



Study for the Fitness Check of EU consumer and marketing law

Executive Summary

Study context and objectives

This evaluation study was conducted by Civic Consulting in cooperation with KU Leuven CCM in the framework of the Fitness Check of EU consumer and marketing law. It assesses the effectiveness, efficiency, coherence, relevance and EU added value of the following five EU consumer and marketing law directives in line with market and technology developments: Unfair Commercial Practices Directive (UCPD), Price Indication Directive (PID), Misleading and Comparative Advertising Directive (MCAD), Unfair Contract Terms Directive (UCTD), and Injunctions Directive (ID). The interplay with the Consumer Rights Directive, and existing sector-specific consumer protection rules in passenger transport, electronic communications, energy and consumer financial services, as well as with the relevant rules in the E Commerce Directive and Services Directive is also considered.

The study is based on country analyses by legal experts in all 28 Member States (including a review of academic literature and evaluation of case law); a broad scale interview process at EU and Member State level, consisting of a total of 255 interviews with key stakeholder organisations (mostly ministries, enforcement bodies, consumer organisations, business associations) and an additional 282 business interviews in all 28 Member States; an open public consultation with a total of 436 responses; a survey of qualified entities under the Injunctions Directive which received 29 answers from 21 Member States; and a comprehensive analysis of costs and benefits of the legislation. The fieldwork and the analysis for the study were concluded in February 2017.

Main conclusions

The study concludes that the legislative framework subject to this evaluation is considered to be broadly fit for purpose. The UCPD and the UCTD, most notably with the principle-based approach regarding unfair commercial practices and unfair contract terms (in combination with the black list of the UCPD and the indicative list of the UCTD), have been successful in creating a comprehensive EU legislative framework in their respective areas providing a well-working 'safety net' to address new commercial practices, contract terms and market developments in general. These two key consumer directives have significantly increased the level of consumer protection in those Member States (the large majority) in which a less comprehensive or even no such framework existed before. For most Member States therefore the directives provided a clear added value. Stakeholders in a significant number of Member States confirm that overall the principle-based approach of the MCAD is also effective for protection of businesses, with only a limited number of business-to-business (B2B) misleading practices reportedly being cause for concern. The PID is considered to be by and large effective and to provide added value in terms of better (unit) price information. Finally, the ID is an important enforcement instrument, and has contributed much to the enforcement of EU consumer law at the national level, even though this evaluation confirms that more needs to be done to ensure that consumer law is enforced effectively in the Member States.

In light of technological innovations in the online environment, and the increase of EU cross-border business-to-consumer (B2C) trade, the relevance and the added value of EU action in this area has become even more pronounced.

During the last decade, consumer trust has increased across the EU, in spite of the financial crisis. In Eurobarometer surveys between 2006 and 2014, the proportion of consumers who agree with the statement that in general, retailers and service providers respect the rules and regulations of consumer law increased by 9 percentage points from 62% to 71%. The last decade also saw a significant increase in B2C cross-border shopping in the EU. Cross-border shopping over the internet has more than doubled since 2006, from 6% to 16% in 2014. In the interviews conducted for this study with key stakeholder organisations in all Member States, they often expressed the view that the directives have had a positive impact on cross-border trade.

Consumer research through market studies and Eurobarometers, complaints data, and the responses of qualified entities to the survey conducted for this study consistently show that consumer law infringements are a continuing problem. In other words, the legal framework subject to this evaluation has not translated into a significantly lower prevalence of unfair commercial practices and unfair contract terms. This lack of improvement is likely due to insufficient enforcement but also several factors related to the development of markets and society, with innovation in technologies and practices not only bringing benefits to consumers, but also creating new vulnerabilities which can be exploited by unscrupulous traders. While costs of businesses for complying with the directives under review seem to be proportionate, this evaluation has concluded that there are certain problems regarding coherence (and, as a result, regarding efficiency) in terms of overlaps and inconsistencies between rules.

These and other key findings of this study regarding the 99 specific evaluation questions are presented in detail below, structured according to the five evaluation criteria of effectiveness, efficiency, coherence, relevance and EU added value.

Effectiveness

Key evaluation questions regarding this criterion focus on the effectiveness of the principle-based approach of the UCPD, MCAD and UCTD, as well as of the black list of unfair commercial practices (UCPD) and the indicative list of terms which may be regarded as unfair (UCTD). Questions regarding the effectiveness of the ID focus on the use of the injunction procedure across the EU and related trends, as well as the obstacles to the effective use of the procedure. Findings of the evaluation include:

Unfair commercial practices and marketing: The principle-based approach of the UCPD allows for the combating of unfair practices that do not fall under any of the black listed items, and is ‘future-proof’ in that it allows national authorities and courts to adapt their assessments to the rapid evolution of new products, services and selling methods. It would seem that so far CJEU jurisprudence, the recently updated UCPD Guidance document and the exchange of ideas amongst national enforcement authorities within the CPC Network contribute to a common understanding of the principle-based UCPD across the EU, limiting disparities in its application and related impacts. In addition, the black list of the UCPD is generally considered to generate practical and significant benefits. For practices on the list, there is no need to apply the transactional decision test in order to take action, which facilitates enforcement and may avoid costly and time-consuming litigation. There are however limitations in the application of the black list, namely, some of the blacklisted practices are considered to be irrelevant or incidental in practice; in several countries it is reported that many blacklisted practices are difficult to apply as they are formulated in a way which still requires an assessment in concreto of the unfairness of the behaviour of the traders. The country research also identified a call from various stakeholders to add a number of commercial practices that are considered to be problematic to the black list. The

benchmark of the average consumer is considered to allow in practice a significant degree of flexibility in its application. In contrast, the specific provision on vulnerable consumers is considered to be of limited relevance in practice. Regarding the PID, although the available evidence indicates that consumers continue to encounter problems with unit price indication, they are reported to be aware about the unit selling price or at least stakeholders consider that there are no major problems in this respect. The research conducted for this evaluation did not provide evidence that the divergences between national laws due to the minimum harmonisation character and the use of regulatory options under the PID have a significant effect on cross-border trade. Stakeholders in a significant number of Member States also confirm that overall the principle-based approach of the MCAD is effective. However, several country reports stress the absence of application experience of the MCAD, and others emphasise that in particular small enterprises are affected by misleading advertisements. While in theory disparities in the application of the principle-based approach of the MCAD and the minimum harmonisation character of provisions on misleading advertising could have negative effects on cross-border trade, the research for this study identified no significant problems in this respect.

Contract conclusion and performance: With regards to the UCTD, there is a principle-based approach in that the UCTD applies to all trade sectors and that all contracts not positively excluded are covered. This broad scope of application has certainly contributed to the effectiveness of the Directive. The indicative list of terms which may be regarded as unfair is considered to have significant practical benefits in terms of consumer protection and legal certainty. It has been transposed in various ways in the different Member States, the Directive being a minimum harmonisation instrument. Most countries have some form of black (automatically unfair) or grey (presumed unfair) list, in some cases even both. The black or grey lists were reported to provide more legal certainty than a mere indicative list. Specifically, they facilitate the judicial task, provide more predictability as to the result of the procedure, and have thus helped to eradicate certain unfair terms considered particularly dangerous for consumers (e.g. arbitration clauses). While the transparency principle of the UCTD is considered an important precondition for a high level of consumer protection, its full effectiveness is currently not reached due to a lack of clarity regarding the consequences of a breach of this principle. The sanction that a term is non-binding has also contributed to achieving a high level of consumer protection. However, in the context of collective proceedings, the limited effect of judgments and decisions declaring a term unfair limits the effectiveness of the UCTD.

Injunctions: In the five year period since June 2011, qualified entities responding to the survey conducted for this study (29 qualified entities from 21 MS) initiated a total of 5 763 injunction actions. The number of injunction actions that concerned national infringements appears to have been relatively stable since 2008, while the number of cross-border injunction actions had been insignificant from the outset and has remained low. All available evidence confirms that while the injunction procedure is by and large considered being effective in several countries where its use is common, obstacles to the effective use of the injunction procedure have been identified in the Member States, where they apply to different extents. The available evidence also confirms that the impact of the ID in terms of its aim to facilitate cross-border injunction procedures can still be considered minimal. The complexity of cross-border injunction procedures mainly stems from the application of foreign law. This clearly has a limiting effect on cross-border injunction litigation. Court fees and lawyers' fees for injunction procedures brought by consumer organisations and public bodies have been named by stakeholders as key obstacles to the effectiveness of the injunction procedure generally, including domestically. Other key obstacles are insufficiently deterrent effects of injunctions, in particular the limitation of the effect of the injunction decision to the future rather than remedial effects and the lack of legal certainty, relating mostly to uncertainty about the correct interpretation of national legislation and to the discretion of courts or authority that reduce the predictability of the outcome of litigation.

Efficiency

The evaluation questions regarding efficiency concern both the costs and benefits of the minimum and fully harmonised consumer rules for consumers and businesses.

To put these costs and benefits in perspective, the study first considers the related *benefits for society*:

From an economic perspective, the behaviour of traders towards consumers with respect to *communication, advertising, and marketing* is likely to have a large impact on the functioning of consumer markets, since the influence on consumers' information and decision-making in such markets is very significant. Consumer policy therefore has the potential to positively interact with market forces in order to foster competition and improve both allocative and productive efficiency. Reasons for taking policy measures at the EU level are twofold: first, because cross-border trade within the EU is significant enough to be vulnerable to inconsistent policy choices by Member States, and second, traders' behaviour is not bound by Member States' borders, and thus it directly impacts cross-border trade.

Regarding *contract conclusion and performance*, transaction costs are real costs, and thus, reducing the costs of preparing the terms of contracts with the help of standard contract terms is a socially desirable endeavour. However, if there is no individual negotiation, the drafter will possess an informational advantage over the content and the use of standard terms, thus involving asymmetries of information between contracting parties. Additionally, it is rational for the consumer to remain ignorant of standard clauses as they anyhow cannot be changed, a strategy that can be anticipated by the drafter, who can then select the level of quality most beneficial to themselves. The contracting process involving standard terms therefore does not by itself result in the level of quality in the bundle of rights and obligations of the parties that will be desirable in a societal perspective, i.e. there is a market failure as to the content of standard terms. Legislators in the EU with the UCTD (as implemented in the Member States) and third countries with their national legislation have therefore introduced minimum standards of quality in standard terms through several means (such as black or grey lists of terms, general notions and tests of unfairness).

Regarding *injunctions*, it is well-known from an economic perspective that decentralised, dispersed, individual action for enforcing consumer protection legislation often results in significant under-deterrence of infringements. First, infringement of a given rule may not be detected by the affected consumers; second, consumers may rationally decide to forego legal actions and the ensuing remedies, considering the potentially negative balance of costs and benefits of such legal action; third, individual consumers tend to choose a level of legal action that is sub-optimal in a societal perspective, as they do not consider in their decision whether to take legal action that legal action also provides benefits for society. The injunction action, if successful, serves to enforce the substantive rules of consumer law and has a positive impact on collective consumer interests.

Benefits for consumers: In line with these societal benefits, consumers benefit from protection against unfair commercial practices provided by the UCPD mainly through an improved functioning of the market in terms of outcomes for consumers, by deterring harmful practices and increasing transparency and reducing influences that potentially distort economic decision making, thereby increasing consumer welfare. Consumers may also benefit from a passing on of the reduction of traders' costs due to reductions in compliance costs linked to legal disparity between Member States.

Very few consumer policy measures have the potential to influence the economic welfare of consumers

to such an extent and with such a wide scope of application as the UCTD. The obligations for traders concerning transparency and fairness of standard contract terms and the possibility to declare the nullity of an unfair contract term address the mentioned market failure and thereby increase consumer welfare.

The actual benefits for consumers from the consumer and marketing law framework depend on the combination of the adequacy of the substantive rules with the level of enforcement. The most obvious and relevant benefit for consumers from the Injunction Directive is enhanced enforcement of consumer law. However, the deficiencies of the ID, which limit its effectiveness especially in a cross-border context, reduce these potential benefits to a significant degree.

Costs for consumers: Consumers may also incur costs related to the consumer and marketing law framework in place. Costs may accrue due to the insufficient functioning of the framework, i.e. through the unfair commercial practices or unfair contract terms of traders which are not prevented by the legal framework. In addition, the variety of terms in standard contracts may be reduced due to the legislative framework, and such a reduction is not necessarily welfare-enhancing for all groups of consumers. Finally, traders may pass on their costs of compliance with the consumer and marketing law framework in the form of higher prices, although this study finds that even if they would be fully passed on, the effect on prices would likely be minor, based on the estimated business costs in this respect (see below).

Benefits for traders: Traders operating cross-border reap the most tangible benefits related to a consumer and marketing law framework which is to a significant extent harmonised across Member States, since their costs are likely to decrease as a result of a reduction in the level of legal fragmentation across Member States. In our business interviews, between 63% and 46% of the businesses that sell their products/services in other EU countries indicated that they benefited at least slightly from the EU legislative framework subject to the Fitness Check. However, even traders who do not operate cross-border may experience benefits from a more stable and consistent legal framework as a result of it being Europeanised. Also, a source of potential benefits for traders from concentrated litigation under injunctive action proceedings is the avoidance of possibly contradictory outcomes under individual enforcement actions, and thus, enhanced legal certainty.

Costs for traders: To explore the costs for traders, business interviews covering all Member States were conducted in five sectors.¹ On the basis of the data collected, the annual costs incurred by businesses in the EU28 for checking that their advertising/marketing and standard contract terms still comply with national legislation and adjusting business practices if needed were estimated at EUR 278 million in the five sectors reviewed (best estimate). These costs appear very proportionate compared to the approximate annual turnover of EUR 1 180 billion in these five sectors, especially taking into account the importance of these rules for the functioning of consumer markets. The estimated overall costs of regular compliance checks amount to approximately 0.024 percent of turnover. Moreover, these estimates refer to the overall compliance costs for businesses related to the national legal framework on marketing and standard contract terms, and therefore are caused by the combined effects of EU and Member State legislation, including relevant sector-specific legislation.

¹ Large household appliances, electronic and ICT products, gas and electricity services, telecommunication services, and pre-packaged food and detergents. For detailed results, see Section 6.2 (Efficiency) and Part 4 of the report.

Coherence

Key evaluation questions focused on the coherence of the Directives under review with other horizontal and vertical EU legislation. Findings of the evaluation include:

Unfair commercial practices and marketing: In the majority of Member States, the interplay between the horizontal UCPD and the sector-specific rules is generally considered to provide for a clear and coherent legal framework and the combination of the UCPD and the sector-specific rules seems to work fairly well in practice. However, in the vast majority of the Member States, different authorities are responsible for the enforcement of the horizontal consumer law and the sector-specific rules and it appears that this causes some problems regarding the application of the general consumer legislation in the regulated sectors. The country research also indicates that there is also room for reducing overlaps in information requirements between the UCPD and the sector specific rules. Regarding the interplay between UCPD information requirements and the information requirements in the horizontal consumer law instruments, overall it would seem that there is a need for streamlining the overlapping information requirements under the different directives. Taking into account the insights of behavioural research, there is also a need for a critical analysis of what type of information with what kind of specificity should be given at what stage of the marketing and contracting process.

Contract conclusion and performance: The legal framework as provided by the UCTD and sectoral EU legislation is also considered to be rather clear and coherent. Businesses and enforcement bodies are considered to be generally aware of the combined application of the two sets of rules in the regulated sectors. However the institutional arrangements for enforcement sometimes affect the use of the UCTD in the regulated sectors.

Injunctions: Qualified entities have criticised the limited scope of application of the ID and suggested to adjust it to the scope of application of the CPC Regulation or to extend it to consumer law in general. The ID is complemented by provisions in other directives (UCPD, UCTD and CRD) that require Member States to introduce injunction procedures at the domestic level for enforcing their specific substantive law provisions. These provisions in various directives are not identical, and their differences do not seem to be based on any clear rationale.

Relevance

Key evaluation questions regarding this criterion address a possible extension of the UCPD to B2B transactions or revision/extension of the MCAD and the need and potential to develop contractual consequences linked to the use of unfair commercial practices. They also consider the appropriateness of the UCTD's system of protection for B2B transactions and the appropriate scope of B2B protection against unfair contract terms. The evaluation questions also address the need and potential for the application of the UCPD and the UCTD to consumer-to-business (C2B) relations. Finally, evaluation questions regarding the relevance of the ID focus on the benefits of further harmonisation of the injunction procedure across the EU and of any further non-legislative or legislative measures to increase the use of injunction procedures. Findings of the evaluation include:

Unfair commercial practices and marketing: A number of Member States currently apply the UCPD also to B2B relations. From several countries it is reported that, from a theoretical perspective, an extension of the UCPD to B2B transactions or a revision/extension of the MCAD could bring benefits for cross-border trade. However, the general perception among the interviewed stakeholders is that there is no need for a fully-fledged extension of the UCPD to B2B transactions whilst a revision/extension of the MCAD with a view to ensuring more extensive protection for traders and competitors could be considered. As regards the need to explicitly extend the scope of the UCPD so as to cover consumer

to-business (C2B) relations, views diverge considerably. The number of cases involving consumer-to-business relations is considered to be limited and it is recognised that under certain circumstances, the UCPD already applies to C2B relations.

Contract conclusion and performance: While a number of Member States already have some form of protection in place to protect businesses against unfair contract terms, often in their general contract law provisions, stakeholder opinions on this issue are divided, as reported in the public consultation in particular. The case to apply control of unfair contract terms is the least controversial for SMEs, in particular micro-enterprises. The similarity and negligible difference between small businesses (especially micro-enterprises) and consumers in terms of knowledge, experience and negotiating power has been stressed in several country reports and studies. In all Member States, it seems in principle possible to rely on general contract law provisions to seek remedies in case of an unfair commercial practice. However they are directly linked to breaches of the UCPD only in some countries. The country research indicates that the question of whether or not there is a need to develop contractual consequences linked to the use of unfair practices is highly controversial, and stakeholders are divided in their opinion in this respect.

Regarding injunctions, at the domestic level, stakeholders have confirmed the relevance of EU legislation in the Member States where injunction procedures have for the first time been introduced or where they have been improved by the adoption of the ID. The low numbers of cross-border injunctions in spite of an increasing number of cross-border complaints indicate, however, that current needs are not sufficiently addressed, and that existing obstacles to the use of the injunction procedure in a cross-border perspective diminish its relevance in practice. Co-operation and exchange of information between qualified entities have proven to be a useful – although infrequent – ‘third way’ in addressing cross-border infringements. Non-legislative measures by the EU Commission, in particular the financing of education measures, have been helpful but have not reached all qualified entities yet.

EU added value

Key evaluation questions concern the additional value resulting from the EU intervention, compared to what could be achieved by Member States themselves. Findings of the evaluation include:

The UCPD and UCTD have significantly increased the level of consumer protection in the large majority of Member States in which less comprehensive or no such framework existed. This is also, but less so, the case regarding the MCAD, which seems to have improved protection of businesses in some countries, but not others.

With regard to effective enforcement of consumer law, the ID is not the only instrument, but it forms a necessary part of a bundle of instruments that improve the consumer’s position vis-à-vis traders, including the CPC Network, the Rome I Regulation and the Brussels I Regulation. At the same time, the ID does not negatively affect honest traders as it applies to infringements of consumer laws established by other directives and regulations. Thus, while not creating obstacles to honest traders, it has increased their potential to trade on the markets of other Member States, as consumers feel more confident to enter into transactions with them.

All directives subject to this study are considered to have contributed to removing obstacles to the Internal Market. While obstacles to the Internal Market remain, there is no doubt that both the maximum harmonised rules and the minimum harmonised rules, in conjunction with the harmonising effect of CJEU case law, have reduced these obstacles at least to some extent, also reducing the resulting costs for businesses to adjust to legislative diversity when offering their products and services cross-border.

Recommendations

Based on the overall findings of the evaluation, the study provides the following specific recommendations for improving the EU legislative framework concerning unfair commercial practices and marketing, contract conclusion and performance, and injunctions. Suggestions for refining the concepts of the "average" and "vulnerable consumer", as well as options for codification of the current rules, are also elaborated.

Unfair commercial practices and marketing

- *Regroup and streamline the marketing/pre-contractual information requirements* currently included in different directives. The number of requirements in Art. 7(4) UCPD could be reduced, in light of the overlap with Art. 5/6 CRD regulating the pre-contractual stage. To tackle the problem of information overload, it is suggested to draw on behavioural research in determining the information required at each stage of the transaction;
- *Integrate unit price indication requirements in other instrument.* As the PID only remains relevant with regard to the unit price, this requirement could be integrated into the CRD or into both the CRD and the UCPD. Finally, a broader option for codification could be considered (see below);
- *Distribute UCPD guidance document widely to business associations and enforcement authorities and update in regular intervals;*
- *Review practices on UCPD black list and introduce a mechanism for updating.* The country research identified several commercial practices currently not covered by the black list that some stakeholders considered to be problematic. It is recommended to conduct an open, transparent and inclusive consultation process on possible additions, and to include a mechanism in a recast UCPD for updating the black list (e.g. delegated/implementing acts). It is also recommended that a notification requirement be introduced whereby the Commission and other Member States are notified of the emergence of new unfair practices;
- *Extend the protection of the UCPD to consumers selling products,* as consumers are typically in the weaker position in these transactions. This could be achieved by broadening the definition of "commercial practice" to all practices "directly connected with the promotion, sale or supply of a product to or from consumers". As a result, commercial practices by traders who purchase goods from consumers would be covered by the UCPD;
- *Address needs regarding contractual consequences of unfair practices.* Options could be to continue the legislative status quo; to replace the current negative cross-reference in Article 3(2) and Recital 9 UCPD with a positive cross-reference to national "contract law" and "individual actions"; or for the UCPD to provide for a harmonised set of remedies that are available to consumers who have been harmed by an unfair commercial practice. It is recommended to review all three options in the context of the subsequent impact assessment;
- *Improve protection against misleading practices in B2B relations.* Several options for further aligning the legal regimes for B2B and B2C transactions were identified and described in the report. It is recommended to at least align the MCAD's general prohibition of misleading advertising with the UCPD's general prohibitions of misleading practices, and to complement the recast MCAD with a short list of common and harmful misleading practices in B2B relations. As regards the lack of effective enforcement framework in B2B relations, especially in the cross-border context, various solutions are possible, ranging from creating a network of public enforcement authorities in the field of business protection to encouraging/strengthening voluntary enforcement mechanisms at the national and/or EU level.

Contract conclusion and performance

- *Clarify the scope of application of the UCTD.* Although the existing CJEU case law has largely clarified most of the interpretation issues regarding the UCTD identified in this study, textual amendment could avoid confusion and make it clear that the UCTD applies to all contracts between “traders” and “consumers”, that the UCTD covers contracts where the consumer has not paid a price, that terms also in unilateral acts and terms and notices affecting the rights/obligations of the consumer are indeed subject to control by the Directive. It is also recommended that the exclusion of individually negotiated term be removed. Lastly, guidance should be provided on the scope of the exclusion of price and main subject matter;
- *Extend the control of unfair terms to small businesses* given the negligible difference between small businesses and consumers in terms of knowledge, experience and negotiating power;
- *Provide guidance on transparency.* Guidance or textual amendment could set out CJEU case law on transparency. It should be made clear that a lack of transparency can lead to the unfairness of a term, and that enforcement bodies can act against terms that are not transparent;
- *Clarify the general test of unfairness* (the ‘open norm’), which generates a degree of uncertainty and is interpreted differently in the MS;
- *Introduce a limited, non-exclusive black list of unfair terms* at the EU level. Examples of terms which could be blacklisted and of terms for which this is not recommended are provided in the report;
- *Provide guidance with commentary and examples* in relation to each paragraph (at least for specific sectors) in order to improve the effectiveness of the UCTD indicative list. Such guidance could build on CJEU jurisprudence, as well as national best practices;
- *Clarify the role of national courts*, as they must take up an active role to ensure the effectiveness of the UCTD. There is a need for codification at EU level of the task of the national courts, or at least for guidance on the exact role of the national courts and the principles that can be inferred from CJEU case law. Further education and training of judges is also necessary;
- *Clarify consequences of a term being found unfair for the contract term and for the contract as a whole* through textual amendment or guidance, based on clarifications already provided by the case law of the CJEU and addressing the issues that remain unclear;
- *Include summary T&Cs in consumer contracts*, with “key terms” to be presented separately and clearly, e.g. in a short summary on the first page of the T&Cs following a structure that is similar for all contracts of this product or service category.

Injunctions

- *Improve coherence of the various injunction procedures* required under EU law for domestic and cross-border injunctions. The specific provisions of other consumer law directives should be abolished or integrated into the ID. Where cross-border injunctions require specific rules, they could be regulated in a separate chapter within the ID;
- *Extend the scope of application of the Injunctions Directive*, the preferable solution being a coherent scope of application of both the ID and the CPC Regulation. Both instruments should cover consumer law in general and could include a non-exclusive list of legislation that falls into that category;
- *Remove obstacles that limit use and effectiveness of injunction procedures.* The general and crucial obstacles are litigation costs, insufficiently deterrent effects – in particular the limitation of the injunctions decision to the future rather than providing consumers with remedies for the breach – and the lack of legal certainty, with additional specific obstacles relating to cross-border injunctions. These could be addressed via the abolition or modification of the loser-pays principle; the introduction of further remedies to remove the consequences of the infringement;

the introduction of effects that go beyond the parties of the injunction procedure; and the introduction of clear mandatory rules at the level of the ID. Such mandatory rules should relate to the publication of the decision and of corrective statements as well as the way in which sanctions are imposed in the case of the continuation of an infringement after the injunction decision;

- *Introduce modifications to “normal” civil procedural law.* Where injunction procedures are dealt with by civil courts, the procedural rules should reflect the public interest character of such proceedings. This could, in particular, relate to the burden of proof. Also, some Member States have provided for a certain specialisation of courts in injunction procedures, aiming at uniform application of the law and greater legal certainty. Best practices in this respect could be identified and provided in guidance to Member States;
- *Improve the use of injunctions cross-border.* In cases of litigation in foreign courts, cross-border litigation in domestic courts, and co-operation between qualified entities, which are three valid strategies for cross-border litigation;
- *Continue non-legislative measures.* Co-operation and exchange of information between qualified entities have proven to be useful in addressing cross-border infringements. It is recommended to continue and expand the training measures to a larger number of qualified entities.

Concepts of "average consumers" and "vulnerable consumer"

- *Clarify the "average consumer" concept,* and make it clear that insights from behavioural studies and available empirical data can be taken into account to determine what is ‘reasonably’ circumspect and ‘reasonably’ observant. It could also be emphasised that the benchmark of the average consumer has to be a dynamic benchmark, reflecting new insights from behavioural sciences;
- *Streamline the "vulnerable consumer" concept* by deleting Art. 5(3) UCPD and including it in Article 5(2) UCPD. Certain unfair practices may reach a larger group of consumers, but are actually directed to a specific group of consumers which may be vulnerable. Such practices should be assessed from the perspective of the average member of that group of consumers. As it may be difficult to prove that a practice is ‘directed’ to a specific group, it should be added as an alternative criterion that a practice is likely to affect a specific group of consumers. It should be made clear in an amended recital that vulnerability can be influenced by external factors and may be temporary.

Codification

- *Options for codification.* There are gaps, overlaps and inconsistencies in the current EU legal framework for consumer protection, including especially overlapping information requirements. *Codification is one possibility to solve the identified problems.* Options include maintaining the existing directives, a ‘minimal’ horizontal instrument, a comprehensive horizontal B2C instrument, or a comprehensive horizontal B2C and B2B instrument. The incorporation of (parts of) other directives could be envisaged, although it is recommended to keep a revised ID as a separate instrument;
- *Such a horizontal instrument does not necessarily imply that all provisions must use the same method of harmonisation.* It appears from the country research for this evaluation, and from earlier consultations and studies, that stakeholders continue to disagree on the desired level of harmonisation. Especially for the provisions on unfair contract terms, the link with national contract law underlines the need to maintain minimum harmonisation in this area.