

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

*Interim results – protection against unfair  
contractual terms*

*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)

*By Civic Consulting in collaboration with KU Leuven CCM*

**CIVIC**  
CONSULTING

# Study conclusions so far /1

- The UCTD is generally considered to be effective in establishing a high level of consumer protection. In particular:
  - The principle based approach allows for flexibility and adaptation to new market situations
  - The recent CJEU case-law on the unfairness test and the price/main subject-matter exclusions as well as on the active role of national judges has contributed to its effectiveness
  - Important improvements in consumer protection are reported in specific sectors (e.g. mortgage/ consumer credit)

# Study conclusions so far /2

- A lack of effectiveness is mainly blamed on national factors, such as:
  - Lack of resources available to (some) national enforcement authorities
  - Lack of awareness by (some) national courts

# Study conclusions so far /3

- But there are elements in the UCTD that impair its full effectiveness:
  - Scope and sanction of transparency requirement is unclear
  - Open norm is interpreted differently
  - Black and grey lists are considered to be more effective than indicative lists
  - The exact role of national courts is not sufficiently clear;
  - The exact consequences of unfairness ('non binding') are not sufficiently clear
  - Effective means of (collective) redress are considered to be lacking

# Stakeholder views /1

- In their responses to the full questionnaire of the consultation, all consumer associations and a large majority (more than 80%) of all other respondent categories agreed that the right to be protected against unfair clauses in the small print is beneficial to consumers
- Almost all consumer associations agree that consumer protection against unfair contract terms should be strengthened by introducing a black list of terms that are always prohibited. 76% of public authorities also agree, while 65% of business associations disagree

# Stakeholder views /2

- In the answers to full questionnaire of the public consultation a majority of *business associations* (51%) were *against* a total or partial extension of scope to B2B contracts, however, a majority of *businesses* were *in favour* of it (57%)
- In the position papers submitted, business stakeholders indicated that:
  - It is neither possible nor recommended to require a uniform model (such as a simplified, icon-based model) for T&Cs
  - Clarifications are best issued in the form of guidance
  - A black-list would be unnecessary or unworkable in practice

# Stakeholder views /3

*Consumer organisations* indicated in their submissions to the consultation that the UCTD provides important consumer protection, but should be improved:

- A black and/or grey list of unfair terms would provide greater clarity for consumers and traders
- The application of the Directive should be extended to terms on the adequacy of the price and the main subject-matter (to which also some, but not all public authorities agreed)
- However, any revision of the UCTD should not include full harmonisation (a view also supported by public authorities)
- Terms and conditions should be simplified and shortened, but not in a way that would sacrifice quality

# Initial thoughts on the possible way forward /1

- Scope of application: Textual amendment
  - All consumer contracts / certain notices
  - Extension to negotiated terms
  - Guidance on scope of exclusion of core terms
- Unfairness test: Guidance / textual amendment
  - Spelling out key CJEU guidance, especially from *Aziz*

# Initial thoughts on the possible way forward /2

- Transparency: guidance / textual amendment
  - Also oral contracts
  - Spelling out key CJEU guidance, especially *RWE*, *Kasler*; defining 'plain, intelligible language'
  - Providing clear sanction for intransparent terms and clarifying link with unfairness test
  - Making Article 7 measures possible to prevent continued use of terms that are merely intransparent

# Initial thoughts on the possible way forward /3

- 'Non binding': Guidance/textual amendment
  - Codifying the duty to examine unfairness *ex officio*
  - Guidance on the exact role of national courts
  - Guidance on the prohibition to revise unfair clauses/ (im)possibility to rely on default rules
- Indicative list:
  - Examples in relation to each paragraph
  - Limited EU black and / or grey list
- Legal training