities resulting from an individual competitive position deemed superior or concerted actions. The latter requires a specific call to action. Therefore, actors affected by boycotts must address the particular actor that drives the boycott impact, either the collective power of demanders or the communicative power of a boycott caller.

To sum up, actual boycott activities by companies or demanders acting in concert, regardless if applied on companies or destinations, constitute an anti-competitive action according to Art. 102 TFEU will therefore be deemed illegal if a boycott is executed from a dominant market position. In contrast to that, the calling for a boycott is only conflicting with Art. 102 TFEU if the call is addressed to a selected group of customers from a dominating market position. However, even without a dominant position, such activities almost always constitute an unfair commercial practice. This also applies to boycotts initiated with a good cause or a justifying moral reason.

The only justification acceptable from an E.U. law perspective is protecting the competition itself or consumer interests within Europe (Bradford et al., 2019). The latter is purely restricted to the economic activity of the consumers and hence part of the competitive environment. Ideological, moral, or other socially desirable justifications do not play a role in European competition law. Such considerations may only find their way into the legal review if related to constitutional freedoms.

Due to the 'national' nature of constitutional freedoms and the lack of a European constitution, constitutional considerations only apply nationally. Subsequently, this paper only applies constitutional concerns to the law on unfair commercial practices. Abuse of a dominant market position because it is governed directly by E.U. law is never to be justified by constitutional concerns. This also leads to an essential limitation of this paper's findings: it may only claim legal relevance in the geographical area specifically addressed. Individual member states' evaluations might and will differ significantly from the proposed generic principles.

An aspect where it becomes apparent is the evaluation of the various constitutional freedoms as a restriction of the law on unfair commercial practices. Each state's constitution is based on traditions and heritage (Abdelkader, 2017). While it might be possible to operationalize the applicability of the freedom of speech across countries, it is rather challenging to do the same for the freedom of religion as its scope depends on the country's history (Abdelkader, 2017; Spijkerboer, 2018; Tokrri, 2020). The only general statement that can be proposed is that the more the law on unfair commercial practices limits the possibilities of boycotts AND restricts constitutional rights, the more likely it becomes that a boycott is declared legal from a constitutional perspective. But even then, illegality remains the norm and legality the exception to protect the constitutionally protected rights of economic activities by the boycotted actors.

9. Practical implications

Tourism-related companies and destinations that face a boycott and a subsequent economic impact are in a preferable position to fight such a boycott in court, despite the limitations of rational apathy (Van den Bergh, 2013). They do not have to prove the boycott is illegal and illegitimate. It is the responsibility of the boycotter or boycott caller to prove that neither a dominant market position exists nor that the boycott is based on economic and financial interests. Even if executed in good faith, boycotters and callers can only justify their actions by constitutional rights.

In reverse, boycotters must be clear about the negative consequences of an illegal boycott. Being morally right does not protect them from the effects of being legally wrong. Moreover, direct boycott activities may only be legal if executed on a small scale outside a dominant market position, which instantly limits such an action's economic and political effectiveness.

Boycott callers ultimately need to ensure that the freedom of speech or other constitutional rights back all statements directing into a boycott. Additionally, the caller must remain outside of direct competition in the market where the boycott will occur. Otherwise, the constitutional justification diminishes as the action is purely evaluated according to the competitive position, resulting in boycotts becoming illegal virtually.

Overall, the legal considerations shall also facilitate activism ethically, morally and legally appropriate. However, inappropriate activism may result in adverse legal consequences that may also be perceived as removing legitimacy and potentially steer rejection (Shepherd, 2021) and move ethical and political discussions in the opposite direction.

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