STUDY TO SUPPORT THE FITNESS CHECK OF EU CONSUMER AND MARKETING LAW

Interim results – protection against unfair commercial practices

European Consumer Summit 2016, 17.10.2016

Workshop 2- Increasing fairness of commercial practices and of contract terms

For the European Commission – Directorate-General Justice and Consumers (DG JUST)

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Study methodology

- Desk research and legal analysis in 28 MS
- Stakeholder interviews in 28 MS
- Business interviews in 28 MS
- Survey of qualified entities
- Econometric analysis & compliance cost analysis
- Cross-cutting analysis
- Other sources that feed into the study
  - Consumer survey (June 2016, 23.500 responses)
  - Commission's online public consultation (May – September 2016, 436 responses)

Study conclusions so far /1

- Principle-based approach of the UCPD generally considered effective
  - Future-proof
  - Yet some concerns about legal uncertainty for consumers and businesses, as well as need for enforcement authorities and courts to 'circumstantiate' the principle-based rules
- Practical benefits of black list (no *transactional decision* test)
  - Authorities: alleviates burden of proof, adds to 'enforcement toolbox'. Traders: Increased legal certainty, easier compliance check. Consumers: (Some) increased clarity on banned practices.
  - But: Limitations in its applications (e.g. some practices less relevant, issues regarding the wording)

Study conclusions so far /2

- Minimum harmonisation clause for financial services and immovable property in Article 3(9) UCPD
  - Not of relevance in all MS (update 2011 Study)
  - Country research shows no unequivocal position on whether keep or remove Art. 3(9) (compare 2013 UCPD Report)
- Misleading environmental claims in energy sector
  - Experiences seem to differ widely between MS
  - Practical problems when challenging green claims
  - There is not yet experience with the application of the revised 2016 UCPD Guidance

Study conclusions so far /3

- 'Average consumer' benchmark (*transactional decision* test)
  - Applied differently within and throughout MS
- 'Vulnerable consumer' benchmark
  - In many MS not considered very relevant in practice
  - Used for a variety of groups in broader context, e.g. over-indebted/poor consumers
  - Little indication of recognition of new specific categories of vulnerable consumers
- Yet, *modulated* 'average consumer' benchmark often used, i.e. 'average consumer' or 'target group' (creates flexibility in application)

Study conclusions so far /4

- National law provisions concerning contractual consequences linked to the use of unfair commercial practices:
  - General private law doctrines: either in the background (e.g. Germany); or specific positive cross-reference (e.g. France) or specific negative cross-reference (e.g. Estonia)
  - Specific contractual remedies (e.g. Belgium)
- Not much case law in this regard

Stakeholder views /1

- Broad consensus in the answers to the full questionnaire of the consultation that the right to be protected against misleading or aggressive commercial practices is beneficial to consumers. At least 90% of public authorities, consumer associations, businesses and business associations were of this opinion
- Impact of EU consumer and marketing law on the protection of consumers against unfair commercial practices is seen as very or rather positive by 87% of respondents
- A majority of *businesses* responding to questionnaire were in favour of expanding targeted protections for B2B relations; however, a majority of *business associations* were not

Stakeholder views /2

Business stakeholders commented in submissions to the consultation that current protections against UCPs were sufficient, but should be better enforced:

- Consistent enforcement between Member States is essential
- Definitions of "average consumer" and "vulnerable consumer" are generally well understood/applied, should be preserved
- Self- and co-regulation should be encouraged further; and
- Individual or contractual remedies linked to UCPs would be unnecessary

Stakeholder views /3

Business stakeholders were divided in their submissions to the consultation on whether greater protections should be provided in B2B relations:

- While some did not support any extension of B2C rules to B2B relations, others were in favour of or open to targeted extensions where intervention would be well-supported by evidence
- Some were in favour of greater protections under the MCAD, including: full harmonisation, a general prohibition of misleading/comparative marketing, a UCPD-style blacklist, and a private enforcement right for affected businesses
- Note however that submissions (position papers) were only received from business associations and large companies

Stakeholder views /4

Consumer organisations and *public authorities* saw in their submissions to consultation many opportunities to improve protection under the UCPD:

- The concepts of "average consumer" & "vulnerable consumer" should be adapted to new research into consumer behaviour
- The development of online platforms, price comparison tools, and the sharing economy requires [on top of the clarifications laid down by the new UCPD Guidance] further actions/steps on questions of information, liability and the definitions of "consumer" and "trader"
- Consumers need access to contract law remedies for contracts concluded on the basis of UCPs, and
- Implementation of the UCPD should place more emphasis on consistent enforcement and consumer redress

Initial thoughts on the way forward /1

- Blacklist:
  - Review practices on the UCPD black list and include new practices that are most harmful
  - Removal of any vague terms
  - Possibly introduce a mechanism for regular review
- 'Average consumer' benchmark: Should threshold be lowered in light of behavioural research results?
- Develop contractual consequences linked to the use of UCPs at MS or at EU level?

Initial thoughts on the way forward /2

- No pressing need for B2B black list
- If at all, a possible black list could be very short and focus on a limited number of practices (e.g. misleading directory companies)
- Slightly different general prohibitions of misleading advertising (MCAD – minimum harmonisation) / commercial practices (UCPD – full harmmonisation)
  - Streamlining?
  - Extension of Art. 6 and 7 UCPD to B2B (= integration)?