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Report of the Fitness Check on

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive');

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers;

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees;

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests;

Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

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Acronyms and abbreviations

B2B	Business-to-business
B2C	Business-to-consumer
C2B	Consumer-to-business
C2C	Consumer-to-consumer
CJEU	Court of Justice of the European Union
CRD	Consumer Rights Directive 2011/83/EU
CPC	Consumer Protection Cooperation
CSGD	Consumer Sales and Guarantees Directive 1999/44/EC
DG	Directorate-General
DG JUST	Directorate-General for Justice and Consumers
EC	European Commission
EU	European Union
FC report	Fitness Check report
IA	Impact assessment
ICT	Information and communication technology
ID	Injunctions Directive 2009/22/EC
MCAD	Misleading and Comparative Advertising Directive 2006/114/EC
PID	Price Indication Directive 98/6/EC
SMEs	Small and medium-sized enterprises
SWD	Staff working document
T&Cs	Terms and conditions (standard contract terms)
UCPD	Unfair Commercial Practices Directive 2005/29/EC
UCTD	Unfair Contract Terms Directive 93/13/EEC

1. Introduction

This Fitness Check covers the following key EU consumer and marketing law directives:

- Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (the Unfair Commercial Practices Directive or '**UCPD**');
- Directive 93/13/EEC on unfair terms in consumer contracts (the Unfair Contract Terms Directive or '**UCTD**');
- Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers (the Price Indication Directive or '**PID**');
- Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (the Sales and Guarantees Directive or '**CSGD**');
- Directive 2009/22/EC on injunctions for the protection of consumers' interests (the Injunctions Directive or '**ID**');
- Directive 2006/114/EC concerning misleading and comparative advertising (the Misleading and Comparative Advertising Directive or '**MCAD'**);

The UCPD, UCTD, PID, CGD and MCAD lay down substantive consumer protection and marketing rules that apply to the entire economy rather than specific sectors i.e. they are 'horizontal' (cross-cutting) directives. The only piece of horizontal EU consumer protection legislation not included in this Fitness Check is the Consumer Rights Directive 2011/83/EU (CRD). The CRD is covered by a specific evaluation procedure, as set out in its Article 30, which requires the Commission to report on the Directive's application to the European Parliament and the Council. The Fitness Check and the CRD evaluation ran in parallel; this Fitness Check report also analyses consistency with the CRD on consumer information requirements, which is one area where there are overlaps with the Directives covered by this Fitness Check. The Fitness Check and CRD evaluation results are being published in parallel and there will be a single follow-up strategy for both the Fitness Check and the CRD evaluation.

Besides the formal reporting requirement under the CRD, another reason why it was deemed more appropriate to present a separate evaluation of the CRD was the very different timing for the adoption of the various directives concerned. Each of the Directives covered by this Fitness Check has been in application for at least 10 years (including the Injunctions Directive, whose current 2009 version is in fact a codification of the original 1998 Directive). By contrast, the CRD has been in application for less than 3 years (since June 2014 — or even less in Member States where transposition was delayed). This limited implementation experience was therefore considered too short to assess its fitness in a similar way as for the Directives under assessment.

The ID distinguishes itself from the rest of the Directives covered by this Fitness Check in that it is a procedural instrument for enforcing the substantive rules laid down in some of the other Directives and in other EU consumer law instruments. The ID was included in the Fitness Check to strengthen the enforcement dimension of the evaluation.

This Fitness Check evaluates whether the Directives remain fit for purpose on the basis of **five criteria: effectiveness, efficiency, coherence, relevance** and **EU added value**. It also aims to identify excessive regulatory burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time. Finally, it determines whether there is a need for further action at EU level to improve the Directives' implementation and application or update their provisions.

These general EU consumer and marketing law directives are complemented by **sector-specific consumer protection rules** in areas such as timeshare and holiday services[1], package travel[2], passenger transport, electronic communications, energy and consumer financial services. These sector-specific EU consumer rules complement the requirements of the Directives covered by this Fitness Check by, for example, laying down additional consumer information requirements and rules on the amendment and termination of contracts. Although this Fitness Check does not cover the sector-specific rules as such, it does analyse under the 'coherence' criterion the interplay of the Directives with sector-specific EU consumer rules in the areas of passenger transport, electronic communications, energy and consumer financial services.

The Fitness Check also analysed, to an extent, the coherence with other horizontal EU legislation on retail commerce, such as the e-Commerce Directive 2000/31/EC and the Services Directive 2006/123/EC, as these contain consumer information requirements. The Fitness Check also evaluated the six Directives in the broader context of EU policies intended to achieve effective enforcement of consumer rights under EU law, such as Regulation (EC) No 2006/2004 on consumer protection cooperation (CPC Regulation)[3].

The Fitness Check did not deal with existing and future instruments in the area of protection of personal data[4], EU private international law rules or cross-border enforcement of court decisions[5].

2. Background

2.1. Description of the Directives covered by this Fitness Check

The body of substantive EU law (the UCTD, PID, CSGD, UCPD, MCAD) and procedural law (the ID) under analysis was adopted at EU level between 1993 and 2009. The legislation in question forms part of a wider set of regulatory instruments meant to: (i) assist its correct enforcement (particularly the CPC Regulation No 2006/2004, adopted in October 2004); and (ii) enhance the possibilities of redress for consumers who are victims of breaches of the legislation (see in particular Directive 2013/11/EU on alternative dispute resolution and Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, both adopted in May 2013). This legislation has to be also seen in close connection with the

[1] The interplay between Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts and general EU consumer legislation has been analysed in a separate report on the application of Directive 2008/122/EC, COM COM(2015) 644 final of 16.12.2015, available at: http://ec.europa.eu/justice/consumer-marketing/files/timeshare_report_2015.pdf .

[2] The current Council Directive 90/314/EEC on package travel, package holidays and package tours has been revised and will be replaced from 1 July 2018 by Directive 2015/2302 on package travel and linked travel arrangements. The Fitness Check therefore did not analyse its interplay with the six Directives under assessment.

[3] Regulation (EC) No 2006/2004 on consumer protection cooperation (CPC Regulation) is currently being reviewed under Commission proposal for a new CPC Regulation (COM(2016)283 final); for further information: http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/index_en.htm.

[4] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data; Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Directive on privacy and electronic communications) and, from 25 May 2018, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the General Data Protection Regulation) (GDPR)).

[5] Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I); Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast); European Small Claims Procedure (Regulation (EC) No 861/2007), European order for payment procedure (Regulation (EC) No 1896/2006). The Fitness Check looks to some extent at the impact of the above-mentioned rules on the effectiveness of the injunctions procedure.

Consumer Rights Directive which: (i) has further harmonised transparency requirements for both online and offline transactions; (ii) introduced specific transparency requirements for digital content; and (iii) further harmonised a number of key contractual aspects related to sale and services contracts, as well as contracts for the provision of digital content and public utilities.

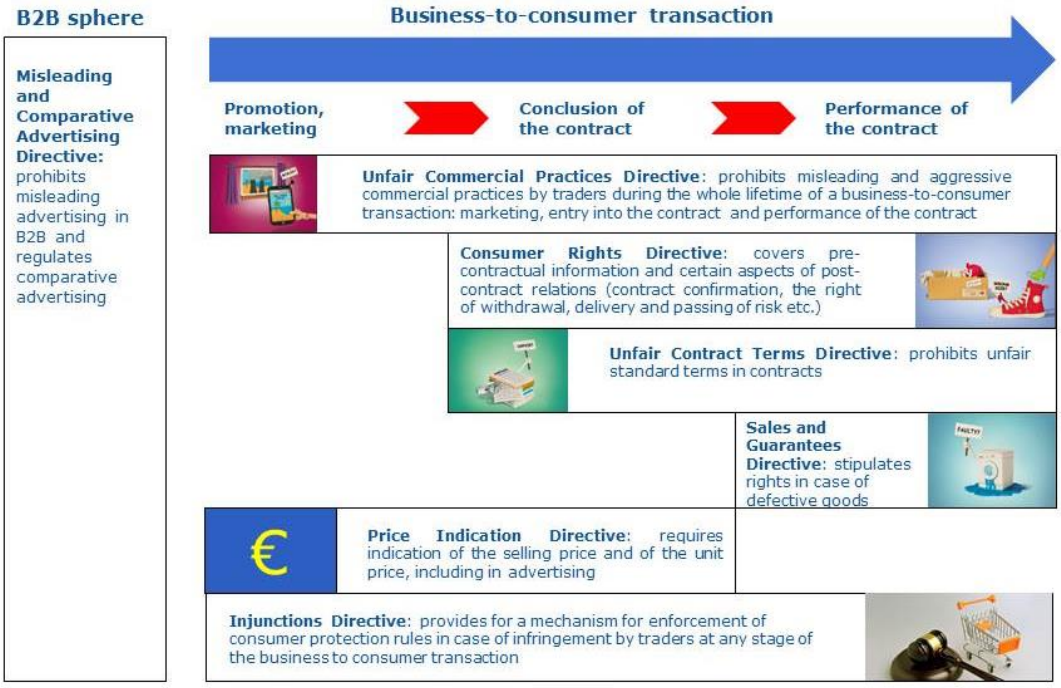
The Directives covered by this Fitness Check protect the consumer throughout the business-to-consumer (B2C) transaction. The MCAD mainly protects traders against unfair business-to-business (B2B) marketing practices. They apply to transactions taking place both online and offline and to both domestic and cross-border transactions. The UCPD, UCTD and MCAD are 'principle-based' instruments, i.e. they set out criteria against which the trader's behaviour is to be assessed on a case-by-case basis. The principle-based approach is backed up, in the case of the UCPD, by a list of commercial practices that are always prohibited and in the case of the UCTD, by an 'indicative and non-exhaustive' list of unfair contract terms.

The PID and CSGD are more prescriptive by nature. The PID requires traders to indicate specific information — the selling price and price per unit — while the CSGD provides general criteria for assessing whether a good is in conformity with what was marketed and presented by the seller at the time of its purchase and prescribes specific consumer remedies in the event of lack of conformity.

The ID is a procedural law instrument facilitating the enforcement of some of the Directives under analysis here and some other EU consumer law instruments.

The following diagram (Figure 1) illustrates the scope of the Directives covered by the Fitness Check (as well as the Consumer Rights Directive) and how they complement one another.

Figure 1. Workflow of the transaction



The **UCPD** protects consumers against practices by businesses which are contrary to requirements of professional diligence and which may affect consumer behaviour. Examples of such practices include misleading and aggressive commercial practices. The Directive applies to all commercial practices before, during or after the transaction, including in the online environment, and to all products, including digital products. The Directive provides for full harmonisation of the respective rules across the EU, with the exception of rules on

financial services and immovable property. The Directive protects consumers against unfair commercial practices of traders by:

- providing, in Annex I, a blacklist of 31 specific commercial practices which are prohibited in all circumstances;
- prohibiting commercial practices which are considered as misleading or aggressive;
- prohibiting unfair commercial practices that are contrary to the requirements of professional diligence.

In order to qualify as misleading, aggressive or contrary to the requirements of professional diligence, a commercial practice must cause or be likely to cause an average consumer to take a transactional decision that he/she would not have taken otherwise. This is to be assessed on a case-by-case basis by the competent national bodies.

The UCPD requires traders to provide consumers with information that they need to take an informed transactional decision. In addition, it provides a specific list of information requirements for the 'invitation to purchase'.

The UCPD requires Member States to ensure that there are means available to combat unfair commercial practices so as to enforce compliance with its provisions. In particular, the Directive specifically requires that people or organisations have the possibility to take legal action (i.e. court action) against the commercial practice or to bring the case before an administrative authority that is either competent to make a decision on complaints or to initiate legal proceedings.

The **UCTD** protects consumers against the use by traders of standard (not individually negotiated) contract terms which, contrary to the requirement of good faith, create a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Unfair terms are not binding on the consumer. The Directive applies to both online and offline environments, and to all products, including digital ones. It contains an 'indicative and non-exhaustive list' of standard terms that may be considered as unfair. It is a minimum harmonisation instrument and Member States can lay down stricter consumer protection rules in their national legislation. Many Member States have used this possibility by, for example, introducing 'blacklists' of contract terms considered unfair in all circumstances.

The UCTD requires Member States to ensure that there are means available to prevent the continued use of unfair contract terms. The Directive specifically requires that people or organisations must be able to take action before courts or before an administrative authority to obtain a decision as to whether the contract terms are unfair so that the court or authority can apply appropriate and effective means to prevent the continued use of such unfair terms. The Directive does not, however, harmonise the details of how people and organisations can go about taking such action.

The **PID** deals with the indication of the selling price and the price per unit of measurement of products offered by traders to consumers. The aim is to improve consumer information and make it easier to compare prices. The PID is a minimum harmonisation directive which also includes important regulatory options that many Member States have used in their national implementation.

The **CSGD** lays down rules on the conformity of a good with the contract and the respective remedies, and also sets some requirements on commercial guarantees. It applies to the sale of tangible goods, both new and second-hand, regardless of the sales channel. It is a minimum harmonisation instrument allowing Member States to provide for more stringent consumer protection measures. Several Member States have used this possibility by, for example, introducing more favourable rules for consumers on the duration of the legal guarantee period

(the period laid down in the Directive is 2 years) or an extended period for reversal of the burden of proof (beyond the 6 months provided for in the Directive).

The **ID** provides an important tool for both public and private enforcement of key EU consumer law through collective action. The Directive requires Member States to have in their national legal order a procedure for stopping infringements where the collective interests of consumers protected by EU consumer law are harmed. The pieces of EU consumer legislation covered by such procedures are listed in Annex I to the Directive and include the UCPD, the CSGD, the UCTD and the Consumer Rights Directive. Injunctions can be brought by what are called ‘qualified entities’; depending on the Member State, ‘qualified entities’ can be in particular organisations or/and independent public bodies. For example, a consumer organisation launches a court action to stop a trader using an unfair standard contract term in its contracts with consumers; a Consumer Ombudsman requests that the court prohibits a misleading advertisement used by a trader on its website. Another objective of the Directive is to make it easier to use injunctions in a cross-border context.

The **MCAD** applies to all business-to-business (B2B) advertising and provides a minimum legal standard of protection across the EU against misleading B2B advertising. It also lays down uniform rules on comparative advertising that apply in both B2B and B2C areas. These rules are aimed at ensuring that comparative advertising compares ‘like with like’, is objective, does not denigrate or discredit other companies’ trademarks and does not create confusion among traders.

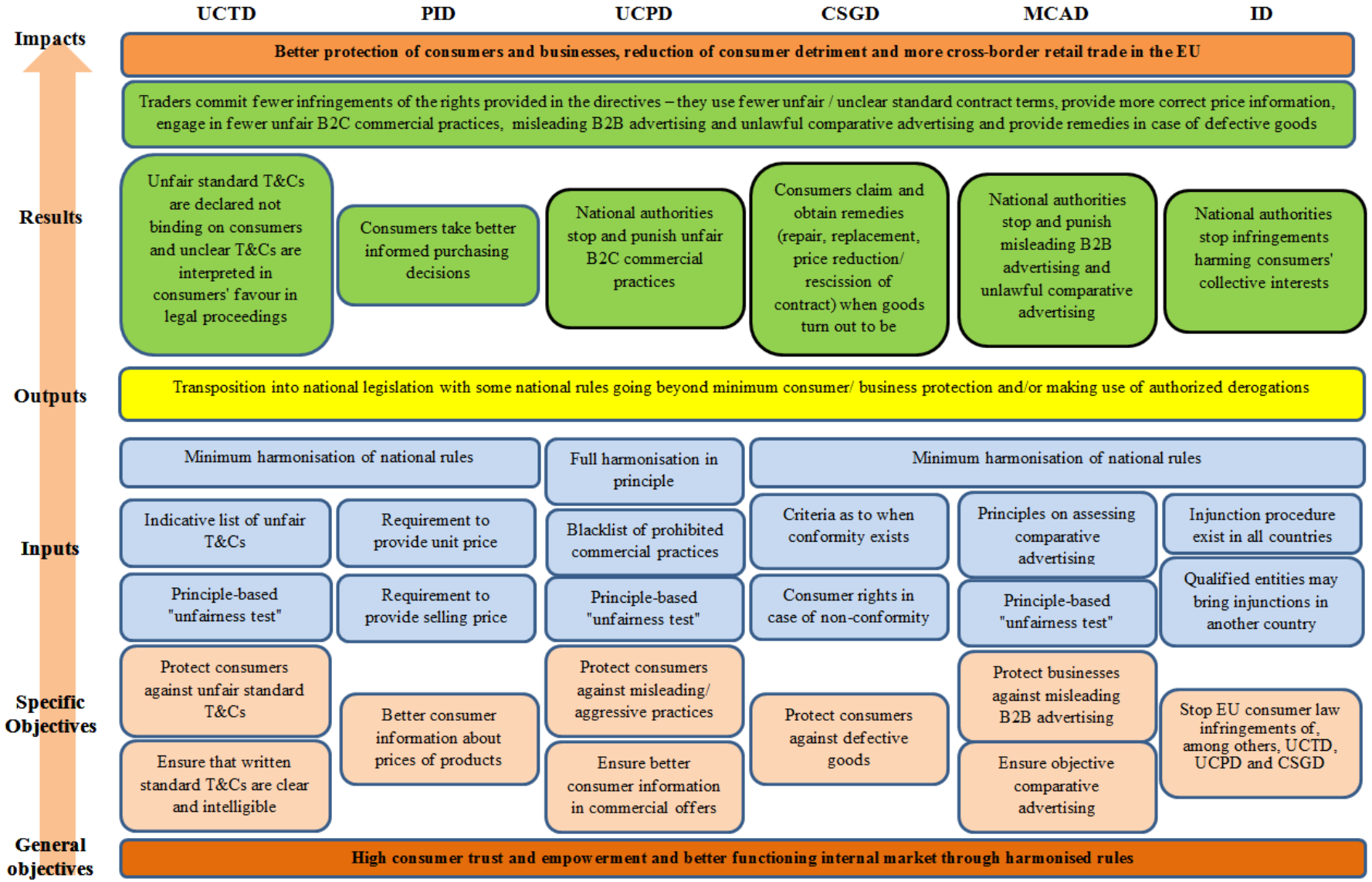
The CRD applies to business-to-consumer (B2C) transactions. It mainly deals with pre-contractual information and the consumer' right of withdrawal. **Pre-contractual information requirements** are fully harmonised for distance and off-premises contracts whereas the requirements for on-premises sales (sales in brick-and-mortar shops) are of a minimum nature. They include specific requirements regarding interoperability and functionality of digital content. **Consumers have the right to withdraw** from distance and off-premises contracts (contracts concluded outside business premises) within 14 calendar days from the delivery of goods or from the conclusion of the service contract.

In addition, the CRD lays down rules on **delivery of goods and passing of risk**. Traders must deliver the goods within 30 days from the conclusion of the contract if not agreed otherwise. In general, the trader will bear the risk for any damage to goods during transportation until the consumer takes physical possession of the goods. The CRD also limits any additional costs imposed on the consumer for the **use of a means of payment**. It prohibits the use of default settings ("pre-ticked boxes") for charging **additional payments** without consumer's express consent. It also limits the **costs for telephone communications** with a trader in relation to the contract concluded. In such cases, the consumer cannot be bound to pay more than the basic phone rate.

2.2. Intervention logic of the Directives covered by the Fitness Check

Five out of the six Directives covered by this evaluation — the UCPD, UCTD, PID, ID and CSGD — aim at increasing consumer trust and empowerment (i.e. stronger consumer protection) and at a better functioning internal market (i.e. more cross-border trade in the EU). The MCAD aims to protect businesses against misleading advertising and create a harmonised basis for comparative advertising. The final intervention logic (see Figure 2 below) shows the inter-linkages between the Directives in terms of their general and specific objectives, inputs, outputs and the intended results and impacts.

Figure 2. Intervention logic



2.3. Previous evaluations

With the exception of the MCAD, all the Directives covered by this Fitness Check include **monitoring/review clauses**. In most cases, these clauses refer to one-off reporting obligations by the Commission. The contents and main findings of these previous reports are summarised below.

The 2013 Communication and accompanying report on the **UCPD** concluded that it did not seem appropriate to amend the Directive and that it had considerably improved consumer protection in and across the Member States. Instead the Communication and report called for improved enforcement in the Member States. It was found that the principle-based rules of the Directive had allowed national authorities to adapt to fast-evolving products, services and sales methods, including to new online practices that were developing in parallel with developments in advertising techniques. It was concluded that, by fully harmonising the national rules, the Directive had contributed to the removal of obstacles to cross-border commerce and simplified the regulatory environment. The assessment also looked into the possibility of extending the Directive beyond B2C transactions. It concluded that the vast majority of Member States and stakeholders did not support an extension of the Directive, whether to B2B transactions or to C2B or C2C. The Commission therefore considered that there was no case for such extension at the time.

Furthermore, on 25 May 2016 the Commission published a **revised guidance document**[6] on the application of the UCPD with a view to improving businesses' compliance with the Directive and its enforcement in the Member States, in particular for new business models and market operators in the digital economy.

The 1999 report on **the UCTD** described the impact of the Commission's various activities since 1993, which included infringement procedures, market studies and information campaigns. It also suggested a number of improvements to the scope of the Directive, the notion of unfair term and the indicative list of terms in the Annex to the Directive. The report also highlighted the repercussions the Directive had had for consumers and the business community, the legislation of the Member States, national jurisprudence, the case-law of the Court of Justice and legal doctrine. The Commission's report acknowledged that despite a clearly positive effect of the Directive, unfair terms continued to be used on a wide scale in consumer contracts and new problems were continually cropping up. It warned about the possible development of economic relationships that would not tend towards greater equity in contractual relations. The main aim of the report was therefore to describe legal and practical situation after the adoption of the Directive and to pave the way to a comprehensive discussion with the stakeholders on issues described in the report.

The 2006 Communication on the **PID** reported on the application of the Directive as well as consulted on its impact on the internal market and on the overall level of consumer protection. It was stated that there was no evidence that the existing divergences between national laws on price indication raised significant internal market barriers that would justify regulatory intervention. It also concluded that the Directive had contributed to an increase in the protection of consumers, although the actual extent of its impact remained unclear — in particular because of the regulatory options in the Directive that resulted in diverging national implementations. The 2006 evaluation addressed in particular the issue of the transitional derogation for small retail business from the obligation to indicate the unit price which several

[6] Commission staff working document — Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices, SWD(2016) 163 final.

countries continued to apply. It concluded that there was no conclusive evidence for a possible legislative revision of the PID regarding this transitional derogation.

The 2007 Communication on the **CSGD** had a twofold objective. In its first part, it reported on the transposition of the Directive, including whether Member States had gone beyond the minimum harmonisation and used the regulatory options provided in the Directive. In its second part, the Communication examined the case for introducing direct liability of producers into EU legislation. The communication revealed divergences between national laws in this area but did not conclude to what extent these divergences affected the proper functioning of the internal market and consumer confidence. It also did not reach a conclusion as to whether the lack of EU rules on direct producers' liability had a negative effect on consumers' confidence.

The first report on the **ID**, dated 2008, reported on its transposition by Member States, its application and obstacles for the use of the injunction procedure for cross-border infringements. The second report, dated 2012, provided more detailed analysis of the use of the injunction procedure, reported on its impact on consumers and explored in more depth the question of its effectiveness. The two Commission reports on the ID showed that the introduction — thanks to the Directive — of the injunction procedure in all EU Member States has brought substantial benefits to the European consumers. Injunctions proved to be a successful tool for policing markets, especially to ensure fair contract terms. The injunction procedure had been largely used for national infringements but had had a much more limited impact on cross-border infringements. The two reports provided a thorough analysis of the application of the Directive and answered the evaluation questions to some extent. The reports concluded that the application of the Directive should be further examined in future Commission reports to decide whether there is a need for it to be amended.

In addition, the Commission's **2007 Green Paper on the Review of the Consumer *Acquis*,** which prepared the ground for the subsequent proposal for the Consumer Rights Directive, set out a broad assessment of the EU consumer law in application at that time. It also included a consultation document on a range of issues, including issues under the UCTD and the CSGD.

The 2012 Communication on the **MCAD** described how the Directive was implemented in Member States and assessed its functioning. The Communication also focused on prevalent problems relating to existing marketing scams affecting SMEs, in particular the issue of misleading business directories. Finally, it proposed a revision of the Directive. The Directive was deemed to require revision because the scale, persistence and financial detriment resulting from certain misleading marketing practices, at cross-border level in particular, had to be addressed in a more targeted and efficient manner at EU level.

3. Evaluation questions

The overall aim of the Fitness Check is to analyse the effectiveness, efficiency, coherence, relevance and EU added value of the Directives covered by the Fitness Check. Table 1 below presents the main evaluation questions.

Table 1. Evaluation criteria and main evaluation questions

Criteria	Main evaluation questions
Effectiveness	– What progress has been made over time towards achieving the objectives of the Directives covered by the Fitness Check? Is this progress in line with the initial expectations? – What is the level of businesses' compliance with the provisions? – Which main factors (e.g. implementation by Member States, action by stakeholders) have contributed to or hindered achieving these objectives?

	– Beyond these objectives, have these instruments led to any other significant changes, both positive and negative?
Efficiency	– What are the costs and benefits (monetary and non-monetary) associated with applying these legal instruments in the Member States? – What good practices for cost-effective implementation can be identified? – What, if any, specific provisions in these instruments can be identified that hinder cost-effective implementation or maximisation of the benefits? In particular, what is the (unnecessary/cumulative) regulatory burden identified? – What are the specific challenges that SMEs, and micro enterprises in particular, face when implementing these instruments?
Coherence	– To what extent have the general principles and requirements set out in these legal instruments contributed to the coherence of consumer protection policy? To what extent have they proved complementary to other EU interventions/initiatives on consumer protection? – What, if any, specific inconsistencies and unjustified overlaps, obsolete provisions and/or gaps can be identified in relation to the entire EU regulatory framework in this policy area, including the forthcoming rules on online sales of goods under the Digital Single Market Strategy, and other EU directives? How do they affect the application/performance of these instruments? – How do the general EU regulatory framework and the interactions between the different instruments covered by the Fitness Check affect their separate and overall impacts?
Relevance	– To what extent are the objectives of these instruments still relevant and valid? Are there any other objectives that should be considered in view of current needs and trends in consumer behaviour and in the markets?
EU added value	– What has been the EU added value of the consumer law Directives in the context of national horizontal and sector-specific consumer law (both substantive and procedural), and of civil and commercial law?

As announced in the Roadmap[7], the focus of the Fitness Check was to assess the extent to which the general objectives of these Directives i.e. greater consumer trust and empowerment (stronger consumer protection) and internal market integration (more cross-border trade in the EU), have been achieved. Specifically, the Fitness Check:

- examined whether these instruments capture and reflect the current market trends and, in particular, changes in the markets and consumer behaviour (the questions on the enforcement of EU consumer law and consumer redress have been an important part of the exercise);

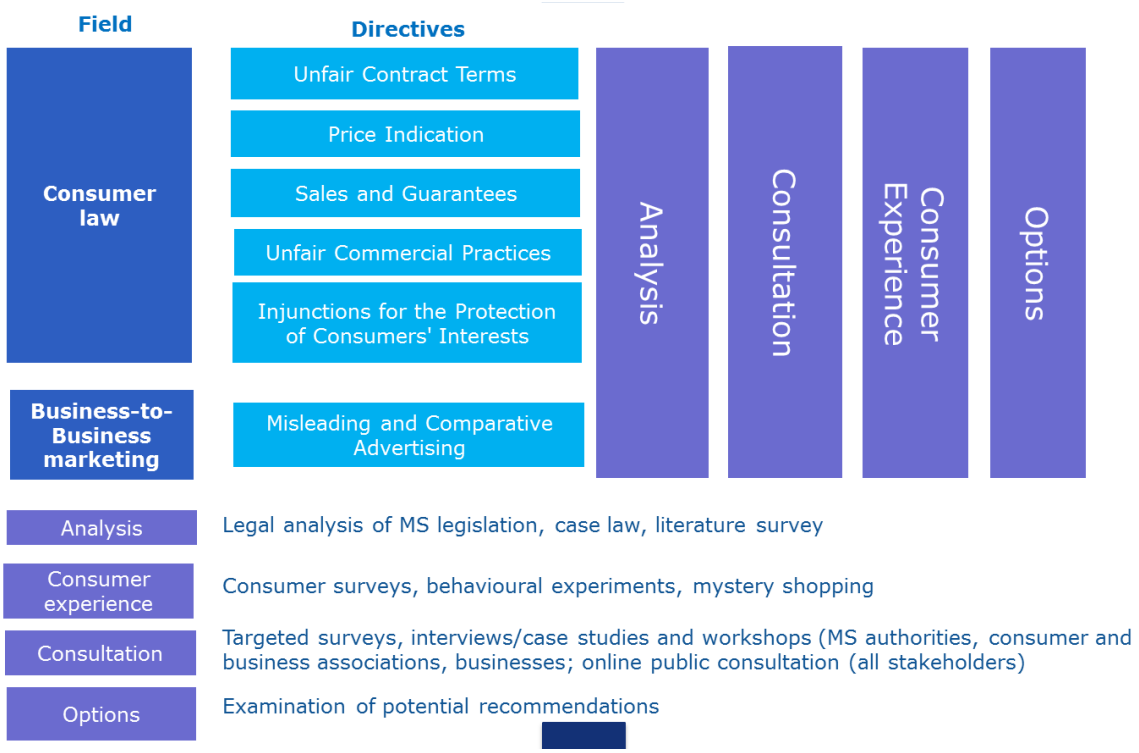
[7] The Roadmap of the Fitness Check explaining its scope, objectives and procedure was published in January 2016, available at: http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm

- assessed how well these legal instruments fit within the overall system of EU consumer protection legislation;
- assessed the potential for simplification and the reduction of regulatory costs and burdens while guaranteeing a high level of consumer protection;
- explored ways of bringing added clarity, removing overlaps and filling the identified regulatory gaps.

4. Method

The following Figure 3 illustrates the various evaluation activities undertaken within the Fitness Check.

Figure 3. Evaluation activities undertaken[8]



Detailed information about the process and methodologies of all the Fitness Check evaluation activities is provided in **Annexes 2 to 4.**

Three dedicated external studies were performed to support this Fitness Check. Their final reports accompany this Fitness Check report.

The first, **Lot 1 study** (main study) evaluated the UCPD, UCTD, PID, MCAD and ID. It included interviews with 147 public authorities, 49 consumer associations, 59 business associations in all Member States and at EU level as well as a business survey in all Member States. A separate **Lot 2 study** assessed the CSGD. Following the adoption of the Commission's proposal for a Directive on online and other distance sales of goods in December 2015[9] and as announced in its Communication[10], the Commission made it a priority to analyse the possibility for aligning the legal rules on face-to-face sales and distance sales of goods. These priority data were sent to the European Parliament and the Council in

[8] Evaluation of the 'consumer experience' did not cover issues related to the MCAD (which is primarily a B2B instrument) and to the injunctions procedure since under the ID individual consumers are not, in principle, parties to the proceedings.
[9] COM(2015)635 final.
[10] COM(2015)633final.

August and September 2016 in order to feed into the legislative process on the proposal for a Directive on online and other distance sales. The results of the Lot 2 study are presented as two separate reports. The third, **Lot 3 study** was dedicated to gathering information about consumer awareness and experience of exercising their rights. It included a large-scale consumer survey and mystery shopping exercises and behavioural experiments. The Fitness Check also benefited from the findings of several other studies performed by DG JUST, notably the 'Study on measuring consumer detriment in the European Union'[11], the 'Exploratory study of consumer issues in the sharing economy'[12] and the 'Evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law'[13].

The Fitness Check online public consultation ran from 12 May to 12 September 2016 in all EU languages. In total, 436 replies were received via the EU survey IT tool. Around 50 respondents also submitted additional position papers[14]. More information is provided in Annex 3 and a detailed analysis has been prepared as part of Lot 1 study.

The Fitness Check included one **high-level conference — the 'Consumer Summit'** on 17 October 2016. It brought together around 450 representatives of national authorities, European institutions, consumer organisations, businesses and academics. All information about the Summit, including the conclusions of the thematic workshops, is available on the Summit's website[15].

For the purposes of the Fitness Check (and the CRD evaluation) DG JUST set up, through an open call for applications, **a dedicated stakeholder expert group**. The group consisted of the main EU level consumer and civil society organisations, five major national consumer associations and the main EU level business associations[16].

Since the beginning of 2016, DG JUST has made a number of presentations and discussed the Fitness Check at regular meetings of the **DG JUST networks** of consumer protection organisations:

- the Consumer Protection Cooperation (CPC) network;
- the Consumer Policy Network (CPN);
- the European Consumer Consultative Group (ECCG); and
- the European Consumer Centres (ECC) network.

For more details, please refer to Annex 3.

The Fitness Check also benefited from the findings of the evaluation carried out by the **European Economic and Social Committee (ECSC)**, at the request of the Commission, into how civil society organisations across the EU perceive and experience the implementation of EU consumer and marketing law at Member State level[17].

Data from the above-mentioned external studies and the dedicated consultation activities were used in the analysis in combination with Eurobarometer data (as reported in the bi-annual

[11] Available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/consumer-detriment/index_en.htm
[12] Not yet published.
[13] Not yet published.
[14] A summary of the public consultation and the responses are available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=31689.
[15] http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34204.
[16] Full details of the Group, including its membership and proceedings, are available from the Register of Commission Expert Groups and DG JUST website.
[17] Information Report 'Consumer and marketing law (fitness check)', INT/796 of 19/12/2016.

Consumer Conditions Scoreboards[18]) and other available evidence, such as other studies on specific matters. For instance, Eurobarometer findings are compared with the findings of the dedicated consumer survey of the Lot 3 study and the business survey of the Lot 1 study. Wherever available, both qualitative and quantitative data are used although certain elements of the evaluation could not be quantified into monetary terms such as benefits arising due to the instruments under evaluation. Sampling was used to analyse business costs, i.e. evaluation focused on five retail trade sectors (concerning both goods and services), and results at the company level were then extrapolated to the EU level.

There are also limitations in the available information. In particular, obtaining specific cost estimates proved to be challenging in the business interview and not every respondent could submit this type of information. The results of the online public consultation are quoted in the evaluation by stakeholder category which provides more objective results; yet these results cannot be regarded as adequately representative. The replies of business respondents to the public consultation have to be treated with particular caution since more than half of respondents came from one country (Germany).

5. Implementation: state of play (results)

The Directives subject to the Fitness Check generally required Member States to **introduce new rules or to amend existing laws on consumer protection and marketing**. Correct enactment at national level is thus an essential part of implementation. Transposition took place at different times and in different ways[19]. The Commission carried out transposition checks after the deadline for implementation of each Directive. It also initiated and carried through a significant number of formal infringement and pre-infringement procedures, in particular through the EU Pilot system.

Of the Directives covered by the Fitness Check, it was the **UCPD** that encountered **most transposition difficulties.** After a thorough transposition check and numerous EU Pilot procedures, the Commission opened 14 infringement cases concerning incorrect transposition of the UCPD. They address incomplete and inaccurate transposition of various provisions and of the practices listed in Annex I to the Directive, and, in some cases, additional national rules covered by the UCPD that were incompatible with the full harmonisation nature of the UCPD. 13 cases were still pending at the end of 2016, but the Commission should be able to close many of them during 2017, as many of the countries concerned have announced legislative changes and are in the process of formally adopting them.

As regards **implementing the Directives in the wider sense**, several of them also stipulate that Member States must give their national administrative authorities and/or courts powers to enforce national transposition provisions. However, the Directives do not prescribe any specific institutional system for their enforcement. Irrespective of the enforcement model, Article 47 of the EU Charter of Fundamental Rights states that anyone whose rights and freedoms under EU law are violated is entitled to an effective remedy before a tribunal.

Member States have **different enforcement systems.** For instance, the injunction procedure involves the courts in most of them (Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, Germany, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia, Spain, Sweden and the UK). However, it is an administrative procedure in Latvia, Malta, Poland and Romania, while the laws of Estonia, France, Hungary and Slovakia provide for both types of procedure.

[18] Available at: http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/index_en.htm.

[19] For an overview of national transposition measures by Directive and Member State, see Part 4 (country reporting) of the Lot 1 study.

In most EU countries, the consumer protection authorities (the administrative authorities) can take administrative decisions on traders' infringements of consumer law. For instance, it is the consumer protection authorities that generally take decisions on infringements of the UCPD, CSGD and PID. On the other hand, the consumer protection rules laid down in the UCTD are generally enforced through national courts: either in litigation between consumers and traders or in the context of injunction procedures, including actions brought by consumer protection authorities. In a few countries (Austria, Germany and Greece), consumer law is enforced mainly by consumer and business organisations that may bring an action before the civil courts.

Despite these differences, all four directives (UCPD, CSGD, PID and UCTD) and the provisions of the MCAD on comparative advertising (which apply in both B2B and B2C relations) fall within the **Consumer Protection Cooperation (CPC) Regulation**, which provides a framework for cooperation between national authorities on enforcement issues involving more than one country. Under the CPC Regulation, these national authorities form a Europe-wide enforcement network, the 'CPC network'. The Commission recently tabled a **proposal for a new CPC Regulation** designed to give enforcement authorities all the powers they need to work together faster and more efficiently against infringements within the EU[20].

As regards the difficulties with **implementation** of the Directives covered by the Fitness Check, some Member States and their courts seem to have difficulty ensuring that some consumer rights stemming from different directives, in particular the UCTD, are not rendered less effective by national rules of procedure and court practices. While the case-law of the Court of Justice takes full account of the Member States' procedural autonomy, it also aims to ensure that consumers, as the weaker party, are not prevented from **effectively relying on protection under EU consumer law**. Consequently, national courts are required to examine consumer law *ex officio*, including unfair contract terms, and to abide by the principles of *equivalence* and *effectiveness*. These two concepts aim to ensure that breaches of EU consumer law are recognised as equivalent to public policy considerations that are to be assessed by national courts of their own motion at particular stages of the procedure, and that the rules of procedure do not make it unduly difficult for consumers to invoke their rights. For instance, remedies should not be subject to excessive requirements, and it should be possible to suspend enforcement where breaches of EU consumer law are at stake and have not been previously checked.

When, in the light of complaints against the wide-spread use of unfair contract terms in financial services contracts, in particular credit contracts, as demonstrated also by some preliminary rulings of the CJEU[21], and inadequate protection against unfair contract terms in court proceedings, the Commission launched **infringement proceedings** against Slovakia, , Slovakia introduced new rules on the *ex officio* examination of consumer law in both court and out-of-court proceedings and reported on changes in the practice of its courts. Following several CJEU preliminary rulings[22], Spain has amended its laws to give consumers better protection against unfair contract terms in mortgage enforcement proceedings and payment order proceedings. However, many disputes between Spanish banks and consumers about unfair contract terms in mortgage credit contracts remain pending, and have triggered and are still triggering numerous requests for preliminary rulings to the CJEU[23]. There is also an infringement case concerning action to be taken by Spain in response to various CJEU

[20] Regulation (EC) No 2006/2004 on consumer protection cooperation (CPC Regulation) and the Commission proposal for the new CPC Regulation (COM(2016)283 final).
[21] E.g. Cases C-76/10 – Pohotovosť, C-453/10 , Pereničová, Perenič and C-34/13 Kušionová.
[22] In particular Cases C-415/11 Aziz and C-169/14 Sánchez Morcillo.
[23] E.g., Case C-8/14 BBVA, Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 Unicaja Banco, Joined Cases C-154/15 and C-307/15 Gutiérrez Naranjo and Case C-421/14 Banco Primus.

rulings. The Commission has also opened pre-infringement investigations regarding the relationship between Directive 93/13/EEC and the rules on mortgage enforcement in a few other EU countries.

6. Answers to the evaluation questions

6.1. Effectiveness

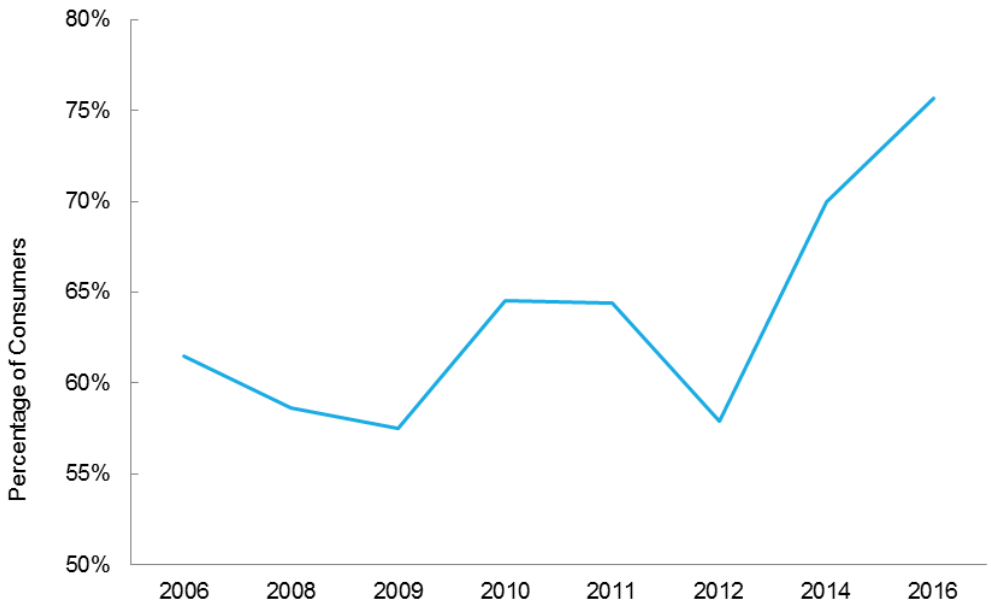
6.1.1. Consumer trust and cross-border shopping

The overarching objectives of the Directives covered by this Fitness Check are: **increasing consumer trust and empowerment** while contributing to a **better functioning of the internal market**.

In the absence of an impact assessment for any of the six Directives concerned, **no baseline is available**. In addition, the Directives were enacted over a considerable period of time. The evaluation therefore relied on available survey data, in particular Eurobarometers, to track developments.

In terms of achieving the first general objective of **greater consumer trust and empowerment**, Eurobarometer survey data show (Figure 4) that the percentage of consumers who agreed that in general retailers and service providers respect the rules and regulations of consumer law **has increased between 2006 and 2016**. The figure was 76 % in 2016, having increased by 14 percentage points between 2006 and 2016.

Figure 4: Percentage of consumers agreeing that in general traders respect the rules and regulations of consumer law, EU%[24]



[24] Source: Special Eurobarometer 252 and 298, Flash Eurobarometers 282, 299, 332, 358, 397 and survey on consumers' attitudes towards cross-border trade and consumer related issues (2016) to be used in the forthcoming Consumer Conditions Scoreboard 2017 (expected publication — summer 2017). Question: For each of the following statements, please tell me if you agree or disagree with it. In (OUR COUNTRY)… 'In general, retailers and service providers respect your rights as a consumer.' Note: EU % comprises the EU-25 in 2006, the EU-27 from 2007 to 2012, and the EU-28 thereafter.

The percentage of consumers who feel confident about purchasing online from another Member State has also been steadily increasing. In 2003, only 10 % of consumers felt that they had a high level of protection when buying something online from another Member State. By contrast, in 2016, 58 % of consumers felt confident doing so.

In the **2015 Digital Single Market** Strategy[25], the Commission stressed the yet untapped potential for further growth within the EU, noting that while 61 % of EU consumers felt confident about purchasing online from a retailer in their own Member State, only 38 % felt confident about purchasing from a retailer in another EU Member State. The Strategy also highlighted as a problem the fact that only 7 % of SMEs in the EU were selling cross-border. This was attributed also to differences in Member States' consumer protection rules, which discourage companies from cross-border trading and prevent consumers from benefiting from the most competitive offers. The Commission therefore concluded that work was needed to further harmonise the obligations of parties to a sales contract. As a result, the Commission proposed in December 2015 two directives fully harmonising in a targeted way the rules on remedies for digital content and distance sales of tangible goods. These proposals are currently under negotiation in the European Parliament and Council[26].

Figure 5: Percentage of consumers feeling confident in purchasing online from another EU country, EU%[27]

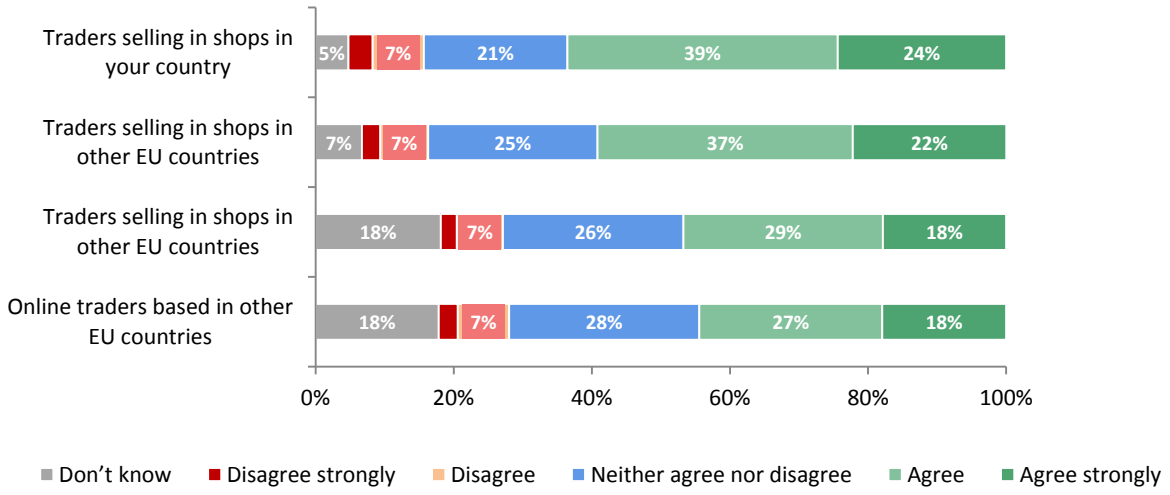
[25] Communication from the Commission 'A Digital Single Market Strategy for Europe' Brussels, 6.5.2015, COM(2015) 192 final; available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0 192.

[26] For more information, see 'Digital contracts for Europe' at: http://ec.europa.eu/justice/contract/digital-contract-rules/index_en.htm .

[27] Source: Special Eurobarometers 193, 252 and 298, Flash Eurobarometers 299, 332, 358, 397 and survey on consumer attitudes towards cross-border trade and consumer protection (2016) to be used in the forthcoming Consumer Conditions Scoreboard 2017 (expected publication — summer 2017).
Question: 2003: Do you think that, as a consumer, you have a high level of protection or not when you buy something on the internet from a seller/company located in another country of the European Union?
2006-2011: Would you be more confident, as confident or less confident purchasing goods or services via the internet from providers located in other European Union countries compared to purchases from providers located in (OUR COUNTRY)? [Displayed are the combined responses for 'as confident' and 'more confident'].
2012-2016: How strongly do you agree or disagree with each of the following statements. 'You feel confident purchasing goods or services via the internet from retailers or service providers in another EU country.' Note: EU % comprises the EU 15 in 2003, EU-25 in 2006, EU-27 from 2008 to 2012 and EU-28 thereafter. .

In the 2016 consumer survey of this Fitness Check[28], consumer perceptions about **traders' compliance with consumer rights** were measured for online and offline traders in the respondent's own country and online and offline traders in another EU country. As indicated in Figure 6, depending on the sales channel, a majority of respondents (between 45 % and 63 %) 'strongly agreed' or 'agreed' that traders comply with consumer rights while between 9 % and 11 % 'strongly disagreed' or 'disagreed' with this statement. Both offline (63 %) and online traders (59 %) from the respondents' own countries were perceived as more compliant ('strongly agree' and 'agree') with consumer rights than offline (47 %) and online (45 %) traders in other EU countries.

Figure 6. Consumer perception of traders' compliance with the consumer rights

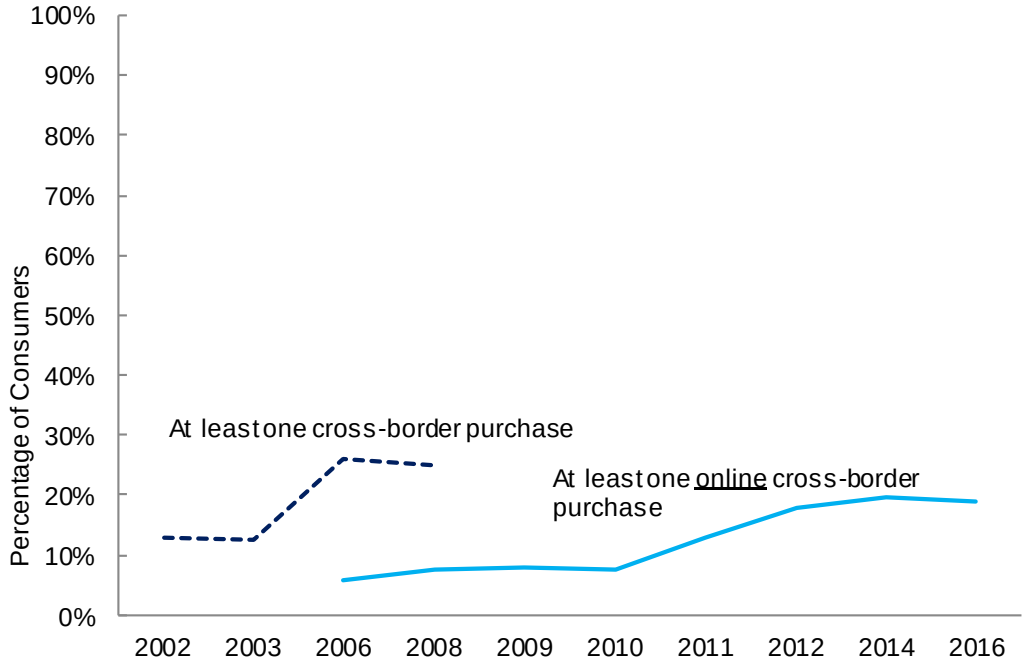


In terms of the second objective of **better functioning internal market**, Eurobarometer data show (Figure 7) that between 2003 and 2006 alone the average proportion of survey respondents in the EU reporting at least one cross-border purchase in the previous year more than doubled, from 12 % to 26 %[29]. The level of cross-border shopping **over the internet** has also increased considerably since 2006. In 2016, 19 % of all Eurobarometer respondents reported that they made an online purchase from another EU country, an increase of 13 percentage points on 2006. This figure matches that of the 2016 consumer survey carried out for this Fitness Check, which found that 17 % of respondents reported buying 'very often' or 'often' online from traders in another EU country.

[28] Lot 3 Study — consumer survey question 7 'How strongly do you agree or disagree that the following types of traders comply with their obligation towards consumers?'.

[29] The Eurobarometer definition of a cross-border purchase for this question included distance purchasing and purchasing as a result of physical travel (e.g. shopping while on holiday). However, in the case of physical travel, it did not include purchases linked to the trip itself (transportation, accommodation, meals, leisure activities, etc.).

Figure 71: Percentage of consumers who made at least one (online) cross-border purchase in the EU within the last 12 months, EU%[30]



Stakeholder expressed the view that these positive developments are attributable also to EU consumer protection legislation[31]. In addition, the impact of EU consumer law on consumer trust and cross-border shopping was specifically tested through modelling as part of the Lot 1 study, which analysed the UPCD's impact on consumer trust and online cross-border

[30] Source: Standard Eurobarometer 57.2, Special Eurobarometers 128, 252 and 298, Flash Eurobarometers 299, 332, 358, 397 and survey on consumers' attitudes towards cross-border trade and consumer-related issues (2016) to be used in the forthcoming Consumer Conditions Scoreboard 2017 (expected publication — summer 2017). Questions for general cross-border purchases:
2001-2003: Over the last 12 months, have you bought or ordered products or services for private use from shops or sellers located in another EU country, or not?
2006-2008: Please tell me if you have purchased any goods or services in the last 12 months, in (OUR COUNTRY) or elsewhere in any of the following ways? [Yes, from a seller/provider located in another EU country].
Questions for online cross-border purchases:
2001-2003: [If the respondent indicated a cross-border purchase] How did you buy or order them? [On the internet]
2006-2008: Please tell me if you have purchased any goods or services in the last 12 months, in (OUR COUNTRY) or elsewhere in any of the following ways? 'Via the internet.' [Yes, from a seller/provider located in another EU country]
2009-2011: In the past 12 months, have you purchased any goods or services, by internet, phone or post in (OUR COUNTRY) or elsewhere in any of the following ways? [Yes, from a seller/provider located in another EU country]
2012-2016: In the past 12 months, have you purchased any goods or services via the internet (website, email etc. …) in (OUR COUNTRY) or elsewhere in any of the following ways? [Yes, from a seller/provider located in another EU country]. Base: respondents who use the internet for private reasons. Note: EU % comprises the EU-15 up to 2004, the EU-25 from 2004 to 2007, EU-27 from 2007 to 2013, and EU-28 thereafter.

[31] E.g. in the online public consultation, 82 % of public authorities, 95 % of consumer associations and 77 % of business associations considered that the harmonized EU consumer and marketing rules had 'very positive impact' or 'rather positive' impact on the **protection of consumers against unfair commercial practices**. Furthermore, 50 % of public authorities, 50 % of consumer associations and 42 % of business associations 'strongly agreed' or 'tended to agree' that **businesses can trade across the EU** easily thanks to the harmonized EU consumer and marketing rules. The share of respondents in these categories that 'tended to disagree' or 'strongly disagreed' with these statements was, respectively, 18 %, 5 % and 31 %.

shopping[32]. Only the UCPD was appropriate for carrying out this analysis because of its comparatively more recent adoption in 2005: unlike the older directives covered by the Fitness Check, good quality cross-country time series data on the UCPD can be obtained for nearly all Member States. Moreover, the full harmonisation character of the UCPD (except for financial services and immovable property) meant that it was possible to produce a more accurate estimate of the Directive's impact. While the deadline for transposition of the UCPD was in 2007, in several Member States transposition was delayed to 2008, 2009 and 2010. These differences in transposition dates provided a degree of variation to estimate the impacts of the Directive.

The dataset for the analysis was mainly collected from Eurobarometer and Eurostat. Data on **consumer trust and cross-border online purchases (**i.e. 'outcome' variables) are available for all 28 EU Member States for the years between 2006 and 2014 (excluding 2007 and 2013, where no relevant Eurobarometer data were collected)[33]. A broad dataset of macroeconomic variables for all Member States over the time period in question was collected from Eurobarometers and Eurostat in order to control for factors varying over both time and countries that would be expected to influence the outcome variables.

In the three initial panel regression models considered — the fixed-effects, the least-squared dummy variables (LSDV) and random effects models — **the UCPD was not found to have any significant causal effect on the overall level of consumer trust, nor on the overall level of cross-border online purchases.** It is important to note, however, that this does not rule out the possibility that such an effect does exist. The size and length of the dataset, as well as the complications presented by the coincidence of the time period with the financial crisis and the recent accession of nearly half the countries to the EU, make it difficult to disentangle any significant effects of the UCPD.

A fourth and more distinct regression model, the fixed-effects logistic regression, was conducted to supplement the results of the first three models. Rather than testing the effect of the transposition on the level of consumer trust or cross-border online purchases, this model used binary dependent variables to test the likelihood that UCPD transposition would lead to a higher level of consumer trust or cross-border online purchases in the current year compared to the previous year.

This **regression found that the UPCD had a significant effect** on consumer trust, both with the full dataset (all Member States) and the restricted dataset (excluding the seven Member States that already had a comprehensive legislative framework concerning unfair commercial practices in place before the UCPD was transposed). The model also found that the UCPD had a significant effect on cross-border online purchases (with the restricted dataset only).

However, as with the results of the first three regressions, these results should also be interpreted with care and **are not unequivocal proof of a causal effect from the UCPD being transposed in the Member States.** Rather, these results support the hypothesis that an effect may exist, but would require further investigation to draw more robust conclusions. For example, further investigation could be carried out once a longer time series of relevant outcome variables becomes available, if the relevant Eurobarometer questions continue to be used in future surveys.

Accordingly, the **results of this modelling are not conclusive** In contrast, in all the analysis, the **percentage of households with internet access at home** was found to have a positive and highly statistically significant effect on consumer trust and cross-border purchases. This

[32] For details, see the Lot 1 Study.

[33] However, due to the later accession dates of Romania, Bulgaria and Croatia, Eurobarometer data for these Member States are only available from 2008 (for Romania and Bulgaria) or 2012 (for Croatia).

can be explained by: (i) the contribution of increasing access to information online to better consumer information; and (ii) greater choice of products and services for consumers.

6.1.2. Traders' compliance

Despite overall improving consumer perceptions about traders' compliance with consumer law, **a number of consumers continue reporting consumer rights-related problems**. Eurobarometer data show (Figure 8) that, despite the interim variation, the average incidence of problems was almost identical in 2008 and 2016, at 21 % and 20 % respectively. These results show that the level of consumer protection has not significantly improved. Nevertheless, this can still be considered an overall positive outcome because: (i) the complexity of problems experienced by consumers has been generally increasing because of the increased technological complexity of offers and products; and (ii) especially online, unfair practices put in place by a trader have a greater impact across several EU markets at once.

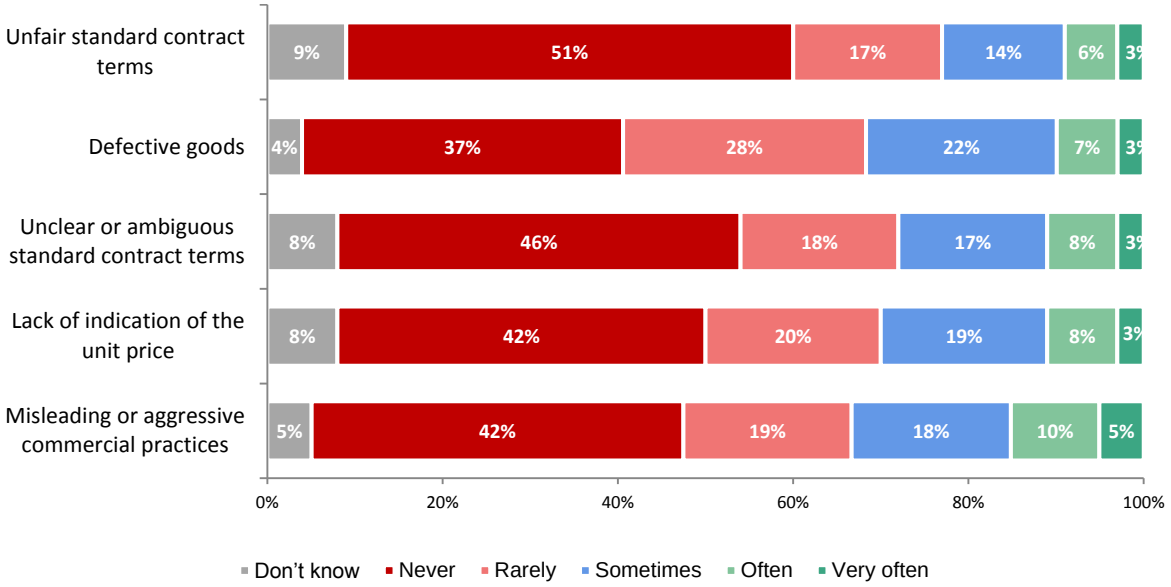
Figure 8: Percentage of consumers who experienced at least one problem with a good or service in the last 12 months, Eurobarometer, EU%[34]

In the 2016 consumer survey carried out for this Fitness Check, consumers were also asked to specify what kinds of problems they had possibly encountered in the previous 12 months

[34] Source: Special Eurobarometer 298, Flash Eurobarometers 299, 332, 358 and 397. Question: 2008: In the last 12 months, have you made any kind of formal complaint in writing, by telephone or in person, to a seller/provider about a problem you encountered? [Possible responses: Yes / No, you have not encountered any problems / No, unlikely to get a satisfactory remedy / No, sums involved too small / No, did not know how or where to complain. Displayed is the proportion that gave a response other than 'No, you have not encountered any problems.'] 2009-2011: In the last 12 months, have you encountered any problem when you bought something in (OUR COUNTRY)? 2012: In the last 12 months, have you had legitimate cause for complaint when buying or using any goods or services in (OUR COUNTRY)? 2014: In the past 12 months, have you encountered any problem when buying or using any goods or services in (OUR COUNTRY) where you thought you had a legitimate cause for complaint? Note: EU % comprises the EU-27 from 2008 to 2012 and the EU-28 thereafter. The 2016 data will be reported on in the forthcoming Consumer Conditions Scoreboard (expected publication — summer 2017). Due to a methodology change in the survey the figure for 2014 is estimated on the basis of the change observed between 2014 and 2016 (computed on data based on a comparable methodology).

(Figure 9). *Misleading or aggressive commercial practices* were experienced most often (33 % of respondents stated that such practices had occurred at least 'sometimes' in the past year). This was followed by *defective goods* (32 %) and *lack of indication of the unit price* (30 %), whereas breaches of the UCTD were reported as occurring relatively less often[35]. These data also show that a significant number of consumers reported 'never' having experienced a consumer problem over the previous 12 months (the figures range from 51 % in relation to unfair terms to 37 % of respondents in relation to problems with defective goods).

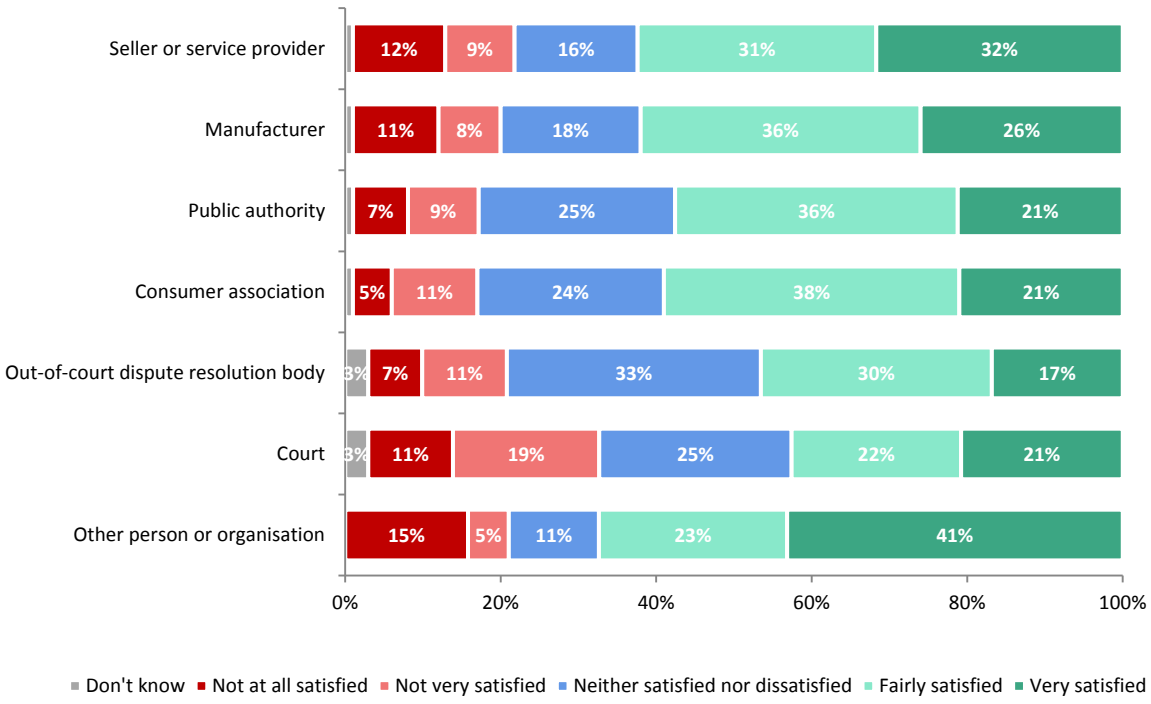
Figure 9. Consumer problems related to consumer rights in the past year



As regards **problem resolution,** the r**espondents' satisfaction** (Figure 10) was highest in relative terms for problem resolution by sellers or service providers (63 % 'very' or 'fairly' satisfied respondents) and manufacturers (62 %). Satisfaction was somewhat smaller for problem resolution efforts by public authorities (57 %) and consumer associations (59 %). This could be explained by the fact that when problems occur, consumers first turn to the seller/service provider or manufacturer and take other action only if this fails, i.e. in more complex cases.

[35] Consumer survey question: 'In the past 12 months, have you experienced problem(s) with any goods or services where you thought you had a legitimate cause for complaint related to the following five problem types?

Figure 10. Satisfaction with how the problem was solved, by type of organisation involved[36]

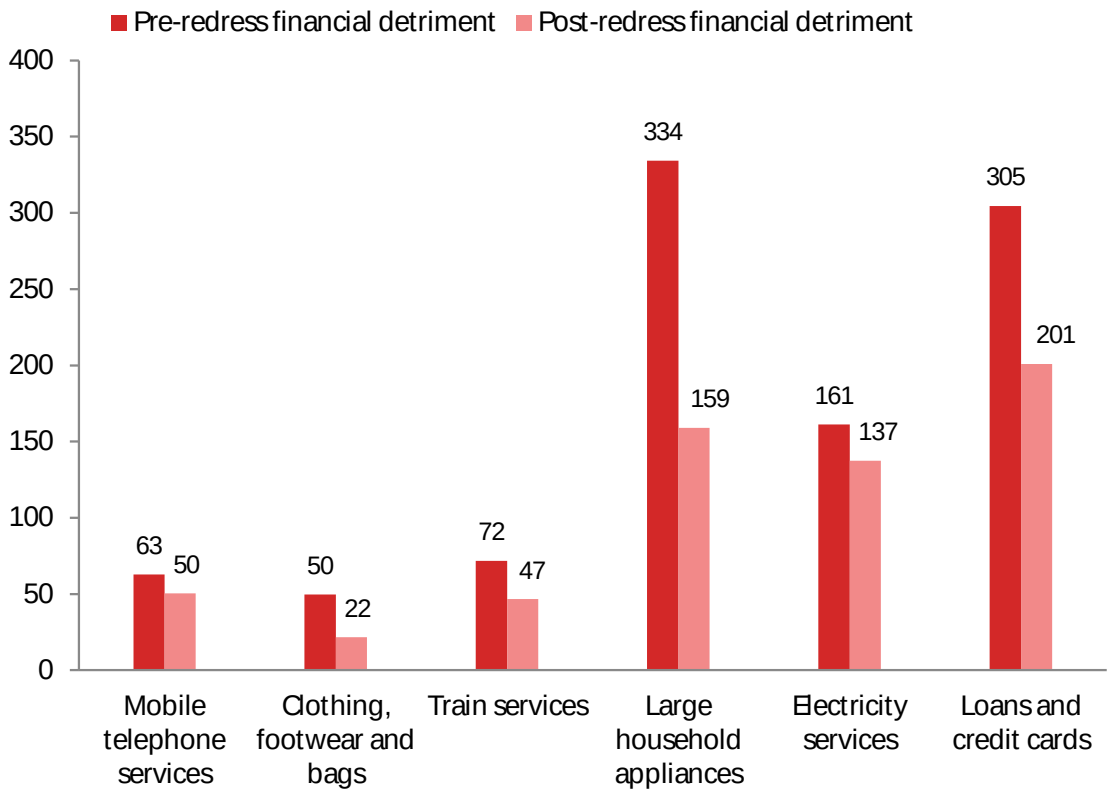


In the **online public consultation**, 47 % of consumer respondents reported having experienced problems in dealing with traders in the past year[37]. When asked to further describe their last most serious problem, among the problems covered by the Directives covered by the Fitness Check, **unfair commercial practices were again the most often reported issue** (20 % of consumer respondents), followed by problems with defective goods (13 %) and unfair standard contract terms (10 %)[38]. Nevertheless, 42 % of consumer respondents who provided information on their most serious problem were **able to solve it to at least to some extent** (with 18 % managing to fully solve their problem), while over half (58 %) did not manage to solve their most serious problem at all.

Figure 11 below provides insights into the **financial consumer detriment** caused by consumer rights-related problems and the effectiveness of redress actions in six product sectors. The reduction of detriment via redress was most significant in the areas of clothing, footwear, bags and large household appliances and the least in the areas of mobile telephone services and electricity.

[36] Consumer survey question: 'How satisfied were you with the way your complaint was dealt with by the …'
[37] Online public consultation question: 'In the past 12 months, have you experienced any problems in dealing with sellers and services providers?'
[38] Online public consultation question: 'What was the most serious problem that you encountered in the last 12 months and that you remember well?'

Figure 11: Pre- and post-redress financial detriment (average per respondent who experienced a problem and sought redress, in euro), online survey[39]



6.1.3. Enforcement challenges

The substantive consumer protection rules of the Directives covered by this Fitness Check are **enforced through different means,** of which the injunctions procedure under the ID is one**.** The other available means (which are explained below) are not harmonised in the Directives even though some of them (i.e. UCPD and UCTD) include provisions on enforcement. **The effectiveness of these enforcement channels depends on a variety of factors which still differ widely across Member States.**

Specifically, the **UCPD** requires Member States to ensure that there are means available to combat unfair commercial practices so as to enforce compliance with its provisions. People or organisations must have the possibility to take legal action (i.e. court action) against the commercial practice or to bring the case before an administrative authority that is either competent to make a decision on complaints or to initiate legal proceedings. Furthermore, the UCPD (as well as the CRD) includes a requirement for Member States to have in place effective, proportionate and dissuasive penalties for infringements of national law transposing these Directives. The **UCTD** requires Member States to ensure that there are means available to prevent the continued use of unfair contract terms. People and organisations must have the possibility to take action before the courts or an administrative authority to obtain a decision as to whether the contract terms are unfair, so that the court or authority can apply appropriate and effective means to prevent the continued use of such unfair terms.

[39] Study on measuring consumer detriment in the European Union, Part 3, Figure 1, available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/consumer-detriment/index_en.htm.

As regards the available means of enforcement, consumers who have had their consumer rights infringed may, first of all, **individually seek redress** by initiating legal action against the trader, contributing in this way to the enforcement of those laws. Consumers can also seek the resolution of the problems via mediation, in particular via the network of European Consumer Centres (ECCs) for cross-border cases or via out-of-court dispute resolution (regulated at EU level by Directive 2013/11/EU on alternative dispute resolution and Regulation (EU) No 524/2013 on online dispute resolution[40]). Finally, consumers can complain to public authorities entrusted with consumer protection. Such authorities may then initiate proceedings to assess whether infringements have taken place and possibly punish the infringing trader. In addition to individual action, consumer rights are also enforced via collective enforcement actions. In such cases, organisations with a legitimate interest in combating non-compliance with consumer protection legislation may file legal action with the courts or administrative authorities against the responsible trader(s), in the collective interest of consumers. The EU Justice Scoreboard examines the efficiency of national justice systems in applying EU consumer law, including the UCPD, UCTD and CSGD.

There is a high correlation between retailers' perceptions of enforcement efforts on the one hand and their assessment of compliance with consumer legislation on the other hand. This suggests that monitoring efforts do translate into better outcomes for consumers[41]. Specifically, retailers' views on enforcement have a high positive correlation with their assessment of compliance (0.68) and a negative correlation with the perceived prevalence of unfair commercial practices (-0.62). This is further implied by the high correlation between retailers' assessment of the role of public authorities and consumer NGOs in monitoring compliance, and consumers' trust in these organisations to protect consumer rights (0.78 and 0.65 respectively).

Most stakeholders consulted during Fitness Check consultation activities and in particular at the 2016 Consumer Summit, including business and consumer representatives, called for a **more effective and consistent enforcement of EU consumer law.** The need for strong enforcement is particularly relevant given the quickly developing digital environment, which enables traders to target massive numbers of consumers rapidly and makes it possible for rogue traders to discontinue or restart a detrimental practice quickly.

Individual legal action by consumers

As demonstrated by the Study on Procedural Protection of Consumers[42], there are substantial differences among Member States as regards key factors in relation to access to justice in consumer protection matters, such as the cost of access to the civil justice system, possible availability of legal aid and requirement for legal representation. In accordance with Article 47 of the Charter of EU Fundamental Rights, the role of the courts is to resolve cases independently and impartially. In view of the weaker position of the consumer, the CJEU has developed a doctrine through its case-law, mainly concerning the UCTD (16 judgments

[40] Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:en:PDF; Regulation (EU) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:en:PDF.

[41] Consumer Conditions Scoreboard 2015, available at: http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/docs/ccs2015scoreboard_en.pdf .

[42] 'Evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law', not yet published.

between 2000 and 2016) regarding '*ex officio*' obligation for courts themselves to assess whether consumer rights may have been infringed in a particular case. According to the above-mentioned Study on Procedural Protection of Consumers nine Member States have incorporated into their national laws express provisions on *ex officio* checks of either unfair terms or more generally mandatory consumer protection law (FR, IT, LV, LT, NL, PT, SK, ES, UK (England & Wales)). However, **the *ex officio* principle still appears to be opaque** in meaning and application to many lawyers and judges throughout the Member States. Improving the level of knowledge among practising judges and other lawyers is therefore urgently required.

Thanks to the recently introduced Directive 2013/11/EU on consumer alternative dispute resolution (on consumer ADR), EU consumers must by now have access, across the whole EU, to out-of-court dispute resolution procedures for resolving their disputes with EU traders in a fast, fair and inexpensive way. The out-of-court dispute resolution procedures covered by the Directive, i.e. those run by "alternative dispute resolution entities", need to comply with specific quality requirements (e.g. expertise, independence, impartiality, fairness, transparency). Only those out-of court bodies which have been assessed by the Member States against such requirements and have been officially notified to the European Commission qualify as 'ADR entities' as defined the Directive. The Directive ensures access to alternative dispute resolution for disputes over contractual obligations stemming from sales or service contracts, no matter what product or service consumers purchased (only disputes regarding health and higher education are excluded). This is also irrespective of whether the product or service was purchased online or offline and whether the trader is established in the consumer's Member State or in another Member State.

Furthermore, the online dispute resolution (ODR) platform[43] provided for by Regulation (EU) No 524/2013 on consumer online dispute resolution and developed by the Commission has been accessible to consumers and traders across the EU since 15 February 2016. Its objective is to help consumers and traders resolve their domestic and cross-border disputes over online purchases of goods and services with the help of alternative dispute resolution bodies, in line with the ADR Directive. The ODR platform allows consumers to submit their disputes online in any of the 23 official languages of the EU.

So far, about 30 000 complaints have been submitted on the ODR platform. Of these 64.2 % concern domestic complaints and 35.8 % relate to cross-border complaints. The top five most complained about sectors are: (i) clothing and footwear; (ii) airlines; (iii) information and communication technology (ICT) goods; (iv) electronic goods (non-ICT/recreational) and (v) mobile telephone services[44]. As for the substance of the complaints, the largest categories relate to: (i) the CSGD (goods that are defective and not in conformity with the order and problems related to legal guarantee: 33 % of all complaints); (ii) problems with delivery (22 %); and (iii) problems with invoicing/billing (12 %). The ODR platform does not record the outcome of the dispute resolution. However, according to a survey of complainants whose complaints were automatically closed on the platform (i.e. those complaints for which no solution has been found through the platform), about 40 % of the complaints were satisfactorily solved outside the platform (i.e. directly with the trader).

The **European Consumer Centres (ECCs)** network consists of 30 offices in the EU Member States, Norway and Iceland. The centres provide free-of-charge help and advice to consumers on their cross-border purchases, whether online or on the spot within these 30 countries. The ECC-Net advises on disputes between a consumer and a trader located in two different

[43] Available at: https://webgate.ec.europa.eu/odr/main/?event=main.home.show.

[44] More detailed statistics are available at: https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.statistics.show.

countries with the aim of achieving amicable outcomes. In 2014, the ECC network handled more than 37 % complaints. Complaints about defective products/ lack of conformity with the contract (i.e. CSGD-related) accounted for 21 % of complaints, followed by complaints about contract terms (UCTD — 10 %) and selling techniques/unfair practices (UCPD — 6 %). ECCs managed to solve more than two thirds of cases amicably[45].

The recently revised Regulation (EU) 2015/2421 establishing a **European small claims procedure** offers consumers and small businesses an inexpensive and citizen-friendly solution to settling cross-border payment claims worth up to EUR 5 000. The revised Regulation puts the electronic service of documents on an equal footing with the postal service and enhances the use of distance means of communication during hearings and for the taking of evidence.

Finally, EU private international law instruments like the **Brussels I[46], Rome I[47] and Rome II[48]** Regulations address the specific aspects of the weaker position of consumers vis-à-vis foreign traders.

Public enforcement

There are very large national variations in **public enforcement**. These are due to institutional diversity, distribution of powers between central, regional and local authorities, funding, staffing and powers of consumer protection authorities and the like. Already the 2013 Communication on the UCPD the Commission stated that '*Member States and stakeholders appear to consider national enforcement of the Directive, in general terms, adequate and effective but signal that* ***the lack of resources****, the complexity or length of internal procedures and the lack of deterrent sanctions threaten to undermine its proper application*'. The issue of tight funding for consumer protection agencies was often raised in the replies to country interviews for the Lot 1 study. These practical problems have to be seen in the context where many consumers do not have confidence in public authorities to protect consumer rights, although the confidence level has slightly increased during recent years[49].

The UCPD, CSGD, PID and UCTD, as well as the provisions of the MCAD on comparative advertising (which apply in both B2B and B2C relations), fall under the **Consumer Protection Cooperation (CPC) Regulation**, which provides a framework for enforcement cooperation between national authorities in cross-border cases. The Commission's evaluation of the CPC Regulation[50] identified the following main problems:

- Enforcement bodies have insufficient minimum powers to cooperate efficiently and swiftly, especially in the digital environment. In particular, the CPC authorities have limited powers to obtain information from domain registrars and financial police on the real identity of the trader behind a malpractice

[45] Source: The European Consumer Centres Network — Anniversary Report 2005-2015, available at: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/reports/10-years_en.htm.
[46] Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[47] Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).
[48] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II).
[49] In a series of Eurobarometers, the proportion of respondents expressing trust in public authorities rose slightly from 2006 to 2014, from 57 % to 61 %. Source: Special Eurobarometers 252 and 298, Flash Eurobarometers 282, 299, 332, 358 and 397. However, in the Fitness Check consumer survey (2016)[49] only 46 % of respondents expressed confidence in the ability of consumer protection authorities to stop breaches of consumer rights.
[50] Report from the Commission to the European Parliament and the Council 'Assessing the effectiveness of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on the cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), 25.5.2016, COM(2016) 284 final, available at: http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-report_en.pdf.

committed in the digital sphere. In addition, authorities in some Member States do not have the power to order the suspension/closing down of websites which contain scams or sell fake products. Some authorities also lack the power to conduct test purchases/mystery shopping and therefore lack the power to check how traders respect consumer rights such as the right of withdrawal (as guaranteed by Article 11 of the CRD) during or after the sale.

- Insufficient sharing of market intelligence. The development of e-commerce has allowed for wide-ranging marketing campaigns which can reach millions of consumers instantly. This requires authorities to set up a much speedier intelligence-gathering system than was needed in the days of offline trade. In addition, authorities need to be able to reorganise their priorities faster and be more agile.
- Limitation of the mechanism to address infringements concerning several countries (known as 'widespread infringements'). Different national authorities are now often faced with similar infringements taking place in their markets. The current CPC Regulation contains provisions for tackling such infringements; however, these provisions are insufficient and too loose to generate an efficient EU-level response. This results in the treatment of some widespread infringements in parallel and not in a coordinated manner, creating an unnecessary duplication of enforcement efforts and inconsistencies in how EU consumer law is actually applied.

To remedy these problems, in May 2016 the Commission put forward a proposal for the reform of the CPC Regulation. This proposal is currently under negotiation by Parliament and the Council. It aims at equipping enforcement authorities with the uniform set of powers they need to work together faster and more efficiently against intra-Union infringements. Should this proposal be adopted by the European parliament and by the Council, national consumer protection authorities would be able to:

- request information from domain registrars and banks to detect the identity of the responsible trader;
- carry out mystery shopping to check, for example, the presence of geographical or other discrimination, or any unfairness in after-sales conditions;
- order the immediate take-down of websites/suspension of illegal content hosting scams.

The intention is that advertising campaigns of short duration that may have a lasting impact by trapping consumers in unwanted subscriptions would be included under harmful practices that could be challenged using the CPC mechanism. It is also proposed that the Commission be able to launch and coordinate common actions to address EU-wide infringements to ensure a consistent approach to enforcement of EU consumer law, which is largely harmonised. Provision would also be made for a one-stop-shop approach to consumer law under which enforcement authorities would notify the businesses concerned of the issues, ask them to change their practices and, if necessary, compensate the affected consumers. Finally, to detect market problems earlier, organisations with an interest in consumer protection (e.g. consumer associations) will be able to signal bad cross-border practices to enforcement bodies and to the European Commission.

Penalties for infringements of consumer law represent an important part of the enforcement system as they have an impact on the degree of deterrence provided by public enforcement.

However, the **penalties** currently available to the consumer enforcement authorities vary enormously across the EU[51].

In particular, national penalties schemes do not always allow taking into account the Intra-Union dimension of an infringement. The proposal for the revision of CPC Regulation includes the power to impose fines for intra-Union infringements among the minimum powers of competent authorities. The implementation of this power by Member States would not require them to set out a new regime of penalties for this particular category of infringement, but only to apply the regime applicable for domestic infringement.

Collective actions

Consumer rights can be enforced in a collective manner through the injunctions procedure under the ID or via collective redress.

The 2013 Commission Recommendation on collective redress encourages Member States to have collective redress systems in place, stressing that procedures have to be fair, equitable, timely and not prohibitively expensive. By July 2017 the Commission should assess how the Recommendation has been implemented and if any further action, potentially including legislative measures, is needed to ensure that the Recommendation's objectives are fully met.

The **Injunctions Directive** forms a necessary part of this bundle of EU instruments dealing with the enforcement of consumer law. The collective character of the injunction procedure is particularly relevant in the digital age, with increasing numbers of EU-wide traders marketing and selling strategies, bringing with them the related risk of wildly spread infringements, which may cause mass harm to consumers across the EU. However, the injunctions procedure remains underused in many Member States and several shortcomings hampering the effectiveness of the injunctions procedure have been identified in the majority of Member States, albeit to differing extents. The Fitness Check therefore concludes that **the injunctions procedure could be further harmonised** to stimulate its use and to make it more effective as an enforcement tool of EU consumer law (for detailed analysis, see Chapter 1.5 of Annex 1).

6.1.4. Role of awareness about consumer rights

Many consumers are not aware of their rights. According to the Consumer Conditions Scoreboard 2015[52], only 9 % of European consumers were able to correctly reply to all three questions about consumer rights. Only 41 % of respondents knew that they have the right to a free repair or replacement if their goods are defective (as provided by the CSGD); just one third (33 %) knew that they do not need to pay for or return unsolicited products and 56 % were aware that they have a right to a 'cooling-off' period when purchasing goods at a distance (as provided in the Consumer Rights Directive). The 2015 Consumer Scoreboard also compared the average percentage of correct answers given to these statements with the 2012 figures, showing a small rise from 41 % to 43 %. In contrast, the proportion of European consumers who knew the correct answers to all questions decreased from 12 % in 2012 to 9 % in 2015.

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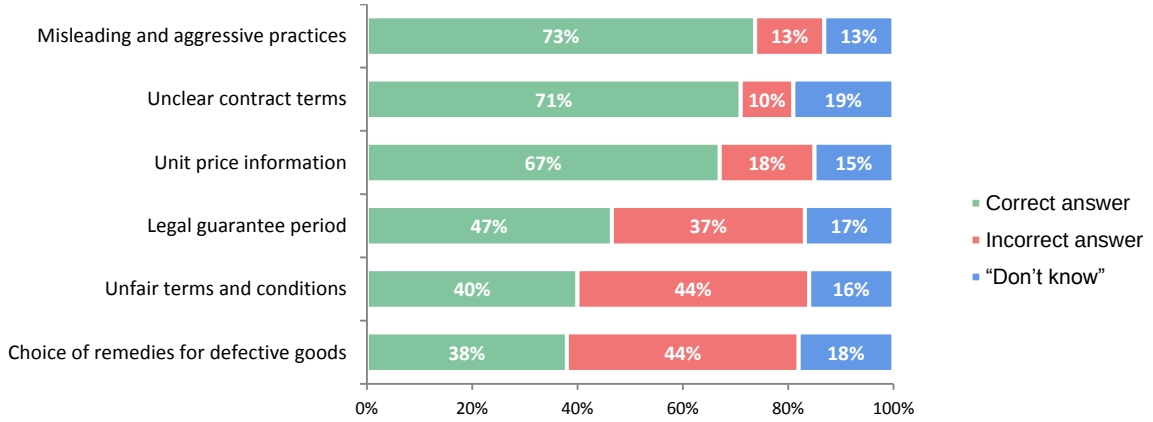
[51] For example, breaches of the CRD are punishable in CY by up to 5 % of the annual turnover or up to EUR 200 000, in LV by up to 10 % of the annual turnover with a cap of EUR 100 000 and in NL by up to 1 % of the annual turnover or up to EUR 900 000. In contrast, fines available to enforcement authorities in LT are set between EUR 144 and EUR 1 448, in BG — between (approx.) EUR 50 and EUR 1 530 and in RO between (approx.) EUR 220 and EUR1 110. For comparison, the new General Data Protection Regulation (GDPR) lays down the maximum level of administrative fines. For some infringements, this can go up to EUR 20 000 000 or up to 4 % of the undertaking's total worldwide annual turnover of the preceding financial year, whichever is higher.

[52] Consumer Conditions Scoreboard: Consumers at home in the Single Market, 2015 edition, available at: http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/docs/ccs2015scoreboard_en.pdf.

The consumer survey of the Fitness Check investigated respondents' awareness of the consumer rights by **asking them practical questions about realistic scenarios that consumers often face concerning the UCPD, UCTD, PID and CSGD.** The replies show that respondents were most knowledgeable (Figure 12) about their rights regarding *misleading and aggressive practices* (73 %), *unclear contract terms* (71 %) and *unit price information* (67 %). In contrast, they knew less about the *length of the legal guarantee period* (47 %), *their right to not be bound by unfair terms and conditions* (40 %) and their *rights regarding the choice of remedies for defective goods* (38 %).

Figure 12. Overview of the awareness of consumer rights

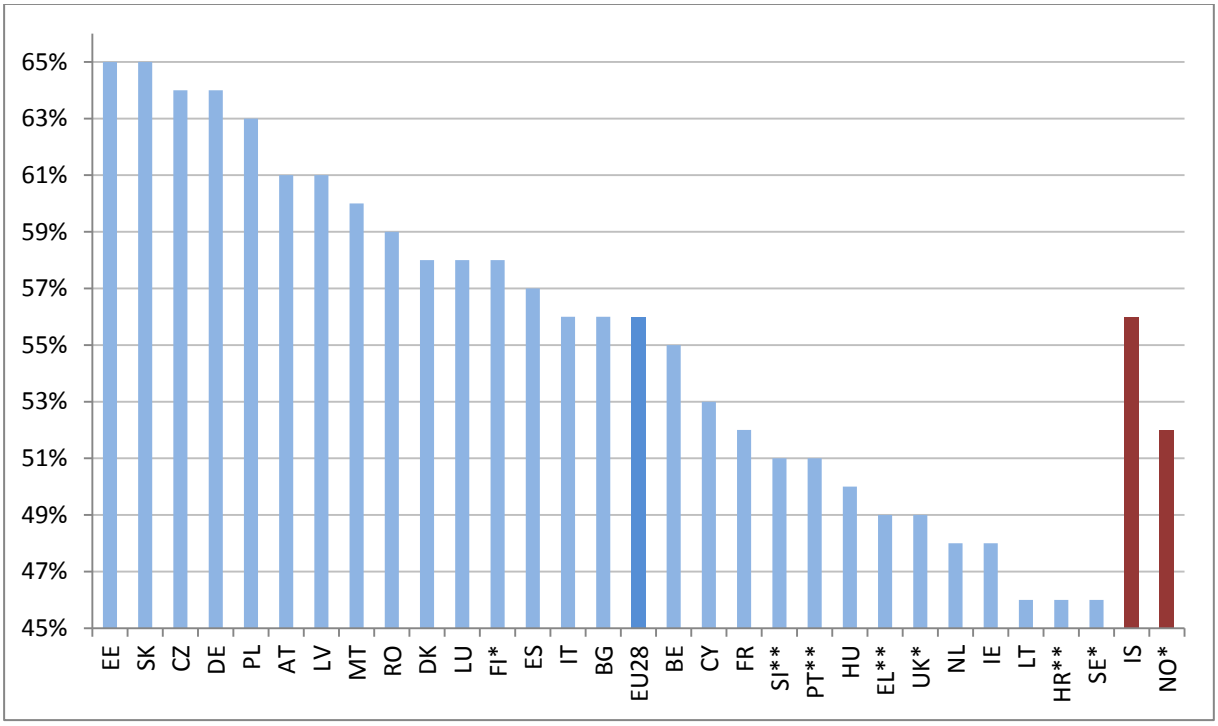


Awareness of the period during which the seller is liable for defective goods (the 'legal guarantee' period) was lowest for respondents in countries where this period is longer than 2 years or not limited in law (Ireland, the UK, the Netherlands, Finland and Sweden). In fact, in those countries many respondents assumed that the EU-wide two-year period applies, which means that EU-wide rights are better known than national ones. Similarly, respondents' awareness of their rights concerning the choice of remedies for defective goods was also often relatively lower in countries where national legislation goes beyond the respective EU Directive. Respondents from Croatia, Lithuania, Slovenia, Portugal and Greece all had particularly low awareness of the applicable national regulations in this area. Exceptions were Ireland and the UK, which scored equal to and higher than the EU-28 average respectively.

On the basis of these replies, a **consumer rights awareness index**[53] was established, showing that on average EU-28 respondents answered 56 % of the consumer rights questions correctly (see Figure 13). Respondents in countries that go beyond the minimum EU requirements for the duration of the seller's liability for defective goods (countries marked by *) and for the choice of remedies for defective goods (countries marked with **) accounted for 9 out of 10 of the lowest scoring countries.

[53] The consumer awareness index was computed to indicate the percentage of awareness questions that respondents of the consumer survey could answer correctly.

Figure 13. Consumer rights awareness index at country level



The consumer survey showed that **consumer rights awareness is an important driver of the actions that consumers take when faced with breaches to their consumer rights**. Accordingly, the percentage of respondents complaining to the seller or service provider increased with increasing consumer rights awareness: no less than 64 % of respondents with very high consumer rights awareness (i.e. scoring between 75 % and 100 % on the consumer awareness index) took action to solve their problem, as opposed to just 47 % doing so among the respondents with a very low consumer awareness (i.e. scoring between 0 % and 25 %).

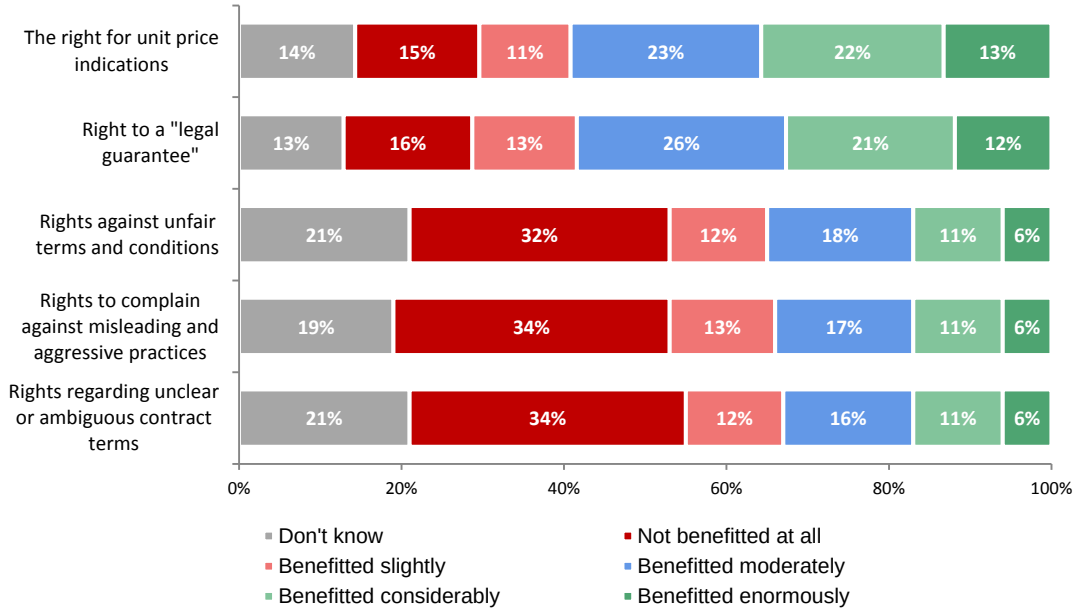
6.2. Efficiency

6.2.1. Benefits for consumers

Benefits for consumers due to the consumer rights under the Directives covered by the Fitness Check were assessed in the consumer survey only in a **qualitative manner**. Specifically, respondents were asked to **what extent they have benefited from the five substantive rights provided by the Directives** covered by the Fitness Check[54]. The replies (Figure 14) show that most respondents (72 %) reported benefiting at least '*slightly*' from the right to a 'legal guarantee' for goods, while 69 % of respondents reported benefiting from the right for unit price indication. Relatively fewer respondents considered the other investigated rights beneficial, i.e. the rights not to be bound by unfair terms and conditions (47 %), the rights to complain against misleading and aggressive practices (47 %) and the rights to interpret unclear or ambiguous contract terms in the consumer's favour (45 %). The number of respondents who indicated they had not drawn any benefit from these rights ranged from 34 % to 15 % (depending on the right). Accordingly, **the consumer rights provided by these Directives continue to benefit a large majority** of consumers.

[54] For detailed results, see Part 2 of the Lot 3 study.

Figure 14. Benefits of consumer rights



According to a recently finalised study on consumer detriment[55], across six markets studied, consumers had suffered detriment of between EUR 20.3 billion and EUR 58.4 billion over the last 12 months in the EU-28[56]. On average, survey respondents who experienced problems **received the highest level of redress** in the clothing, footwear and bags market, recovering between 50 % and 61 % of their initial costs and losses. In contrast, respondents received the lowest value of redress as a proportion of financial detriment in the mobile telephone services market and the electricity services market, recovering respectively only about 14 % and between 12 % and 21 % of their initial costs and losses[57].

The Spanish experience with mortgage contracts illustrates the **large potential consumer benefits.** Foreclosure proceedings, penalty interests and floor clauses in adjustable interest rate mortgages have been strongly affected by the UCTD and its interpretation by the CJEU and Spanish courts. For example, the recent judgment by the CJEU will lead to Spanish banks paying large sums back to consumers due to an unfair term in their mortgage loan agreements.[58]

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[55] Study on measuring consumer detriment in the European Union, available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/consumer-detriment/index_en.htm.

[56] These estimates refer to revealed personal consumer detriment as a result of a problem for which the consumer had a legitimate cause for complaint. Detriment is to be understood as the sum of post-redress financial detriment (monetary costs and losses incurred by the consumer either as a direct result of a problem or from trying to solve a problem) and monetised time loss. Post-redress detriment is calculated after compensation for the problem received from the seller/provider and obtained through several possible procedures, including alternative dispute resolution or legal procedures. The fieldwork was carried out in February and March 2016. Respondents reported on problems over the last 12 months.

[57] The percentages are calculated on the basis of the average levels of pre-redress and post-redress financial detriment in the selected markets, i.e. taking into account all respondents who reported on problems in the markets, irrespective of whether they took action to sort out the problem and irrespective of the status of the problem resolution.

[58] Judgment in Joined Cases C-154/15, C-307/15 and C-308/15 (Gutiérrez Naranjo v. Cajasur Banco, Palacios Martínez v. BBVA and Banco Popular Español v. Irles López). In its judgment, the CJEU overruled national case law that had limited the temporal effects of the declaration of nullity of an unfair term (in this specific case, 'floor clauses' in mortgage loan agreements establishing a minimum rate below which the variable rate of interest cannot fall). According to some estimates, Spanish banks may have to pay back roughly EUR 3 to 5 billion, see: http://economia.elpais.com/economia/2016/12/21/actualidad/1482306332_458117.html.

As regards procedural law, the most obvious and relevant **benefit for consumers stemming from the ID is that the key underlying EU substantive consumer protection rules may be enforced via collective injunction actions**. In cases where the infringement has widespread effects and individual consumers do not initiate legal action for various reasons such as lack of awareness of their rights, lack of finance or psychological reluctance, the collective action brought by an entity to stop the infringement and prohibit it in future actually benefits all consumers affected.

The Fitness Check measured the impact of the injunction procedure in terms of the reduction in consumers' detriment in the past 5 years among the 'qualified entities' surveyed. On average, responding qualified entities rated the impact of the injunctions on reducing consumers' detriment with respect to national infringements as 2.6 on a scale of one to five ('no reduction at all' to 'very significant reduction'). However, the average assessment of the impact of the injunction procedure on reducing detriment with respect to infringements originating in other EU countries was 1.3 out of 5 (qualified entities that did not initiate any injunction actions rating it at a minimum of 1.0). **These rather low figures show that there is still scope for improving the overall use of these injunction procedures to make them more effective.**

6.2.2. Costs for consumers

Non-compliance with consumer protection rules can lead to costs for consumers**.** Consumers are often reluctant to initiate lawsuits against unlawful practices, in particular if their individual loss is small in comparison to the costs of litigation. As a result, continued illegal practices — in the context of continuously developing mass marketing and mass consumption — cause significant **aggregate loss to European consumers**.

For example, it was reported from Hungary that in the 'yellow cheque' case in which a mobile phone company unfairly charged consumers in various ways, only around 5 % of consumers claimed compensation from the company.

In Germany, in a mass problem of unfair price increasing terms in gas contracts — an issue that reached the Court of Justice in the Case C-92/11 *RWE* — the Consumer Centre of Hamburg represented 54 (out of 300 000) consumers in a representative action. Another 50 000 consumers protested against the price increase but paid and would therefore have had to claim the money back, which most did not do. Only around 5 000 consumers refused to pay the increased price. Looking at the broader dimension, it was estimated that only 1-2 m out of approximately 17 m gas customers joined the protest, and of those only a small proportion actually managed not to pay the increased price in the end.

The underuse of injunctions therefore leads to losses for consumers because breaches of consumer law that could be stopped by injunctions are allowed to continue. It is also argued in the Lot 1 study that the impact of the injunction procedure in terms of reducing consumer detriment and in terms of its preventive, deterrent effect is clearly limited if its only legal consequence is to stop the infringement. This lack of compensatory and of deterrent effect has caused Member States to introduce additional measures in recent years which can sometimes

be claimed to be part of the injunction procedure[59].

C**onsumers also incur costs in solving problems**, i.e. in exercising their substantive rights provided by the Directives. **Individual consumers do not bear any costs in relation to the injunction action as defined by the ID**, since they are not parties to the proceedings initiated by the entity acting to protect their collective interest.

The costs of problem solving were analysed in the consumer survey of the Fitness Check (with respect to the most recent reported problem). The results show that, firstly, ***administrative follow-up*** (which includes the time and cost for phone calls to the seller, postage, etc.) required on average 3.5 hours and cost on average EUR 17. Secondly, ***legal follow-up*** (which includes the time and cost spent on legal advice or any other expert advice) required on average 1.8 hours and EUR 16. Finally, ***product follow-up*** (which includes all efforts for resolving the problem through repair or replacement at the respondent's own cost) took on average 3.7 hours and cost EUR 19.

A comparative analysis of the **costs due to problems with domestic and cross-border traders** confirms that consumers must invest more time and money to solve problems with traders in other EU countries, both online and offline, than they do to solve problems with domestic traders.

Table 2. The mean time spent on administrative, legal and product follow-up by type of trader

		Administrative follow-up (hours)	Legal follow-up (hours)	Product follow-up (hours)
Trader with whom the most recent problem occurred	In a shop in your country	3.16	1.30	3.59
	On the internet from a trader based in your country	3.53	1.76	3.17
	In a shop in another EU country	3.73	5.12	7.51
	On the internet from a trader based in another EU country	4.98	3.71	5.82
	Other	3.04	0.96	2.24

Table 3. The mean amount of money spent on administrative, legal and product follow-up by type of trader

		Administrative follow-up (costs)	Legal follow-up (costs)	Product follow-up (costs)
Trader with whom the most recent problem occurred	In a shop in your country	15.15	15.34	17.49
	On the internet from a trader based in your country	15.65	11.86	15.99
	In a shop in another EU country	23.46	38.29	27.81
	On the internet from a trader based in another EU country	31.62	31.17	30.76
	Other	10.95	9.12	14.04

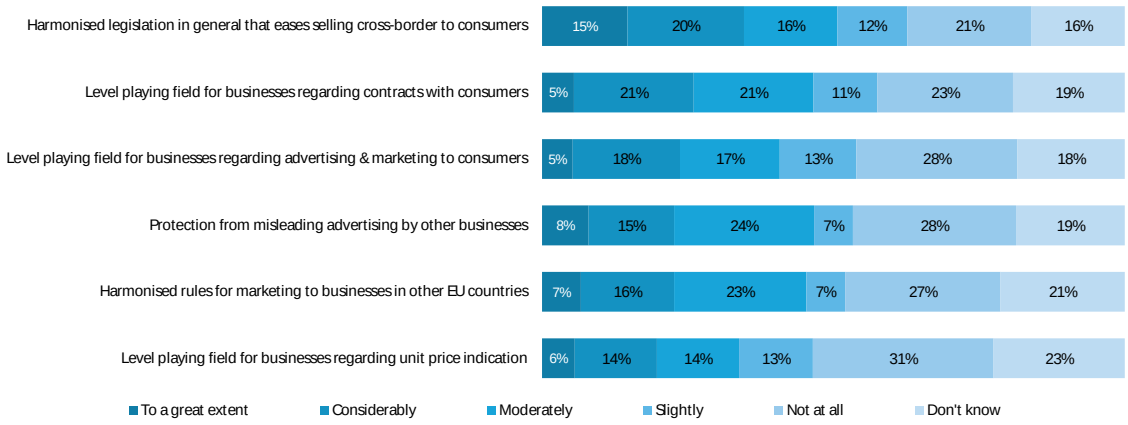
[59] For instance in the UK, so-called 'Enhanced Consumer Measures' were introduced in 2015 for injunctions for the breach of consumer law. These can be obtained together with injunctions in court procedures, and they are fairly flexible. Next to redress orders, which include either compensating consumers where they can be identified, or otherwise measures intended to be in the collective interests of consumers, there are the categories of 'compliance' and 'choice'. 'Compliance' means measures intended to prevent or reduce the risk of the occurrence or repetition of the conduct to which the enforcement order or undertaking relates, whereas 'choice' refers to measures intended to enable consumers to choose more effectively between persons supplying or seeking to supply goods or services.

Finally, implementing the Directives could mean additional costs for consumers if **traders passed on their costs for compliance with the legal framework to consumers through higher prices**. The Fitness Check evaluation did not assess the extent to which these costs are passed on to consumers. However, even if they were fully passed on, the effect on prices would likely be minor, considering the estimated compliance costs for businesses (see Chapter 6.2.4).

6.2.3. Benefits for businesses

Benefits for businesses due to the Directives covered by the Fitness Check were assessed in the business interviews only in a **qualitative manner**. The businesses survey of the Fitness Check concerning advertising and marketing, standard contract terms, and unit price indication (under the UCPD, MCAD, UCTD and PID) shows that how businesses perceive these Directives depends greatly on whether they are active in cross-border trade or focus on the domestic market. Figure 15 shows that **between 46 % and 63 % of the businesses that sell their products/services in other EU countries indicated that they benefited at least slightly from these instruments.**

Figure 15: Extent to which businesses that sell their products/services in other EU countries benefited from[60]…



In particular, 63 % of these businesses indicated that the **harmonised legislation makes it easier to sell cross-border to consumers in other EU countries.** The second greatest benefit was the **level playing field** that was created across the EU for businesses regarding contracts with consumers. The analysis by size classes (Table 4) indicates that medium-sized and large enterprises that sell their products/services in other EU countries benefit the most from these Directives.

[60] Lot 1 study, business interview question: 'Based on your experiences, please indicate to what extent your company has benefited so far from the harmonisation of rules concerning advertising and marketing, standard contract terms, and unit price indication across the EU'.

Table 4: Share of interviewed businesses that sell their products/services in other EU countries and that indicated that they benefited at least slightly from the UCPD, UCTD, MCAD and PID, by size class of enterprise

	Micro	Small	Medium-sized	Large
Level playing field for businesses regarding advertising & marketing to consumers	44 %	30 %	**75 %**	66 %
Level playing field for businesses regarding contracts with consumers	44 %	30 %	**83 %**	63 %
Level playing field for businesses regarding unit price indication	44 %	35 %	**66 %**	42 %
Harmonised legislation in general that eases selling cross-border to consumers	66 %	43 %	**83 %**	54 %
Protection from misleading advertising by other businesses	33 %	43 %	**66 %**	58 %
Harmonised rules for marketing to businesses in other EU countries	22 %	39 %	**75 %**	58 %

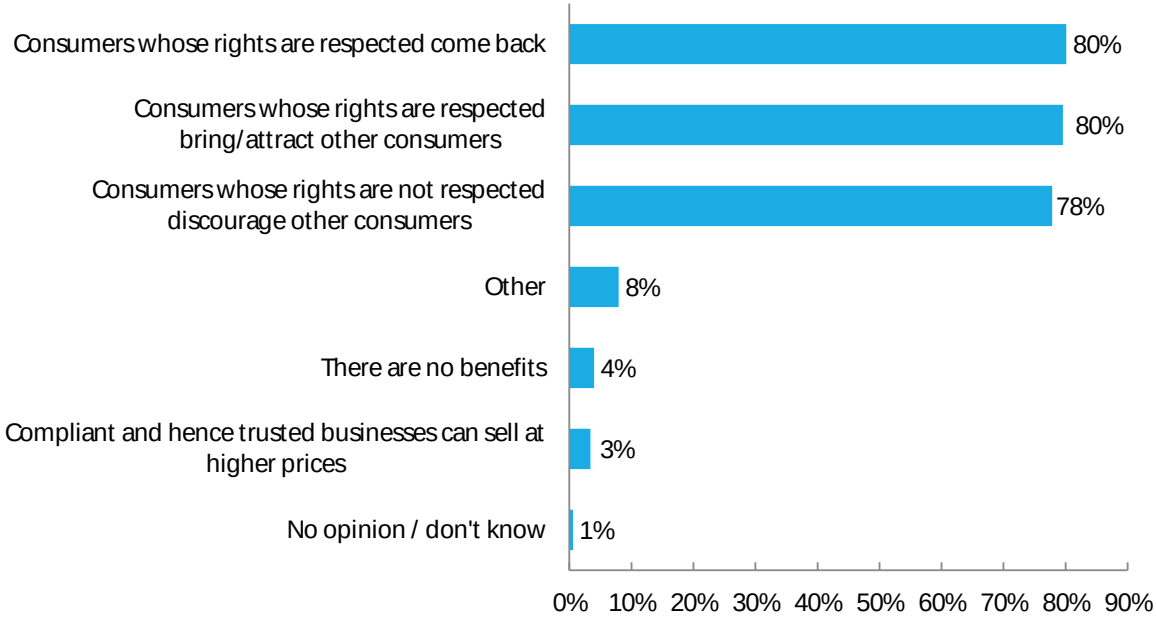
In contrast, a considerably smaller share (between 29 % and 51 %) of the businesses that do not sell their products/services in other EU countries indicated that they benefited at least slightly from these Directives. In particular, the benefits of having harmonised rules on selling cross-border in the EU were ranked last among the **sample of businesses that only operate domestically**[61]. This is understandable since traders who do not sell in other Member States are substantially less affected by legal diversity across Europe, and thus their costs are affected less by the harmonisation at EU level. Nevertheless, these traders still benefit from a more stable and consistent EU legal framework.

Accordingly, traders **operating cross-border are clearly the ones reaping the most tangible benefits from the harmonised rules.** In the online public consultation of the Fitness Check many business stakeholders therefore advocated for pursuing full harmonisation where possible in order to eliminate barriers to cross-border trade. This issue is particularly prominent in relation to remedies against defective goods (see the following Chapter 6.2.4. on business costs). It has already prompted the European Commission to table specific proposals for further harmonising rules in this area back in December 2015[62].

By way of comparison, the business responding to the online public consultation indicated the following benefits of complying with EU consumer and marketing law (Figure 16): 'Consumers whose rights are respected come back', 'consumers whose rights are respected bring/attract other consumers' and 'consumers whose rights are not respected discourage other consumers' were each selected by about 80 % of business respondents. 8 % of business respondents indicated 'other' benefits. According to the respondents' comments, these benefits include avoiding lawsuits or other administrative procedures; comparing more favourably against competitors; and increasing consumer trust.

[61] For detailed results, see Part 4 of the Lot 1 study.
[62] For detailed analysis of the online public consultation, see Part 2 of the Lot 1 study.

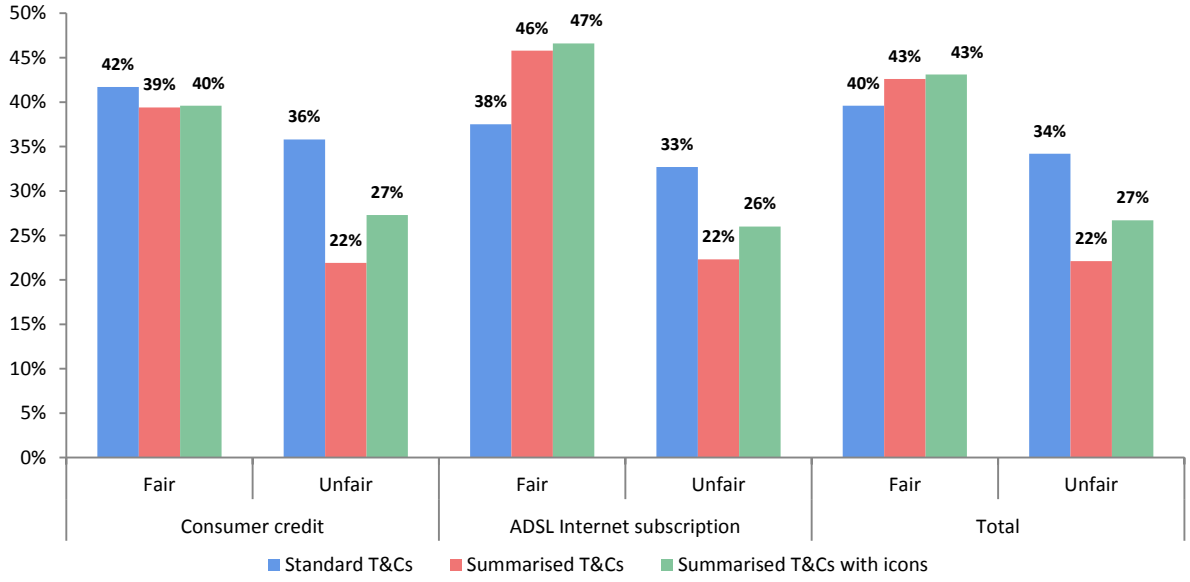
Figure 16: Benefits for businesses from complying with EU consumer and marketing law[63]



For traders, the beneficial impact of complying with consumer protection rules on consumer decision-making was confirmed in the behavioural experiment on consumer responses to contract terms[64], which tested respondents' intention to buy the product on the basis of different content and presentation of standard terms and conditions. The results (Figure 17) show that consumers prefer traders offering fair standard terms. This preference was considerably stronger when respondents were presented with ***summarised terms and conditions***, as they were easier for them to understand**.** Consumers were significantly less likely to buy from a seller with unfair terms and conditions if they were summarised.

[63] Company replies to the online public consultation question: *'In your view, what are the benefits for businesses from complying with EU consumer and marketing law?'* It is important to note that majority of the respondents were German companies.
[64] For detailed results, see Part 2 of the Lot 3 study.

Figure 17. Respondents' intention to buy from trader depending on type and presentation of standard terms and conditions



Businesses can also benefit from the fact that, thanks to the **CPC Regulation, competent national authorities coordinate their actions** so as to consistently apply the same response to malpractices spreading across the EU and avoid the same breach being handled differently. For example, in 2014 the CPC network tackled the misleading marketing of online games as 'free' when in fact they included in-app offers, and in 2015 it addressed the lack of transparency in car rental[65]. These actions resulted in a significant change of practices by major market players. Multinational traders also considered them efficient and pragmatic because the changes offered legal certainty for their cross-border operations, created a level playing field with competitors based in other countries and reduced potential litigation costs in several Member States[66].

As regards the benefits of the procedural rules, the Lot 1 study concluded that the ID constitutes a benefit for honest traders by helping to create fair trading conditions within the internal market. As stated in the study, the concentrated litigation under the ID also helps avoid possibly contradictory outcomes under individual enforcement actions, thus benefiting traders by increasing legal certainty. In addition, the per-case litigation cost for the trader under a collective action for injunction may be lower than having to face a multitude of individual cases.

6.2.4. Costs for businesses, including SMEs

Introduction

Out of the six Directives under the Fitness Check, one — the ID — is of a **procedural nature** and regulates the way in which the entities appointed by the Member States can take action before the courts or administrative authorities to stop traders acting in breach of EU consumer

[65] http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/coordinated_enforcement_actions_en.htm .

[66] The proposal to revise the CPC Regulation provides for clearer and more transparent procedures to address widespread infringements, to obtain quick and effective outcome, and to guarantee legal certainty and traders' defence rights. Businesses operating in most or all Member States will benefit from a one-stop-shop approach to issues with the implementation of consumer laws in their commercial practices. The traders concerned will be invited to propose commitments and discuss with authorities at EU level the best way to put their practices in line with consumer law.

law. **For traders that comply with the substantive requirements of consumer law[67], the ID and its national implementing legislation do not lead to any additional costs**, on top of compliance costs linked to the substantive rules. The only possible additional costs for compliant traders are the possibility of being subject to frivolous claims. It could be argued that the lower cost (per affected consumer) of bringing claims under a collective mechanism may make it more likely that such claims will be filed. However, the Fitness Check has not identified any evidence of qualified entities bringing frivolous or unjustified claims in the EU under the ID.

The other five Directives provide **substantive obligations** for businesses. However, three of them — UCPD, UCTD and MCAD — are principle-based, meaning that they do not contain detailed prescriptive requirements, but rather require businesses to act according to principles of good faith, transparency and due diligence vis-à-vis consumers (or, in the case of the MCAD, vis-à-vis other businesses). The scope of the rules under the PID is relatively limited as it essentially requires businesses to display the *unit price* of the product (kg, litre, etc.). The PID requirement to display the *selling price* has now been superseded by similar requirements under the UCPD and CRD (these newer Directives also have a broader scope than the PID as they apply not only to movable goods covered by the PID but also to services and digital content[68]). The most prescriptive one of these five substantive law directives is the CSGD, which sets out detailed obligations of the sellers when the goods they sell are not in conformity with the contract.

The Commission has so far carried out two comparative analyses regarding the costs to SMEs of complying with EU regulation in selected areas. The first, entitled 'TOP 10 most burdensome legislative acts for SMEs' was carried out in 2012[69] and the second one, entitled 'Annual Burden Survey' is being performed in 2017 (full results are not yet published at the time of finalising this report). The previous analyses in 2012 found that SMEs regarded VAT as the most burdensome area of EU regulation for SMEs. The area of 'Consumer protection — safe shopping (distance selling, advertising, unfair commercial practices, timeshare of holiday properties, etc.[70]) scored as the second least burdensome for SMEs among the 32 surveyed areas.

In 2014 and 2016, questions regarding compliance burdens and costs were also included in the Eurobarometer surveys for the preparation of the Consumer Conditions scoreboards. In 2016 a large majority of traders agreed that complying with consumer legislation in their own country was easy (71 %) and that the costs of compliance were reasonable (66 %). However, only 55 % of traders operating cross-border agreed that compliance in other EU countries was easy and just 48 % agreed that the related costs were reasonable (Figure 18).

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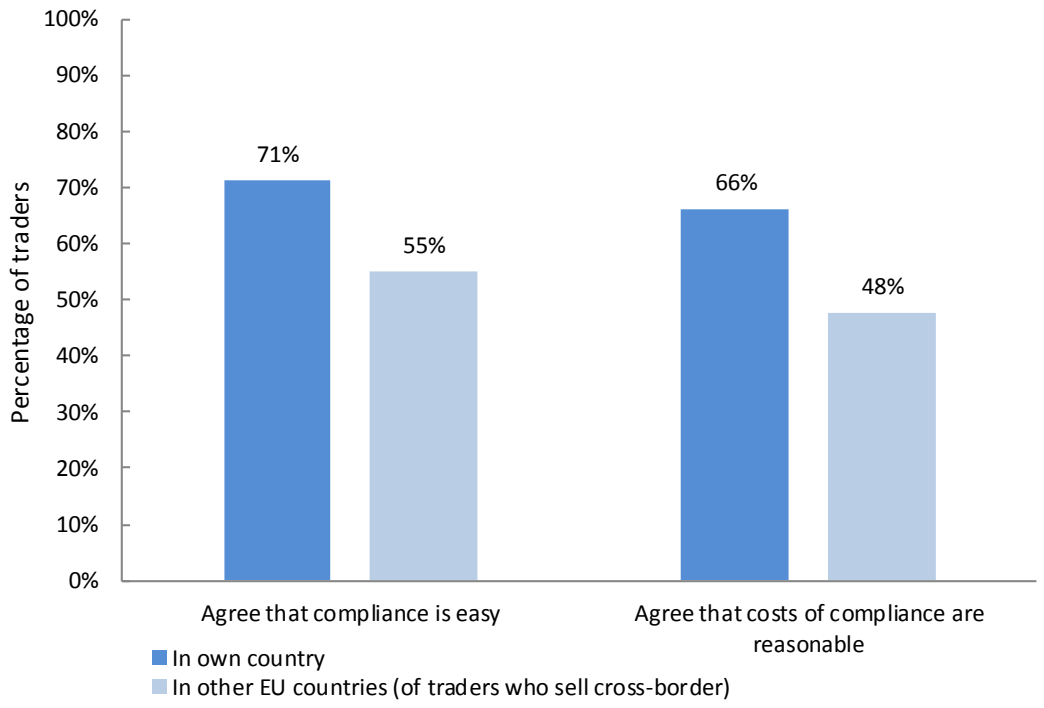
[67] Costs that may result from non-compliance of a specific trader with consumer law provisions (e.g. litigation costs, damages to be paid) are by definition not relevant in the discussion of administrative burdens and compliance costs.

[68] Regarding the scope of the PID, see Commission Communication on the implementation of Directive 1998/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers, 21.6.2006, COM(2006) 325 final; available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006DC0 325.

[69] For further information, including results of the SME public consultation: http://europa.eu/rapid/press-release_IP-13-188_en.htm.

[70] The 2012 burden survey covered 32 areas. The definition of this area is closest to the main subject matter of the Directives covered by the Fitness Check, i.e. the substantive consumer protection rules. The survey list included two more areas placed under a general heading of 'consumer protection', i.e. 'Legal redress and settlement of disputes' (ranked 14th most burdensome out of 32) and 'Food Safety (hygiene, labelling, etc.)' — (ranked 26th most burdensome out of 32).

Figure 18: Percentage of traders agreeing that compliance with consumer legislation is easy and the costs are reasonable, EU-28 in 2016[71]



2016-2014	-1.6*	- 2.0	- 1.1	-4.0*

Statistically significant changes are identified in the table with an asterisk (*)

Although the questions were not identical, this result can be favourably (albeit cautiously) compared with a similar Eurobarometer question asked once in 2006, i.e. before the entry into application of the UCPD. This found that a mere 34 % of retailers and service providers operating or willing to operate cross-border would rate compliance costs for consumer legislation in other EU countries as 'low or negligible'[72].

In the Fitness Check the business compliance costs with **UCPD, MCAD, UCTD and PID** were assessed in 282 business interviews covering all Member States. The interviews focused on five sectors[73]:

- large household appliances;
- electronic and ICT products;
- gas and electricity services;

[71] Survey on retailers' attitudes towards cross-border trade and consumer protection (2016) to be used in the forthcoming Consumer Conditions Scoreboard 2017 (expected publication — summer 2017). Question: I will read you three statements about compliance with consumer legislation in (OUR COUNTRY). Please tell me whether you strongly agree, agree, disagree, or strongly disagree with each of them: 'It is easy to comply with consumer legislation in your sector.' / 'The costs of compliance with consumer legislation in your sector are reasonable.' Note: For 'own country' data, the proportion is calculated out of all traders; for 'other EU countries', the proportion is calculated only out of traders who indicated that they sell cross-border. This question was first included in the 2014 survey. The 2014 and 2016 results are not being compared as it is too early to conclude on trends.

[72] Flash Eurobarometer 186: Business attitudes towards cross-border sales and consumer protection. Question: Overall, how do you rate the possible extra compliance costs for cross-border sales arising from the different national laws regulating transactions with consumers in other EU countries?

[73] These five sectors were selected in order to cover both goods and services markets and to include markets where: 1) the unit price indication is relevant; 2) there are additional sector-specific EU consumer rules; 3) high incidence of consumer problems is reported. On average, two interviews per sector were conducted in each Member State. For more details on the interviews and the methodology applied, refer to Part 4 of the Lot 1 study.

- telecommunication services; and
- pre-packaged food and detergents.

Target companies were businesses (of which two thirds were SMEs) that sell products or services to consumers in the selected sectors. These business interviews also distinguished between the **one-off costs** businesses incur when entering another EU country's market for the first time to sell their products/services (cost of legal fragmentation) and the **costs incurred on a regular basis** for checking that the company's advertising/marketing and standard contract terms comply with national legislation and then adjusting their business practices. Only a minority (28 %) of the interviewees sold their products and/or services in other EU Member States and about three quarters (72 %) only operated domestically. Only the first group was exposed to costs linked to requirements in other Member States.

As regards **the CSGD**, in its Digital Contracts Proposals of December 2015 the Commission already proposed reducing the current level of fragmentation of national transposition rules by replacing and fully harmonising them in respect of *distance sales* (especially online sales). The impact assessment that accompanied the Digital Contracts Proposals[74] demonstrates that such fragmentation imposes a tangible burden on traders selling online cross-border. When it adopted the Digital Contracts Proposals the Commission pledged to examine, in the context of the Fitness Check, the need for maintaining aligned rules for both distance and face-to-face sales in this area, i.e. the potential for extending the proposal on online sales of goods to all sales channels (as currently covered by the CSGD). The Fitness Check evaluation of the CSGD therefore focused on the costs of benefits of maintaining aligned rules.

One-off costs when entering another EU country's market (cost of legal fragmentation)

While UCPD provides for full harmonisation (except the areas of financial services and immovable property), the other four substantive law directives (MCAD, UCTD, PID and CSGD) provide for minimum harmonisation. MCAD and UCTD are principle-based and the PID regulates one very specific issue. For example, the main objective of the more prescriptive national blacklists of unfair contract terms is to make it easier to apply the general principles enshrined in the UCTD.

The vast majority of the stakeholders interviewed in the Member States and at EU level do not consider that the minimum level of harmonisation provided for under the UCTD, MCAD and PID causes significant problems for cross-border trade. In the business survey of the Fitness Check only 15 % of business respondents referred to legal differences in the rules on marketing and standard contract terms (i.e. national differences in the area of UCPD, MCAD and UCTD) as their reason for not selling abroad.

[74] Available at http://ec.europa.eu/justice/contract/digital-contract-rules/index_en.htm .

Figure 19. Reasons for not selling products/services in other EU countries [75]

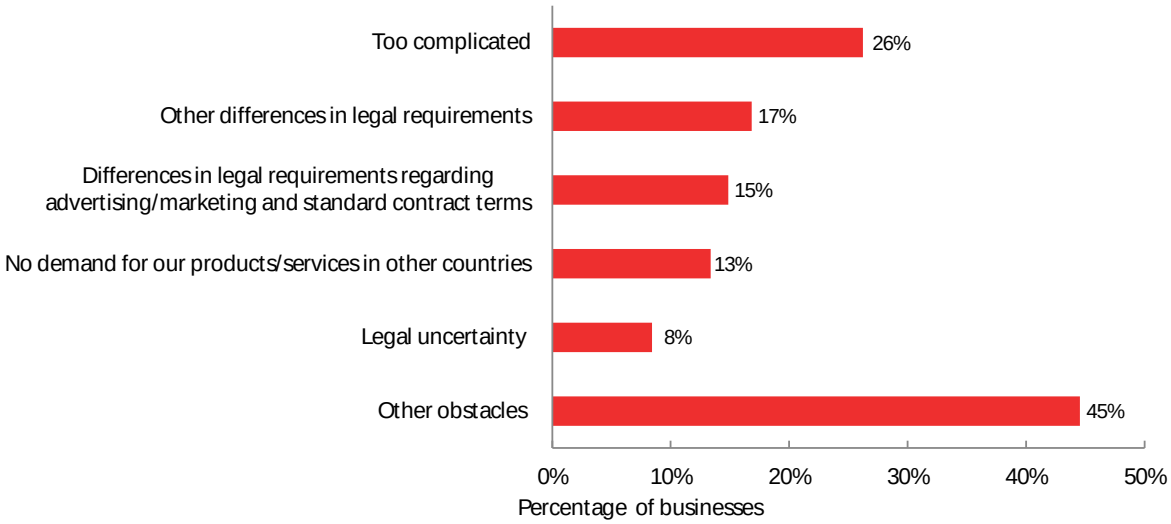


Table 5 below presents the estimated one-off costs per business by sector in relation to the UCPD, MCAD and UCTD, based on median values, for businesses that sell their products and/or services in other EU Member States[76]. Since only a minority (28 %) of the interviewees sold their products and/or services in other EU countries, these estimates are based on a smaller respondent base and should be used with caution.

Table 5: One-off costs for checking compliance with and adjusting business practices to the national legislation regarding advertising/marketing and standard contract terms when entering another EU country's market (per business)

Sector	Median labour costs for professional staff (EUR per country entered)	Median labour costs for administrative or sales staff (EUR per country entered)	Median other costs, e.g. for legal advice (EUR per country entered)	Total one-off costs (EUR per country entered)
Large household appliances	1 357	620	333	2 310
Electronic and ICT products	946	465	316	1 727
Gas and electricity services	3 943	1 086	7 000	12 029
Telecommunication services	3 470	2 016	3 111	8 597
Pre-packaged food and detergents	1 262	155	1 111	2 528

Overall, costs are highest for businesses in the two network services sectors. Total one-off costs for compliance checks and adjusting business practices when entering another EU country's market are highest in the sector for gas and electricity services, with median one-off costs of EUR 12 029 per business that sells its services to consumers in other EU countries.

[75] Business survey of the Lot 1 study, question: 'Why you do not sell your products/services in other EU countries?'.

[76] The costs listed in the table exclude costs related to the translation of contracts and correspond to costs when entering one other EU country's market. For detailed results and explanations, see Part 4 of the Lot 1 study.

The second highest costs are in the sector for telecommunication services, with median one-off costs of EUR 8 597 per business that sells its services to consumers in other EU countries. Total one-off costs per business are similar in the sectors for pre-packaged food and detergents and large household appliances, with median one-off costs of EUR 2 528 and EUR 2 310, respectively. They are lowest in the sector for electronic and ICT products, with median one-off costs of EUR 1 727.

These interviews explored the costs of checking compliance with and adjusting business practices to the legal requirements in another EU country regarding advertising/marketing and standard contract terms. Since it is practically impossible for businesses to attribute their costs in this area to specific legal instruments, the respondents' estimates are likely to cover **the combined effects of not only UCPD, MCAD and UCTD but also of national legislation going beyond the requirements of these Directives and the requirements of EU sector-specific consumer legislation and its national implementing legislation**. In particular, gas and electricity services and telecommunication services are subject to detailed sector-specific EU and national consumer protection rules (see Chapter 6.3). Accordingly, not all of these reported costs can be directly attributed to the UCPD, MCAD and UCTD.

Of the above-mentioned costs, **two thirds or more relate to compliance checks and adjusting business practices concerning advertising and marketing**, i.e. they relate to UCPD and MCAD (subject to the above-mentioned caveat). Of these costs, the larger part is related to advertising and marketing targeting consumers (i.e. compliance with UCPD). In absolute terms, the median one-off costs of compliance checks and adjusting business practices concerning advertising and marketing targeted towards both consumers and businesses are estimated to range between EUR 1 160 and EUR 8 060 per business across the five sectors covered.

These amounts suggest that a **reduction in those costs per country could positively impact the costs faced by cross-border active businesses when entering additional EU markets**. However, the extent of this reduction is difficult to quantify, as the interviewed businesses typically considered the requirements of the **legal framework concerning unfair commercial practices and marketing as a whole, not differentiating between specific directives and whether rules originated at EU or at national level.**

Legal fragmentation costs related to the CSGD

The **minimum level of harmonisation provided for under the CSGD** has resulted in important national differences such as:

- obliging consumers to notify the defect within specific time-limit;
- extending the seller's liability beyond the minimum harmonised 2 years;
- extending the period for the reversal of the burden of proof beyond the minimum harmonised 6 months;
- providing consumers with a free choice of remedies/ short term right to reject.

These differences create additional costs for online retailers, as shown in the impact assessment accompanying the Digital Contracts Proposals of December 2015, which consisted of a Proposal on remedies for digital content and a Proposal on distance sales of goods[77].

The Fitness Check analysed whether **retailers using face-to-face channels** experience similar problems. According to the available Eurobarometer survey data, 42 % of retailers using face-to-face sales channels indeed considered that the additional costs of complying with different

[77] SWD/(2015)274 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD %3A20 15 %3A27 4 %3AREV1 .

consumer protection rules and contract law (including legal advice) was a 'very important' or 'fairly important' barrier to the development of their cross-border sales to other EU countries. This is only slightly lower than the percentage of retailers using distance sales channels, where 46 % reported that these national differences constitute a barrier. Of the retailers interviewed in the Lot 2 study (Table 6), 54 % reported that the free choice of remedies that currently exists in some Member States (as opposed to the hierarchy of remedies) results in moderate to major costs. In the same vein, differences in national rules such as longer periods of reversal of proof (38 %), the absence of an obligation for consumers to notify a defect within 2 months (37 %) and a longer legal guarantee period (36 %) were also reported as currently causing moderate to major costs[78].

Table 6 — Overview of estimated costs for retailers based in or selling to those Member States where the existing national rules go above the minimum harmonisation of the CSGD

	Legal guarantee period longer than 2 years	Reversed burden of proof for up to two years (instead of 6 months)	No obligation for consumers to notify the defect	Free choice of remedies
Major costs	19.6 %	8.8 %	11.8 %	19.8 %
Moderate costs	16.8 %	28.9 %	24.7 %	33.9 %
No costs/benefits prevail	47.7 %	48.2 %	50.5 %	34.7 %
Don't know	15.9 %	14.0 %	12.9 %	11.6 %
Number of respondents	107	114	186	121

The Proposal on distance sales of goods tabled in December 2015 therefore replaces, in respect of distance sales, the CSGD by providing the following key rules:

- a uniform two-year legal guarantee period;
- a uniform two-year time limit for the reversal of the burden of proof;
- no longer allowing Member States to oblige consumers to notify the seller of a defect within 2 months of purchase;
- a hierarchy of remedies (repairs or replacement first, followed by price reduction or termination of contract and reimbursement of the price).

As indicated in the Communication accompanying the Digital Contracts Proposals, the Fitness Check looked into the costs and benefits of fully harmonising these rules also for offline sales, thus aligning the rules of sales in brick-and-mortar shops with those in the Proposal on distance sales of goods.

As regards the **harmonised length of the legal guarantee period of 2 years,** over half of retailers (58 %) felt there would be no impact on their business if uniform rules were applied.

[78] For further details see Lot 2 'Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels'.

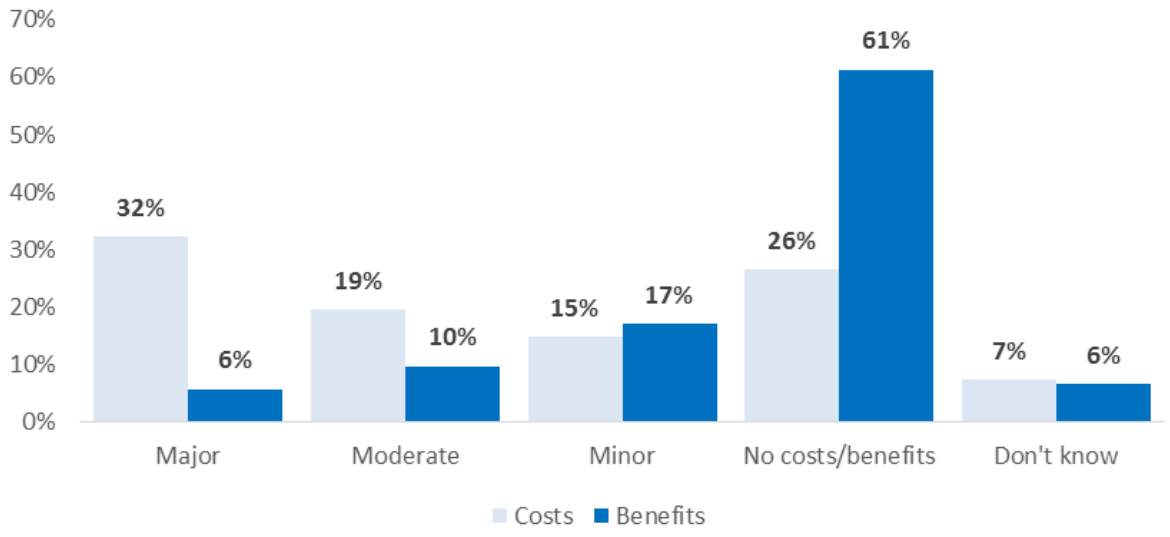
However, around one fifth (21 %) did feel this would make for fairer competition between distance retailers and face-to-face retailers and 13 % thought it would lead to lower costs due to rules being applied consistently across the EU.

Table 7. What would be the impacts of introducing a uniform legal guarantee period for 2 years for both sales channels

	Lower costs through simpler regime (same rules across the EU for face-to-face and distance sales)	Fairer competition between retailers selling face-to-face and retailers selling by way of distance communication (e-commerce, mail order etc.)	No impact. The fact that different rules would apply to products purchased by way of distance communication as opposed to face-to-face sales does not matter	Other	Don't know	Base size (N=)
All countries	13 %	21 %	58 %	7 %	7 %	351

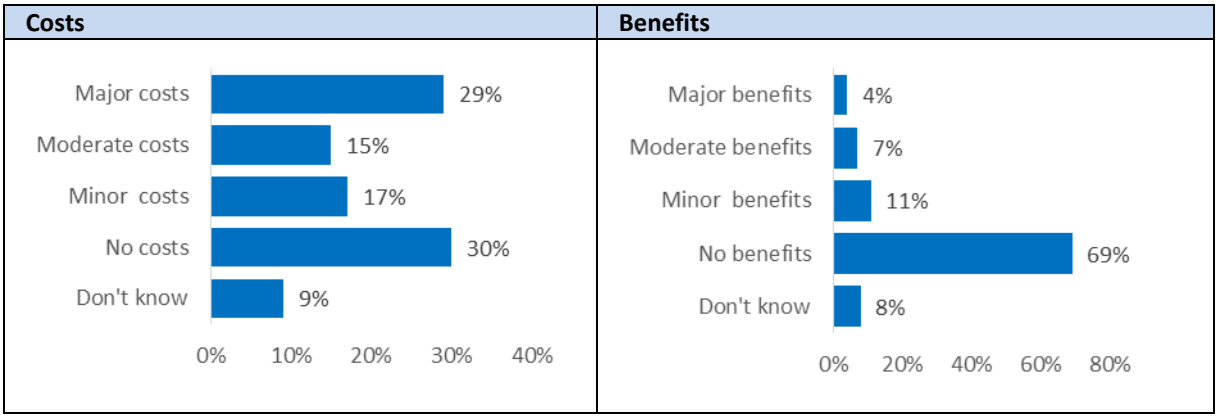
The majority of responding retailers stated that harmonising the length of the reversal of burden of proof at 2 years would represent major (32 %) or moderate costs (19 %), while bringing no (61 %) or only minor (15 %) benefits.

Figure 20. What would be the impact on your business if a period of reversal of burden of proof of 2 years were to be introduced in all EU countries?



Opinions among retailers were **divided on removing the possibility for Member States to provide for an obligation to notify**, with 29 % of respondents stating that removing this obligation would impose major costs and 30 % stating it would impose no costs.

Figure 21. Overview of reported costs and benefits if consumer were no longer obliged to inform the seller of a defect within 2 months of discovering it[79]



Costs incurred by businesses on a regular basis (relating to marketing and standard terms under the UCPD, UCTD and MCAD)

All the businesses interviewed, including those not operating cross-border in the EU, could still face compliance costs, both in terms of checking and verifying requirements at national level in the country where they operate and in terms of adjustment and changing practices.

All interviewed businesses were therefore asked how frequently they check that their advertising, marketing and standard contract terms comply with national legislation. Table 8 below shows the distribution of answers by company size.

Table 8: Frequency distribution of compliance checks, by size class of enterprises[80]

Size class	Once a month or more often	Once every three months	Once every six months	Once a year	Once every two years	Less than once every two years	Never
Micro	2 %	3 %	5 %	34 %	7 %	10 %	38 %
Small	21 %	11 %	18 %	23 %	7 %	4 %	18 %
Medium-sized	22 %	17 %	14 %	25 %	0 %	3 %	19 %
Large	39 %	16 %	12 %	27 %	1 %	1 %	4 %
Total	*22 %*	*12 %*	*12 %*	*27 %*	*4 %*	*4 %*	*19 %*

Accordingly, 81 % of the interviewed businesses reported checking that their advertising/marketing and standard contract terms comply with national legislation, whereas 19 % indicated that they never check compliance.

[79] For further details see Lot 2 'Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels'.

[80] Business survey of the Lot 1 study, question: 'In recent years, how frequently have you checked that your advertising/marketing and standard contract terms still comply with national legislation?'

Table 9 below presents the total annual costs for compliance checks and adjusting business practices incurred by businesses that check for compliance, calculated on the basis of median values, by sector[81].

Table 9: Annual total costs incurred for checking that the company's advertising/marketing and standard contract terms still comply with national legislation and adjusting business practices if needed (per business — total amounts for all EU countries targeted)[82]

Sector	Median labour costs for professional staff (EUR per year)	Median labour costs for administrative or sales staff (EUR per year)	Median other costs, e.g. for legal advice (EUR per year)	Total annual costs (EUR per year)
Large household appliances	946	357	516	1 819
Electronic and ICT products	1 577	620	735	2 933
Gas and electricity services	2 997	2 171	5 420	10 588
Telecommunication services	4 101	465	10 400	14 966
Pre-packaged food and detergents	946	310	1 833	3 090

Similarly to the pattern for the one-off costs presented above, **regular costs are substantially higher in the two network services sectors**.

Cost estimates by size classes of companies indicate (Table 10) that median annual **costs increase with company size in nearly all sectors**, with the exception of small deviations in the sectors for pre-packaged food and detergents and telecommunication services.

Thus, in the sector for **large household appliances**, the median annual total costs per business range from EUR 194 for micro businesses to an overall high of EUR 54 806 for large businesses. In the sector for **electronic and ICT products,** the median annual total costs per business range from EUR 864 for micro businesses to EUR 16 098 for large businesses. In the sector for the **gas and electricity services**, the median annual total costs per business range from EUR 3 840 for micro businesses to EUR 20 182 for large businesses. In the sector for **telecommunication services**, the median annual total costs per business range from EUR 1 466 for micro businesses to EUR 49 513 for medium-sized businesses and EUR 40 646 for large businesses. In this sector, the costs indicated by the medium-sized enterprises during the interviews were very similar to the numbers provided by large enterprises in this sector. However, the number of interviews and in particular the number of businesses that provided quantitative data on their costs (half of the businesses that provided quantitative data were large businesses) do not make it possible to draw further conclusions on the differences in costs between these two categories. In the sector for **pre-packaged food and detergents**, the median annual total costs per business range from an overall low of EUR 118 for micro businesses to EUR 14 865 for large businesses.

[81] For businesses operating cross-border, the interviews clarified that costs invested when entering another EU country's market are not to be considered in the estimate, to avoid double-counting.

[82] Interviewed businesses were asked to report total amounts for all EU countries they target, including the country in which they are registered.

Table 10: Annual total costs incurred for checking that the company's advertising/marketing and standard contract terms still comply with national legislation and adjusting business practices if needed. Figures are per business, for those that undertake compliance checks, and are based on median values, in EUR by size class

Sector/Size class	Micro	Small	Medium-sized	Large	Micro and small enterprises	Medium-sized and large enterprises
Large household appliances	194	2 225	1 700	54 806	347	3 954
Electronic and ICT products	864	3 541	3 569	16 098	1 523	6 930
Gas and electricity services	3 840	7 966	11 667	20 182	7 066	25 261
Telecommunication services	1 466	6 880	49 513	40 646	3 485	30 878
Pre-packaged food and detergents	118	2 723	5 780	14 865	541	7 899

The following figures provide for graphical comparison of the cost estimates by company size classes.

Figure 22: Median annual total costs for businesses undertaking compliance checks, per business, in EUR by size class — Large household appliances

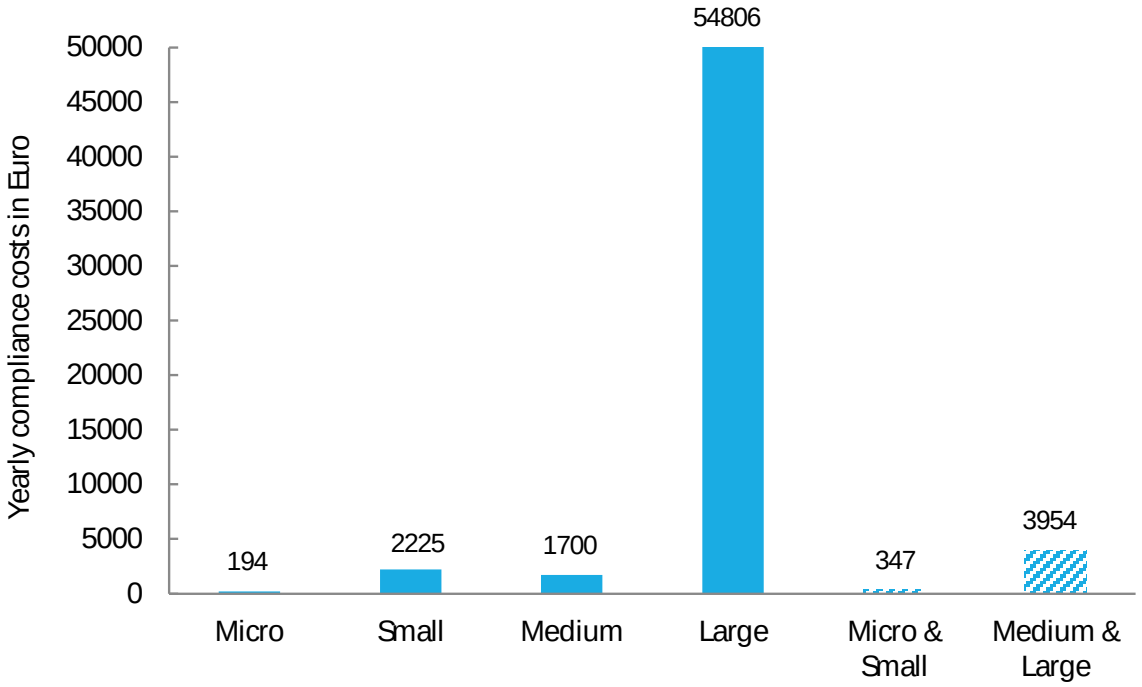


Figure 23: Median annual total costs for businesses undertaking compliance checks, per business, in EUR by size class — Electronic and ICT products

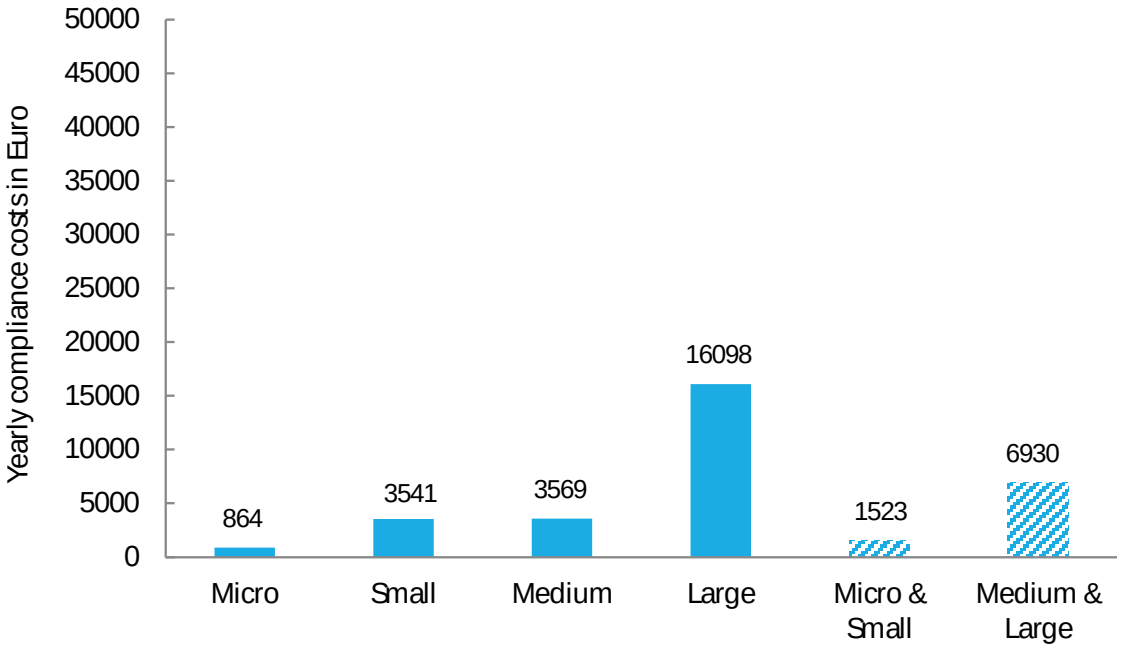
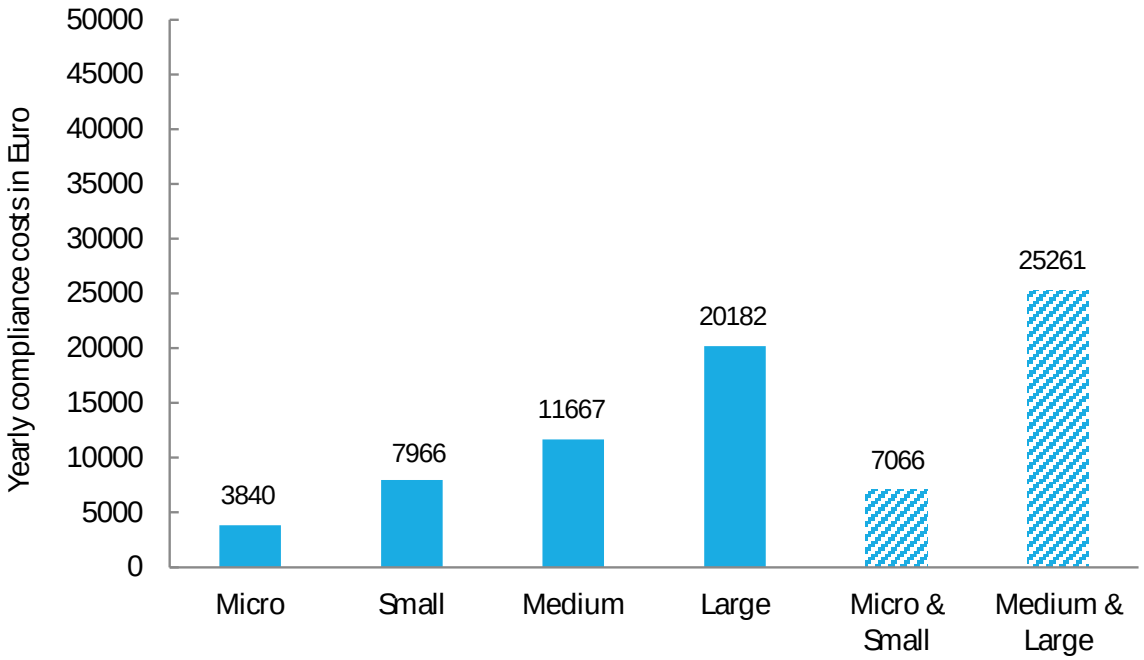


Figure 24: Median annual total costs for businesses undertaking compliance checks, per business, in EUR by size class — Gas and electricity services[83]



[83] Note: Of the medium-sized businesses in this sector, only one provided quantitative data for 'other costs'. Therefore, a conservative estimate of 'other costs' was used when calculating the total costs per business for medium-sized enterprises, based on the value obtained for the total sample in this sector weighted by size class, i.e. not taking into account the one (high) input provided. However, no estimate was needed for the calculation for the grouping medium and large enterprises, because the base size was larger than three. It included the one (high) input from the medium-sized business. As a result, the total estimate for medium and large enterprises is larger than the separate estimates for medium-sized businesses and for large businesses.

Figure 25: Median annual total costs for businesses undertaking compliance checks, per business, in EUR by size class — Telecommunication services

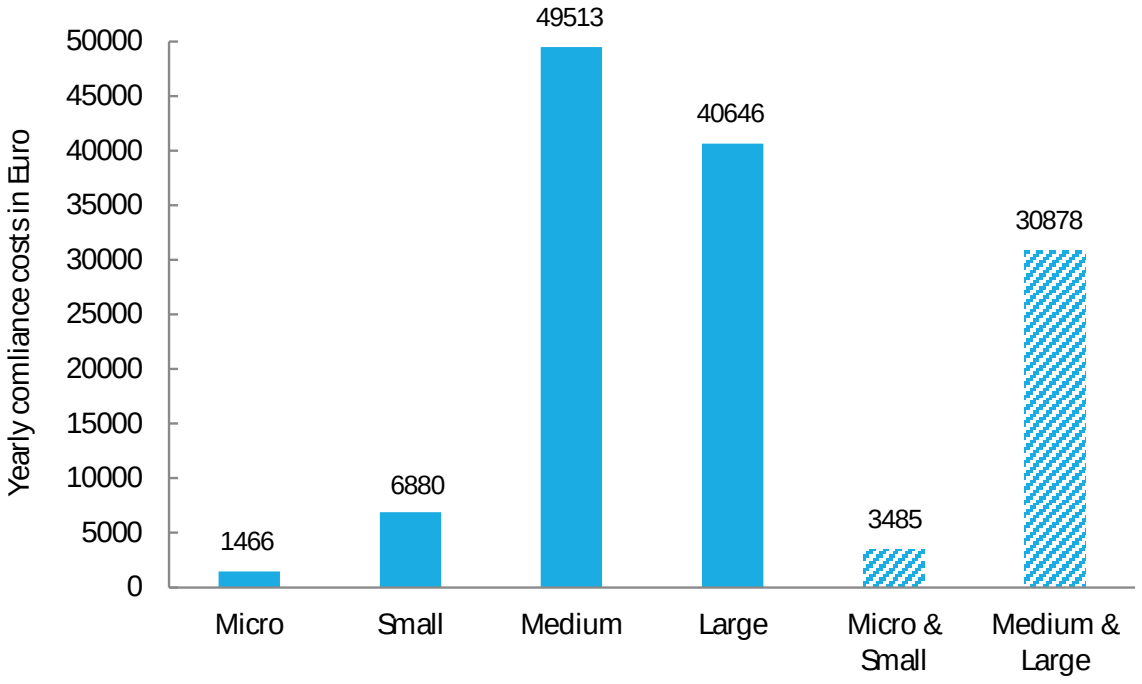
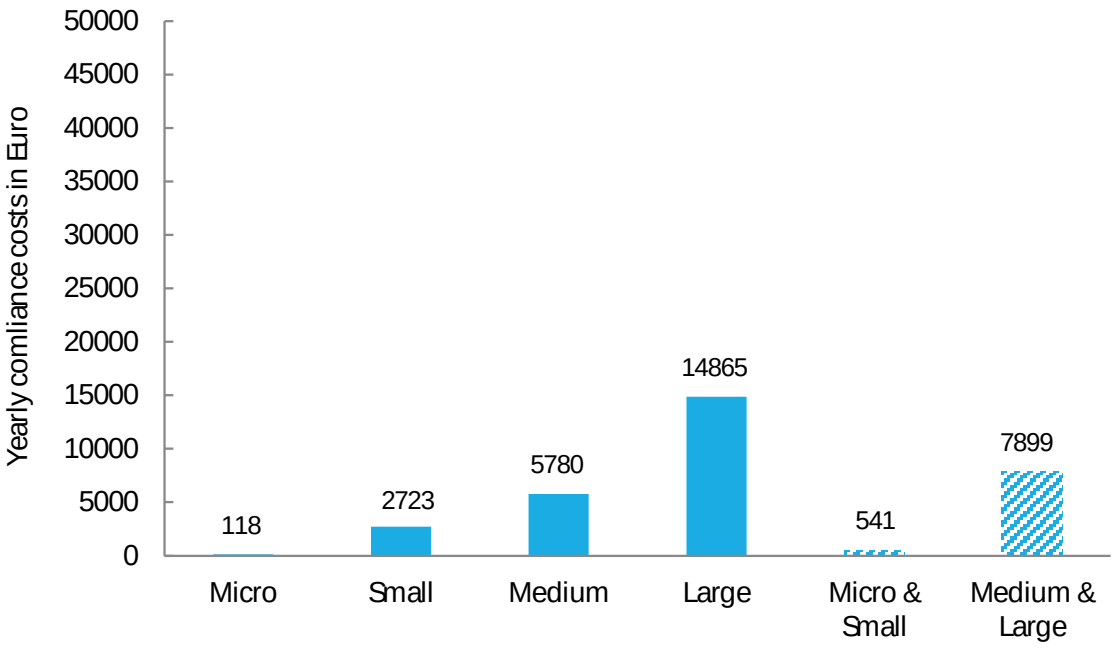


Figure 26: Median annual total costs for businesses undertaking compliance checks, per business, in EUR by size class — Pre-packaged food and detergents



Compliance costs at EU level

The results obtained at the business level for the selected sectors were then **extrapolated to the EU level**. The median annual costs per business per sector were multiplied by the number of businesses in the sector that check for compliance on a regular basis. This was done first separately by size class (i.e. for micro, small, medium-sized and large enterprises), and the four intermediate EU-level estimates were then summed up. Using the costs per business irrespective of size class and the number of businesses (of all size classes) concerned in the

sector would have resulted in overestimations. A more granular approach was therefore used to ensure that the resulting estimates provide a realistic picture which reflects that companies of different sizes employ a different amount of resources for compliance checks.

Table 11 below presents results of the extrapolation by sector and size class. The 'total' column provides total annual costs incurred by all businesses in the EU, calculated by summing up the total amounts for the four size classes in each sector. The extrapolation to the EU level used median values for costs per business to derive a best estimate [84]

Table 11: Total annual costs incurred by businesses in the EU for checking that their advertising/marketing and standard contract terms still comply with national legislation and adjusting business practices if needed — best estimates in EUR million, by size class of enterprises[85]

Sector/Size class	Micro	Small	Medium-sized	Large	Total (sum)
Large household appliances	5.1	2.9	0.2	1.6	9.8
Electronic and ICT products	45.4	9.0	1.5	0.8	56.7
Gas and electricity services*	n.a.	n.a.	n.a.	n.a.	11.3
Telecommunication services	22.8	8.9	13.5	4.7	49.8
Pre-packaged food and detergents	53.8	65.3	19.3	10.9	149.4

In this extrapolation, the number of businesses per sector and size class has a strong influence on the results. For instance, while lower levels of costs were measured for micro enterprises, the large number of micro enterprises in the selected sectors results in them having high total business costs compared to the other size classes. For example, in the sector for electronic and ICT products the best estimate of total annual costs incurred by micro businesses in the EU-28 is EUR 45 million, compared to between EUR 0.8 million for large businesses and EUR 9 million for small businesses.

[84] The methodology of the extrapolation and detailed results are presented in Part 4 of the Lot 1 study.

[85] Based on business interviews and Eurostat data on annual detailed enterprise statistics and distributive trades/services by employment size class (NACE Rev. 2). Notes: In the sector for telecommunication services, the share of businesses that sell to consumers was estimated because the available Eurostat data on the number of businesses for the relevant NACE 2 category do not make it possible to distinguish between businesses that sell to consumers and businesses that are only involved in business-to-business transactions. Based on information provided in the Broadband Internet Access Cost (BIAC) study 2016 (available at https://ec.europa.eu/digital-single-market/en/news/broadband-internet-access-cost-biac-study) and Eurostat data on annual detailed enterprise statistics for services (category 'wired telecommunications activities'), an estimate of 41 % was applied. In the sector for gas and electricity services, data on the number of businesses by size class are not available. As such, business costs could only be extrapolated to the EU level on the basis of the whole sample, i.e. by multiplying the median annual costs per business in the sample by the total number of businesses that check for compliance in this sector. In the sector for gas and electricity services, the share of businesses that sell to consumers was estimated, as the available Eurostat data on the number of businesses for the relevant NACE 2 category do not make it possible to distinguish between businesses that sell to consumers and businesses that are only involved in business-to-business transactions. Instead, the CEER National Indicators Database (2016) was used, in particular the underlying data of the ACER electricity and gas retail markets volume for 2015.

The total **costs incurred, by all businesses in the EU-28 in the five selected sectors, for checking that their advertising/marketing and standard contract terms comply with national legislation and adjusting business practices if needed amount to EUR 278 million per year** (best estimate) for an estimated number of 962 261 businesses in the five selected sectors.

Of these costs, the largest share of **46 %** is caused by compliance checks and adjusting business practices related to advertising and marketing targeted at consumers. **16 %** is related to advertising and marketing targeted at businesses, with the remaining share of **39 %** of costs being related to standard contract terms in consumer contracts. This is similar to the pattern observed at company level regarding the one-off costs when entering another EU country's market.

These costs appear very proportionate, including for SMEs, compared to the approximate annual turnover of EUR 1 180 billion in these five sectors, given the importance of these rules for the functioning of consumer markets. Indeed, t**he estimated overall costs of regular compliance checks amount to approximately 0.024 % of turnover,** of which 0.011 % for checking compliance with rules concerning advertising and marketing targeted at consumers, 0.004 % for checking compliance with rules concerning advertising and marketing targeted at businesses, and 0.009 % for checking compliance with rules concerning standard contract terms[86].

It must be emphasised that **these estimates refer to the overall compliance costs for businesses in these areas, and therefore are caused by the combined effects of UCPD, MCAD and UCTD, national legislation going beyond their requirements and EU sector-specific legislation and its national implementing legislation.**

Therefore, these costs cannot be directly attributed to the UCPD, UCTD and MCAD. It is also likely that, when these Directives were transposed into national legislation, they had a stronger impact on company costs since the existing national provisions had to be, at least to some extent, revised and changed to comply with the new EU requirements. After this phase, it is possible (although not certain) to anticipate that harmonising the rules on commercial practices and standard contract terms at EU level through these Directives has brought stability and consistency to this area. The need for and cost of regular compliance checking and adjustment can therefore be expected to decrease.

Business costs related to the unit price indication under the PID

As regards compliance costs with the PID, business interviews focused on businesses in the pre-packaged food and detergents sector (for which unit price indication is most relevant). 75 % of the 65 respondents reported that they provide consumers with unit prices for pre-packaged food and/or detergents to comply with legislation 15 % did not provide this information, and 9 % either did not know or did not provide an answer. On the basis of those who provided such data, the median number of working days spent per year on price indication by professional staff is 2.0, the number of working days spent per year on price indication by administrative or sales staff is 5.0 and the median amount of other costs for price indication (e.g. for electronic price labels) is EUR 1 800 per business per year. Overall, respondents indicated that, on average, **30 % of these costs (i.e. EUR 654 per year) are specifically related to indicating *unit prices*.**

[86] Turnover is a common measure of comparison for which Eurostat data are available. The comparison of turnover at the sector level is not straightforward due to data limitations. In some cases, Eurostat data on turnover is available only at NACE 2 group level, while this Fitness Check (Lot 1 Study) used more granular data, i.e. at size class level, for the extrapolation. Data limitations about the total company turnover by size classes at EU level also do not allow for comparison of the total compliance costs per turnover at size class level.

It has to be stressed that these figures stem from replies provided only by SMEs operating in the food retail sector, as the larger companies had difficulties in providing estimates regarding the cost of indicating prices. Country research carried out within the Lot 1 study has provided incidental evidence that compliance with the obligations of the PID places little burden on large retailers due to economies of scale. Other reasons reported by the responding SMEs for the rather low reported costs relate to the fact that price information is often automatically provided on websites or on electronic labels using special software, which further reduces the regular updating costs. In the light of all of the above, **it appears reasonable to conclude that the costs of indicating (unit) prices do not seem to imply a disproportionate burden on businesses**, including SMEs.

6.3. Coherence

6.3.1. Interplay and complementarity with EU sector-specific consumer law

The Directives covered by this Fitness Check apply in conjunction with EU **sector-specific consumer protection rules.** There may well be hundreds of EU sector-specific instruments that also protect consumers' economic rights, at least indirectly. That means it was only possible to assess consistency as part of this Fitness Check by selecting samples of sectors with a significant level of relevant EU sectoral regulation, where complaints data suggest there are problems in applying both the sector-specific and general consumer protection rules. The assessment of consistency between the 'horizontal' Directives covered by the Fitness Check and the sector-specific rules therefore focused on passenger transport, electronic communications, energy and consumer financial services[87]. To mitigate the risk of overlooking any other inconsistency issues, the Fitness Check was overseen by an Inter-Service Steering Group with representatives from 10 other Directorates-General.

Consistency with EU sector-specific consumer legislation is most relevant in the case of UCPD and UCTD, which lay down general rules that also apply to these specifically regulated sectors. **EU sector-specific consumer legislation often contains provisions on unfair contract terms or transparency requirements**. For example, Directive 2009/72/EC concerning electricity stipulates that Member States must ensure that consumers 'receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of electricity services'[88]. Under the Markets in Financial Instruments Directive, all information (including standard contracts) addressed to clients or potential clients must be fair, clear and not misleading[89]. Directive 2003/55/EC concerning natural gas covers some of the same aspects as the UCTD, requiring Member States to ensure a high level of consumer protection as regards the transparency of contractual terms and conditions[90]. When assessing the transparency of a contract in a regulated sector, the CJEU

[87] According to the Market Monitoring Survey of the latest 2016 Consumer Market Scoreboard, 12.2 % of consumers had had problems with passenger transport. The figure was 17.4% for electronic communications, 9.4% for energy and 7.8% for consumer financial services. An average of 10.5% consumers on all service markets had encountered problems.

[88] Annex I to Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

[89] Article 19 (2) of Directive 2004/39/EC on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC; V. COLAERT, '*De rechtsverhouding financiële dienstverlener — belegger*', 294.

[90] Annex I to Directive 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; B. J. DRIJBER in M. ROGGENKAMP and H. BJORNEBYE, '*European Energy & Law Report*', Volume X, Intersentia, 13.

often applies both cross-cutting and sector-specific consumer legislation[91]. Moreover, sector-specific EU consumer legislation lays down specific rules on contractual relations between providers and consumers that are more detailed than the general UCTD rules. For example, Article 20(2) of the Universal Service Directive 2002/22/EC lays down specific rules on amending contracts in the electronic communications sector[92].

The Lot 1 study has found that stakeholders largely agree that **the combination of cross-cutting and sector-specific rules generally makes for a clear and consistent legal framework**. However, they also **draw attention to some issues** regarding the simultaneous application of both sets of rules, as outlined below.

On the one hand, stakeholders recognise the added value of UCPD and UCTD providing a **'safety net' that guarantees a high overall level of consumer protection and compensates for any regulatory gaps in the regulated sectors**. Sector-specific legislation does not usually address all the problems that exist, particularly in dynamic sectors such as financial regulation, energy and transport. As the UCPD and the UCTD also apply to such sectors, they compensate for any gaps in the sector-specific regulation. Conversely, there is widespread recognition that sector-specific legislation protects consumers in areas where the horizontal legislative framework was deemed insufficient and the enactment of specific rules was warranted.

Despite this, the Study also shows that **infringements of the UCTD, in particular, are frequent in the regulated sectors**.

In the **air transport sector**, BEUC (the *Bureau Européen des Unions de Consommateurs*) has noted that a significant number of standard terms and conditions scrutinised and deemed unfair by national courts were based on the IATA Recommended Practice 1724 (IATA RP 1724). For instance, it is obligatory under Article 3.3 of the IATA RP 1724 for passengers to strictly respect the order of the flight itinerary. If a passenger misses or fails to take one leg of a return flight, the airline can automatically cancel the remaining leg and rescind the contract. This clause was held to be unfair by several judgments in different Member States.

Also, according to certain respondents in the online public consultation, passenger transport is one of the areas with most consumer complaints. Consumers, but also traders, are not always aware of the application of the UCTD in this sector. Moreover, these respondents think there is room for improvement in cooperation between enforcement bodies in the passenger transport field. However, the online public consultation and the country research also explicitly highlight the benefits of applying the UCTD to air transport[93].

The 2010 Commission market study in the **retail energy sector** found that consumers have little trust in suppliers' offering fair contract terms and that they often have difficulty understanding complex electricity contracts. A survey conducted in support of the market

[91] For example, in C-92/11 *RWE Vertrieb AG* the Court examined whether increases in the price of natural gas are compatible with both the transparency requirements of Articles 4(2) and 5 of the UCTD and similar provisions in Directive 2003/55/EC concerning common rules for the internal market in natural gas. See also C-453/10 Perenicova, where the ECJ applied the UCTD in a consumer credit case.

[92] Article 20(2) of the Universal Service Directive 2002/22/EC states that '2. Member States shall ensure that subscribers have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by the undertakings providing electronic communications networks and/or services. Subscribers shall be given adequate notice, not shorter than one month, of any such modification, and shall be informed at the same time of their right to withdraw, without penalty, from their contract if they do not accept the new conditions. Member States shall ensure that national regulatory authorities are able to specify the format of such notifications.'.

[93] For the detailed results of the online public consultation, see Part 2 of the Lot 1 study.

study found that 11 % of respondents in Denmark and 12 % in the Netherlands had reported a problem with the terms and conditions of their electricity contract within the last 2 years[94].

In 2014, the French consumer protection authority, the Directorate-General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), reported on the following cases in the **retail water distribution sector**, often involving small distributors that claimed to lack the technical or legal resources to update their terms and conditions:[95]

- 200 cases with illegal contract terms (*'clauses illicites'*);
- 100 cases with unfair terms (*'clauses abusives'*);
- 400 cases with presumed unfair terms (*'clauses présumées abusives'*).

In the **internet services provision** (ISP) market, a 2012 Commission market study found that 35 % of surveyed stakeholders (national regulators, consumer organisations and ADR entities) thought unfair terms in ISP contracts were 'fairly' or 'very common'. The most common complaints concerned termination fees, contract duration, cancellation notice periods and automatic rollovers[96].

Last but not least, CJEU case-law and complaints received by the Commission indicate significant problems of compliance with the UCTD in the **financial services sector**, especially in mortgage loan or consumer credit agreements at least in particular Member States. As indicated in Chapter 5 'Implementation: state of play', the Commission has also opened formal proceedings against some Member States that are finding it difficult to ensure that the UCTD is applied effectively in the financial services sector, in particular.

Most of the parties involved see a clear **interplay between the general consumer legislation that applies across several sectors and the sector-specific rules**. While Article 3(4) UCPD expressly provides that, if there is any conflict between the UCPD and sector-specific rules, the latter take precedence[97], there is no comparable rule in the UCTD that would deal with conflicts between the different sets of rules that apply simultaneously[98]. Instead, the sector-specific rules often state that their requirements apply 'without prejudice' to the cross-cutting law, in particular the UCTD[99].

However, the main issue in the area of consistency according to the Lot 1 study appears to be not so much the overlaps or conflicts between the UCPD/ UCTD and sector-specific rules, but rather **their enforcement by different enforcement authorities.** In fact, in most Member States, different authorities are responsible for enforcing the general consumer law and the sector-specific rules. Research suggests that cooperation between the various bodies is not always as good as it could be. In general, one national body deals with enforcing the UCPD/

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[94] Study on the functioning of retail electricity markets for consumers in the European Union, available at: http://ec.europa.eu/consumers/archive/consumer_research/market_studies/docs/retail_electricity_full_study_en.pdf.

[95] *Clauses illicites ou abusives dans les contrats de fourniture d'eau potable*, DGCCRF, available at: http://www.economie.gouv.fr/dgccrf/clauses-illicites-ou-abusives-dans-contrats-fourniture-deau-potable .

[96] Consumer market study on the functioning of the market for internet access and provision from a consumer perspective, available at: http://ec.europa.eu/consumers/archive/consumer_research/market_studies/docs/internet-service-study-full_en.pdf.

[97] The interplay issue is also addressed in the revised 2016 UCPD guidance document, which is considered by many to provide helpful insights.

[98] The application of the *lex specialis* principle in Article 3(4) of the UCPD is the subject of an upcoming preliminary ruling in Case C-54/17 *Wind Telecomunicazioni.* The preliminary reference was sent by the Italian Council of State on 1 February 2017 in the context of an unfair commercial practice that raised questions about the interplay between the powers of the competition enforcement authority and the sector-specific enforcement authority for the electronic communications sector.

[99] For example, Annex I to Directive 2009/72/EC states that its requirements apply to the respective contracts without prejudice of the Community rules on consumer protection (including the UCTD).

UCTD (regardless of the sector), while the sector-specific rules are enforced by another body or bodies. The latter have no power to tackle infringements of the general provisions applicable to the regulated sectors, if those provisions are not included in the sector-specific rules.

Some countries have established a **cooperation mechanism for their competent authorities**. Cooperation between authorities has also been facilitated by the CPC Regulation, which brings together, for coordinated enforcement measures and workshops, national authorities responsible for cross-cutting and sectoral instruments dealing with EU consumer law, as listed in the Annex to the CPC Regulation[100]. Furthermore, some countries have introduced special arrangements for the financial sector, under which the sector-specific regulator enforces both general consumer protection law and sector-specific rules.

As regards the **PID**, the online public consultation and earlier Commission contacts with interested parties have shown that a number of questions have arisen concerning the indication of the unit price for **household laundry detergents,** which are subject to sector-specific rules under Regulation EC No 648/2004 (the Detergents Regulation). The unit price of these products is sometimes given per 'wash-load', rather than per kilogram or litre.

Under the PID, both the 'selling price' and the 'unit price' (price per unit of measurement) must be given for all products which traders supply to consumers. Article 2(b) of this Directive defines the 'unit price' as '*the final price (...) for one kilogram, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely and customarily used in the Member State concerned*'. Article 4(2) states that the '*unit price shall refer to a quantity declared in accordance with national and Community provisions*'.

The questions received from interested parties during the Fitness Check suggest a certain **lack of understanding of the PID's requirements and the way they are implemented in different EU countries[101].** Moreover, while this issue has arisen mainly in the context of detergents, discussions have started at national and EU level on indicating the unit price of alternative car fuels. These could be extended to other products in future.

It thus looks as if consistency and legal clarity could be improved if there were an EU-level mechanism such as a register to make it easier for traders – particularly those operating in more than one EU country – to establish whether the EU countries concerned require or allow the unit price to be displayed for specific products, such as detergents, using units other than the traditional units of quantity listed in Article 2(b) of the PID.

In contrast, contrary to some requests from stakeholders, **it seems inappropriate to use general consumer law (in this case the PID) to stipulate the units to be used for the unit price indication for specific products**. Instead, such units could be stipulated in future product-specific EU legislation taking precedence over the general rules set out in the PID.

6.3.2. Consistency with the Consumer Rights Directive

Among the Directives subject to the Fitness Check, **specific positive information requirements** for traders are set out in the UCPD and the PID.

[100] The competent authorities making up the CPC network are listed at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2015%3A023%3ATOC.

[101] See, for example, the open submissions (policy papers) in the online public consultation (analysed in Part 2 of the Lot 1 study) where several contributors seem to consider that the current PID prevents the display of the unit price per wash-load.

Article 7(4) of the UCPD states that where a commercial communication includes a description of a product and its price, the trader must provide information – if it is not already apparent from the context[102] – about:

- the product's main characteristics, to an extent appropriate to the communication medium (i.e. bearing space and time limits in mind) and the product;
- the trader's identity and geographical address;
- the full price;
- the existence of the right of withdrawal (where applicable);
- the arrangements for payment, delivery, performance and the complaint-handling policy (if such arrangements depart from the requirements of professional diligence).

All the above information required under Article 7(4) of the UCPD **is also required by the CRD as pre-contractual information** (CRD Articles 5 and 6). In addition to covering all the information elements of Article 7(4) UCPD, the CRD information requirements are also more elaborate. For example, while Article 7(4) of the UCPD merely requires the right of withdrawal to be stated, Article 6(1)(h) of the CRD requires details about the conditions, time limits and procedures for exercising this right.

The CRD information requirements apply at **the pre-contractual stage of a transaction**, e.g. when the consumer visits a physical shop or views the product descriptions in an online shop. On the other hand, UCPD information requirements under Article 7(4) apply to any 'invitation to purchase', i.e. a commercial communication that states the product's characteristics and price in a way appropriate to the medium through which the commercial communication is conveyed, thereby enabling the consumer to make a purchase.

The PID requires traders to indicate the 'selling price' and the 'unit price' of products offered to consumers. Any 'advertisement' that mentions the selling price must also indicate the unit price. The requirement to indicate the **selling price** under the PID overlaps with the requirement to provide the full price under Article 7(4) UCPD and Articles 5 and 6 of the CRD. Only the **unit price** requirement of the PID is not included in the UCPD or CRD.

The **relationship between Article 7(4) of the UCPD and the CRD** has been addressed in the existing guidance documents on the two directives[103]. In short, these UCPD information requirements are most relevant at the advertising stage of the transaction whilst the pre-contractual stage is regulated in greater detail by the CRD.

In the online public consultation[104] most respondents in all categories either strongly agreed or tended to agree that the **marketing/pre-contractual information requirements currently included in the UCPD, PID and CRD should be regrouped and streamlined**. For example, 67 % of consumer respondents, 68 % of public authorities, 62 % of business respondents (companies) and 56 % of business associations agreed with this statement. Participants in the 2016 Consumer Summit on the Fitness Check also broadly supported streamlining of these information requirements.

Views on a related but more specific question, however, were more divided: whether **information given to consumers at the advertising stage should focus on the essentials, while more detailed information should not be required until just before the contract is**

[102] In addition, Article 7(3) of the UCPD allows for some flexibility in providing the information under Article 7(4):'Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.'.

[103] Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, 25.5.2016, SWD(2016) 163 final and DG JUST Guidance document on the CRD, June 2014.

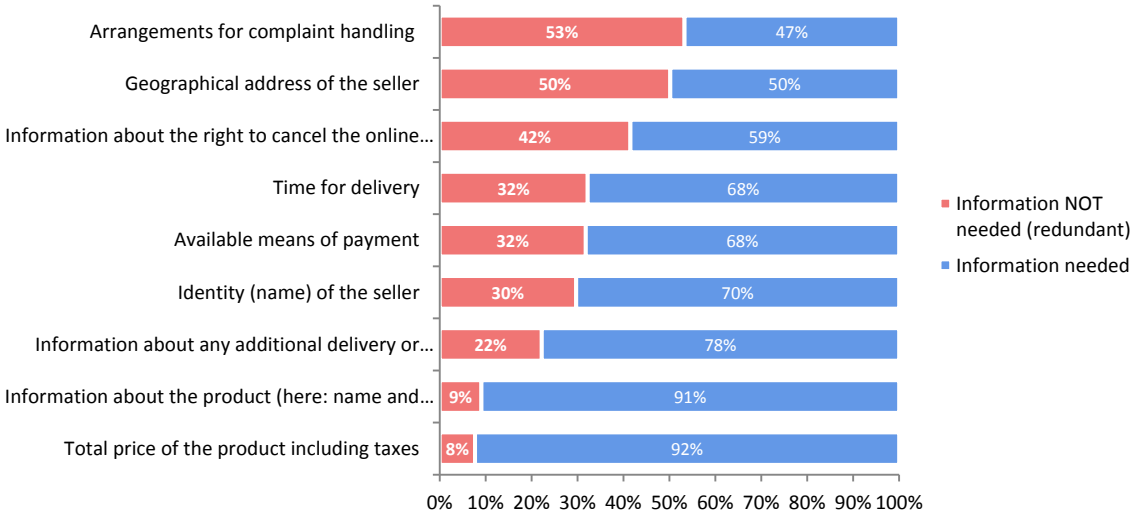
[104] See Part 2 of the Lot 1 study.

concluded. This idea was strongly supported by business associations (82 %) and companies (65 %) and about half (53 %) of the public authorities but only by minority of consumer associations (45 %) and consumers (27 %).

The behavioural experiment and consumer survey in the Lot 3 study looked into the **potential for reducing some of the requirements in Article 7(4) of the UCPD at the advertising stage.** A behavioural experiment tested consumers' interest in information to be provided in advertisement and subsequent pre-contractual stages. The results show (Figure 27) that most consumers want to receive most of the items of information for which Article 7(4) of the UCPD provides. However, most respondents stated that they did not need the following information required by the UCPD already in the advertisement:

- arrangements for complaint handling - 53.3 %;
- the seller's geographical address - 50.2 %.

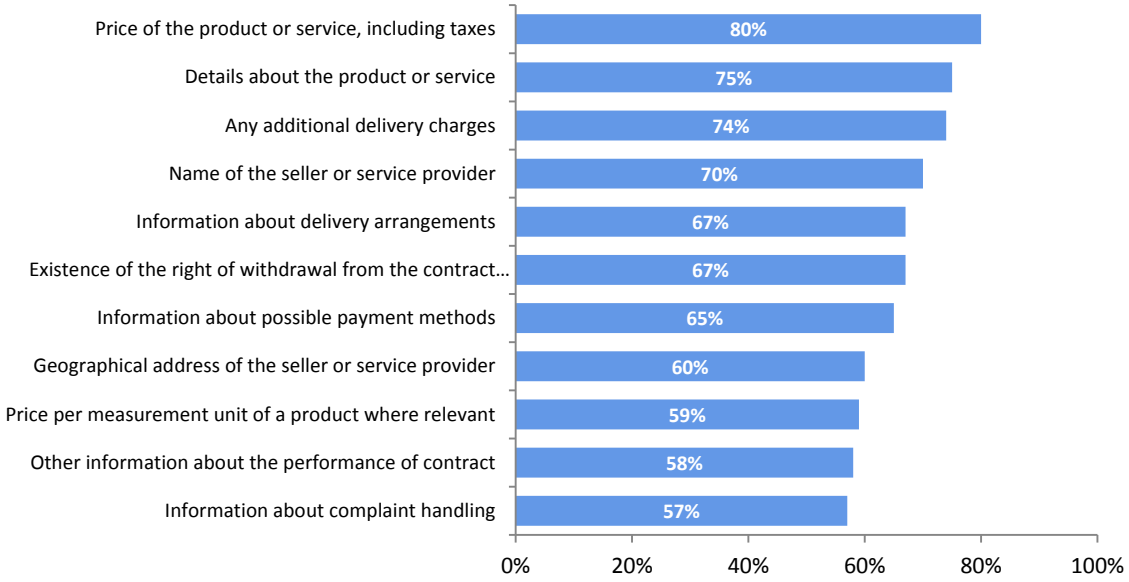
Figure 27. Behavioural experiment — perceived redundancy of UCPD information items



These findings were confirmed by the results of the Fitness Check consumer survey[105] where arrangements for complaint handling and the seller's geographical address were two of the three least important items under Article 7(4) UCPD to be included in advertisements (Figure 28). Although in this case most respondents regarded all the information items as important, it should be borne in mind that – unlike the participants in the behavioural experiment – participants in the consumer survey were merely informed about the effect of overlapping information at the advertisement and the subsequent pre-contractual stage but did not experience it in practice.

[105] Consumer survey of the Lot 3 study, question: 'When you see an online advertisement or advertisement on a poster for a good or a service, how important is it for you to receive the following information already in the advertisement? Note that you will receive all the same and even more information about the product and contract terms when actually visiting the (online) shop concerned'.

Figure 28. Consumer Survey — perceived importance of information presented in advertisement (respondents considering information as (important' or 'very important')).



In the **parallel evaluation of the CRD**, its information requirements were found to be still relevant, except for the requirement, laid down in Article 6(1)(c), to provide the trader's fax number and email address. More modern means of communication (such as web-based forms) would now suffice, provided that they enable the consumer to keep in touch with the trader efficiently, in a manner that enables the consumer to keep a proof of such exchanges on a durable medium. The evaluation also suggests that there is scope for examining how the presentation of pre-contractual information can be simplified.

The Fitness Check also looked into the interplay between the information requirements laid down by Article 7(4) UCPD and those laid down by **the Services Directive** and the **e-Commerce Directive**.

Article 22 of the **Services Directive** refers to information that should be made available to service recipients in all types of relations (B2C and B2B) and does not specifically target the marketing or contracting stage. In contrast, Article 7(4) UCPD is only applicable to B2C transactions and more specifically to 'invitations to purchase'. Moreover, under Article 22 of the Services Directive, certain pieces of information must be provided at the recipient's request only.

The **e-Commerce Directive** applies to information society services, which can include the services provided by operators of websites and online platforms that enable consumers to buy a good or service. Article 5 of the e-Commerce Directive lays down general information requirements for service providers, while its Article 6 states what information is to be provided in commercial communications. The lists of items set out in these two Articles are minimum lists. By contrast, the fully harmonised Article 7(4) UCPD applies to all types of B2C invitations to purchase, whether offline or online. Interested parties in several countries drew attention to an example of inconsistency between the UCPD and the e-Commerce Directive. Article 5 of the e-Commerce Directive stipulates that it must be stated 'whether prices are inclusive of tax and delivery costs'. Article 7(4) of the UCPD, on the other hand, states that prices in an invitation to purchase must include tax and costs.

The Lot 1 study concludes that, in several EU countries, interested parties take the view that no practical problems arise due to the overlap **of these information requirements in the UCPD, the Services Directive and the e-Commerce Directive** and thus no additional costs

are incurred by businesses or public authorities. In other countries, it is admitted that businesses may incur costs, as they have to have recourse to, and review, multiple laws and regulations. Where different authorities are responsible for enforcing implementing provisions, there may also be problems of coordination, pushing up costs.

6.3.3. Consistency with the Digital Contracts Proposals

In December 2015, the Commission tabled the Digital Contracts Proposals[106] consisting of:

- a proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods ('Proposal on distance sales of goods');
- a proposal for a Directive on certain aspects concerning contracts for the supply of digital content ('Proposal on remedies for digital content').

These two proposals aim to reap the growth advantages of the digital single market by creating an environment that guarantees legal certainty for businesses, enabling them to apply a single set of rules to selling their goods and digital content. They should also boost consumer trust in the digital single market.

The proposals were a response to the challenges facing consumers and businesses on the digital single market. As the Proposal on distance sales of goods would apply to goods sold online and by other means of distance selling, after its adoption and entry into effect the CSGD would cover only face-to-face consumer sales.

This would mean that sellers and consumers would then be subject to two different sets of rules, depending on whether a purchase was made online or offline. In 2015, around 1.85 million retailers (52 % of all retailers in EU-28) sold face-to-face only, whereas 1.32 million retailers (37 % of all retailers in EU-28) sold both face-to-face and at a distance[107]. The latter group would thus be directly affected by two separate sets of rules unless they were brought into line with one another.

According to industry data, the number of retailers selling through a variety of channels ('omni-channel retailers') is expected to increase further, thanks to rising online sales. In the EU, online retail accounted for 6.3 % of total retail sales in 2013, rising to 7.2 % in 2014 and 8.4 % in 2015[108]. Although it is reasonable to assume that the growth in online sales will adversely affect physical shops to some extent, digital channels will coexist with physical ones in omni-channel business models[109]. This trend follows growing consumer demand and consumers' expectation of being able to switch back and forth between online and physical shops before making their purchase[110].

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[106] For more information on the Digital Contracts Proposals see: http://ec.europa.eu/justice/contract/digital-contract-rules/index_en.htm

[107] Lot 2 'Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels'.

[108] Centre for Retail Research, 'Online Retailing in Europe, the US and Canada 2015 – 2016', http://www.retailmenot.com/corp/static/filer_public/86/ed/86ed38d1-9cb9-461c-a683-ab8e7b4e1ffc/online_retailing_in_europe_us_and_canada.pdf. .

[109] Impact assessment accompanying the Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods.

[110] According to the MIT Technology Review report 'Beyond the checkout cart', more than 80 % of people who buy goods in physical shops check prices online. Moreover, the trend of showrooming has shown that people go in-store to review a product, then go online to find it at a lower price (http://www.tlcmarketing.com/Market/uk/Article/Post/Marketin--trend-report-2015-the-omnichannel-experience, http://www.forbes.com/sites/danielnewman/2014/07/22/the-omni-channel-experience-marketing-meets-ubiquity, http://marketingland.com/why-brands-should-go-omni-channel-in-2014).

Moreover, in the consumer survey for this Fitness Check about 60 % of EU consumers reported buying goods in shops in other EU countries on a scale from 'rarely' to very 'often'. They would thus benefit from a single set of arrangements for online and offline sales.

The Lot 2 study on the CSGD showed that national ministries, business and consumer organisations alike strongly support having a single set of rules on offline and online consumer sales. They believe that bringing the CSGD's rules into line with those of the Proposal on distance sales of goods would improve transparency, reduce complexity and make the system easier to understand for both consumers and traders. This would make it easier to buy and sell across borders, boost competition and cut traders' compliance costs and prices.

Consumer organisations and consumer authorities in countries not going above the minimum harmonisation of the CSGD see fully harmonised rules as a way of increasing consumers' trust. Full harmonisation would make it easier to apply the rules and encourage consumers to make a larger proportion of their purchases in other EU countries. By contrast, consumer organisations and consumer authorities that fear a loss of their current national consumer protection peaks under minimum harmonisation did not see the adoption of fully harmonised rules for all sales channels as beneficial.

All of the categories of interested parties concerned view the existence of different rules for different sales channels as confusing for consumers.

Many thought such a situation would create discrepancies in the protection available to consumers shopping via different channels. EU countries that would provide higher protection for distance sales would probably see a shift from face-to-face to online sales[111].

In the business interviews conducted as part of the Lot 2 study (Table 12), most retailers agreed that a **single set of rules for face-to-face and online and other distance sales, in line with those proposed in the Proposal on distance sales of goods, would increase competition, both in the EU (54 %) and in their domestic market (52 %).** 41 % of retailers agreed that an extended period of 2 years for the reversal of the burden of proof period under the Proposal on distance sales of goods would improve the quality and durability of goods. 46 % disagreed or strongly disagreed that in Member States with a legal guarantee period longer than the two-year period of the CSGD a reduction of such longer legal guarantee periods to 2 years would reduce the quality and durability of goods.

Table 12. Business feedback on the impacts of full harmonisation of rules across the EU

	Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Don't know	**strongly agree/ agree**	**Strongly disagree/ disagree**
A single set of rules will increase competition in the retail sector in the EU	20 %	34 %	19 %	16 %	7 %	4 %	54 %	23 %
A single set of rules will increase competition in our domestic	16 %	36 %	21 %	16 %	7 %	5 %	52 %	23 %

[111] For further details see Lot 2 'Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels'.

	Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Don't know	**strongly agree/ agree**	**Strongly disagree/ disagree**
market from retailers based in other EU countries								
The increase in the reversal of the burden of proof period will increase the quality and durability of goods	12 %	29 %	17 %	22 %	15 %	5 %	41 %	37 %
The reduction in the legal guarantee period in countries that now have a longer period will reduce the quality and durability of goods in these countries	11 %	22 %	13 %	30 %	16 %	8 %	33 %	46 %

Data from this Fitness Check overall support the policy choices made in the Proposal on distance sales of goods.

As regards the **length of the legal guarantee period**, the consumer survey of the Fitness Check showed that in 96 % of recent problems with defective goods the consumers discovered the defect during the first 2 years from purchase, thus within the two-year legal guarantee period provided in the CSGD. This indicates that the two-year time period is largely sufficient to address consumer problems with defective goods. For 45 % of defective products, the defect was discovered within less than 1 month, for 26 % — between 1 and 6 months, and for only 4 % of products the defect was reported to appear more than two years after the purchase.

As regards the length of the period during which the **burden of proof** is reversed, only a minority of traders insist on consumers proving traders' liability within the entire two-year legal guarantee period; there is no change, or only a very limited one, in traders' behaviour on this point before or after the six-month period[112]. However, consumer organisations advocate aligning the two periods to make them simpler to apply.[113] Extending to 2 years, in the Proposal on distance sales of goods, the period for which the burden of proof is reversed is a response to their concerns.

[112] According to the Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU (2015), available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/guarantees/index_en.htm.

[113] For further details see Lot 2 'Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels'.

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The Proposal on distance sales of goods no longer includes the option for Member States to stipulate that the **consumer must report the defective good within 2 months** of discovering the lack of conformity. This change is supported by the finding that consumers took immediate action on between 37 % and 58 % of problems, depending on product type. A further 25 % - 32 % of problems were followed up within one week[114].

As regards the hierarchy of remedies, 77 % of consumers agreed that it was reasonable for a seller to first offer to repair or replace a defective product before offering a refund. On the business side, 59 % of interviewed retailers thought it fair for customers to receive a full refund if they were dissatisfied with the first repair[115].

6.3.4. Consistency of enforcement rules

The ID sets out procedural rules on injunctions, one of the means of enforcing consumer law; some of the substantive law directives also include provisions on enforcement. As regards consistency between these rules on enforcement, the Fitness Check focused on the extent to which the Injunctions Directive is consistent with the CPC Regulation and with the enforcement provisions included in other directives subject to this Fitness Check, and in the CRD.

The CPC Regulation differs from the ID as regards both the types of infringement of consumer law it covers and the question of who can activate it.

The CPC Regulation provides for the enforcement tool of EU consumer law for infringements involving more than one EU country, while the ID applies to both national infringements and infringements with implications for more than one country While only public authorities can make use of the CPC Regulation, the injunction procedure laid down by the ID may be initiated by any ‘qualified entity’, that is, by any properly constituted body that has a legitimate interest in ensuring compliance with the EU consumer law instruments listed in Annex I to the Directive.

Both CPC Regulation and ID are designed to improve the enforcement of EU consumer law. However the Annex to the CPC Regulation lists far more EU instruments than Annex I to the ID[116]. The Lot 1 study has not identified any valid reason why some pieces of EU legislation should qualify as consumer law under the CPC Regulation, but not under the ID. It recommends, as the preferred solution, that both instruments cover consumer law in general and include a non-exclusive list of pieces of legislation falling into that category[117]. However,

[114] Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU (2015).

[115] Idem.

[116] From the legal instruments falling within the ID, only the Services Directive 2006/123/EC (Art. 20) is missing from the CPC Regulation. In contrast, the CPC Regulation covers a number of instruments that are not listed in the Annex to the Injunctions Directive, such as the Price Indication Directive 98/6/EC, the Privacy and Electronic Communications Directive 2002/58/EC, the Air Passengers Rights Regulation (EC) No 261/2004, the Boat Passengers Rights Regulation (EC) No 1177/2010, the Bus Passengers Rights Regulation (EU) No 181/2011, the Audiovisual Media Services Directive 2010/13/EU (Articles 9, 10, 11 and Articles 19 to 26) and, finally, the Misleading and Comparative Advertising Directive 2006/114/EEC. The proposal for a new CPC Regulation tabled in May 2016 is designed to add further EU consumer law instruments to the Annex to the CPC Regulation. These are: the Services Directive 2006/123/EC (Article 20), Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (Articles 10, 11, 13, 14, 15, 16, 17, 18, 21, 22, 23, Chapter 10 and Annexes I and II) and Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (Articles 4 to 18 and 20(2)). It is provided in the new Commission's proposals for digital contracts and geo-blocking, that these texts should, once adopted by the European Parliament and Council, also be included in the Annex of the CPC Regulation and to the ID.

[117] According to consumer organisations (position paper presented by BEUC within Public Consultation), areas such as product liability, data protection, transport or financial services should all be fully covered by the ID.

as also indicated in the Study, the latter idea is discussed given the question of what the consumer protection actually entails. The Commission's preferred solution would therefore be to **align the Annexes to both instruments. This would provide clarity on the key EU laws to benefit from enforcement mechanisms laid down in the CPC Regulation and the ID.**

The UCPD, the UCTD and the CRD contain enforcement provisions requiring Member States to ensure that there are adequate and effective means[118] to enforce these Directives. **Injunctions, i.e. an order requiring the cessation or prohibition of an infringement, appear to be the very least that the above-mentioned provisions imply.** At the same time the specific provisions of the above-mentioned Directives related to the injunctions differ to some extent from the ID provisions, for instance as regards the entities explicitly mentioned as being entitled to bring injunctions[119]. Most importantly, the UCPD contains several provisions that the ID does not have. For instance, the UCPD states that it is up to national governments to decide whether an injunction may be directed jointly against a number of traders from the same economic sector and/or against a code owner where the relevant code promotes non-compliance with legal requirements (the UCTD contains similar provisions). The UCPD also includes specific provisions regarding administrative authorities ruling on injunctions (Article 11) and specific rules on evidence (Article 12).

As stated in the Lot 1 study**, there seems to be no clear rationale for the differences identified between the injunctions provisions of the relevant Directives**. **Aligning them could help simplify the EU injunctions framework and make it more consistent**[120].

6.4. Relevance

6.4.1. Economic context and importance of consumer rights

Consumer expenditure accounts for 56 % of EU GDP. The data from the Consumer Scoreboard show a consistent **positive relation between consumer conditions and the economic situation in different Member States**, suggesting that a healthy consumer environment is linked to economic growth. Effective consumer policies impact both on the demand side of the economy (by reducing consumer detriment and empowering consumers to play their part in driving the markets) and on the supply side (ensuring a level playing field and legal certainty for companies).

According to the recently finalised study on consumer detriment[121], across six markets studied consumers had suffered detriment of between EUR 20.3 billion and EUR 58.4 billion over the

[118] These means should: combat unfair commercial practices in order to enforce compliance with the provisions of the UCPD in the interest of consumers (Article 11(1) of the UCPD; prevent, in the interests of consumers and of competitors, the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers (Article 7 of the UCTD); and ensure compliance with the CRD (Article 23 of the CRD).

[119] Even if all the Directives leave the choice of enforcement bodies to the Member States, and all of them only require Member States to have at least one category of enforcement bodies in place. Competitors are only explicitly mentioned in the UCPD. Professional organisations are explicitly mentioned by the CRD.

[120] In the online public consultation 50 % or more of all respondent categories other than business associations, including 65 % of consumer associations and 50 % of public authorities, agreed that there was a need to ensure coherence between the ID and other provisions on the enforcement of consumer rights. Among business associations, 28 % agreed, 20 % disagreed, and 52 % had no opinion/did not answer this item.

[121] Study on measuring consumer detriment in the European Union, available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/consumer-detriment/index_en.htm.

last 12 months in the EU-28[122]. These values amount to **between 0.2 % and 0.7 % of the overall level of total private consumption** in the EU-28, which stood at EUR 8 285 billion in 2015[123]. These **estimates are conservative** in nature[124]. Psychological detriment, measured as the proportion of respondents who felt 'quite a lot' of emotional stress or 'extremely' emotionally stressed as a result of the problem, was also found to be significant. The lowest amount was between 40 % and 46 % for the market for clothing, footwear and bags, and highest on average in the markets for electricity services (57 % to 74 %) and loans, credit and credit cards (51 % to 77 %).

The continued relevance of the consumer protection objectives of the Directives covered by the Fitness Check is also demonstrated by the perceived importance of consumer rights-related factors among other decision-making factors when consumers make a purchase. These factors were examined in the consumer survey[125]. Figure 29 presents the evaluated factors, with four consumer rights-related factors presented in *blue*. **At least two thirds of consumer survey respondents evaluated all consumer rights-related factors as 'important' or 'very important'**. The legal guarantee period for goods, clear and fair terms and conditions and the availability of means to obtain remedy or redress if something goes wrong were, on average, seen as highly important factors. Only *the price of a good or service* was considered more important than these three consumer rights-related factors. By contrast, practical aspects such as delivery costs, language and delivery time were perceived as less important, although still important for no less than 77 %, 75 % and 71 % of the respondents respectively. This overview combines the perceived importance of consumer rights when purchasing goods both online or offline. The findings for each sales channel taken individually are very similar.

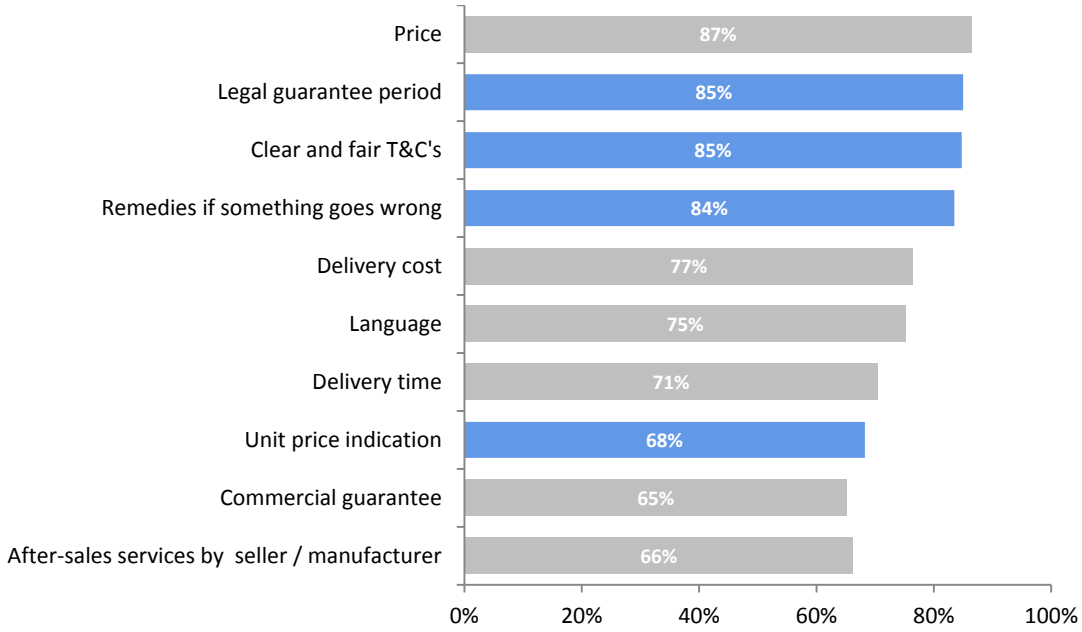
[122] These estimates refer to revealed personal consumer detriment as a result of a problem for which the consumer had a legitimate cause for complaint. Detriment is to be understood as the sum of post-redress financial detriment (monetary costs and losses incurred by the consumer either as a direct result of a problem or from trying to solve a problem) and monetised time loss. Post-redress detriment is calculated after compensation for the problem received from the seller/provider and obtained through several possible procedures, including alternative dispute resolution or legal procedures. The fieldwork was carried out in February and March 2016. Respondents reported on problems over the last 12 months.

[123] Source: http://ec.europa.eu/economy_finance/db_indicators/ameco/index_en.htm. 'Private final consumption expenditure' refers to the expenditure on consumption of goods and services of households and non-profit institutions serving households. Goods and services financed by the government and supplied to households as social transfers in kind are not included.

[124] Hidden detriment, i.e. detriment that consumers experience but are unaware of, is not included in the estimates. The same is true for psychological detriment. Furthermore, situations in which consumers tried to make a purchase but failed or were denied market access are excluded from the scope of personal detriment as well as some other dimensions of personal detriment (e.g. social detriment).

[125] Based on survey question Q1 in which respondents had to evaluate the importance of selected factors for making a purchase decision at an online or offline shop in their own country or another EU country. These results represent the average importance scores for the various factors across the four types of different traders (channels).

Figure 29. Importance of factors in the decision-making process (consumer rights factors are shown in blue)



According to the online public consultation, the **majority of consumer respondents believe that it is important to be protected by consumer and marketing law when buying goods and services,** regardless of whether they are making a purchase domestically, within or outside the EU. Specifically, this protection is viewed as 'very' or 'rather' important by 98 % of consumer respondents for domestic transactions and by 96 % for cross-border transactions within the EU. In both cases only 1 % considered that consumer protection is not important. EU consumer protection legislation was considered relatively less relevant for transactions outside the EU (82 % considered it important and 8 % as unimportant). This may be explained by the fact that in these transactions EU consumers may not benefit from the protection of EU consumer protection legislation (in accordance with the Rome I Regulation on applicable law)[126].

6.4.2. Need for uniform consumer protection rules to promote the internal market

EU consumer protection rules remain relevant in the **context of deepening the internal market**. This is due to the increasing number of intra-EU consumer transactions[127] and of widespread infringements that have an effect across the EU, especially online.

Table 13 presents the respondents' most recently reported problem, by type of trader and problem category according to the Fitness Check consumer survey (2016). The share of problems reported with traders in another EU country is around 13-15 % (with the exception of unit price indication, for which the share of problems with foreign traders is relatively smaller).

[126] Online public consultation question: 'How important is it for you to be protected by consumer and marketing law when buying goods or services?'.

[127] Consumer survey of the Lot 3 study: 17 % of respondents reported having shopped 'Very often' or 'Often' with online traders in another EU country, while 11 % had done so at physical shops in another EU country.

Table 13. How often the last problem was reported with different types of traders

	In a shop in your country	On the internet from a trader based in your country	In a shop in another EU country	On the internet from a trader based in another EU country	Other
Lack of indication of the unit price	**79 %**	12 %	3 %	5 %	1 %
Defective goods	**45 %**	38 %	1 %	14 %	2 %
Misleading or aggressive commercial practices	33 %	**37 %**	1 %	12 %	17 %
Unclear or ambiguous standard contract terms	**40 %**	**39 %**	2 %	11 %	8 %
Unfair standard contract terms	**40 %**	36 %	4 %	11 %	8 %

As regards **traders' views on the relevance of EU consumer protection rules**, the available Eurobarometer data show that a significant number of them continue to consider differences between consumer protection rules as significant obstacles to cross-border sales. Table 14 below shows that 37 % of traders held such an opinion in 2016. This is fewer compared to 2006 and also compared to 2014, the time of the entry into application of the Consumer Rights Directive, which fully harmonised important consumer protection aspects of distance sales (notably pre-contractual information requirements and the right of withdrawal). Further progress could be expected after the entry into application of the new Commission Proposals currently under negotiation in Parliament and the Council. The proposals will fully harmonise the rules on consumer remedies for digital content and distance sales of goods.

Table 14: Proportion of traders identifying differences in national contract law as an obstacle to cross-border trade in response to Eurobarometer questions, EU%[128]

Year	Question	Base	Results
2006	Please tell me how important do you think these obstacles are to cross-border sales. 'Additional costs of compliance with different national laws regulating consumer transactions'	Traders who sell or have interest in selling cross-border	55 % 'Fairly important' or 'Very important'
2008			60 % 'Fairly important' or 'Very important'
2011	How important are the following obstacles to the development of your cross-border sales to other EU countries? 'Additional costs of compliance with different consumer protection rules and contract law (including legal advice)'	All traders	34 % 'Fairly important' or 'Very important'
2012			41 % 'Fairly important' or 'Very important'
2016	How important are the following obstacles to the development of online sales to other EU countries by your company? 'Differences in national contract law'	Traders who currently sell online	38 % 'Fairly important' or 'Very important'
Diff 2016-2014			-3 percentage points
2016	How important are the following obstacles to the development of online sales to other EU countries by your company? 'Differences in national consumer protection rules'		37 % 'Fairly important' or 'Very important'
Diff 2016-2014			-5 percentage points

[128] Source: Flash Eurobarometers 186, 224, 331, 358, 396 and survey on retailers' attitudes towards cross-border trade and consumer protection (2016) to be used in the forthcoming Consumer Conditions Scoreboard 2017 (expected publication — summer 2017). Note: EU % comprises the EU25 in 2006, EU27 from 2008 to 2012 and the EU28 thereafter.

6.4.3. Need for protection in relations other than B2C

B2B relations

One of the issues investigated in the Fitness Check was the relevance of the UCTD in B2B relations. According to the Lot 1 study several Member States **already have a certain degree of protection in place to protect businesses against unfair contract terms**, often in their general contract law provisions and supplemented by additional, often sector-specific provisions[129]. The Lot 1 study recommended expanding the UCTD to also protect SMEs due to the **similarity and negligible difference between small businesses and consumers** in terms of knowledge, experience and negotiating power, which has been stressed in several country reports and studies.

However, the Fitness Check consultation also demonstrates highly **divided views regarding such extension of the UCTD**, with many business associations and also public authorities opposing this idea. In the online public consultation, while over half of respondent businesses (54 %) considered that the scope of application of the UCTD should be extended to B2B contracts, business associations mostly disagreed (24 % agree v. 38 % disagree) and public authorities had divided views/ did not show much support (21 % agree v. 21 % disagree).

Furthermore, several Commission services are currently investigating B2B unfair trading practices, including unbalanced contract terms, in the areas of online platforms, free flow of data, internet of things, cloud computing and the food supply chain.

C2C relations

When both contracting parties (i.e. the supplier and the recipient of the service or the goods) are consumers, EU consumer protection legislation does not apply. Consumer-to-consumer (C2C) transactions are becoming more prevalent due to the rise of the online collaborative economy, which was the subject of a dedicated study[130].

According to its findings, the existing national civil law rules (such as the requirement for the parties to act in good faith) and sector-specific legislation (where licensing or authorisation requirements apply to both B2C and C2C activities) may arguably ensure a basic consumer protection in C2C transactions. However, the Study concludes that, in the case of C2C contracts concluded online, the existing national, civil law rules may need adjusting.

The necessity of EU level rules for C2C was also discussed at the 2016 Consumer Summit in the context of the discussion on collaborative economy and did not find much support among participants. As some national examples show, Member States are free to act and are already acting to extend the B2C protection rules to C2C relations where they consider it needed[131].
Furthermore, before discussing the need for regulating C2C relations especially in the collaborative economy, it is necessary to gather evidence on the problems in the context of genuine C2C contracts. This is currently not possible since in most cases the suppliers acting on online platforms do not indicate their status. It is therefore not clear to consumers whether the contracts they conclude on platforms are C2C contracts or B2C contracts. In this respect, the CRD evaluation discusses the need for additional transparency obligations for online marketplaces, which enable and facilitate the conclusion of contracts between suppliers and consumers, in order to make it clearer who is the supplier and its status, i.e. ‘trader’ or ‘consumer’.

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[129] Such as Austria, Czech Republic, France, Lithuania, Portugal, Germany, Denmark, Slovenia, the Netherlands, Sweden, Poland. For overview of national legislation expanding the UCTD to B2B relations see Annex 5.
[130] Not yet published.
[131] In this respect, the study refers to a recent amendment to the French Civil Code that introduced a new provision prohibiting unfair contract terms in both B2C and C2C ‘adhesion contracts’, i.e. contracts whose content has been pre-formulated.

C2B relations

The question of the application of UCPD in C2B relations where traders buy products from consumers is discussed in the UCPD guidance document. It refers to car dealers, antique dealers and retailers of second-hand goods as typical examples of traders engaging in C2B transactions. In general, the Lot 1 Study has concluded that C2B transactions are not frequent and that the above-mentioned examples are the most relevant in practice.

Since commercial practices are only those *'directly connected with the promotion, sale or supply of a product to consumers'* the UCPD guidance concludes that the reverse situation, where traders purchase products from consumers, does not fall within the UCPD. However, there are cases where **a link can be established between the sale of a product by a consumer to a trader and the promotion, sale or supply of a (different) product to the consumer**. For instance, trade-in agreements are common place in the motor vehicle trade. The trader purchases a used vehicle from the consumer who in turn buys a vehicle from the trader. In such cases, the trader's purchase could be considered as part of the remuneration given by the consumer for the business-to-consumer part of the transaction. Trade-in agreements clearly fall within the UCPD.

According to the Lot 1 study, while **UCTD may be applicable to C2B relations** by virtue of its application to 'contracts concluded between a seller or supplier and a consumer', this issue is not clear. However, in practice UCTD is already applied to protect consumers in C2B contracts in several countries. The application of the UCTD in those countries is not problematic as it is acknowledged that the position of the consumer in C2B contracts is similar to the position of the consumer in B2C contracts.

6.5. EU added value

6.5.1. Added value of the EU consumer protection framework

The technological developments and new market practices are not only bringing benefits to consumers, they are also creating new vulnerabilities, which can be exploited by unscrupulous traders. EU-wide infringements of consumer rights therefore **require adequate enforcement action at EU level.** To be effective, **EU-wide enforcement must be grounded in common and uniform EU consumer protection legal framework. The Directives covered by this Fitness Check provide such a framework.**

The most important EU added value of these Directives therefore lies in the fact that **their common harmonised rules enable the national enforcement authorities to address, in particular in the context of the CPC framework**, more effectively cross-border infringements that harm consumers in several Member States.

Most recently, the CPC authorities have started a joint action on the basis of the UCPD and UCTD with regard to major social media platforms. These platforms are used by millions of EU consumers who are affected by their terms and conditions and commercial practices (see more details about the joint action in Chapter 7.5)

Furthermore, the Fitness Check consumer survey demonstrated that **consumers' awareness of their rights has a direct, positive impact on the consumer's propensity to complain and seek redress** (see Section 6.1.4. on the role of awareness).

As shown by the following example regarding the 'legal guarantee' rights under the CSGD, **EU consumers are more aware of their rights under EU law than under national law**. In this example, respondents were asked to indicate the length of the period in their country during which they may bring a claim against the seller if the product turns out to be defective (i.e. the 'legal guarantee' period). At EU-28 level, 47 % of respondents gave the correct answer, 36 % gave an incorrect answer, and 17 % answered 'Don't know'.

The results at country level in Table 15 (cells in grey indicate the correct answer for each country), show that the awareness was much lower in countries with legal guarantee periods above the minimum EU-wide 2 years. Ireland, the UK, the Netherlands, Finland and Sweden are the bottom five in terms of awareness of this consumer right. For these five countries, **respondents were actually more likely to select the answer '2 years' than the correct response for their national situation.**

Table 15. Awareness of the legal guarantee period at country level

	Correct response	6 months	1 year	2 years	3 years	5 or 6 years	No time limit	Don't know
EU-28	**47 %**	**6 %**	**17 %**	**49 %**	**5 %**	**2 %**	**4 %**	**17 %**
Slovakia	**91 %**	2 %	1 %	**91 %**	2 %	1 %	0 %	3 %
Czech Republic	**86 %**	3 %	1 %	**86 %**	3 %	1 %	1 %	4 %
Portugal	**76 %**	5 %	7 %	76 %	3 %	1 %	1 %	8 %
Denmark	**75 %**	4 %	7 %	75 %	5 %	1 %	1 %	8 %
Malta	**74 %**	4 %	8 %	74 %	2 %	1 %	2 %	11 %
Latvia	**73 %**	3 %	5 %	74 %	4 %	1 %	1 %	13 %
Estonia	**71 %**	5 %	8 %	71 %	4 %	1 %	1 %	11 %
Spain	**65 %**	5 %	10 %	66 %	4 %	1 %	1 %	13 %
Italy	**64 %**	6 %	16 %	64 %	3 %	1 %	1 %	9 %
Germany	**63 %**	7 %	12 %	63 %	7 %	1 %	2 %	8 %
Belgium	**61 %**	7 %	8 %	61 %	4 %	1 %	1 %	18 %
Luxembourg	**61 %**	6 %	7 %	61 %	4 %	2 %	3 %	17 %
Poland	**60 %**	7 %	11 %	60 %	4 %	1 %	3 %	16 %
**Norway*	**56 %**	3 %	7 %	24 %	**14 %**	32 %	2 %	18 %
Bulgaria	**54 %**	6 %	10 %	54 %	8 %	2 %	6 %	15 %
Austria	**49 %**	10 %	19 %	49 %	7 %	0 %	2 %	13 %
Cyprus	**49 %**	6 %	15 %	48 %	8 %	2 %	4 %	16 %
Iceland	**47 %**	5 %	12 %	47 %	**10 %**	2 %	1 %	24 %
Lithuania	**43 %**	**15 %**	12 %	43 %	4 %	1 %	2 %	23 %
Romania	**43 %**	**12 %**	8 %	43 %	4 %	1 %	**8 %**	26 %
Hungary	**42 %**	4 %	**37 %**	42 %	5 %	2 %	0 %	10 %
Slovenia	**42 %**	7 %	21 %	42 %	4 %	2 %	3 %	20 %
Croatia	**39 %**	9 %	26 %	39 %	4 %	1 %	1 %	20 %
Greece	**31 %**	8 %	24 %	31 %	3 %	1 %	5 %	**28 %**
France	**28 %**	10 %	22 %	28 %	3 %	1 %	4 %	**32 %**
**Sweden*	**19 %**	2 %	20 %	**39 %**	19 %	1 %	3 %	17 %
**Finland*	**15 %**	5 %	14 %	**30 %**	6 %	3 %	15 %	**28 %**
**Netherlands*	**7 %**	2 %	17 %	**35 %**	**10 %**	4 %	7 %	24 %
**UK*	**6 %**	4 %	**36 %**	17 %	4 %	6 %	**11 %**	22 %
**Ireland*	**4 %**	3 %	**37 %**	16 %	6 %	4 %	4 %	**30 %**

The Fitness Check also shows that stakeholders in all Member States often **link the increase in consumer trust with the improved levels of consumer protection** brought by the Directives covered by this Fitness Check. They also often express the view that the relevant **Directives have had a positive impact on cross-border trade**, i.e. they have made it easier for consumers to purchase cross-border from traders located in other EU countries and for traders to sell cross-border to consumers located in other EU countries.

The increase in the level of consumer (or business) protection resulting from the Directives covered by the Fitness Check, in particular from UCPD, MCAD and UCTD, **depended on the pre-existing state of national legislation in individual Member States.** In

most Member States the consumer law directives covered by the Fitness Check provided **a clear added value as regards consumer protection.** To a lesser extent this is also the case for the MCAD as regards the protection of businesses.

Only a minority of Member States had a comprehensive legislative framework concerning unfair commercial practices in place before the UCPD was implemented (most notably Austria, Denmark, Germany, Finland, France, Spain and the UK). In more than two thirds of the Member States the UCPD has significantly increased both the comprehensiveness of the legislative framework concerning unfair commercial practices and the level of protection against unfair commercial practices from the perspective of consumers.

In the case of the **UCTD**, most Member States already had a general clause of some kind in their national legislation that could, at least in theory, be used against unfair terms in consumer contracts. However, the UCTD also introduced the indicative list of terms which may be regarded as unfair under the Directive and codified the transparency requirements.

In principle, a high level of consumer protection could also be ensured by a purely national legal framework. This is illustrated by the small number of Member States in which comprehensive legislation against unfair commercial practices was already in place before the implementation of the UCPD. However, it is clear that these two key consumer directives (UCPD and UCTD) have **significantly increased the level of consumer protection in the large majority of Member States** which had a less comprehensive legal framework before the directives were transposed, or even none at all.

Stakeholders in a significant number of Member States confirm that, overall, the principle-based approach of the **MCAD** is effective in protecting businesses. More than half of the interviewed businesses indicated that they benefited at least slightly from the MCAD.

The **PID** is considered to be largely effective and to provide clear added value in terms of better (unit) price information. In most Member States, consumers are reported to be effectively informed and aware about the unit selling price. However, cases of lack of compliance remain widespread.

Concerning the **ID**, the level of consumer protection would be lower in a number of Member States had the EU not imposed on them the duty to protect the consumers' collective interests through such a collective enforcement mechanism. Stakeholders have confirmed the added value of the ID in the Member States where injunction procedures have been introduced for the first time or where they have been improved following the adoption of the ID. Although a few Member States had already established injunction procedures in relation to specific kinds of breaches, such as unfair commercial practices law or unfair contract terms, their legislation did not extend to all the areas of consumer law that are by now listed in Annex I to the ID.

As regards the **CSGD**, consumers buying from any seller in the EU can at least rely on their minimum rights, most importantly the legal guarantee of at least 2 years, the reversal of the burden of proof of at least 6 months, and the right to require an appropriate reduction of the price or have the contract rescinded if repair or replacement have not been completed within a reasonable time. Given that 11 % of consumers reported having shopped 'very often' or 'often' face-to-face in another EU country, and 17 % having done so from an online trader in another EU country, there is clearly an EU added value in setting these rights at EU level.

6.5.1. Added value concerning internal market integration

The second objective of EU consumer and marketing law, i.e. a **better functioning internal market,** cannot be achieved by national laws alone. All directives covered by the Fitness Check are considered to have contributed towards reaching this objective. Both the maximum harmonised rules and the minimum harmonised rules, in conjunction with the harmonising effect of CJEU case-law, have helped reduce the obstacles to the internal market (at least to

some extent), while also **cutting the resulting costs for businesses** in adjusting to legal diversity when offering their products and services cross-border.

According to the business interviews, between 46 % and 63 % of the businesses that sell their products/services in other EU countries indicated that they benefited at least slightly from the EU legislation subject to the Fitness Check. In particular, businesses that sell their products/services in other EU countries indicated that they benefited most from the harmonised legislation that facilitates selling cross-border to consumers in other EU countries. They also benefited from EU rules ensuring that standard contract terms are fair which improved the level playing field across the EU for businesses regarding contracts with consumers.

EU consumer law has also contributed to a **significant increase in B2C cross-border shopping** in the last decade, although such development is also strongly influenced by factors outside the legal environment, in particular increasing consumer access to the internet.

The **UCPD** in particular has replaced divergent regulations across the EU by providing for a uniform legal framework in all Member States. Its cross-cutting, principle-based approach provides a useful and flexible framework across the EU, while the introduction of the blacklist helped eliminate some unfair practices on various national markets.

Furthermore, having a common EU consumer protection framework enables **coordinated enforcement actions at EU level in the framework of CPC network (**for example on in-app purchases and car rental — see case description in Chapter 7.2). This EU-level coordination and enforcement prevents the same infringement being resolved differently in different Member States. This brings coordination gains and more legal certainty and stability for traders across the EU.

With regard to the **CSGD**, the Fitness Check confirmed the Commission's earlier conclusion that its minimum level of harmonisation approach prevents the full potential of the single market from being reached, as recognised in the Commission's Digital Single Market Strategy. This problem is already being addressed by the Commission through the Proposal on distance sales of goods of December 2015.

7. Conclusions

7.1. Effectiveness

The Fitness Check shows that there **has not been significant progress on traders' compliance with consumer protection rules** — about the same number of consumers reported infringements in 2008 and 2016. On the other hand, this is still an **overall positive outcome**, as infringements happening online can now harm more consumers across the EU at the same time.

The complexity of problems experienced by consumers is also increasing due to the technological development of marketing techniques and products and of the greater impact on consumers and national markets of unfair practices perpetrated online. With increasing internet use and online shopping comes higher risk of exposure to online fraud[132].

[132] According to the experience of European Consumer Centres Network (ECC-Net), common types of fraud include fake offers (non-delivery of services/products), second-hand cars and counterfeit products, free trial and phishing scams. See the ECC-Net's 2013 report on *Fraud in cross-border e-commerce*: http://ec.europa.eu/consumers/ecc/docs/ecc-report-cross-border-e-commerce_en.pdf
ECC-Net is currently also working on a joint project on subscription traps, which will be available by the end of 2017.

Notwithstanding this, the substantive rules laid down in the Directives **are capable of addressing the existing consumer problems**. This is borne out by the experience of enforcement, in particular in the context of the joint actions and online 'sweeps' by national consumer enforcement authorities under the Consumer Protection Cooperation (CPC) network.

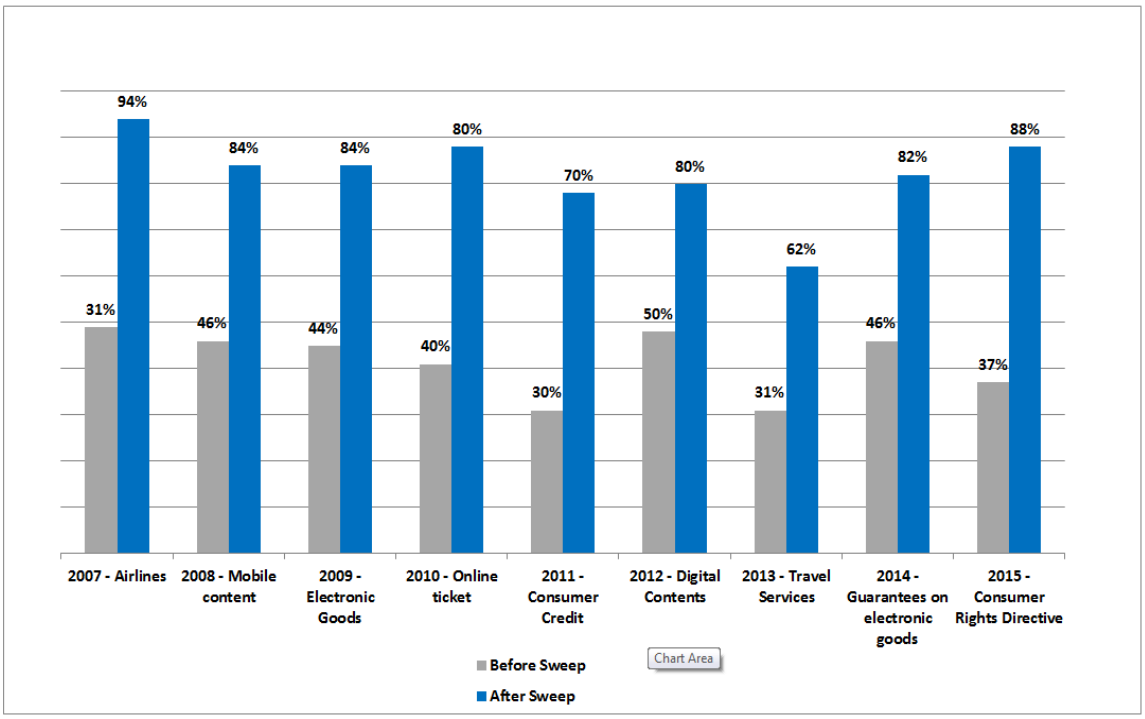
As shown in the example below, each 'sweep' action carried out by the CPC authorities since 2007 to identify breaches of EU consumer law and improve compliance with this law has led to a significant reduction in the number of infringements.

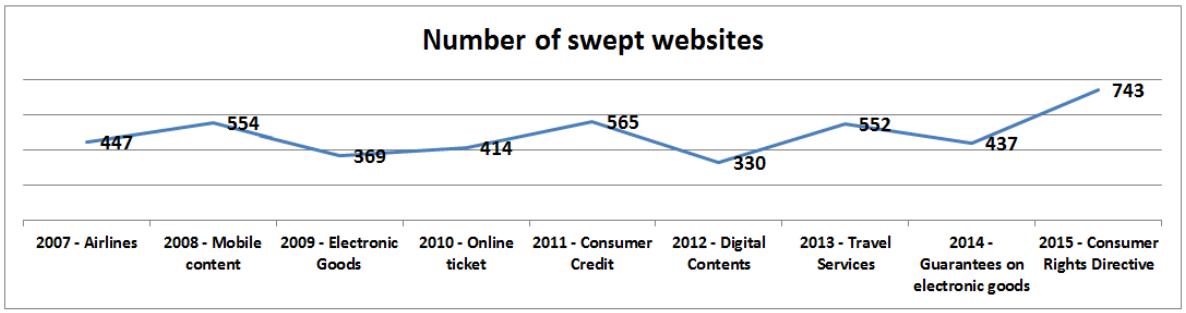
PRACTICAL EXAMPLES: Enforcement does make a difference

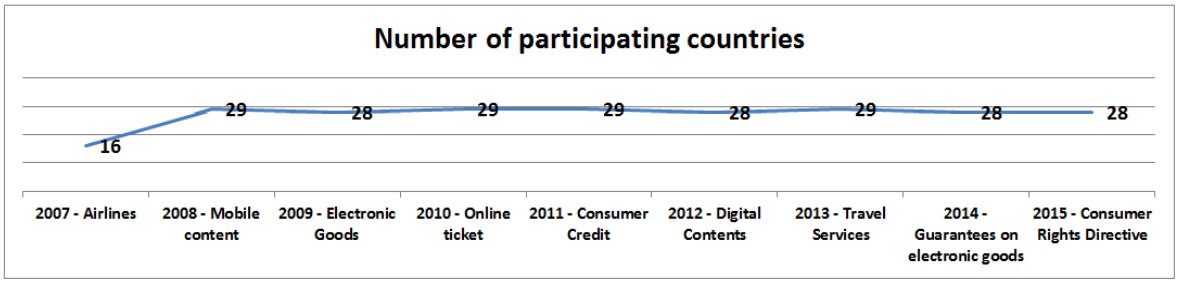
The 'EU sweep' is an EU-wide screening of websites. It takes the form of simultaneous, coordinated checks to identify breaches of consumer law and subsequently ensure its enforcement. Following an investigation of this kind, the relevant national authorities take appropriate enforcement actions: they contact companies about suspected irregularities and ask them to take corrective action or face legal action.

Sweep actions reveal whether EU consumer protection laws are doing what they were designed to do. This kind of tool can also be used to test the effectiveness of the enforcement action.

The European Commission sweep actions have focused so far on: airlines (2007, UCTD), mobile content (2008, UCPD), electronic goods (2009, UCPD and CSGD), online tickets for cultural and sports events (2010, UCTD and UCPD), consumer credit (2011, the Consumer Credit Directive, UCPD and UCTD), digital content (2012, UCTD and UCPD), travel services (2013, UCTD and UCPD), guarantees on electronic goods (2014, CSGD) and the CRD (2015).







Source: http://ec.europa.eu/consumers/enforcement/sweeps/index_en.htm

Most of the substantive law Directives covered by this Fitness Check are largely principle-based, do not distinguish between online and offline environments and are fully technology-neutral. Therefore they also deal with **new problems**, even if they were adopted before the age of e-commerce kicked in. This is clearly demonstrated by cases in the digital area in the context of the CPC, such as the most recent joint enforcement action on terms and conditions and commercial practices in social media (e.g. Facebook, Twitter). The action is based on the existing rules of the UCTD and UCPD. In May 2016, the Commission updated as part of its e-commerce package measures its guidance on the UCPD, putting particular focus on how its rules make it possible to tackle emerging issues arising in the online environment.

The extensive consultation activities carried out (stakeholder interviews and the 'consumer summit' of October 2016) have not revealed any evidence that the current rules are not fit for the digital age. However, in relation to the CSGD a clear **lack of fitness for digital age** had been identified already back in 2015, consisting in the fact that the Directive does not contain any rules to protect consumers against the provision of defective digital content. This problem is already being tackled by the Commission through the Digital Contracts Proposals of December 2015, which included a proposal on the supply of digital content.

In conclusion, the substantive consumer protection provisions of the Directives are overall **fit for purpose, i.e. they are appropriate to tackle the problems that consumers are facing today, including in the digital and online markets**.

Accordingly, the **main obstacle preventing achievement of the objectives of the legislation covered by this Fitness Check** is the **insufficient enforcement** of the rules. This is coupled with: (i) consumers' still limited awareness of their rights; and (ii) **shortcomings over redress** opportunities, which detracts from consumers' propensity to seek redress.

PRACTICAL EXAMPLE: lack of enforcement leads to wide-scale infringements and consumer detriment

In one Member State, consumers buying real estate properties were not informed of the existence of pre-existing mortgages on those properties and as a result, a large number of properties were sold without the purchasers receiving the title deeds. Moreover, the contracts contained a number of unfair terms. Under the UCPD, such a commercial practice should

have been clearly classified as a 'misleading omission' and, consequently stopped and prohibited. Also, the unfair terms contained in the relevant contracts should have been swiftly declared as non-binding. However, according to numerous complaints received by the Commission, including from complainants in other Member States, the relevant enforcement authorities were not applying the relevant consumer protection rules in this area. In consequence the Commission started an infringement procedure under Article 258 of the Treaty of the Functioning of the European Union to make sure that EU consumer laws are correctly implemented.

As regards the effectiveness of individual directives, UCPD and the UCTD have created a comprehensive EU legislative framework to address both existing and emerging commercial practices, contract terms and market developments in general. They also provide a 'safety net' of complementary protection in specifically regulated consumer protection areas. The enforcement of the UCPD has been facilitated by the recently revised Commission's guidance document.

On the other hand, the effectiveness of the UCPD could be improved by also providing **consumers with clear EU-wide rights to remedies** in cases where they are victims of unfair commercial practices. These are currently regulated differently at the national level and rarely applied in practice despite the high reported incidence of UCPD infringements. A right to individual remedies under the UCPD could also contribute to the circular economy, as set out in the Commission's circular economy action plan[133]. This is because such consumer rights could act as an additional deterrent against misleading claims about environmental and durability features of goods and services.

As for the **UCTD**, the evaluation showed a certain lack of clarity concerning its interpretation and application in for example: (i) the scope of exemptions of individually negotiated terms, of terms concerning price and the main subject matter; (ii) the legal consequences of the non-binding nature of unfair contract terms; and (iii) the obligation of national courts to take an active role in applying the UCTD in individual cases. These issues could be addressed through specific Commission guidance, similar to the guidance that already exists for the UCPD and CRD.

An important part of both the UCPD and UCTD are their lists of unfair commercial practices and unfair contract terms respectively. During the consultation, several stakeholders put forward ideas for possible updating of the **UCPD blacklist**. However, these suggestions show a great diversity of views that do not converge on any specific priorities. Therefore, at present there does not appear any clear candidate for possible additional inclusion in the UCPD blacklist. In any case, any future additions to the blacklist would first have to pass through the proper stakeholder consultation process.

On the UCTD, the consultation has shown that stakeholders in Member States which have introduced a **blacklist or grey list** of unfair terms tend to consider these lists as more effective than the 'indicative and non-exhaustive' list of the UCTD. Based on these examples, the Lot 1 study suggests introducing a blacklist at EU level. However, there is currently no compelling evidence that the principle-based approach of the UCTD in combination with the current indicative list cannot address new and emerging infringements. Currently, ongoing enforcement activities through the CPC network are testing the overall effectiveness of the UCTD, including its indicative list, in the context of social media platforms (see case description in Chapter 7.5).

[133] Communication 'Closing the loop — An EU action plan for the Circular Economy', 2.12.2015, COM(2015) 614 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX %3A52 015DC0 614.

Lastly, the length of standard term and conditions is found to be a considerable obstacle for consumers in identifying unfair terms. The Commission is already working on this issue with industry and consumer stakeholders. The aim is to agree on voluntary principles for better presentation of both the standard contract terms and pre-contractual information under the CRD.

The unit price indication requirement of the **PID** is considered by and large to be effective at ensuring better price comparability. However, the evaluation also revealed major compliance problems in practice.

The **CSGD** is also overall effective at enabling consumers to seek redress when they receive defective goods. However, as demonstrated in the impact assessment of the Digital Contracts Proposals that Commission presented in December 2015, the results are less positive when it comes to the cross-border dimension. The minimum harmonisation approach, which leads to different national rules, does not encourage consumers to buy from other EU countries or businesses to sell to other EU countries. This prevents consumers and businesses from benefiting to the full from the opportunities of the internal market. The Commission has therefore proposed to fully harmonise these rules for distance sales, which could also contribute to circular economy in line with the Commission's Circular Economy Action Plan. This evaluation largely confirms that the Commission's policy choices in the proposal on distance sales of goods are justified. It also confirms the need to keep consistency in the legal regimes for distance and face-to-face sales in this area (for more information see the conclusions on coherence in Chapter 7.3).

The B2B advertising rules under the **MCAD** have a broad scope of application. However, the evaluation shows that: (i) a number of specific misleading B2B practices continue to be a source of concern; and (ii) the grounds cited by the Commission already in 2012 for possibly revising the MCAD remain valid. On the other hand, the evaluation did not provide compelling evidence that urgent action is needed in this area.

Finally, the **ID** has contributed to enforcing EU consumer law at national level. Its aim to stop infringements harming **collective consumers' interests** makes it an enforcement tool that is still fit for purpose. However, this evaluation confirms that the injunctions procedure as designed by the Directive should be made more uniform and more effective across the EU.

7.2. Efficiency

The Fitness Check's analysis of the Directives' **efficiency** mainly aimed to identify monetary and non-monetary costs and benefits associated with applying the Directives.

All stakeholder groups largely share the view that these EU rules have significant benefits for consumer protection and cross-border trade, and also result in better protection of businesses. The results of the consumer survey show that among the specific rights provided by the Directives, consumers have drawn most benefits from the *rights to a 'legal guarantee' for goods* and *rights for unit price indication.* The number of respondents who indicated they had not drawn any benefit from these rights ranged from 15 % to 34 % (depending on the right). Accordingly, **the consumer rights provided by the Directives continue to be beneficial for a large majority** of consumers.

The businesses survey of the Fitness Check concerning the UCPD, MCAD, UCTD and PID shows that perception of the Directives' benefits strongly depends on whether the business is active in cross-border trade or focuses on the domestic market. Across all potential benefits, **between 46 % and 63 % of businesses that sell their products/services in other EU countries indicated that they** benefited at least slightly from the Directives. In particular, these businesses indicated that they benefited most from the harmonised legislation that

facilitates selling cross-border to consumers in other EU countries, followed by the EU-wide level playing field for businesses regarding contracts with consumers. **Traders operating cross-border are clearly the ones reaping the most tangible benefits from harmonisation and the reduced legal diversity between Member States.**

Furthermore, **cross-border businesses benefit from the more coordinated enforcement of these Directives by the CPC network** (see below example).

PRACTICAL EXAMPLE: Cost-effective implementation of consumer laws across the EU

In-app purchases are a legitimate business model, but it is essential for app-makers to understand and respect EU law while they develop these new business models across the EU. Following a large number of complaints in EU Member States concerning in-app purchases in online games and in particular inadvertent purchases by children, EU Member States national authorities joined forces with the European Commission to find solutions: Apple, Google and the Interactive Software Federation of Europe were asked in December 2013 to provide concrete solutions across the EU to the concerns raised. In particular it was requested that:
- games advertised as 'free' do not mislead consumers about the true costs involved;
- games do not contain direct exhortation to children to buy items in a game or to persuade an adult to buy items for them;
- consumers be properly informed about the payment arrangements for purchases and should not be debited through default settings without consumers' explicit consent;
- traders provide an email address so that consumers can contact them with queries or complaints.

Thanks to the clear rules set out at EU level the industry was able to address consumer concerns by making the same adjustments of its practices across the EU.

Source: http://europa.eu/rapid/press-release_IP-14-847_en.htm

According to the Commission's cross-sector comparative analysis performed, business **compliance costs** in the area covered by the Fitness Check compare rather well with costs in other sectors. In the first 2012 analysis of burdens imposed by EU legislation, EU rules in the area of '*Consumer protection — safe shopping (distance selling, advertising, unfair commercial practices, timeshare of holiday properties, etc.)*' were considered the second least burdensome by SME respondents among the 32 surveyed areas.

According to the Eurobarometer survey for the next 2017 edition of the Consumer Conditions Scoreboard, in 2016 a large majority of traders agreed that compliance with consumer legislation in their own country is easy (71 %) and that the costs of compliance are reasonable (66 %). However, when it comes to traders operating cross-border, only 55 % of them agreed that compliance in other EU countries was easy and just 48 % agreed that the related costs were reasonable.

According to the business survey of this Fitness Check, the median annual costs of compliance with the national rules governing marketing and standard contract terms (i.e. rules in the area of the UCTD, UCPD and MCAD) vary depending on company size. For example:

- for large household appliances, costs range from EUR 194 for micro businesses to an overall high of EUR 54 806 for large businesses; and
- for pre-packaged food and detergents, costs range from EUR 118 for micro businesses to EUR 14 865 for large businesses.

Extrapolated to EU level, all businesses in the EU-28 in the five selected sectors have to pay EUR 278 million per year (best estimate) to check that their advertising/marketing and standard contract terms comply with national legislation and to adjust their business practices if needed. The figure covers an estimated 962 261 businesses in the five selected sectors. **These costs appear very proportionate, including for SMEs given the approximate annual turnover of EUR 1 180 billion in these five sectors**, and when taking into account the importance of these rules for the functioning of consumer markets. Indeed, the estimated overall costs of regular compliance checks amount to approximately 0.024 % of turnover, of which: 0.011 % relates to rules on advertising and marketing targeted at consumers; 0.004 % relates to rules on advertising and marketing targeted at businesses; and 0.009 % relates to rules on standard contract terms.

In practice it is difficult for a business **to attribute the cost of complying with regulations on marketing and standard terms to specific rules in the UCPD, MCAD and UCTD**. Therefore, the available cost estimates reflect the combined effects of: (i) these Directives; (ii) national rules going beyond the Directives' minimum requirements; (iii) EU sector-specific consumer protection rules and their national implementation.

In conclusion, the Directives do not appear to impose any unreasonable burden on businesses, while the reasonable burdens they impose appear completely necessary to achieve the high level of consumer protection required by the Treaty. However the **cost-effective implementation** of the CSGD is hampered by the existing national differences that hinder cross-border trade. In this respect, the Fitness Check confirms the findings of the impact assessment for the Commission's Digital Contracts Proposals of December 2015[134] intended to fully harmonise the rules for distance sales of goods.

The **ID** does not impose any specific obligations on honest EU traders, since its aim is to stop infringements of key substantive EU law. Likewise, the ID does not generate any cost for individual consumers. On the contrary, since the injunction procedure is a collective action brought in collective consumers' interests, it may also bring substantive benefits to individual consumers who may for various reasons be discouraged from filing legal action by themselves. The injunction procedures may ultimately bring substantial benefits for both EU consumers and EU traders, since decreasing the number of infringements contributes to consumer welfare and to achieving a level playing field for traders.

7.3. Coherence

The evaluation of coherence aimed at determining the extent to which the Directives complement other EU consumer protection legislation and how far they have contributed to the overall coherence of EU consumer protection regulatory framework.

The coherence assessment focused on the interplay of the Directives with sector-specific EU consumer legislation in the areas of passenger transport, electronic communications, energy and consumer financial services. These areas were chosen due to the existence of detailed sector-specific EU consumer protection regulation in these sectors and due to the relatively high incidence of reported consumer problems. In this area, the Fitness Check also analysed the interplay between the PID and sector-specific rules on detergents and between the CSGD and the new Digital Contracts Proposals. Finally, the Fitness Check looked at the interplay and simplification potential of consumer requirements under the UCPD in light of the overlapping and more detailed rules of the CRD.

[134] SWD/(2015)274final : http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2015%3A274%3AREV1.

The Fitness Check concluded that the horizontal Directives under analysis and EU sector-specific consumer protection legislation mostly complement one another. Stakeholders largely agree that the combination of horizontal and sector-specific rules provides a clear and coherent legal framework. In particular, the UCPD and UCTD provide a 'safety net' complementing and filling regulatory gaps in the regulated sectors.

PRACTICAL EXAMPLE: EU horizontal consumer protection legislation fills the gaps in sectoral regulations

In September 2015, the Volkswagen Group (VW) admitted publicly that millions of diesel vehicles worldwide — and about 9 million in the EU alone — were equipped with 'defeat software'. This software enabled the cars to pass pollutant emission tests, even though in normal road conditions emissions would be significantly above legal thresholds. In the EU, the VW Group did not openly recognise any illegal practice but it announced that the vehicles concerned would be repaired.

Two sets of EU legislation apply to this case: sectoral type-approval legislation (Directive 2007/46, which lays down the general framework, and Regulation (EC) 715/2007, which sets the Euro 5 and Euro 6 emissions limits) and general EU consumer law (the Unfair Commercial Practices Directive and the Consumer Sales and Guarantees Directive).

Under the EU sectoral law, national authorities are responsible for checking that a car model meets all EU standards before it can be sold on the single market. They should also take corrective and punitive action when a car manufacturer breaches those requirements. In December 2016 the European Commission decided to act against the Czech Republic, Germany, Greece, Lithuania, Luxembourg, Spain and the United Kingdom on the grounds that they had disregarded EU vehicle type-approval rules. The Commission has also taken important steps to make vehicles more environmentally friendly and to restore consumer confidence. It has introduced more robust and realistic testing methods for measuring both nitrogen oxides (NOx) and CO_2 emissions from cars and proposed a Regulation on the approval and market surveillance of motor vehicles that would ensure greater quality and independence of vehicle testing, more surveillance of cars already in circulation and greater European oversight.

Under the UCPD, the trader should act in line with the requirements of professional diligence. The consumers should have been informed that the vehicles they bought had a defeat device and therefore did not comply with the technical legislation. Under the Consumer Sales and Guarantees Directive, sellers are liable to consumers for any lack of conformity which exists at the time the goods were delivered and appears within 2 years from when the good was delivered ('legal guarantee'). In such a case, the consumer is entitled to have the defective car brought into conformity free of charge by repair or replacement or, if this is not possible, to receive a price reduction or the reimbursement of the total price of the car.

Under the above provisions consumers may file individual legal action against VW. In Member States where compensatory collective redress mechanism exist, consumers and the bodies representing them can also file collective action against VW.

The European Commission called on VW to treat consumers fairly *and equally across Europe. The Commission also regularly meets with national consumer authorities. In several Member States, consumer authorities launched their own investigations. In Italy, the Italian Competition Authority found that Volkswagen AG e Volkswagen Group Italia S.p.A. had been*

jointly breaching unfair commercial practices legislation and imposed a fine of 5 million euros, i.e. the maximum fine provided by the law.

Sources:

http://europa.eu/rapid/press-release_IP-16-4214_en.htm

http://europa.eu/rapid/press-release_MEX-17-231_en.htm

http://www.agcm.it/en/newsroom/press-releases/2294-ps10211-the-italian-competition-authority-fines-the-volkswagen-group-for-tampering-with-their-vehicles'-emissions-control-systems.html

EU sector-specific EU legislation often contains more detailed prescriptions for the sector in question. These sector-specific rules can overlap with and deviate from the 'horizontal' rules that apply to all sectors. Such situations are catered for by specific provisions in both the horizontal Directives and in the sector-specific legislation. For example, Article 3(4) of the UCPD states that sector-specific EU rules prevail in the event of conflict.

Accordingly, parts of or some of the rules in the horizontal Directives covered by this Fitness Check are not applicable in the specific sectors. However, **this does not mean that the horizontal rules are obsolete** as they still remain relevant and applicable in many other sectors where such more detailed prescriptions do not exist.

Although the Directives under analysis here are generally complementary with other (sector-specific) EU consumer legislation, the evaluation also identified the **need to clarify or improve a number of issues.**

Firstly, in addition to the more general finding of inadequate enforcement, there appear to be specific additional problems over the **simultaneous enforcement** of the EU's horizontal consumer rules, in particular the UCPD and UCTD, and EU sector-specific consumer rules. There should be better coordination at national level between the general consumer protection authority dealing with the UCPD and the UCTD on the one hand and the sector-specific regulators on the other. The Commission has already organised workshops to facilitate exchanges between consumer protection authorities and other relevant national regulators and will continue to do so.

Specific coherence issues have arisen in the context of the Commission's proposal on distance sales of goods as part of the Digital Contracts Proposals of December 2015. While all the Directives covered by the Fitness Check apply in the same manner to online and offline sales channels, the Commission Proposal is intended to introduce fully harmonised rules for distance sales only, which will differ to a certain extent from the minimum rules of the CSGD. On this point, the Fitness Check evaluation confirms the need for consistent rules that apply to both the online and offline sectors, as under the current CSGD. The Commission is therefore already actively assisting Parliament and the Council in their discussion on possibly expanding the scope of its December 2015 Proposal.

The 'internal coherence' assessment shows a need to consider **reducing the information requirements applying at the advertising stage** provided under Article 7(4) UCPD. This is because traders must provide the same and more detailed information at the pre-contractual stage under the CRD. This concerns in particular the UCPD information requirements about complaint handling and traders' geographical address. These requirements were deemed as relatively less relevant in advertising by consumers in the consumer survey and in a behavioural experiment.

As regards **the injunctions procedure**, the Fitness Check has demonstrated that the alignment of the ID with the enforcement provisions in the UCPD, UCTD and CRD could help make the EU injunctions framework simpler and more coherent. The Fitness Check confirmed, in line with the findings of previous Commission reports, that the **ID** should cover more EU consumer law. Therefore its scope of application should be aligned with the scope of the CPC Regulation.

7.4. Relevance

The data collected and stakeholder consultations confirm the continued **relevance** of all the Directives covered by this Fitness Check. Their objectives and content are consistent with market developments and current needs and trends in consumer behaviour. The evaluation showed that the consumer protection and internal market integration objectives pursued by all of the Directives continue to remain highly relevant.

Consumers attach strong importance to consumer rights-related factors in their purchasing decision. At least two thirds of consumer survey respondents evaluated all consumer rights-related factors as 'important' or 'very important' when making a purchase.

PRACTICAL EXAMPLE: The objectives of EU consumer law are still relevant and valid

'Floor clauses' in mortgage contracts became infamous after the onset of the financial crisis which sent interest rates crashing. As a result banks tried to find ways to hold on to their profits. One of these ways was to sign up consumers to a variable interest rate mortgage loan, but without informing them of the 'floor' below which interest rates could not fall. 'Floor clauses' have been found in variable-rate mortgage contracts in Spain, but were common in other EU countries too.

In December 2016 the Court of Justice of the European Union (CJEU) ruled on the basis of the UCTD that finding a contract clause to be unfair must have the effect of restoring the consumer to the situation that consumer would have been in if that term had not existed. The judgment referred to the 'floor clause'. In accordance with the CJEU judgment Spanish consumers who had been affected by mortgage contract 'floor clauses' could claim reimbursement for any interest they had unfairly paid from the moment the contract was signed.

Analysts estimated that banks may have to pay back to consumers as much as EUR 4.5 billion. As a European court ruling, the decision is binding in all courts across the European Union.

Sources:

http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160144en.pdf

http://www.beuc.eu/press-media/news-events/eu-court-sides-spanish-consumers-unfair-mortgage-clauses

EU consumer protection rules remain relevant also in the **context of furthering the internal market**. This is due to the increasing number of intra-EU consumer transactions and the widespread infringements with an EU-wide dimension, especially online.

The Fitness Check also explored the relevance of the existing consumer protection rules in relations other than B2C. More specifically, for B2B relations the Lot 1 study recommended

to consider expanding the scope of the UCTD so that it also protects SMEs. However, various Commission departments are currently carrying out studies on the presence of unfair trading practices in B2B relations, including unbalanced contract terms, in connection with online platforms, the free flow of data, the internet of things, cloud computing and the food supply chain. At this stage there are also **divided views across the EU on expanding the UCTD to cover B2B,** with several business associations and public authorities opposing the idea.

7.5. EU added value

The Directives covered by the Fitness Check provide a clear EU added value. The UCPD and UCTD in particular have significantly increased the level of consumer protection in those Member States (in fact the large majority) in which a less comprehensive or even no such framework existed before. By ensuring more consistency across the EU, these Directives provide for coordination gains in enforcement work as well as more legal certainty and stability for cross-border traders in the EU. Specifically, **the common harmonised rules provided by these Directives make it possible for the national enforcement authorities to address more effectively, in particular through the CPC framework**, cross-border infringements that harm consumers in several Member States.

PRACTICAL EXAMPLE: Common EU consumer law standards enable Member State to tackle international players more effectively

Directives covered by this Fitness Check apply also to online markets. Social media has become part of consumers' daily lives and a majority of Europeans use it regularly. Given the growing importance of online social networks, consumer authorities in EU Member States cooperating through the CPC network and the European Commission met in March 2017 with Facebook, Twitter and Google+ to make sure that the players in this sector comply with the strong EU rules in place to protect consumers from unfair contract terms and practices. For instance, under EU consumer law, EU consumers cannot be forced to apply to courts only in California to resolve a dispute or to waive other mandatory rights, such as the right of withdrawal from an online purchase. Social media companies also need to take more responsibility in addressing scams and fraud happening on their platforms.

The relevant directives (UCTD and UCPD in this case) enable national consumer protection authorities to speak with one voice with major traders from around the world on the basis of the same rules and make their position stronger if there is a need to enforce compliance with consumer law rules.

The relevant directives also make it easier for traders to provide legally sound services across the EU.

Sources: http://europa.eu/rapid/press-release_IP-17-631_en.htm

The technological innovation and new market practices are bringing benefits to consumers. However, these developments are also creating new vulnerabilities that can be exploited by unscrupulous traders. EU-wide infringements of consumer rights therefore **require appropriate enforcement action at EU level.** To be effective, **EU-wide enforcement must be grounded in common and uniform EU consumer protection legal framework, as provided by the Directives covered by this Fitness Check**.

7.6. Possible follow-up actions

The Fitness Check found that further improving the overall effectiveness, efficiency and coherence of the six Directives requires three strands of action:

1) ensuring that not only consumers, traders and their associations, but also judges and other legal practitioners, have **better knowledge** of all rights and duties under this part of EU consumer and marketing law, as robustly interpreted by the CJEU;
2) ensuring **stepped-up enforcement** and easier redress when the substantive law provisions in question are breached through **a number of targeted legislative amendments** in order to: (i) enhance the overall enforceability and the quality of consumer protection; and (ii) reduce, where appropriate, divergences in implementation;
3) simplifying the regulatory landscape where this is fully justified.

In addition, the Commission will also continue data collection via **consumer scoreboards** on compliance, enforcement, consumer trust and other relevant parameters. The scoreboards have recently gone through a thorough methodological revision, resulting in improved indicators and analysis.

Concerning the first objective set out above, **lack of awareness** appears to be a significant obstacle to achieving the goals of EU consumer legislation. Even though the data show that consumers have a slightly improved knowledge of some of their key rights, overall knowledge could be significantly stepped up through targeted awareness-raising activities and by providing easily accessible, up-to-date and practical information that is relevant for every-day shopping.

For traders, DG JUST has just launched a **Pilot project on training SMEs in the digital age** financed by European Parliament and carried out by BEUC, UEAPME and Eurochambres. This project is meant to ensure better prevention of breaches of consumer law and to complement the various awareness-raising activities in the Member States, which typically rather focus on consumers.

The Commission is also currently creating a **Consumer Law Database**, which — based on the already existing information in the Unfair Commercial Practices Database and the Consumer Law Compendium — will provide updated information about the national laws, case-law, administrative practice and doctrine in respect of the 12 EU Directives in the field of consumer and marketing law. The Consumer Law Database will form part of the E-Justice Portal (https://e-justice.europa.eu).

The Commission's recent proposal for a **Regulation on a Single Digital Gateway**[135] will also contribute to increasing awareness as it would introduce an obligation on the EU and Member States to offer clear, comprehensive and updated information to consumers on what their rights are when buying products or services from another EU country, and will facilitate their access to assistance services.

[135] Proposal for a Regulation on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012, 2.5.2017, COM(2017)256, available at: https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-256-0_en. The proposal introduces an obligation on the EU and the Member States to offer clear, comprehensive and updated information about accessing the Single Market, including consumer rights. It will also make national product requirements available online, increase transparency and allow consumers to make more informed choices. The single digital gateway will make the relevant assistance services available at EU and national levels, including the European consumer centres network, easier to find through an easy-to-use interface.

In addition, **stepped-up training and capacity building for legal practitioners** (e.g. judges) and consumer organisations would lead to more consistent application of EU consumer law in both domestic and cross-border cases. This would be a useful complement to a reformed CPC mechanism.

Last but not least, guidance on the UCTD (similar to the existing documents for the UCPD and CRD) could help make it easier to understand and apply the Directive. This would address the implementation difficulties identified in this evaluation, including over the interplay between the UCTD and sector-specific consumer legislation. Such guidance could draw on the rich CJEU case-law and national administrative practice and case-law that is currently being collected in the new Consumer Law Database.

The evaluation has demonstrated significant problems with consumers' understanding of standard terms and conditions. The Commission has already started a discussion with industry stakeholders within the REFIT stakeholder group on ways to improve the **presentation of mandatory consumer information requirements and the standard terms and conditions**. This could lead, for example, to a set of key principles agreed by a multi-stakeholder group, similar to the principles for comparison tools and environmental claims. Legislative intervention could be considered too, particularly if the self-regulatory approach proves unsatisfactory.

One way to address the **second objective of ensuring stepped-up enforcement and easier redress** would be to assess the need for an increased **deterrent effect of penalties** for breaches of consumer law. These are currently set at varying levels across the EU and at very low levels in some countries.

On better redress opportunities, **the current UCPD does not provide consumers with a direct right to individual remedies**. The introduction of such rights should be considered, as this would strengthen the overall effectiveness of the UCPD and could also contribute to specific aspects of consumer-related policies, such as sustainable consumption and circular economy in line with the Commission's Circular Economy Action Plan.

The ID could be made more effective. This could be achieved by, for example, expanding its scope to cover more pieces of consumer legislation and by further harmonising the injunction procedure. The possible changes would be particularly intended to: (i) facilitate access to justice and reduce the costs for the 'qualified entities' that protect collective consumers' interests; (ii) increase the deterrent effect of injunctions; and (iii) produce an even more useful impact on the affected consumers.

All these activities would take place in parallel to the ongoing review of CPC, the implementation of alternative and online dispute resolution and the assessment of the 2013 Recommendation on collective redress. The possible revision of the ID needs to be considered in the light of the results of the assessment of the 2013 Recommendation, which addresses both compensatory and injunctive collective redress.

Concerning the third objective of **simplification of the rules**, the evaluation has established that there is limited potential for reducing some of the information requirements provided in the UCPD because they are duplicated in the CRD.

Furthermore, the evaluation has concluded that a **number of aspects of the UCTD** need to be clarified. One option to do so is via a guidance document, as already mentioned above, but there is obviously also room for targeted amendments to the UCTD, including on aspects such as introducing a blacklist, clarifying the scope of application, exemptions and the relationship with sector-specific rules.

All these possible follow-up actions will continue to be thoroughly discussed with Member States and stakeholders. Obviously, any possible legislative follow-up will have to undergo a careful **impact assessment**.

Annex 1 — Additional analysis per Directive

1. Additional analysis of effectiveness

1.1. Effectiveness of the UCPD

In the **2013 Communication on the application of the UCPD**[136], the Commission concluded that the UCPD '*has considerably improved consumer protection in and across the Member States, while better protecting legitimate businesses from competitors who do not play by the rules*'. It also stated that the benefits of the UCPD mainly stem from its horizontal 'safety net' character and its combination of principle-based rules with a blacklist of unfair commercial practices. The blacklist was deemed to have 'provided national authorities with an effective tool to tackle common unfair practices like bait advertising, fake free offers, hidden advertising and direct targeting of children'.

As mentioned in the general 'Effectiveness' Chapter 6.1, the impact of the UCPD on the evolution of consumer trust and cross-border shopping was tested through modelling under the Lot 1 study. The results of this modelling were not conclusive — while one model found significant effects of the UCPD being in place on consumer trust and on cross-border online purchases, this was not the case with the three other methods applied.

As regards qualitative analysis, the Lot 1 study concludes that the **Directive's principle-based rules in combination with the blacklist** are widely considered to provide an effective framework for achieving a high level of consumer protection regarding unfair commercial practices. **Only in a minority of Member States a comprehensive legislative framework concerning unfair commercial practices was already in place before the UCPD** was implemented (most notably Austria, Denmark, Germany, Finland, France, Spain, UK). In more than two thirds of the Member States the UCPD has significantly increased both the comprehensiveness of the legislative framework concerning unfair commercial practices and the level of protection against unfair commercial practices from the perspective of consumers.

In particular, the UCPD's **principle-based approach is 'future-proof' and 'technology-neutral'** in that it allows national authorities and courts to adapt their assessments to the rapid development of new products, services and selling methods. According to the interviewed stakeholders, the enforcement authorities and courts often apply the principle-based approach of the Directive[137].

The Lot 1 study also reveals that authorities in those Member States (most notably Austria, Denmark, Germany, Finland, France, Spain, UK) which already had a principle-based approach within unfair marketing law before the entry into application of the UCPD

[136] Communication 'On the application of the Unfair Commercial Practices Directive — Achieving a high level of consumer protection Building trust in the Internal Market', 14.3.2013, COM(2013) 138 final.

[137] Statistical data on the practical application of the UCPD in Member States is scarce and often incomplete. Relevant data were available from only 11 countries (Belgium, Bulgaria, Croatia, Estonia, Finland, France, Greece, Lithuania, Portugal, Romania, and Slovenia). In five of them, the share of consumer cases decided on basis of the UCPD was 20 % or more of all B2C cases. Further details are available in Chapter 6.1. of the Lot 1 Fitness Check study (Main study). The Centre for Protection against Unfair Competition (*Wettbewerbszentrale*) keeps detailed national statistics on unfair commercial practices in Germany. Out of more than 12, 000 complaints the organisation received in 2015, 58 % related to misleading or missing information in marketing; more than half of these cases related to misleading information about the price or the characteristics of either the product or the trader. A further 7 % of total complaints were related to aggressive or nuisance marketing practices and 2 % of total complaints related directly to blacklisted commercial practices. More than 350 complaints in 2015 referred to traders located in other EU countries and Switzerland, most of which related to misleading advertising. Source: Wettbewerbszentrale Jahresbericht 2015. Available at: https://www.wettbewerbszentrale.de/de/publikationen/jahresberichte/ .

(December 2007) do not report any particular problems with its application, whereas in other Member States, some enforcement authorities and courts had difficulties, especially during the first years of implementation, to apply its principle-based rules to concrete cases. In the meantime, however, most consumer protection authorities have gained more practical experience in applying the UCPD principle-based approach. Stakeholders have also noted that the UCPD Guidance document facilitates a more effective application of the national legislation having transposed the Directive.

The UCPD **blacklist also was generally considered to be effective**. For practices on the list there is no need to analyse the effect of the unfair practice on the consumer's transactional decision (the 'transactional decision test') in order to take action, which facilitates enforcement and may avoid costly and time-consuming litigation. In particular, the enforcement authorities in many Member States consider that the UCPD blacklist is useful and simplifies their work, as it alleviates their burden of proof and reduces arguments over whether a particular practice should be considered unfair or not. The blacklist also makes it easier for *traders* to comply, as it facilitates the identification of unfair commercial practices and thereby increases legal certainty and awareness. There are, however, some **limitations in the application of the blacklist**: some of the blacklisted practices are considered by stakeholders to be quite peculiar or addressing situations which no longer occur in the market, others are reported to be difficult to apply due to their very broad or very narrow conditions which still require a concrete assessment of the unfairness.

In the consultation activities several stakeholders put forward ideas for possible **updating of the blacklist**. These suggestions[138] **show a great diversity of views that do not converge on any specific priorities**. Therefore, **there does not appear any clear candidate for a possible, additional inclusion in the blacklist at this stage**. In view of the significant consequences of inclusion of specific practices into the blacklist, the Lot 1 study has stressed the need for an open, transparent and inclusive consultation process before the Commission proposes any possible additions.

In light of the more general development of consumer markets towards business models based on processing of data supplied or collected from consumers, DG JUST raised in the Stakeholder Expert Group the need for adjusting the blacklisted practice No 20 of the UCPD blacklist. It prohibits, in all circumstances '*Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.'*

Accordingly, this prohibition does not expressly tackle 'free' claims in respect of those products for which the consumers pay with their data. Members of the Stakeholder Expert Group were divided over the need for expressly tackling this issue in No 20 of the UCPD blacklist. Furthermore, the revised UCPD guidance[139] has already explained that '*The marketing of [products only accessible in exchange of providing personal data]as 'free' without telling consumers how their preferences, personal data and user-generated content are going to be used could in some circumstances be considered a misleading practice*.' Such practice would also violate in any event personal data protection legislation.

Some markets or commercial practices have been especially investigated in the past years by the Commission and national enforcement authorities as emerging problem areas under the UCPD.

[138] For details, see the Lot 1 study. Many of the listed suggestions do not identify the specific behaviour that should be blacklisted but only indicate the situations, such as door-to-door sales or excursions, in which unfair practices are occurring. Other provided examples seem already possible to tackle under the existing UCPD or are rather subject to the UCTD, such as unilateral changes of contract terms or excessive contractual penalties.
[139] UCPD http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf.

For instance, **price comparison websites** were noted in the Commission's 2013 report on the application of the UCPD as a growing concern, as the identity of the comparison tool operator, price details for the goods and services being compared, and other information required by the UCPD to help consumers make an informed decision was not always presented in a transparent manner. Already earlier in 2012, the Commission set up a Multi-stakeholder Group on Comparison Tools to address these concerns. A dedicated market study published in 2015 confirmed the prevalence of problems with misleading and inadequate information: 65 % of consumers surveyed for the study indicated that they had experienced a problem with a comparison tool, mostly related to inaccurate information[140]. In response to these findings, the Multi-stakeholder Group published a list of Key Principles for Comparison Tools[141] in 2016 to improve the compliance with the UCPD. These principles subsequently fed into the updated UCPD guidance document[142].

The compliance of price comparison and travel booking websites with consumer law was investigated during the 'sweep' (simultaneous screening of websites in a chosen sector) by the CPC (Consumer Protection Cooperation network) authorities in 2016. It consisted of screening of 352 price comparison and travel booking websites across the EU[143]. **The indication of prices was found not to be reliable on 235 websites, i.e. two thirds of the sites checked.** For example, additional price elements were added at a late stage of the booking process without clearly informing the consumer or promotional prices did not correspond to any available service.

Another example is misleading **environmental claims —** claims that a good or service is more sustainable or environmentally friendly than competing goods or services. The Commission established a Multi-stakeholder Dialogue in 2012 to investigate problems in this area. A dedicated market study in 2014 assessed more than 50 **environmental claims** against the UCPD requirements and found that 'few' would be completely in line with the legislation. Along with increasing consumer sensitivity to environmental concerns, the number of environmental claims on packaging and marketing materials has increased in the last few years, as have complaints that many of these claims are vague or misleading[144]. The Multi-stakeholder Group agreed on principles in 2016, which subsequently also fed into the updated UCPD guidance document.

It is interesting to stress in this context that, throughout the carrying out of these Multi-Stakeholder Dialogues on both price comparisons and environmental claims, **no call was made for a radical change of the UCPD as key legal basis for tackling such unfair practices**. However, consumer organisations considered that more prescriptive EU or national requirements, especially in relation to the impartiality expected from traders operating price comparison websites or on a ban of certain particularly misleading environmental claims (possibly by way of an extension of the EU-wide UCPD blacklist) could be beneficial.

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[140] Study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes for such tools (2015), available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/comparison_tools/index_en.htm. .

[141] Available at: http://ec.europa.eu/consumers/consumer_rights/unfair-trade/comparison-tools/index_en.htm .

[142] See section 5.2.7. of the UCPD guidance document.

[143] Further information about this sweep and next steps is available in the press release of 7 April 2017: http://europa.eu/rapid/press-release_IP-17-844_en.htm .

[144] Consumer market study on environmental claims for non-food products (2014), available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/environmental_claims/index_en.htm. In response to these findings, the Multi-Stakeholder Group published Compliance Criteria on Environmental Claims, available at: http://ec.europa.eu/consumers/consumer_rights/unfair-trade/environmental-claims/index_en.htm.

Earlier sweeps by CPC authorities found unfair commercial practices to be prevalent also within other digital markets.

Thus, the 2013 **Travel Services Sweep** of 552 air travel and hotel websites found 69 % to be non-compliant with EU consumer law, with most problems related to misleading or inadequate information, particularly regarding price transparency[145].

The **Digital Contents Sweep in 2012** investigated 330 websites offering digital content for download and found that more than 50 % provided misleading or inadequate information to consumers. Online games were identified as a particular problem area: many games which were advertised as being for 'free' actually entail significant costs through 'in-game/in-app' purchases which are required to access key features of the game. Only 13 % of the games checked in the sweep were found to be 'very transparent'. As children are a key target of online games, unfair commercial practices in this market raise additional concerns regarding consumer vulnerability[146].

Following this Sweep, the **CPC network carried out a coordinated enforcement action into in-app purchases in online and mobile games**. In 2014, the CPC enforcement authorities obtained commitments[147] from major platforms and game developers associations that:

- consumers be informed about the true costs involved in games containing in-app purchases;
- children not be encouraged to buy items or to persuade an adult to buy items for them;
- consumers be adequately informed about the payment arrangements and that purchases not be debited through default settings without the consumer's explicit consent;
- traders provide an email address so that consumers can contact them with queries or complaints.

Additionally, **online review platforms** were acknowledged as a new problem area in the 2014 edition of the Flash Eurobarometer series on 'Retailers' attitudes towards cross-border trade and consumer protection', which included a new metric to ask traders whether they had come across their competitors writing fake reviews which were actually hidden advertisements or hidden attacks on other businesses. More than one third (35 %) of traders reported encountering this behaviour from their competitors in 2014, with country values ranging from a high of 61 % in Bulgaria to a low of 16 % in Denmark. More than half of traders reported encountering this practice in Bulgaria, Poland and the Czech Republic[148]. The application of the UCPD to online reviews is discussed in detail in the UCPD guidance document.

In view of the principle-based nature of the UCPD, the Fitness Check also investigated whether there are disparities in its application and, if so, whether these disparities have an **impact on cross-border trade**. Already in its 2013 report, the Commission came to the conclusion that '*by replacing the divergent regulations of the Member States on unfair*

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[145] EU-wide screening of websites ('SWEEPS'): Travel services. Available at: http://ec.europa.eu/consumers/enforcement/sweeps/travel_services/index_en.htm .

[146] Study on Digital Content Products in the EU (2012). Available from: http://ec.europa.eu/consumers/enforcement/sweeps/digital_contents/index_en.htm.

[147] For more information: http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/coordinated_enforcement_actions_en.htm.

[148] Flash Eurobarometer 396. Question: Please tell me if you have come across any of the following unfair commercial practices by your competitors in (OUR COUNTRY) in the last 12 months. 'Writing fake reviews which are in fact hidden adverts or hidden attacks on competitors'.

commercial practices with one set of rules, the Directive has simplified the regulatory environment and helped to remove obstacles to cross-border commerce[149].' According to the Lot 1 study, in most Member States it is reported that the principle-based approach **only occasionally leads to divergent application** of the same principles and that, where it occurs, such divergent application has so far not caused any major negative impact on cross-border trade. Also, no major discrepancies have been identified so far within the large national case-law on the application of the UCPD that is currently being gathered for the purpose of the imminent launch of a unified Consumer Law Database[150]. Overall it would seem that, so far, CJEU jurisprudence, the UCPD Guidance document and the exchange of ideas among 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.

Annex 5 provides information about the Member States' national legislation going beyond the minimum requirements of the directives, including Member States imposing additional requirements **in the areas of financial services and immovable property** in accordance with Article 3(9) of the UCPD. As regards the impact of these additional requirements **on cross-border trade**, the Lot 1 study has not identified significant problems recognising that these national rules provide a higher level of protection regarding particular vulnerabilities, better enforcement and market transparency, and increased stability of financial markets. This appears to largely confirm the findings of the 2011 study on the application of the UCPD in these two sectors[151]. That study concluded that it would be undesirable to remove the exemptions for financial services and immovable property as enshrined in Article 3(9) because of: higher financial risk of financial services and immovable property, as compared to other goods and services; the particular inexperience of consumers in these areas, combined with a lack of transparency in particular of financial operations; particular vulnerabilities that occur in both sectors that make consumers susceptible to both promotional practices and pressure; existing experience of enforcement bodies with a nationally grown system; and the functioning and the stability of the financial markets as such.

The UCPD enables public authorities and courts to impose fines and stop unlawful activities by traders. This power has proven to be very instrumental in protecting consumers against misleading/aggressive market practices. However, the UCPD makes **no provision for individual remedies for the benefit of those consumers having suffered detriment**, such as a right to the nullity of the contract concluded as a result of unfair commercial practices or a right to compensation. In the case of misleading marketing of goods, the existing rules on the lack of conformity and legal guarantee under the CSGD already offer some level of protection to consumers. However, this protection is limited by the legal guarantee period and would not cover the entire spectrum of possible unfair practices, such as in particular aggressive marketing. Furthermore, CSGD only applies to tangible goods and not to services for which the risk of misleading or aggressive behaviour is equally high, if not higher.

In order to ensure the effective enforcement of the UCPD, the Fitness Check looked into possibility of introducing remedies for consumers having suffered individual detriment as a

[149] COM(2013) 138 final.

[150] The Commission is creating a Consumer Law Database, which — based on the already existing information in the Unfair Commercial Practices Database and the Consumer Law Compendium — will provide updated information about the national laws, case-law, administrative practice and doctrine in respect of the 12 EU directives in the field of consumer and marketing law. The Consumer Law Database will form part of the E-Justice Portal (https://e-justice.europa.eu).

[151] Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU, Civic Consulting, 22.12.2011, http://ec.europa.eu/justice/consumer-marketing/files/ucpd_final_report_part_1_synthesis.pdf.

result of unfair commercial practices. The results of the online public consultation indicated that consumer organisations (95 %), consumer respondents (75 %) and public authorities (75 %) **would welcome the introduction of specific remedies**. Businesses and business associations were divided, with 45 % of businesses and just 10 % of business associations agreeing that such remedies should be introduced by EU law.

The Lot 1 study revealed a **diverse patchwork of national arrangements** as regards contractual consequences of unfair commercial practices before, during and after a commercial transaction.

Under the national law of all Member States, it appears to be **possible to rely on general contract law** for remedies which consumers may invoke in courts. However, according to the country reports, there is little national case-law providing a clear link between the remedies derived from the general contract law doctrines in national law and the unfair commercial practices as established in the UCPD. In addition, none of the Member States provide for the automatic triggering of contractual remedies. For instance, Estonia provides a negative cross-reference, which explicitly stipulates that the existence of an unfair commercial practice does not in itself result in the nullity of the transaction.

In six Member States, the existence of contractual remedies is made more explicit. In particular, Bulgaria, France, Luxembourg, the Netherlands, Portugal and Slovakia provide a **positive cross-reference to the relevant remedies** in the provisions implementing the UCPD. These positive cross-references in the national laws differ by their scope and the level of detail. However, all of them explicitly highlight the remedy of contract avoidance. According to the country reports, there is limited data concerning the application of these positive cross-references in practice.

Three Member States — Belgium, Poland and the UK — provide for **special remedies specifically for breaches of the UCPD**, which generally differ from the contractual remedies provided for other breaches of consumer law. In Belgium consumers have the possibility of contract avoidance and refund without having to return the product[152]. In Poland consumers have the possibility of contract avoidance, refund and mutual restitution, whereby the benefits under the contract are mutually returned[153]. In the UK consumers have the possibility of contract avoidance, refund, price reduction and damages[154]. Again, the country reports have identified limited data concerning the application of these special remedies.

The Lot 3 study included a **mystery shopping exercise** aimed to investigate whether traders who are likely to have acted in breach of the UCPD would voluntarily accept to offer remedies to the affected consumers. In the 56 completed test cases, only one trader expressly recognised having engaged in unfair commercial practices and only nine traders (i.e. 16 %) proposed to provide a remedy (full or partial refund of the purchase) in response to the mystery shopper's complaint about the breach of the UCPD.

Against this background, the **possible introduction of individual remedies for breaches of the UCPD could be considered further**. The Lot 1 study suggests two options for possible reform: (1) more generally obliging Member States to introduce effective individual remedies for breaches of the UCPD (and replacing the current negative cross-reference in Article 3(2) and Recital 9 of the UCPD[155]), or (2) providing a harmonised set of remedies directly in the UCPD although this latter option is considered to have several drawbacks related to

[152] Article VI.38 of the Code of Economic Law.
[153] Article 12(1) of the Act on Combating Unfair Commercial Practices.
[154] Part 4A of the Consumer Protection from Unfair Trading Regulations 2008.
[155] Article 3(2) and Recital 9 of the UCPD provide that the Directive is without prejudice to national contract law and to the individual actions brought by harmed consumers.

coherence with the existing national contract laws. A right to individual remedies under the UCPD could also contribute to circular economy in line with the Commission's circular economy action plan[156] because such consumer rights could act as additional deterrent of misleading claims about environmental and durability features of goods and services.

1.2. Effectiveness of the UCTD

The UCTD establishes the principle whereby a standard (not individually negotiated) contract term that causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer and contrary to the requirement of good faith, is unfair (the '**unfairness test**') and, therefore, non-binding on the consumer. In addition to the general unfairness test, the UCTD contains an **indicative list of contract terms** which may be regarded as unfair.

The Lot 1 study concludes that the **principle-based approach** of the UCTD **is considered to be effective** and contributes to a high level of consumer protection. The **indicative list** is also considered to have **significant practical benefits** in terms of consumer protection and legal certainty.

Notwithstanding this, the Study also concluded that **black and grey lists** of unfair terms (that exist in some Member States going beyond the minimum rules of the UCTD) are considered by stakeholders in the respective countries to be **more effective than an indicative list**. Moreover, the UCTD indicative list has been criticised for the abstract formulation of some of its items. Stakeholders have also pointed out that the **open-ended nature of the unfairness test** leads to differing interpretations in the Member States.

There is also a **degree of uncertainty** about the meaning of the notions 'individually negotiated terms', 'adequacy of the price and remuneration' and 'main subject matter'. Those aspects are exempted from the application of the unfairness test according to the UCTD, in the case of 'adequacy of the price' and 'main subject matter' insofar as the terms are in plain and intelligible language. In the Member States which have extended the application of the UCTD **to individually negotiated terms**, this extension was reported to have increased consumer protection. Similarly, in the small number of countries which have extended the unfairness test **to the adequacy of the price and the definition of the main subject matter**, the Study suggests that this provides important consumer protection benefits, especially where these terms are not subjected to market discipline, and where the relevant contracts have significant social impacts.

The legal consequence provided in the UCTD that an **unfair contract term is non-binding** on the consumer and that, as a matter of principle, the contract applies without the unfair term(s) is essential for achieving a high level of consumer protection. However, the Lot 1 study shows that there is some uncertainty as to **the effects of the finding of unfairness by courts or other authorised bodies**. The CJEU has clarified for instance that an unfair contract term has to be considered as if it had never been written[157] and may not be adapted or revised by a court so as to preserve its effect at least partially[158]. However, the CJEU has also stated that supplementary rules of national law may be applied instead of non-binding contract terms[159]. At the same time, there are variations in the approach of the courts in different Member States. In addition, the admissibility of an interpretation of the contract by national courts according to the hypothetical will of the parties remains unclear, in particular

[156] Communication 'Closing the loop — An EU action plan for the Circular Economy', 2.12.2015, COM(2015) 614 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX %3A52 015DC0 614.
[157] Joined Cases C-154/15, C-307/15 & C-308/15 Gutiérrez Naranjo y otros, C-618/10 Banco Español de Crédito.
[158] C-618/10 Banco Español de Crédito.
[159] C-26/13 Kásler.

in cases where the nullity of an unfair term would lead to unacceptable economic consequences. Furthermore, according to the study, different opinions have been expressed as to whether supplementary provisions could be invoked where the invalidity of certain terms does not lead to the annulment of the contract.

The UCTD also requires **written terms to be drafted in plain and intelligible language**. The Lot 1 study concludes that this **transparency requirement** is considered as an important element for ensuring a high level of consumer protection. However, while unfair terms are sanctioned in the UCTD by rendering them 'non-binding' on the consumer, there is a some **lack of clarity concerning the scope** of the transparency requirement and the **legal consequences** if this requirement is breached, notwithstanding the guidance provided by the Court, e.g. in *RWE* and *Kásler*[160].

In the vast majority of Member States, court or administrative decisions in the context of individual and collective proceedings are binding only on the businesses who are party to the case. The Lot 1 study suggested that this **lack of an *erga omnes* effect** limits the effectiveness of the UCTD (for a broader discussion on the *erga omnes* effect, including under the UCTD see the Chapter 1.5. on the effectiveness of the ID).

The Lot 1 study also indicates that there is **uncertainty concerning the scope of application** of the UCTD. In particular, the use of the terms 'seller' or 'seller or supplier' in English and some other language versions of the UCTD (which is not fully coherent with the terminology of 'trader' used by most other EU consumer law Directives and most language versions of the UCTD[161]) and 'goods and services' has led to confusion and different approaches in national case-law, for instance on whether the UCTD covers C2B contracts. Furthermore, stakeholders have raised questions as to whether it is necessary for the consumer to pay a price in the form of money,[162] and regarding the scope of the exemptions related to 'individually negotiated terms' and terms related to the 'price' and defining the 'main subject matter'. In addition, since the UCTD refers to 'contract' terms, there is a discussion on whether terms in unilateral acts and any other terms/notices that do not have contractual status are within its scope.

Finally, in order to ensure the effective enforcement of the UCTD, **national courts must take an active role, in particular by examining the unfairness of relevant contract terms *ex officio***. However, the Lot 1 study, as confirmed by a study on the effectiveness of the procedural protection of consumers under EU consumer law[163], shows that national courts do not always comply with this requirement for different reasons. Against this background, the need for increased awareness among judges (in the form of legal training) and for guidance and/or codification of the exact scope of the obligations of national courts was expressed by numerous stakeholders.

The Lot 1 study indicates that the **indicative list of terms** which may be regarded as unfair is considered to have had significant practical benefits in terms of consumer protection and legal certainty. Notwithstanding this, it also concludes that **black and grey lists of unfair terms** that exist in some Member States are considered by stakeholders in those countries to be more effective than indicative lists. On this basis, the Study recommended laying down at EU level either a grey or, preferably, a blacklist of terms considered to be unfair under all circumstances, or a combination of a black and a grey list.

[160] C-92/11 RWE Vertrieb AG, C-26/13 Kásler.
[161] C-488/1 Asbeek Brusse.
[162] Although it has recently been clarified in the *Tarcău* case that payment of money is not a pre-condition for the application of the UCTD.
[163] Not yet published.

Also in the online public consultation, most consumer respondents (61 %) and consumer associations (90 %) agreed that the introduction of an EU-wide blacklist would strengthen consumer protection. In contrast, only a minority of business respondents (47 %) and associations (17 %) agreed with this statement.

The targeted stakeholder consultations suggest that such a possible EU-wide list should only have a **minimum harmonisation character**, leaving Member States a margin of manoeuvre for retaining and updating their national lists as needed[164]. The principle-based approach of the UCTD in combination with the indicative list appears able to address new and emerging infringements, as generally demonstrated by the experience so far acquired within the CPC network. However, currently ongoing enforcement activities within the CPC network are testing the effectiveness of the application of UCTD, including its indicative list, in the online environment.

Moreover, national studies in several Member States suggest that **the length and legalistic language of terms and conditions (T&Cs) pose an obstacle for consumers to identify unfair terms.** This problem was also discussed in the 2016 European Commission study on consumers' attitudes towards T&Cs[165]. The results of the public consultation revealed that most consumer respondents, consumer associations and public authorities agree that the presentation of key standard terms and conditions to consumers **could be improved by applying a uniform model**. In contrast, only 40 % of businesses and 21 % of business associations agree in this respect, with many of them emphasising that it is neither feasible nor recommended to introduce, at EU level, a compulsory uniform model. Nevertheless, some businesses/business associations suggested that guidance in this area may be helpful for SMEs.

The consumer behavioural experiment into consumer responses to contract terms[166] found that adjusting the way in which T&Cs are presented might increase consumers' understanding of such terms. The presentation of **T&Cs** in a summarised, concise form appeared to be more effective, since respondents read such summarised T&Cs more thoroughly than standard (long) T&Cs, and were able to better distinguish between fair and unfair T&Cs. Table 16 below shows the share of experiment participants who after reading T&Cs (which differed in terms of presentation and fairness) were willing to buy from the respective trader.

Table 16. Intention to buy from seller

	Consumer credit		ADSL Internet subscription		Total	
	Fair	Unfair	Fair	Unfair	Fair	Unfair
Standard T&Cs	41.7 %	35.8 %	37.5 %	32.7 %	39.6 %	34.2 %
Summarised T&Cs	39.4 %	21.9 %	45.8 %	22.3 %	42.6 %	22.1 %
Summarised T&Cs with icons	39.6 %	27.3 %	46.6 %	26.0 %	43.1 %	26.7 %

N = 7234 (all respondents)

Accordingly, when the T&Cs were presented in the standard (long) format, around a third of **respondents (36 % and 33 %) still intended to buy the product despite the unfairness of the T&Cs**. When the T&Cs were summarised, the share of these respondents diminished to 22 % in both cases. In contrast, adding icons to the summary T&Cs seems to have no additional beneficial effects. In fact, adding icons to the summarised unfair T&Cs resulted in

[164] Discussion at the Consumer Summit and within the CPN, CPC, ECCG networks.
[165] Study on consumers attitudes to Terms and Conditions (T&Cs), http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/consumers_attitudes_terms_conditions/index_en.htm .
[166] For details see Part 2 of the Lot 3 Study.

a higher intention to buy from the seller offering unfair terms (27 % and 26 %) than in the case of unfair summarised T&Cs without icons. There are several potential explanations for this finding: (1) adding icons may distract respondents, resulting in less attention to the content of (unfair) T&Cs; or (2) respondents trust T&Cs with icons more, which is undeserved if the T&Cs are unfair.

On the basis of these findings, DG JUST has already started discussion within the **Fitness Check Expert Stakeholder group on ways to improve the presentation of mandatory consumer information requirements and the standard T&Cs**. This could lead to a set of key principles agreed by a multi-stakeholder group similar to the ones on comparison tools and on environmental claims.

In view of the principle-based and minimum harmonisation nature of the UCTD the Fitness Check also examined whether the application of the **general unfairness test** in different Member States shows disparities in the understanding of this principle and, if so, whether these disparities have an impact on cross-border trade. The Lot 1 study shows that it cannot be entirely excluded that occasionally judges in different Member States interpret or apply the general UCTD unfairness test differently despite the guidance provided by the CJEU. For instance, the 'no show' clause used by air carriers was seen as fair by a Belgian court[167], whereas it had been deemed unfair by Austrian, German and Spanish courts[168].

However, the study also stresses that the case-law of the CJEU has given significant guidance on the general unfairness test and that in most Member States no significant problems, especially for cross-border trade, were caused by such occasionally different national approaches.

As regards the **impact on cross-border trade of the black and/or grey lists of standard contract terms** existing in some Member States instead of the merely indicative list, the Study acknowledges that, if a contract term is considered (conclusively or presumptively) unfair in a given country, but not elsewhere, this could be a barrier to trade for traders from other countries who use this term. However, while this theoretical possibility was noted in some countries, it was also acknowledged that there is no empirical evidence for significant problems.

Similarly, if Member States apply the Directive to individually negotiated terms, the definition of the main subject matter or the adequacy of the price, it was acknowledged in some countries that this might, in theory, affect cross-border trade (by requiring firms to adapt standard terms for different countries). However, the overwhelming message from the Lot 1 country research was that no such problems were reported.

1.3. Effectiveness of the PID

The selling price indication requirement under the PID is now superseded by the UCPD and CRD, which both require indication of the (total) price. The PID accordingly remains relevant only in relation to its second requirement to **also indicate the unit price**.

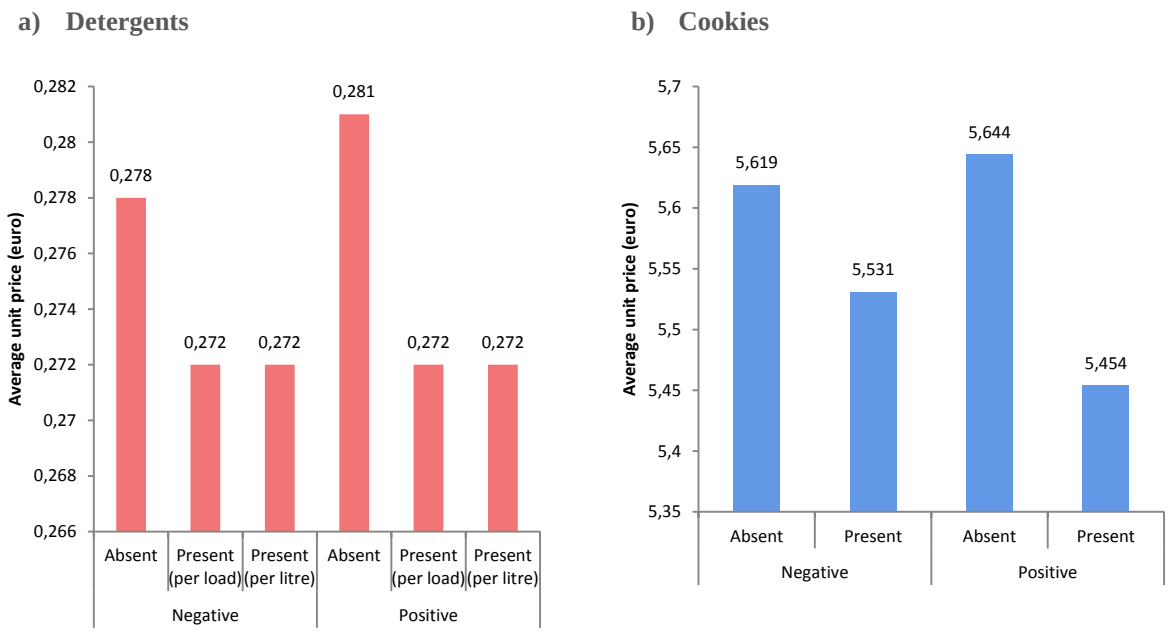
The PID is a minimum harmonisation directive that, in addition, provides for several regulatory options and possibilities for derogations[169]. Thus, a minority of Member States have extended the application of the PID to other sectors, mostly in relation to services. In contrast, a larger number of Member States have made use of specific regulatory choices/

[167] Cess. Pr. Com. Namur 10 mars 2010 — TA c. Brussels Airlines para. 8.
[168] BEUC, Unfair terms in air transport contracts, Letter sent to Mr Tony Tyler, Chief Executive Officer/IATA (Ref. L20 13_016/MGO/UPA/rs — 05/02/2013), p. 2-3.
[169] See Annex 5 for an overview of the situation in the Member States.

derogations, e.g. exempting specific products and 'small retail businesses' from the obligation to indicate the unit price.

The available evidence indicates that the indication of the **unit price is effective in enhancing the consumers' ability in comparing offers and make better informed purchasing decisions.** Specifically, the behavioural experiment on the unit price indication under the Lot 3 study[170] showed that the display of the unit price it enables the consumer to buy the product at the lowest unit price. Namely, **the presence of unit price information reduced the average price paid per unit of the products** (Figure 30). The reduction was larger (i.e. the effect of indicating the unit price is stronger) when it was more rational to buy multiple smaller packages rather than one larger package. These results can be explained by the fact that people generally believe that larger packages have lower unit prices, which is not necessarily true. Moreover, when unit prices were present, most respondents indicated that they used them in their purchase decision.

Figure 30. The effect of unit price information on the average unit price paid[171]



However, according to the Lot 1 study **there is scope for enhancing compliance with the PID rules** on unit price**,** as shown by a number of investigations carried out by national consumer organisations and authorities.

For example, in Germany, the Consumer Centres (*Verbraucherzentrale*) conducted a market check of unit price indication in 10 national supermarket chains in all 16 federal States in 2010. The investigation found that 60 % (1 929) of the 3 225 price tags examined were not in compliance with price indication laws[172]. In the UK, the consumer organisation Which? filed a 'super-complaint' regarding misleading and confusing unit price indication in supermarkets

[170] For details see Part 2 of the Lot 3 Study.

[171] While the differences between the average unit prices are statistically significant, their absolute values vary per product. Whereas in the case of 'cookies' the difference is limited to around €0.01 per kg, the difference of €0.01 per wash-load could mean an absolute price difference of €0.50 in the case of a larger package of detergent (when comprising 50 wash-loads). The Y axis of these graphs start above zero for the purpose of easier readability.

[172] Grundpreisangaben im Lebensmitteleinzelhandel: Eine Gemeinschaftsaktion der Verbraucherzentralen. Available at: http://www.vzbv.de/sites/default/files/downloads/bericht_grundpreisangaben_29_10_2010.pdf.

with the Competition and Markets Authority (CMA) in 2015. As part of their complaint, Which? conducted an investigation and commissioned a survey of more than 2 000 UK adults on their experiences using unit price indications in supermarkets[173]. In response to the complaint, the CMA commissioned 'BDRC Continental' to conduct a qualitative focus group study in the summer of 2015 which confirmed the main results of the Which? investigation[174]. Compliance investigations were also carried out in other Member States shortly after the transposition of the PID, between 2002 and 2004. Although compliance was found to be generally high, authorities in Belgium and Denmark noted problems, particularly among smaller retailers, as these countries had chosen not to use the derogation for small businesses. Additionally, in Belgium, Spain and Italy, compliance was found to be higher for food products than for non-food products[175].

The PID (Article 6) gives the Member States an option to exempt 'certain small' businesses, for a '*transitional period'* from the obligation to display the unit price if this obligation were to constitute an excessive burden for such businesses. This exemption is still being applied in several Member States to different categories and sizes of retailers. As an example, in Slovenia all shops smaller than 500 square metres are currently exempted from the requirement to indicate unit prices, while in Greece the exemption applies to shops under 50 square metres (for an overview of the application of this derogation see Annex 5).

The Commission specifically addressed the issue of this derogation during the previous evaluation of the PID in 2006[176]. It then concluded that there was no conclusive evidence for a revision of the PID regarding this transitional derogation, which accordingly remained in place. In the current Fitness Check online public consultation, majority of consumer associations (80 %) and public authorities (65 %) agreed that the obligation to display the unit price should apply to all businesses irrespective of their size. In contrast, business associations were divided in their views (25 % agreed and 25 % disagreed). The derogation from the unit price indication requirement was also discussed with the consumer and industry stakeholders in the REFIT stakeholder group. There were no strong calls to act towards eliminating or restricting this derogation and representatives of SMEs argued about the costliness of the unit price indication for small retailers and the limited relevance of this information in small shops providing limited range of products. In conclusions, also taking into account the REFIT objectives of lightening the regulatory burden, there appears to be no compelling reason for the Commission to act in this area by changing the status quo.

Some business stakeholders argued in their written submissions to the online public consultation that the **PID should be made more consistent** across the EU with respect to the different types of unit prices allowed by the Directive, which they presented as obstacle especially for retailers that sell online cross-border. The research conducted for this evaluation did not provide compelling 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**. However, as already explained in the 'Coherence' chapter 6.3.1, there appears to be a need to improve the access to information

[173] Which? super-complaint to the Competition and Markets Authority: Misleading and opaque pricing practices in the grocery market. Available at: http://www.staticwhich.co.uk/documents/pdf/misleading-pricing-practices---which-super-complaint-401125.pdf .

[174] Pricing practices in the groceries market: CMA response to a super-complaint made by Which? on 21 April 2015. Available from: https://www.gov.uk/cma-cases/groceries-pricing-super-complaint .

[175] Appraisal of Directive 98/6/EC on consumer protection in the indication of unit prices of products offered to consumers. Final report prepared for the European Commission by EIM Business & Policy Research.

[176] Communication on the implementation of Directive 1998/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers, 21.6.2006, COM(2006) 325 final, available at: http://ec.europa.eu/consumers/archive/cons_int/safe_shop/price_ind/comm_21062006_en.pdf .

about how the PID is implemented in different Member States, in particular as regards the use of units that are different from the standard units of weight, size or volume.

1.4. Effectiveness of the CSGD

The CSGD provides for a period of 2 years (often referred to as 'legal guarantee' period) during which the seller is liable for lack of conformity (defect) that existed already at the time of delivery of the good. According to the consumer survey of the Fitness Check[177], in 96 % of recent problems with defective goods the consumers discovered the defect during the first 2 years from purchase, thus within the two-year legal guarantee period provided in the CSGD. This indicates that the two-year time period is largely sufficient to address consumer problems with defective goods. For 45 % of defective products, the defect was discovered within less than 1 month, for 26 % — between 1 and 6 months, and for only 4 % of products the defect was reported to appear more than two years after the purchase.

Five Member States have a longer guarantee period than provided for in the Directive. The business survey of the Lot 2 study shows that a possible extension of the legal period to 3 or to 5 years is seen to result in major, moderate and minor costs by 22 %, 20 %, 18 % (3 years) or 37 %, 17 %, 11 % (5 years) of responding retailers respectively, while 28 % or 36 % of respondents respectively expect no cost of such a measure[178]. In a Eurobarometer survey, 66 % of European consumers said that they would be willing to pay more for a product if the guarantee period was extended to five years [179].

In the Netherlands and in Finland, the length of the legal guarantee period is based on the duration of the expected average life-span of the product. According to the Lot 2 business survey, 31 %, 18 % and 15 % of retailers expect, respectively, major, moderate or minor costs from the possible introduction, at EU level, of such a system, whereas 30 % expect no costs. On the benefits side, 59 % of businesses see no benefits from the possible introduction of such a system. Moreover, according to the Lot 2 study, stakeholders from the Netherlands and Finland argue that it is difficult to devise a system that addresses the complexity and keeps up with the continual changes and development of products, while establishing clear criteria[180].

The consumer survey also shows that consumers who discovered the defect could, in the vast majority of cases, manage to obtain a remedy provided for in the CSGD (11 % obtained free repair, 42 % replacement, 31 % price reduction or refund). EU-wide, only 6 % of consumers reported that they did not receive any of these remedies.

However, the consumer survey also shows that **only 11 % of consumers shop often or very often in another EU country and only 17 % shop often or very often on the internet from a trader based in another EU country**. 72 % of consumers reported that differences in consumer rights for faulty products are a very important or important factor to consider when buying in another EU country. 85 % and 83 % of consumers (when making their decision to purchase online from another EU country or in a shop in another EU country respectively) found the legal guarantee for goods 'very important' or 'important'.

On the business side, **42 % of retailers selling via face-to-face channels**[181] reported different consumer rules and contract law as an important barrier to the development of their cross-

[177] For details see Part 2 of Lot 3 Study.
[178] Lot 2 'Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/44/EC'.
[179] Flash Eurobarometer 367. Attitudes of Europeans towards building the single market for green products: http://ec.europa.eu/public_opinion/flash/fl_367_sum_en.pdf.
[180] Lot 2 'Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/44/EC'.
[181] For retailers selling via distance selling channels, this number is even higher (46 %).

border sales to other EU countries. This is comparable to the findings for **retailers using distance sales channels**, among which 46 % reported these costs to be important barriers[182].

As already explained in Section 6.1.4, consumers are not well informed about their legal guarantee rights, e.g. EU-wide only 47 % of respondents correctly knew the legal guarantee period applicable in their country. These data confirm the findings of the earlier 2015 study on legal and commercial guarantees[183].

The differences in existing national rules currently going above the minimum harmonisation create additional costs for retailers, as shown in the Impact Assessment accompanying the December 2015 Digital Contracts Proposals[184].

Finally, the CSGD only applies to tangible goods and **most Member States do not have specific national rules when regulating digital content**. The impact assessment accompanying the proposal for a Directive on certain aspects concerning contracts for the supply of digital content showed that, over a period of 12 months, at least 70 millions of consumers (nearly 1 in 3 online users) who had used music, anti-virus software, games or cloud storage services had experienced problems with their digital content related to quality, access or contract terms and conditions. Among online consumers who purchased or tried to purchase digital content online cross-border and experienced problems, 16 % reported having received the wrong digital content, 13 % a digital content of lower quality, 9 % faulty digital content and 10 % reported not having been able to access the digital content. Only 10 % of consumers experiencing problems related to access, quality or the terms and conditions of the supply of digital content receive remedies. The lack of clear contractual framework for digital content caused detriment to consumer. This detriment was estimated between EUR 9-11billion in the EU just for music, anti-virus, games and cloud storage services[185].

1.5. Effectiveness of the ID

As stated in the first 2008 Commission report on the application of the Injunctions Directive, **the major achievement of the Directive has been the introduction in each Member State of a procedure for bringing injunctions to protect the collective interests of consumers**. The 2012 Commission report concluded that, **despite their limitations, injunctive actions constitute a useful tool for the protection of the collective interests of EU consumers with considerable potential if the shortcomings identified are addressed.** In particular, the report pointed to the significant disparities among Member States in the level of the use of the injunction procedure and its effectiveness. Even in those Member States where injunctions are considered effective and are widely used, their potential is not fully exploited due to a number of shortcomings, the most important being the **high costs linked to the proceedings, the length of the proceedings, the complexity of the procedures, the relatively limited effects of the rulings on injunctions and the difficulty of enforcing them**. These difficulties were considered even more present in injunctions with a cross-border dimension and the possibility to seek injunctions in another Member State was almost not used by the qualified entities.

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[182] Source: Microdata of the Eurobarometer survey Fl359 (published in June 2013) was analysed to understand the main obstacles preventing retailers from selling in other EU countries. Responses for retailers falling within NACE category G47 (Retail trade, except of motor vehicles and motorcycles) were extracted. This is also confirmed by more recent data on retailers selling online (Flash EB 396 'Retailers' attitudes towards cross-border trade and consumer protection', 2015, p. 43): 'differences in national consumer protection rules' and 'differences in national contract law' were reported as important obstacles to developing online sales to other EU countries by respectively 41 % and 39 % of retailers selling online.

[183] Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU (December 2015): http://ec.europa.eu/consumers/consumer_evidence/market_studies/guarantees/index_en.htm.

[184] SWD/(2015)274 final p. 11 and 12 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD %3A20 15 %3A27 4 %3AREV1 .

[185] ICF International, 'Economic Study on Consumer Digital Content Products', 2015. .

The Lot 1 study confirms the conclusions of the previous Commission reports in their entirety.

Indeed, the introduction — thanks to the ID — of the injunction procedure across the EU has brought benefits to European consumers, as it has been regularly stopping infringements to consumer law[186]. The injunction procedure as designed by the ID aims at stopping infringements harming **collective consumers' interests. In the context of growing mass consumption this characteristic makes of injunctions a tool that in particular fit for purpose of the enforcement of EU consumer law. However several shortcomings hampering the effectiveness of the injunction procedure as designed by the Directive has been identified in all Member States, even if to different extents.** According to the Lot 1 study, where Member States have only implemented the bare minimum standard as prescribed by the ID, effectiveness is low. The Study provides an overview of national legal frameworks for injunctions and their very different degrees of effectiveness; in light of such findings, the Study recommends further harmonisation of the injunction procedure at EU level with a view to substantially improve the enforcement of EU consumer law[187].

As reported by the Lot 1 study in several EU Member States the injunction procedure is largely used regarding national infringements (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Netherlands, Portugal and Sweden). In other countries it is used only to some extent (Bulgaria, Estonia, Hungary, Luxembourg, Poland, Slovakia, Spain and the UK) and in some counties it is rarely or not at all used (in Croatia, Cyprus, Czech Republic, Lithuania, Malta, Romania and Slovenia).

The use of the injunctions is influenced by the national enforcement systems. The injunction procedure is mostly used in Germany and Austria, which both traditionally rely on the private enforcement of consumer law initiated by the consumer and business organisations. In Member States like Ireland and UK where both public authorities and consumer organisations can enforce consumer law, consumer organisations approach the authorities, asking them to use their powers, rather than using the injunction procedure themselves. The same approach is typical for many underfunded consumer organisations (for instance in Cyprus or Slovenia). Only in a few Member States, a truly mixed system exists in practice where both the public authority and consumer organisations take legal action against traders, for example in Bulgaria, the Netherlands and Slovakia. In this context it needs to be noted that the **injunction action as defined by the ID is always initiated in front of a court or an administrative authority by a qualified entity**. It needs to be differentiated from the power of administrative authorities to stop an infringement on their own initiative — such proceedings would not qualify as an injunction procedure under the ID.

[186] In the online public consultation, at least half of respondents of all types except business associations agree that a court issuing an injunction to stop an infringement of consumer rights constitutes either a very effective or rather effective means of protecting consumer rights in the event of a breach of EU consumer law. 64 % of public authorities indicated this to be effective, as did slightly more than half of consumers (53 %). Most public authorities (60 %) and business respondents (55 %) agree that injunctions by administrative authorities that stop infringements of consumer rights represent a very effective or rather effective means of protecting consumer rights. In contrast, 42 % of consumers and only 20 % of consumer associations agree that such a mechanism is effective.

[187] In the online public consultation, the majority of consumer associations (80 %), consumers (66 %) and public authorities (57 %) either strongly agree or tend to agree that EU injunction proceedings should be made more effective. 45 % of businesses agree, compared to only 12 % of business associations. Many consumer organisations and public authorities also commented that, although their experience suggests that the ID is a useful tool, they see many ways in which it could be improved. In contrast, business stakeholders overall tended to prefer that the injunctions procedure remain unchanged from the status quo.

Within the **survey of qualified entities** of the Lot 1 study[188] the vast majority of injunction actions (4 579 out of 5 763) were reported from Germany, where the consumer organisations are publicly funded and litigation costs are limited. Only from three other Member States — Latvia[189], Austria and Slovakia — one hundred or more injunctive actions were reported. Close to half of the responding qualified entities indicated that they did not initiate any injunction actions since June 2011, often because of insufficient financing. The above-mentioned numbers of documented cases do not necessarily mean that these are the only actions for injunctions that have actually been initiated.

The **sectors most affected by the injunctions actions** are largely the sectors that had also been identified as such in the 2012 Commission report. The infringements taking place in the telecommunications sector still feature on top of the ranking and other sectors such as banking and investments, tourism and package travel also continue to remain among most challenged by the injunctions actions. Likewise, the types of infringements that were challenged by way of injunction procedures does not appear to have changed significantly, misleading and aggressive practices and unfair contract terms have remained prominent types of infringements since the 2008 Commission report[190].

In principle, the reduction in the number of infringements could be expected to also lead to a reduction in related consumer detriment. **The responding qualified entities attribute the reduction of consumers' detriment to injunctions.** It is, however, not possible to confirm through quantitative estimates, as hardly any data in this respect could be identified in the country research, and only one qualified entity provided an estimate in this respect in the survey[191].

The **obstacles to the effective use of the injunction procedure** stem from different reasons. Some of these reasons are outside the scope of the Injunctions Directive. In other cases, the ID does not contain rules which are strict or detailed enough.

Thus, the ID does not regulate the issue of costs related to the injunction procedure. Nevertheless, **the financial risk related to injunctions has been identified as the most crucial obstacle to the effective use of injunctions for qualified entities[192]**. According to the Lot 1 study the most consequent measure would be to include a rule on costs into the ID, according to which qualified entities would not have to pay court or administrative fees and qualified entities would not be liable for the defendant's lawyers' fees. According to the Study, another option to provide for predictable costs would be a system of limiting the litigation cost.

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[188] In total, 29 qualified entities from 21 Member States (Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Slovakia, Slovenia, Spain, Sweden and the United Kingdom) responded to the survey. Given that the survey did not cover all qualified entities across the EU and in line with a caveat noted in the 2012 Commission report, the number of documented cases does not necessarily mean that these are the only actions for injunctions that have actually been initiated. For more details concerning the results of the survey, please see Part 4 of the Lot 1 Study.

[189] In case of Latvia it is not clear from the survey whether injunctions have been issued in proceedings initiated by the qualified entities or by the national authority on its own motion.

[190] According to the online public consultation injunctions were most effective against the use by traders of unfair standard contract terms (44 %), use by traders of misleading or aggressive commercial practices (44 %) and breaches of traders' obligations related to the information they are legally required to provide to consumers (43 %).

[191] This organisation estimated the total reduction for all affected consumers per injunction action to be in the range of EUR 1 million to EUR 4.99 million.

[192] In the online public consultation the majority of businesses (71 %), consumer associations (70 %), consumers (69 %) and public authorities (57 %) agree that injunctions proceedings being too costly represents a very or rather important problem in terms of protecting the rights of consumers. In contrast, 18 % of business associations considered the problem to be very or rather important.

The necessity to consult traders before taking a legal injunction action is left to the Member States by the ID. It appears to be a useful tool in relation to the traders who are in principle willing to comply with the law. **A significant number of cases are settled directly between qualified entities and traders saving time and money of all parties.** In contrast, the Directive does not deal with the requirements relating to the undertaking of the trader that would make a subsequent injunction procedure unsuccessful, which is seen as causing legal uncertainty.

As to the length of the procedure, under the ID the injunctions actions must be dealt '*with all due expediency, where appropriate by way of summary procedure*'. The Fitness check reveals that, to make injunctions effective, **summary procedures should be available in all Member States**, with appropriate exemptions for complex cases.

The ID envisages **publication of the injunctions orders and corrective statements** only '*where appropriate'*, although these measures **are considered effective remedy** both in terms of informing consumers of the infringement and acting as a deterrent to traders who fear of bad reputation. Information of 'the public' has been complemented in some Member States by information of affected consumers making them aware of that infringement so that he or she can take follow-on action for damages[193]. Further reaching provisions at EU level covering practicalities of publication could therefore improve the effects of the injunction order.

The ID foresees **sanctions for non-compliance with the injunctions order** only '*in so far as the legal system of the Member State concerned so permits'*. All Member States have penalties for non-compliance in place. It has, however, been doubted that they are always enough of a deterrent to discourage continued infringements. In addition in some Member States these sanctions are not determined in the injunction order and require additional legal action. Therefore clear legal rules at EU level on sanctions for non-compliance with the injunctions order are recommended by the Fitness Check study.

The primary effect of an injunction order under the ID is that the trader is prohibited to continue the infringement. In most Member States, that decision has only an *inter partes* effect (between the parties). This poses problems for the effectiveness of the procedure in two ways.

First, the *inter partes* nature of the injunction requires individual consumers who bring claims for damages based on the same infringement to prove the infringement anew, which increases their litigation risk and also causes costs to the court system as such. The Lot 1 study indicates that **consumers should be allowed to rely on injunction orders in their follow-on actions for compensation.** To improve the impact of injunctions on individual consumers it should be possible in both consumers' individual and collective redress (if available in national legal order) actions. The issue of the relation between the injunctions and individual consumers' rights has been already considered by the CJUE in C-472/10 *'Invitel'* case. In its judgment, the CJEU held that where the unfair nature of a term in the trader's standard terms has been acknowledged in injunction proceedings (brought in the public interest and on behalf of consumers by a body appointed by national law), **national courts** are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those standard terms apply will not be bound by that term. Moreover it should be made sure that consumers' claims cannot be lost by way of prescription while collective injunctions procedures relevant for those claims are pending.

[193] For instance, in France a qualified entity may not only request the deletion of an unfair clause in a contract offered to consumers but also a declaration that such clauses are deemed unwritten in any identical contracts used by sellers with other consumers and to order the seller to inform consumers at its own expenses and by any appropriate means.

Second, the *inter partes* principle requires qualified entities to bring separate claims against all traders that engage in the same unlawful practice, which may exceed their human and financial resources and is also a burden on the court system. The UCPD and the UCTD leave to the Member States a discretion to decide whether the action against an unfair commercial practice or unfair standard contract term may be directed separately or jointly against a number of traders from the same economic sector, and whether it can be directed against a code owner where the relevant code promotes non-compliance with legal requirements. The ID could make the above possibilities always available in injunctions actions against the infringements of all EU consumer law as listed in the Annex to the ID. In addition, the Lot 1 study suggests an EU rule **extending the effects of injunction to traders which were not parties to the injunction proceedings but engage in the same infringements**. Taking into account the CJUE C-119/15 '*Partner'* case such measure would have to be accompanied by procedural rights of traders to demonstrate that they have not engaged in the materially same infringement, so as to guarantee their right to an effective judicial remedy. The Study also suggests that the above measure would need to be supported by a register where the decided lawsuits as well as the pending lawsuits are made publicly accessible.

The effectiveness of the injunction procedure in terms of reducing consumer detriment as well as in terms of its preventive, deterrent effect **is limited if its only legal consequence is the prohibition to continue the infringement**. There is a recent trend in the Member States towards the introduction of further remedies that are meant to remove the consequences of the infringement that could be taken up with a reform of the ID. **The Fitness Check study considers different measures that could remedy to this lack of effectiveness,** depending on whether the infringement already caused harm or whether the victims of an infringement can be identified (e.g. compensation of individual consumers, redress measures intended to be in collective consumers' interests).

The impact of the ID in terms of its aim to facilitate cross-border injunction procedures can still be considered as being minimal. The initial idea of ID was that consumer organisations and public bodies seek injunctions in another MS where the infringement originated. However, in most Member States, the qualified entities have never dealt with cross-border infringements, and if they have done that, they prefer to use their own courts rather than litigating in a foreign country. Further alternative strategies are the use of the cooperation procedures under the CPC Regulation (as far as relevant consumer protection authorities are concerned) and cooperation with partner organisations from other Member States. All three strategies are valid, but all of them face obstacles. Even in front of their domestic courts the qualified entities may still have to argue foreign substantive law, as the determination of the applicable law is governed by the Rome I (EC) No 593/2008 and Rome II (EC) No 864/2007 Regulations. Problems also arise with the enforcement of the decision, and in particular, of sanctions imposed on the trader domiciled in another Member State. The reason is that the Brussels I recast Regulation (EU) 1215/2012 does not apply to decisions of consumer authorities under public law, and also not to sanctions that bear a public law or criminal law character. Therefore, separate rules on the cross-border enforcement of such sanctions could be included in the ID.

Cooperation and exchange of information between qualified entities from different Member States have proven to be useful in addressing cross-border infringements. Non-legislative measures financed by the Commission, in particular CLEF, COJEF I and COJEF II programmes run by BEUC have been considered effective. With the aim of increasing the use of injunctions for infringements with cross-border implications it is recommended to continue and expand the education and cooperation measures to a larger number of qualified entities across the EU.

1.6. Effectiveness of the MCAD

The current MCAD consolidates the remaining provisions on **B2B misleading advertising and comparative advertising** after the carve-out of B2C unfair commercial practices by the UCPD. The MCAD is a hybrid instrument. Its provisions on B2B misleading advertising constitute minimum harmonisation. By contrast, its provisions on comparative advertising constitute full harmonisation, similar to the provisions of the UCPD.

The scope of the MCAD is limited to 'advertising', because this was the approach used in the original 1984 Council Directive 84/450/EEC concerning misleading advertising, in which the comparative advertising provisions were inserted in 1997. Although the notion of 'advertising' in EU law (including in the MCAD)[194] is rather broad, it is nevertheless narrower than that of 'commercial practices' in the UCPD. The MCAD prohibits misleading advertising in a generic way. Contrary to UCPD, no examples are given; the directive only lists the features to be taken into account to determine whether an advertisement is misleading (Article 3).

Key issues related to misleading and comparative advertising in the B2B context **are not currently measured by Eurobarometer surveys**. Additionally, only few Member States consistently collect data on such problems, making it difficult to draw conclusions about trends over time. However, a public consultation done by the Commission in 2011, which fed into the Commission's 2012 Communication on the MCAD[195], provides some data on the nature and extent of the B2B problems falling within the MCAD.

In the 2012 Communication, the Commission identified the **following drivers of problems in the area of cross-border misleading marketing practices**: lack of effective enforcement, unclear and insufficient rules on misleading marketing practices, insufficient awareness of SME's on unlawfulness of misleading marketing practices.

Misleading directory company schemes[196] were then the most commonly reported problem. In these schemes, businesses receive forms asking them to update their details for a directory, and are then informed that they have signed a contract and must pay a yearly fee. Nearly half of the responses came from companies that had encountered these schemes. Other identified common misleading marketing practices were:

- misleading payment forms, e.g. fake invoices for unsolicited goods or services;
- offers to extend internet domain names (e.g. to other country domains) at exaggerated prices;
- offers to expand protection for trademarks in other countries from businesses that have no formal authority to provide these services;
- companies that charge high prices for 'exclusive' legal advice that is actually based on freely-accessible information;
- misleading offers to provide certain social media marketing services at high prices, when the social media companies themselves offer the same services at much lower rates.

[194] See Article 2(a) MCAD: 'advertising' means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.'.

[195] Communication from the Commission on protecting businesses against misleading marketing practices and ensuring effective enforcement: Review of Directive 2006/114/EC concerning misleading and comparative advertising. COM/2012/0702. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012DC0702.

[196] Misleading directory companies are traders who use misleading marketing practices and send out forms asking businesses to update details in their directories, seemingly for free. If the targeted business signs the form, they are however told that they have signed a contract and will be charged a yearly sum.

A report prepared for the European Parliament in 2008, which surveyed complaint-handling bodies in 16 Member States, also recorded more than **13 000 complaints regarding misleading directory schemes** in the period of 2003-2008[197].

An investigation by the General Secretariat of the Benelux countries in 2014 found that 928 out of 1 153 surveyed businesses (80 %) had been targeted by misleading advertising. Of the targeted businesses, 22 % (201) indicated that they had signed on to the misleading proposal, and 12 % (107) had made a payment as a result, totalling EUR 556 000 between the affected businesses in the last year. Only 12 % of targeted businesses and 68 % of the businesses that had made a payment reported the scam to national authorities. Extrapolating to the entire Benelux region, the General Secretariat estimated that between EUR 850 million — 1.1 billion was paid out by businesses each year based on misleading advertising[198].

Additionally, **online review platforms** were acknowledged as a new problem area in the 2014 edition of the Flash Eurobarometer series on 'Retailers' attitudes towards cross-border trade and consumer protection', which included a new metric to ask traders whether they had come across their competitors writing fake reviews which were actually hidden advertisements or hidden attacks on other businesses. More than one third (35 %) of traders reported encountering this behaviour from their competitors in 2014, with country values ranging from a high of 61 % in Bulgaria to a low of 16 % in Denmark. More than half of traders reported encountering this practice in Bulgaria, Poland and the Czech Republic[199].

According to the Lot 1 study stakeholders in a significant number of Member States confirm that overall **the principle-based approach of the MCAD** provides rather solid legal framework for a considerable part of the B2B advertising market. However, several stakeholders indicated lack of awareness about the MCAD and pointed to a lack of administrative or judicial enforcement. Other stakeholders emphasised that in particular **small enterprises are affected** by misleading advertising. Furthermore, there is limited practical experience of **cross-border enforcement** of the MCAD. Enforcement authority in one Member State reported receiving several complaints concerning cross-border infringements but being unable to react adequately, because of the lack at EU level of an appropriate regulatory framework for cross-border enforcement cooperation in B2B issues.

While on a theoretical level disparities in the application of the principle-based approach and the minimum harmonisation character of provisions on misleading advertising could have negative effective on cross-border trade, **the Lot 1 study has identified no significant problems in this respect.** In most Member States no specific negative experience in terms of disparities in the understanding of the principle-based approach under the MCAD and resulting negative impacts on cross-border trade could be identified, or stakeholders indicated that no data were available in this respect, or they had no opinion due to a lack of practical experience.

The Lot 1 study suggests considering some **targeted enhancements of the MCAD**, although stakeholders are reported to have divided views**.** The suggested amendments largely match

[197] Misleading practices of 'directory companies' in the context of current and future internal market legislation aimed at the protection of consumers and SMEs. IP/A/IMCO/ST/2008-06. Study prepared for the European Parliament by Civic Consulting. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/408562/IPOL-IMCO_ET(2008)408562_EN.pdf .

[198] Rapport final — Enquête Benelux Pratiques commerciales trompeuses visant les professionels. Available at: http://www.benelux.int/fr/les-themes-cles/fraude/les-arnaques-visant-les-professionnels .

[199] Flash Eurobarometer 396. Question: Please tell me if you have come across any of the following unfair commercial practices by your competitors in (OUR COUNTRY) in the last 12 months. 'Writing fake reviews which are in fact hidden adverts or hidden attacks on competitors'.

the priorities already announced in the 2012 Commission's Communication on the MCAD[200] where the Commission pointed to the need to revise the MCAD by explicitly banning, in a blacklist, some clearly misleading practices, such as those of the misleading directory companies. It also proposed that Member States should designate an enforcement authority with the necessary powers in B2B sector and provide for effective proportionate and dissuasive penalties for breaches of the MCAD. It was also announced that the enforcement of the rules in cross-border cases should be strengthened by establishing a cooperation procedure between enforcement authorities.

Several options for amending the MCAD were included in the online public consultation. For example, a clear majority (62 %) of business respondents (i.e. individual companies) agreed that **a blacklist of B2B practices** that are always prohibited should be introduced. In contrast, less than one third (27 %) of business associations agreed with this idea, while 47 % either disagreed.[201] Two thirds of business respondents (63 %) agreed with the idea **that business protection against unfair commercial practices should be extended** to practices happening not just at the marketing stage but also after contract signature (22 % disagree). In contrast, only 28 % of business associations agreed with this statement, while 34 % disagreed. In the country research, while stakeholders in some Member States see a need for such an extension, in other Member States they do not consider this to be necessary.

2. Additional analysis of coherence

2.1. Definitions of 'consumer' and 'trader'

The obligations provided in the Directives covered by this Fitness Check apply to 'traders' (or 'sellers' or 'suppliers' depending on the directive). They are generally defined as persons '*acting for purposes relating to their trade, business, craft or profession*'. Due to the rise of the collaborative economy via online platforms, **also more and more individuals supply goods or services to consumers**. The development of the collaborative economy blurs the line between traders and consumers and makes it more difficult to distinguish **which collaborative economy providers should be treated as 'traders' for the purposes of applying EU (and national) consumer law obligations**. For example, a consumer could be convinced that his or her supplier in the transaction concluded through an online platform is a trader subject to all obligations under consumer protection legislation while the supplier would consider him or herself to be acting as a consumer.

Therefore, the Fitness Check also inquired about the potential of including in the current definition of 'trader' **more specific criteria or even thresholds** to better distinguish between traders and consumers, in particular in the online collaborative economy.

The legal analysis carried out as part of the 'Exploratory study of consumer issues in the sharing economy[202]' shows that the definitions found in national consumer law reflect those provided by the EU consumer *acquis*. In addition, national Commercial Codes also typically set out the notions of 'trader' and 'acts of trade'. Although the terminology used by different national legal instruments is not always completely uniform, definitions of 'trader' and 'consumer' are substantively equivalent. National regulatory approaches (in the field of consumer rights and other areas of law) relevant to distinguishing between B2C and C2C

[200] Communication from the Commission on protecting businesses against misleading marketing practices and ensuring effective enforcement: Review of Directive 2006/114/EC concerning misleading and comparative advertising. COM/2012/0702. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012DC0702

[201] For detailed results of the online public consultation see Part 2 of the Lot 1 Study.

[202] Not yet published.

transactions vary from one Member State to another (as well as within the same Member State in the case of local regulation), and from sector to sector.

Although Member States' approaches are different and fragmented, the '**continuity**' and the '**professional nature**' of the activity carried out are the two main elements that Member States use to qualify a person as a trader rather than a consumer, on a case-by-case basis. These two elements are assessed against indicators that most Member States identify through non-legislative instruments rather than by national legislation. The 'continuity' of the activity is usually assessed against the **number, amount and frequency of the transactions** carried out. Indeed, although not quantified, the continuity (or regularity) of the activity presumes a certain frequency and volume of transactions. Consequently, a one-off exercise of a commercial act would not render a person a trader. The element of the 'professional capacity' is usually assessed against two possible indicators: the profit-seeking motive and the turnover.

The analysis also shows that several Member States have introduced tax thresholds to distinguish between traders and consumers. However, such distinctions between businesses and private individuals are exclusively for tax purposes, and do not necessarily make consumer protection laws applicable. Some Member States distinguish between professional and non-professional activities on the basis of **thresholds developed on a sector-specific basis. For example,** in the **transport sector**, some Member States are considering setting earning thresholds in order to help distinguish between professional and non-professional drivers. In the **accommodation sector** some national, regional and local authorities have developed temporal thresholds to distinguish touristic accommodation service activities carried out by businesses from those conducted by private individuals on an occasional basis.

The specific study further found that there is **no consensus among stakeholders** on how to reduce legal uncertainty generated by the fragmentation of Member States' regulatory approaches due to the development of national level indicators that help distinguish traders from consumers.

In the Fitness Check stakeholder consultation, the idea of setting EU-wide **specific thresholds**, such as the level or percentage of income drawn from collaborative activities, for the purpose of differentiating between consumers and traders was not deemed to be feasible and realistic, in particular due to the differences in the level of incomes across the Member States.

On the other hand, the need to devise **additional criteria** to help with the application of the definition had overall good support from the stakeholders. In this respect, in its Communication on the collaborative economy[203] the Commission already pointed to the importance of the following factors that can help to qualify a provider as trader:

- Frequency of the services: The greater the frequency of the service provision, the more apparent it is that the provider may qualify as a trader.
- Profit-seeking motive: providers that obtain remuneration beyond cost compensation are likely to have a profit-seeking motive.
- Level of turnover of the service provision in the collaborative economy.

According to the Organisation for Economic Cooperation and Development (OECD), additional factors that could be taken into account in order to distinguish between B2C and C2C transactions are[204]:

[203] Communication from the Commission 'A European agenda for the collaborative economy', 2.6.2016, COM(2016) 356 final.

[204] OECD 'Protecting consumers in peer platforms market: exploring the issue', Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy, 29 March 2016, DSTI/CP(2015)4/REV1, p. 18.

- the level of organisation and planning of the activity;
- the value of the transaction;
- the duration of the activity;
- the impression to the outside world.

These criteria for better distinguishing 'traders' and 'consumers' are valid also on a more horizontal basis and are not necessarily limited to the online collaborative economy.

In the context of the parallel CRD evaluation, a strong call was identified, especially from consumer associations and also some business associations, to introduce **specific transparency requirements for online marketplaces** to inform consumers about the identity and quality ('trader' or 'consumer') of the supplier, about the differences in the level of consumer protection when contracting with a trader rather than another consumer and about the default ranking criteria for presenting listings as search results. Such additional transparency requirements, on top of the 2016 UCPD guidance document, could help in tackling some of the problems identified in the collaborative economy context.

2.2. Definitions of 'average' & 'vulnerable' consumer

The UCPD includes the notion of **'average consumer'** as the benchmark for assessing whether a commercial practice is likely to materially distort economic behaviour (i.e. the 'transactional decision' test). The 'average consumer' is defined in CJEU case-law as a 'reasonably well-informed and reasonably observant and circumspect' consumer, 'taking into account social, cultural and linguistic factors'. This definition is also reflected in Recital 18 of the UCPD. Article 5(2)(b) of the UCPD also specifies that, when a commercial practice is directed at a particular group of consumers, its impact should be assessed from the perspective of the average member of the group. The 2016 revised UCPD Guidance document contains examples of national courts applying the 'average consumer' benchmark, and provides further clarifications.

The Lot 1 study suggests that the 'average consumer' benchmark allows, in practice, a **significant degree of flexibility in its application**. It appears that, in a significant number of countries, this benchmark is considered to work rather well and no major problems are reported, at least in the perspective of consumer protection authorities. On the other hand, from other countries it is reported that authorities and courts are unfamiliar with the concept of 'average consumer' or apply it rather implicitly than explicitly. Moreover, consumer organisations often had a critical view of the 'average consumer' notion, both during interviews held at national level and in position papers submitted as part of the online public consultation. The discussion concerning the appropriateness of the 'average consumer' benchmark is also vivid in academic literature, with a number of authors voicing concerns that this benchmark does not provide sufficient protection to consumers that are less capable and more careless than the average. In addition, results of behavioural research have significantly put into question the model of consumers as rational decision-makers, which to some extent underlies the notion of an 'average consumer' that is 'reasonably well-informed and reasonably observant and circumspect'.

Article 5(3) UCPD provides for special protection of **consumers who are particularly vulnerable** because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. In its 2013 Communication on the application of the UCPD, the Commission announced that '*further efforts need to be made to strengthen the enforcement of the Directive in relation to these categories of vulnerable consumers [children and elderly targeted by aggressive practices] who find themselves in a situation of weakness*'. Commission paid particular attention to the 'vulnerable consumer' benchmark also in the revised UCPD Guidance document. Importantly, **it clarified that the list of specific vulnerabilities in Article 5(3) is not exhaustive.**

Lot 1 study concludes that the **‘vulnerable consumer’ benchmark is considered to be of limited relevance in practice**, as appear to be the practical benefits of this provision for consumers so far. By and large, national courts and enforcement authorities seem rather reluctant to apply the special rules of Article 5(3) UCPD for consumers needing more protection. They are not frequently used in the decisions of relevant authorities and courts. The main explanation appears to be that the average consumer benchmark was designed and is clearly perceived as the normal consumer benchmark, the vulnerable consumer being the exception to be interpreted strictly.

Moreover, **where practices are directed to a particular target group (e.g. advertising towards children), the modulated average consumer benchmark applies**, i.e. the benchmark of the average member of that target group (as set out in Article 5(2)(b) of the UCPD). In applying this modulated benchmark, all relevant circumstances of the case and the vulnerability of the concerned person is often taken into account.

The Lot 1 study suggests amending Article 5(2)(b) and 5(3) by basically doing away with the specific rule on vulnerable consumers under Article 5(3) and integrating its content in Article 5(2(b) to reflect the current practice of using the modulated notion of average consumer under Article 5(2)(b) as well as amending recital 18. However, in the absence of evidence of major problems in the application of the current rules and the significant clarifications already provided via the revised UCPD guidance, there does not appear to be a compelling practical need for such changes.

Annex 2 — Procedural information

Lead DG: European Commission Directorate-General Justice and Consumers, DG JUST

Organisation

The **Fitness Check Roadmap** was published in January 2016, along with the Consultation strategy. The Roadmap set out the context, scope and aim of the exercise. It presented the intervention logic and questions to be addressed under the five evaluation criteria of effectiveness, efficiency, relevance, coherence and EU added value. It also contained information on the planned external supporting studies and an overview of other relevant, both completed and ongoing, Commission studies and evaluations.

The Steering Group (ISSG) was set up in October 2015. In addition to the Secretariat General and Legal Service, 10 Directorates-General were invited and designated their representatives to the ISSG: ECFIN, GROW, CNECT, ENV, ENER, MOVE, FISMA, EMPL, COMP, TRADE. The ISSG was consulted on the draft Roadmap and Consultation strategy, the Terms of Reference for the external studies, all deliverables (draft reports) by the external contractors, survey questionnaire and summary report of the online public consultation (which ran from 12 May to 12 September) as well as the draft Fitness Check report and accompanying documents. Throughout the process, the ISSG members were invited to attend all the meetings with the external contractors to discuss their deliverables.

Three external studies supported the Fitness Check: Main study (Lot 1), specific study on sales and guarantees (Lot 2) and Consumer market study (Lot 3) — see further below for a detailed description.

Agenda Planning — Timing

Date	Description
02/10/2013	**Announcement of Fitness Check by Commission under REFIT programme (COM(2013) 685 final)**
10/2015	Establishment of the Steering Group
4/11/2015	1st Steering Group Meeting: discussion of the Fitness Check Roadmap and Consultation Strategy and Terms of Reference for the external studies
18/12/2015	Lot 2 study — Request for services (DG SANTE framework contract)
23/12/2015	Lot 3 — Request for services (DG SANTE framework contract)
30/12/2015	Lot 1 study — Launch of the open call for tender
08/01/2016	Publication of the Fitness Check Roadmap and Consultation Strategy

Date	Description
15/03/2016	Lot 3 study — Contract signed (Consortium led by GfK Belgium)
15/04/2016	Lot 1 study — Contract signed (Consortium led by CIVIC Consulting)
18/04/2016	Lot 2 study — Contract signed (Consortium led by ICF International)
19/04/2016	Lot 3 study — meeting with the Contractor to discuss the inception report; ISSG members consulted on the draft and invited to the meeting
12/05-12/09/2016	**Online public consultation**
13/05-13/06/2016	**Call for applications — Fitness Check Stakeholder consultation group**
25/05/2016	Lot 2 study — Inception report meeting
31/05/2016	2nd Steering Group / Lot 1 inception report meeting
22/07/2016	Lot 2 study — first interim report meeting
5/08/2016	**Submission to the European Parliament and the Council of the preliminary data on Sales and Guarantees (Lot 2 and Lot 3 studies) in the context of Digital Contracts Proposals**
12/09/2016	Lot 2 study — meeting on draft Final report on Priority 1 (alignment of rules) — ISSG members consulted and invited to the meeting
5/09/2016	**Presentation at the European Parliament IMCO and JURI committees of the preliminary data on Sales and Guarantees in the context of Digital Contracts Proposals**
9/09/2016	3rd Steering Group Meeting/ Lot 1 study – first interim report meeting
15/09/2016	**Presentation of data on Sales and Guarantees in the context of Digital Contracts Proposals at the Council working group**
21/09/2016	**First meeting of the Fitness Check Stakeholder Consultation Group**
30/09/2016	**Submission to the European Parliament and the Council of full data on Sales and Guarantees in the context of Digital Contracts Proposals**
17/10/2016	**Consumer summit 2016** Presentation of the interim findings from the external studies

Date	Description
26/10/2016	Lot 3 study — meeting with the contractor to discuss the second interim report; ISSG members consulted and invited
10/11/2016	4th Steering Group Meeting/ Lot 1 study second interim report meeting
21/11/2016	Lot 2 study — Meeting on draft final report on Priority 2 (extending consumer rights); ISSG members consulted and invited
25/11/2016	**Second meeting of the Fitness Check Stakeholder Consultation Group**
12/01/2017	5th Steering Group Meeting/Lot 1 study 'Draft final report' meeting
17/01/2017	Summary of the online public consultation and responses published on DG JUST website; ISSG members consulted on the draft before publication (http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=31689)
27/01/2017	**Third meeting of the Fitness Check Stakeholder Consultation Group**
17/03/2017	6th Steering Group Meeting: discussion of the draft SWD and of final reports of the supporting studies
22/03/2017	SWD sent to the Regulatory Scrutiny Board (RSB)
03/04/2017	**Fourth meeting of the Fitness Check Stakeholders Consultation Group**
27/04/2017	**RSB meeting**
02/05/2017	**RSB opinion**
08 – 19/05/2017	Inter-service Consultation for the Staff Working Document
29/05/2017	**Publication of the SWD and external studies**

Consultation of the Regulatory Scrutiny Board

The meeting of the Regulatory Scrutiny Board took place on 27 April 2017 and it issued a positive opinion with comments on 2 May 2017. The comments of the Regulatory Scrutiny Board were addressed as follows:

1) Revising the executive summary and conclusion sections per evaluation criteria in order to reflect all main findings of the main evaluation chapters.
2) Providing a more nuanced presentation of the question of effectiveness. Namely, the substantive law provisions under evaluation are fit for purpose to address the consumer problems when they are effectively applied, including in online environment. However, there are important issues regarding enforcement (and lack of awareness), and the effectiveness of the directives can be improved through specific targeted changes.
3) Providing more detailed explanation of the enforcement problems, referring in particular to the objectives of the current review of the Consumer Protection Cooperation (CPC) Regulation.
4) Providing a more detailed narrative regarding the coherence between the Directives covered by the Fitness Check and: (1) the Consumer Rights Directive (in particular regarding simplification of some information requirements); and (2) the new Digital contracts proposals (which, on the one hand, address the already identified loophole regarding remedies for digital content and reduce the legal fragmentation in the sale of goods but, on the other, create distinctive regimes for online and offline sales of goods).
5) With a view to reducing the overall volume of the main part of the report, it was rearranged by moving some directive-specific information and information on some specific issues into a new Annex 1.

External expertise

The following three external studies provided the facts and evidence for the Fitness Check:

- Lot 1 - '*Study to support the Fitness Check of EU Consumer law*' (Main study). A call for tender was launched on 30 December 2015 (contract notice in OJ 2015/S 252-461153). The Terms of Reference presented the background and scope of the evaluation (which covered all Directives covered by the Fitness Check, except the CSGD, which was covered by the Lot 2 study), the intervention logic and the detailed evaluation questions, the documents and data sources already available, the methods and phases of the evaluation and the organisation of the evaluation. The contract was signed on 15 April 2016 and covered a period of 10 months. The contract was carried out by a consortium led by CIVIC Consulting GmbH. The final report of the study was approved in May 2017.

- Lot 2 'Study to support the Fitness Check of EU Consumer law: Second Study on aspects related to the Consumer Sales and Guarantees Directive 1999/44/EC' (Study on sales and guarantees). The Terms of Reference presented the background and scope of the evaluation which was limited to the CSGD, the intervention logic and the detailed evaluation questions, the documents and data sources already available, the methods and phases of the evaluation and the organisation of the evaluation. The

contract was signed on 18 April 2016 and covered a period of 8 months. The contract was carried out by a consortium led by ICF International. The Lot 2 study consists of two reports, that were approved in March 2017:

- Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels (covering 'Priority 1' according to the ToR); and
- Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/94/EC ((covering 'Priority 2' according to the ToR);

- Lot 3 '*Consumer market study to support the Fitness Check of consumer rules*' (Consumer Market Study). The Terms of Reference presented the background and scope of the required market research (that consisted of quantitative consumer research, mystery shopping and behavioural research) and the key evaluation themes, the documents and data sources already available, the methods and phases of the research and its organisation. The contract was signed on 15 March 2016 and covered a period of 10 months. The contract was carried out by a consortium led by GfK Belgium. The final report of the study was approved in May 2017.

Annex 3 — Stakeholder consultation

Stakeholder involvement was vital for the Fitness Check in order to identify the problems, collect facts and evidence and, on this basis, to assess the impacts of the legislation, as well as to collect views on potential options for future action.

The Consultation Strategy was developed and published at the start of the project in January 2016. It aimed at implementing as much as possible the Better Regulation Guidelines that published in May 2015 as well as the Framework for Commission expert groups published in May 2016. The relevant stakeholders for this Fitness Check included:

- consumers;
- national and EU-level consumer associations;
- businesses (including SMEs);
- organisations representing businesses in e-commerce and retail trade at European and national level, as well as those representing businesses in specific sectors (for example: telecommunications, energy, financial services, etc.);
- Member States' authorities (the relevant ministries, consumer enforcement authorities and sector-specific national regulators);
- the Network of European Consumer Centres (ECCs).

Also lawyers' associations, universities/research institutes and non-EU nationals, authorities and organisations could provide their views during this consultation. DG JUST also engaged with Members of the European Parliament and the European Economic and Social Committee. The latter contributed to the process also by preparing, at the Commission's request, its own specific assessment report.

The main consultation activities were:

- **Feedback on the Roadmap** following its publication.
- **Targeted stakeholder consultations** under the Lot 1 and Lot 2 studies. They covered national consumer organisations, business associations, businesses, national consumer enforcement authorities, ministries and national regulatory authorities through mix of interviews and surveys.
- **Consumer market research** as part of the Lot 3 study. It included an EU-wide representative consumer survey (23'501 consumers responded online in 28 Member States + Norway and Iceland) on UCPD, UCTD, CSGD and PID.
- **Meetings of the Stakeholder Expert Group** specifically created for the Fitness Check exercise that brings together representatives of European and national consumer organisations as well as representatives of European business organisations.
- **Presentations and discussions with stakeholders** as part of the meetings of DG JUST consumer-related networks — Consumer Policy Network (CPN), Consumer Protection Cooperation Network (CPC), European Consumer Consultative Group (EECG).
- **Presentations and discussions with stakeholders of the** DG GROW SMEs network at its 'SBA Follow-up' meetings.
- **Public online consultation** using EUSurvey.
- **High-level conference — 'Consumer Summit' dedicated to Fitness Check** on 17 October 2016.
- **Dialogue** with the European Parliament's (EP) IMCO and JURI committees and the European Economic and Social Committee (EESC).

The results of all these consultation processes listed above and outlined in more detail below fed into the present Fitness Check Staff Working Document.

1. Feedback on the Roadmap

Formal feedback was received from 10 organisations — 3 consumer organisations (BEUC, Austrian *Bundesarbeitskammer* (BAK) and Cyprus Consumer Association), 6 business organisations (AER, AISE, Ecommerce Europe, Federation of Finnish enterprises, ETNO, GSMA), and 1 ombudsman organisation (NEON).

Several respondents communicated their interest to participate in the Expert Stakeholder Group, as announced in the Roadmap.

1.1.Comments from consumer organisations

Consumer organisations put emphasis on the need for better redress and enforcement. SMEs should not be given any exceptions from the consumer protection rules. As regards the **CGSD,** the respondents suggested that the directive is to be improved by extending the guarantee period and adding durability to the definition of the conformity. They criticised the full harmonisation provided for in the December 2015 Proposal on distance sales of goods as it would undermine specific more favourable consumer rights under national laws. They also pointed to problems with compliance with the CSGD. They welcomed Commission's intention to look at the streamlining of the **information requirements** in different directives. As regards **UCPD,** they pointed to **t**he need to strengthen the enforcement with a stronger role for public enforcement authorities, consumer authorities and the EC but saw no urgent need to amend it. However, the absence of contractual remedies was recognised as a gap. It was moreover argued that UCPD's full harmonisation had negative effect on national legislation in several Member States, which were then prevented from addressing the problems due to their specific cultural, social and economic environment. In relation to the **UCTD, the** idea of an EU-wide blacklist and the consolidation of the Court of Justice's case-law were supported but not full harmonisation. In relation to the **PID**, it was stated that the current derogation from unit price obligation should be more limited. Another problem was raised about the lack of price and unit price indication in internet sales. Finally, as regards the **ID**, it was recognised that it does not work cross-border due to high costs and procedural obstacles. Its application would need to be extended to other EU consumer law, e.g. product liability and data protection. Another priority is relevance of successful injunctions for individual claims by consumers, their effects on other traders undertaking the same illegal practices. It was also argued that the Commission' recommendation on collective redress should be revisited under this REFIT.

1.2.Comments from business organisations

Business respondents recommended reducing the regulatory burden of the consumer law provisions, including in sector-specific EU consumer regulations. They expressed preference for horizontal rules rather than sector-specific rules. In relation to the Digital Contracts proposals, they recommended keeping the same rules on sales and guarantees when buying at distance or face-to-face. Some suggested linking the Fitness Check with the ongoing review of the CRD and indicated opposition to the idea of extending consumer rules to B2B. Several business respondents suggested extending the scope of the Fitness Check by including also the Product Liability Directive (85/374/EEC), Rome I Regulation and Brussels I Regulation as well as the Consumer Credit Directive and personal data protection rules. One respondent

asked for an express recognition of the price per 'wash-load' as a means to provide the unit price under the PID.

Feedback to the Fitness Check roadmap is published at:
http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm

2. Targeted Stakeholder Consultation (April 2016 — January 2017)

Several targeted consultation activities were carried out by the Commission's external contractors under the Lot 1 and Lot 2 studies supporting the Fitness Check.

2.1 Lot 1 study (Main study)

The contractor of the Lot 1 study carried out the following consultation activities based on tailored questionnaires developed for each target group in coordination with the Commission:

- Semi-structured interviews with national consumer enforcement authorities, responsible ministries and the relevant national regulatory authorities as well as the European Consumer Centres (ECCs) — (147 in all 28 Member States).
- Semi-structured interviews with national consumer associations as well as their EU umbrella associations — (49 in all 28 Member States and at EU level).
- Semi-structured interviews with business associations as well as their EU umbrella associations — (59 in all 28 Member States and at EU level).
- Structured phone interviews with individual companies (282 in all 28 Member States in the following sectors: large household appliances, electronic and ICT products, gas and electricity services, telecommunication services, and pre-packaged food and detergents)[205].
- Online survey of qualified entities of the Injunctions Directive (29 responses from 21 Member States)[206].
- Online workshop on 7 December 2016 with experts for behavioural economics and psychology on the concepts of 'consumer', 'average consumer' and 'vulnerable consumer'. The contractor presented initial conclusions and insights from behavioural research, and discussed these results to ascertain whether these concepts, as currently defined in the consumer law directives and relevant jurisprudence, continue to be valid and fit for purpose and discuss possible options for improvement, if needed.

The results of these consultation activities fed into the country-level analysis, which was further analysed and synthesised at the EU level in the cross-cutting analysis of the Lot 1

[205] The sectoral business interviews were conducted to better understand companies' experience with legislation regarding advertising, marketing, standard contract terms and price indication. The exercise started in June 2016, and due to low response rates in some countries, the deadline for participation had to be extended several times. In total, 282 business interviews were completed throughout the EU, checked for quality and analysed. The interviews explored the costs incurred by businesses to ensure that their advertisements/marketing practices and standard contract terms comply with legislation. .

[206] The survey of qualified entities was implemented on an online platform and launched in June 2016. All the qualified entities identified on the basis of the 2016 Notification from the Commission concerning Article 4(3) of the Injunctions Directive and complementary research were invited by email to participate. The results of the survey fed into the cross-cutting analysis on the Injunctions Directive.

study report[207]. Annex IX to the final report of the lot 1 study provides a summary of these consultation activities.

2.2 Lot 2 study on the Consumer Sales and Guarantees Directive 1999/44/EC

In view of time and budget constraints, primary data collection activities undertaken in the context of the Lot 2 study were limited to a representative sample of 15 Member States. It included the following consultation activities:

- Structured phone interviews with micro, small and medium-sized retailers (375 retailers in 15 Member States). The sample of 375 retailers was randomly drawn from the Dun and Bradstreet database, ensuring sufficient coverage by country and sub-sector. The sample consisted of 185 micro enterprises (49 % of the sample), 153 small enterprises (41 %) and 37 medium-sized enterprises (10 %) (based on the number of employees). The survey was targeted at persons with decision-making responsibility within the business (e.g. owner, general manager, commercial/sales manager etc.).
- An online survey of large retailers with shops in multiple EU Member States (10 responses received).
- Semi-structured interviews with EU-wide umbrella associations of consumers and businesses.
- Semi-structured interviews with 67 national stakeholders.

To collect feedback from large retailers a separate simplified online version of the structured phone questionnaire was developed. A sample of 57 large retailers was drawn from a database of 466 large retailers provided by Ipsos. However, only 10 complete responses were received and 10 partial responses — a sample that is not representative of large retailers. The respective information has therefore only been included in the study report in a few instances.

For the targeted stakeholder interviews at national level, over 135 entities were contacted in the period June-September 2016, of which 67 entities responded to the request. The Study encountered a certain degree of consultation fatigue, especially among business associations. In all Member States the two largest business associations representing businesses or retailers were contacted, but not all of them were able to respond.

The results of the Lot 2 study are presented in two separate reports dealing with two priorities.

Priority 1 report — Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels

For this Priority 1 report the interviews with the retailers collected evidence on: (i) the costs and benefits of national rules currently going beyond the Directive, and (ii) the potential impacts of the various legislative changes proposed by the Commission under the Digital Contracts Proposals if their scope were to be extended to cover all sales of goods.

The consultations showed that in Member States with national peaks going over the minimum harmonisation of the CSGD, consumer organisations see this as ensuring a higher level of consumer protection. Businesses, however, considered that diverging rules make it more difficult to make the most of the internal market. All stakeholders were in favour of one set of rules for both online and offline consumer sales.

[207] The list of interviews conducted with relevant organisations in the framework of this evaluation is presented in Annex II to the Lot 1 Study.

Priority 2 report — Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/44/EC

This Priority 2 report presents the results of the study concerning the impacts of longer guarantee periods and other possible rules going beyond the current rules of the CSGD. It relied partially on the same consultation activities for evidence gathering that were used for the Priority 1 report.

The consultation showed that extending consumer rights under the CSGD could raise the level of consumer protection and have positive effects on the environment, sustainable consumption and circular economy. However, businesses feared that such measures would create extra costs and put additional burden on them. All stakeholders considered the amount of costs to depend on who (i.e. retailers or manufacturers) would have to comply with the new measures and on how exactly they would be designed.

3. Meetings of the Fitness Check Expert Stakeholder Group

The Commission set up a Stakeholder Consultation Group (the Group) with the objective to consult the most important consumer and business stakeholders on key issues of the Fitness Check, in particular in relation to the possible need for further modernisation of the relevant rules, through a balanced and inclusive approach.

The Group consists of EU level and national organisations representing consumers and/or civil society and EU level and national business organisations representing retailers, service providers, manufacturers, including SMEs. Member organisations were selected through a call for application (application period 13 May-13 June 2016) requiring applicants to be registered in the Commission's Transparency Register[208]. The Group is registered as DG JUST expert group[209] in the Register of Commission expert groups and other similar entities ('the Register of expert groups').

To date, the Group has met four times: 21 September 2016, 25 November 2016, 27 January 2017 and 3 April 2017. Further meetings will be held in 2017 and, if necessary in 2018, to assist the Commission in the follow-up activities of the Fitness Check exercise.

At the first and second meetings, the discussion focused on modernising information requirements and strengthening fairness of commercial practices and contract terms. Most members favoured a 'principle-based' and technology-neutral EU consumer rules, so that they do not become quickly outdated, complemented with guidance on implementation. Several members agreed on the need to clarify which consumer information requirements apply at which stage of the market transaction (advertising, invitation to purchase, contractual offer). Consumer representatives were vocal in calling for not lowering the level of consumer protection achieved and business organisations in calling for not lowering the level of harmonisation so far achieved.

Vivid discussions took place on the need to impose further rules to distinguish between traders and consumers in the collaborative economy, to further regulate fairness duties of platforms and clarify the liability of platforms acting as intermediaries, and the need to update the current blacklist of unfair practices and introduce a blacklist of contract terms.

At the third meeting, main topics were the *ex officio* assessment by national courts when deciding in consumer cases, improving presentation of mandatory pre-contractual information

[208] http://ec.europa.eu/transparencyregister/public/homePage.do .
[209] http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3423.

and standard terms & conditions and a potential review of the Injunctions Directive. There was a general call for further EU action to alleviate procedural obstacles, to ensure a better training of national judges and to promote out-of-court dispute resolution. Several members supported further guidance and assessment of best practices regarding the information that should be presented to consumers. Some also supported the exploration of a voluntary model for presenting consumer information. Members representing business association expressed reservations regarding compensatory collective redress.

At the fourth meeting, participants exchanged views on the state of play of the Fitness Check report, including key findings and possible follow-up measures. There seemed to be support, from both business and consumer representatives for all the main identified areas for action. Furthermore, it was decided to create a formal subgroup to work on better presentation of terms and conditions and pre-contractual information requirements.

More information on the group's composition, selection procedure and activity (minutes, presentation) is available at:
http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3423

4. Meetings with networks

4.1 European Consumer Consultative Group (ECCG)

The ECCG is the Commission's main forum to consult national and European consumer organisations. The ECCG meets three times a year and consists of one representative of national consumer organisations per country, one member from each European consumer organisation (BEUC and ANEC), two associate members (EUROCOOP and COFACE) and two EEA observers (Iceland and Norway).

At the ECCG meeting of 13-14 April 2016, DG JUST gave a presentation on the Fitness Check, explaining the future steps and also introducing some ideas for possible modernisation of the current rules. During the discussion, Members stressed the need for more harmonised enforcement and sanctions, warned about the risk of lowering consumer protection standards and compared their national legislation on specific issues. ECCG members also stressed the necessity to clarify that the intention of the REFIT is to improve the effectiveness of consumer protection rules.

At the ECCG meeting of 18 October 2016 (following the Consumer Summit of 17 October), DG JUST briefly presented the results of the three Summit workshops and participants discussed concrete ideas for improvement. The discussion can be summarised as follows:

- Consumer law in Europe has largely developed thanks to EU intervention.
- Enforcement of consumer law is poor and/or produces poor result.
- There is a lack of collective redress solutions in many Member States and Member States will not act if the lead is not taken at the EU level. The ECCG will explore the idea of producing an opinion on the implementation of the Recommendation on collective redress.
- Member States need to allow private enforcement and look at the role of consumer organisations in the 'enforcement' ecosystem (e.g. capacity building, funding).
- Free access to justice could be an important improvement for consumer organisations.
- Fitness Check can address simplification but without lowering the level of consumer protection. Minimum harmonisation is important to consider.

- Some consumer organisations check T&Cs to help consumers get redress but the certification of T&Cs is not the task of consumer organisations.
- Vulnerable consumers need to be taken into account better.
- There should be no distinction between online/offline sales in relation to the rules on sales remedies.
- The form of the possible future consumer legislation is not important; it is the substance that matters.

At the ECCG meeting of 1 December 2016, DG JUST presented an overview of the progress and future steps of the Fitness Check, in particular the preliminary findings of the external studies. The Members were requested (in order to provide first-hand information and enable the Commission to verify the correctness of the data coming from other sources) to inform the Commission about their national legislation concerning the contractual consequences of unfair commercial practices, e.g. rules about the annulment of the contract and damages. Several delegations provided the requested information.

More information on the ECCG composition, selection procedure and activity is available at:

Composition
http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=849&NewSearch=1&NewSearch=1

Selection procedure
http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/eccg/index_en.htm

Meeting minutes
http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/documents/

4.2 Consumer Policy Network (CPN)

The CPN is an informal Commission Expert group that has been set up to facilitate exchange of information and good practice between consumer policymakers in the Member States. The members are representatives of the highest administrative level responsible for consumer policy in national administrations of the EU Member States and Norway, Iceland and Liechtenstein. The network meets twice a year.

At the CPN meeting of 25-26 May 2016, DG JUST presented the objectives and process of the Fitness Check and ideas about the possible follow-up activities. During the discussion, Members expressed their views on the potential areas for improvement, such as possible extension of the B2C rules to B2B and C2C relations, modernising presentation of information and of key contract terms and conditions. They were invited to reply to the Commission's public consultation and to co-operate with the Commission's external contractors, in particular through stakeholder interviews.

At the meeting of 18 October 2016, CPN members generally agreed that the existing body of EU consumer law is a good basis and there was no need for fundamental changes. Most members were favourable to streamlining and removing overlaps in existing law. There was a strong call to make enforcement of existing law as top priority, pointing to the importance of successfully concluding the CPC Regulation negotiations. There were divergent views on maximum/minimum harmonisation. Many members showed support for the black list approach in the UCPD and several of them considered that such approach could also be valid for the UCTD. On the collaborative economy, there was a mix of views about what should be done: some warned about regulatory obstacles to new business models, while others saw a

need for action. Most members thought that consumer rules should not be extended to B2B situations.

At the CPN meeting of 23 November 2016, the Commission presented an overview of the progress and future steps of the Fitness Check, in particular the current findings of the external studies. In the discussion, some Members agreed that, as also shown at Consumer Summit, many stakeholders consider EU consumer rules to be still for purpose and, if anything, only some targeted revisions may be needed. Some Members indicated that full harmonisation makes it difficult for Member States to address national specificities and that Member States need room for manoeuvre at the national level. Members also shared their national experiences with the functioning of injunctions. While some were favourable to the idea of a minimum EU-wide blacklist of contracts terms, others regarded the general clause of the UCTD as sufficient and no need for such EU-wide blacklist. Some members were opposed to extending the scope of consumer protection rules to B2B relations.

More information on CPN composition and selection procedure is available at: http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=861&NewSearch=1&NewSearch=1

4.3 Consumer Protection Cooperation (CPC) network

The CPC network is a network of authorities responsible for enforcing EU consumer protection laws in EU and EEA countries.

At the CPC meeting of 10 March 2016 DG JUST made the presentation on the Fitness Check, also outlining the ideas for possible improvement.

At the meeting 18 October 2016, the discussion focused on the CRD, the UCPD and the UCTD. Several members called for minimum harmonisation in respect of the UCPD while others stressed the added value of full harmonisation, in particular in cross-border enforcement. The difficulties in drawing the boundary between application of the UCPD information requirements for the 'invitation to purchase' and the CRD pre-contractual information were mentioned as well as issues with new methods of traders' communication with consumers. Some members were in favour of an EU-wide UCTD blacklist, but only subject to minimum harmonisation.

More information on the CPC:

http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/index_en.htm

4.4 Small Business Act (SBA)

The SBA is an overarching framework for the EU policy on Small and Medium Enterprises (SMEs). It aims to improve the approach to entrepreneurship in Europe, simplify the regulatory and policy environment for SMEs, and remove the remaining barriers to their development. Members include representatives of Business Europe, EuroCommerce, UEAPME, Eurochambres, CEPLIS — European Council of Liberal Professions, Cooperatives Europe, ESBA — European Small business alliance, and German craft organisation ZDH.

DG JUST presented the plans for the Fitness Check to SBA members in March 2016 and updated them on the progress in November 2016.

Specifically, at the meeting of November 2016, DG JUST gave a presentation of the main developments — the results of the public consultation, Consumer summit and external

studies. Members largely agreed that the current consumer law is still fit for purpose; however, there might be need for further improvement. It was stressed that, if changes are to be made, they must be targeted and aiming at further harmonisation to make it easier for businesses to trade across borders. They also called for more efficient enforcement. In their view, the possible review must address new commercial practices and technological developments, in particular, user reviews were mentioned. The need to strengthen B2B protection of SMEs in the area of unfair marketing, and the burden of information obligations for traders were also raised as issues to consider in the Fitness Check exercise.

More information on the SBA:

https://ec.europa.eu/growth/smes/business-friendly-environment/small-business-act/

5. Online public consultation

The online public consultation[210] was conducted by the Commission using the EU Survey[211] tool in all EU official languages. It was intended to allow a wider range of stakeholders and the general public to express their views on the key issues raised in the Fitness Check roadmap. The consultation started on 12 May 2016. It was originally scheduled to run until 2 September 2016 but, in light of several requests, it was subsequently extended until 12 September 2016.

The public consultation covered the six directives subject to the Fitness Check as well as the CRD.

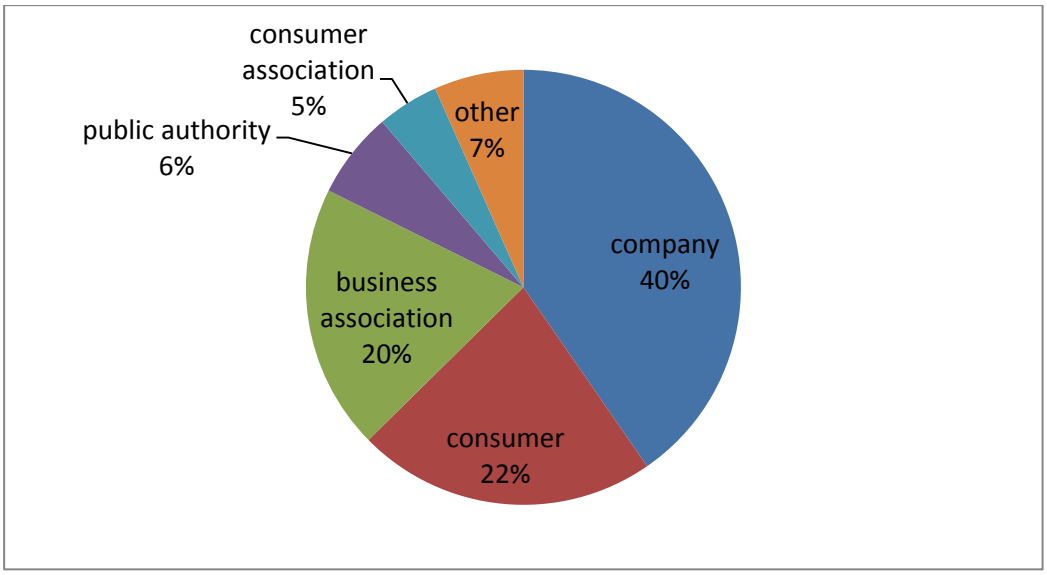
The questionnaire contained three parts:

- short consumer questionnaire available for respondents who indicated that they were consumers (citizens); 97 responses received;
- short business questionnaire available for respondents who identified themselves as a company (or group of companies) in the beginning of the survey; 176 responses received;
- full questionnaire for all other respondent categories (associations, authorities, think tanks, other categories etc.). For individual consumers and individual businesses, it was optional to fill in also the full questionnaire after having completed their respective short questionnaires. 237 responses received (including 36 of the 97 consumers and 37 of the 176 companies who chose to continue to this full version of the survey.)

In total, 436 respondents filled in the online questionnaire. Additionally, 55 position papers were received from the respondents, including three position papers submitted to DG JUST outside the EU Survey tool within the consultation period.

In the following overview of the responses, the category ‘consumer association’ combines both EU-level and national consumer associations; the category ‘business association’ combines both EU-level and national business associations; the category ‘public authority’ combines national consumer enforcement authorities, ministries in charge of consumer policy and sector-specific regulatory authorities; and the category ‘other’ includes: a think tank/ university/ research institute, a professional consultancy/ law firm and others.

[210] http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=31689.
[211] https://ec.europa.eu/eusurvey/home/welcome .



Responses were received from all 28 Member States and 'other' countries including Switzerland, Norway, Turkey and the United States. The biggest number of responses was received from Germany (50 %) followed by Belgium (11 %) and UK (6 %).

The **consumer survey** received 97 responses from 14 Member States.

The majority of consumer respondents view it important to be protected by consumer and marketing law when buying goods and services regardless of whether they are making a purchase domestically, within or outside the EU.

47 % of consumer respondents reported that they had experienced problems in dealing with traders in the past year. The most frequently reported problems were that the trader did not provide key information and that the consumer was misled by a trader's marketing statements and concluded a transaction that was subsequently regretted. Majority of consumers who experienced problems reported not having managed to solve their most serious problem at all. 25 % managed to solve their problem at least to some extent and 18 % managed to solve it fully. The most frequently mentioned reasons for not fully solving the problem was that the trader did not want to comply with consumer rights, followed by too complex/ long/ costly administrative enforcement proceedings.

Around 40 % of consumer respondents felt being well protected by national competent authorities and national courts, but a similar share of respondents thought that these authorities are not effective in implementing consumer law to protect them.

The **business survey** received 176 responses from 14 Member States (with majority from Germany). 71 % of the business respondents carries out their activities both online and offline (23 % only offline, 6 % only online). Vast majority carry out their activities only domestically. Based on number of employees, around 1/3 were micro enterprises (1-9 employees), around 30 % small (10-49 employees), 16 % medium (50-249 employees) and 22 % large companies (250+ employees).

Around 30 % of companies agreed that businesses can trade across the EU more easily thanks to the harmonised EU consumer and marketing rules while 11 % did not agree and 59 % had no opinion.

Large majority of companies and business associations (same question was addressed to them in the 'full' survey — see further) were of the view that the benefits from complying with consumer protection rules are that consumers whose rights are respected come back and bring/attract other consumers whereas consumers whose rights are not respected discourage other consumers (damage to reputation).

Around 40 % of business respondents reported having been confronted with misleading business-to-business (B2B) marketing at least once in the past year. Among these, 17 % stated that they had not managed to solve the problem at all, while 20 % said they managed to solve it fully and around 50 % solved it at least to some extent. Complex/long/costly court proceedings and lack of a competent administrative authority were the most frequently stated reasons for not fully solving the problem. Over 60 % of all business respondents were of the opinion that national courts implement rules rather well or very well, but only 20 % thought that national competent authorities do well in this respect.

The **full questionnaire** received 237 responses from all 28 Member States, including 9 responses from non-EU countries.

Most EU consumer protection rules were regarded as beneficial to consumers by the majority of respondents in all categories (such as right to get information about goods and services offered, right to be protected against misleading or aggressive commercial practices and right to fair standard contract terms etc.).

The majority of respondents in all categories thought that the lack of consumer awareness about their rights is an important problem for the application of the rules.

The majority of respondents in all categories agreed that information requirements currently included in UCPD, PID and CRD should be regrouped and streamlined. Furthermore, majority of businesses, business associations and public authorities considered that the information given to consumers at the advertising stage should focus on the essentials while more detailed information should be required only at the moment before the contract is concluded. Other stakeholders had divided views.

The majority of consumers, consumer associations and public authorities supported the need for an EU-wide blacklist of unfair contract terms. Also around half of businesses were in favour while business associations were mostly against.

Majority of consumers, consumer associations and public authorities agreed that consumer protection against unfair commercial practices should be strengthened by introducing a right to individual remedies, e.g. compensation and/or invalidity of the contract when the consumer has been misled into signing a disadvantageous contract. Company respondents were rather divided on this point (with relative majority in favour) while majority of business associations were against.

In their comments, several respondents stressed the need for better or more consistent enforcement of existing rights.

In total, 55 **position papers** were received during the period of this public consultation. Three quarters of these submissions (39 in total) were provided by business stakeholders, i.e. 6 individual businesses and 33 business associations. Public authorities were the second most common source of submissions (8), followed by other organisations (5) and consumer

organisations (3). Slightly more than one third of submissions (20, or 36 %) were made by EU-level organisations, while 64 % came from respondents at the national level.

Many stakeholders indicated that consumer rules should be streamlined and consolidated where possible, that information requirements are too extensive and overwhelming for consumers and traders, that consumer rules need to be updated to better address the challenges of the digital market, and that better and more consistent enforcement of the rules across Member States is needed. Consumer organisations also emphasised that enforcement must be clearly linked with substantive remedies/redress.

In total, 34 submissions provided specific comments on the **UCPD** and 19 provided comments on the **MCAD.** Business stakeholders generally commented that current protections against unfair commercial practices were sufficient, but should be better enforced, and were divided on whether greater protection should be provided in B2B relations. Consumer organisations and public authorities saw opportunities to improve protection under the UCPD, for example, by adapting the concepts of the 'average' and 'vulnerable consumer' to new research into consumer behaviour, addressing the challenges of the sharing economy and online platforms, and emphasising the need for more consistent enforcement and better access to redress and contractual remedies.

In total, 16 submissions provided comments on the **PID**. Stakeholders argued that price indication requirements should be consolidated and streamlined, and commented that the PID should be made more consistent across the EU with respect to the recognised units and exemptions. Business stakeholders commented that price per use should be permitted in all Member States, and added that compliance with the PID presents challenges in the online environment. Consumer organisations and public authorities commented that the PID should be better enforced and expanded to cover other non-food items and services.

In total, 24 submissions provided specific comments on the **UCTD**. Business stakeholders were generally in favour of the status quo, and most responses (particularly from business associations) opposed an extension of the UCTD to B2B relations. The use of a uniform or graphical model for standard terms and conditions as well as an EU-wide blacklist of unfair terms were considered to be unworkable in practice. Consumer organisations emphasised that the UCTD should remain minimum harmonised, and proposed improvements for consumers, including an extension to cover the adequacy of the price, the main subject matter, individually negotiated terms and a blacklist of unfair terms, and suggested that the presentation of standard terms and conditions should be simplified, without losing quality.

In total, 22 submissions provided comments on the **ID**. Business stakeholders generally argued to preserve the status quo, and did not want revisions to include sanctions or EU-level class action lawsuits in particular. Consumer organisations and public authorities thought that injunctions were useful, but needed improvement. Specifically, these stakeholders reported that injunctions are very costly, or carry significant risks of incurring high costs, especially in cross-border proceedings; that the *inter partes* effect in most Member States limits ability of compensation; that there is little effect on trader behaviour without clear sanctions; and that there is a need for a more effective link to substantive redress for consumers.

In total, 27 submissions provided comments on the **CSGD**. All stakeholder categories commented that online and offline sales and guarantees should be covered in the same way. Business stakeholders generally argued in favour of the status quo, in particular regarding the burden of proof and legal guarantee period. Consumer organisations commented that the Directive had set a strong minimum standard, but thought that it could be revised to improve

consumer protection, in particular by extending the period for the reversal of the burden of proof beyond six months and allowing the legal guarantee period for goods to depend on the characteristics of the good. Consumer organisations also argued that the Directive should remain minimum harmonised to avoid lowering consumer protection.

6. Consumer summit — 17 October 2016

European Consumer Summits are annual high-level stakeholder events organised by DG JUST. The 2016 Consumer Summit was dedicated to the Fitness Check of consumer and marketing law. Around 430 representatives of national authorities, European institutions, consumer organisations, businesses as well as academics took part in the Summit to discuss whether and how the current EU consumer and marketing law rules should be modernised.

At the plenary session, besides high-level Commission representatives, speakers included Members of the European Parliament and of the European Economic and Social Committee. At the first high-level panel, Per Bolund, Minister for Financial Markets and Consumer Affairs, Deputy Minister for Finance, Sweden; Gerd Billen, State Secretary, Federal Ministry of Justice and Consumer Protection, Germany; Rastislav Chovanec, State Secretary of the Ministry of Economy of the Slovak Republic; Theresa Griffin, Member of the European Parliament, Committee on Industry, Research and Energy and Jean-Eric Paquet, Deputy Secretary General, European Commission discussed ways to achieve a clear, stable and robust regulatory framework to boost consumer trust and sustainable growth. At the second high-level panel, the leaders of main EU consumer and business representatives discussed the challenges and prospects for EU consumer law.

The detailed discussions were organised in three participatory workshops, organised in parallel, where participants also exchanged views among themselves in smaller groups.

Participants of the first **Consumer information** workshop generally expressed support for:
- streamlining information requirements currently provided in several directives;
- strengthening transparency requirements for online intermediaries (platforms);
- improving how mandatory information is displayed to consumers.

Most participants in the **Fairness** workshop agreed on the need for:
- clearer individual remedies for victims of unfair commercial practices;
- introduction of a ‘blacklist’ of unfair contract terms;
- codification of the CJEU case-law on the *ex officio* application of the UCTD by national courts.

They however expressed divided views on the need to extent Business-to-Consumer (B2C) rules to protect SMEs from unfair practices and unfair contract terms.

Participants in the **Injunctions** workshop agreed that there is a need for:
- reducing costs for consumer organisations;
- ensuring that the affected consumers get redress as a result of the injunctions decision;

They had divided views on whether also the role of business organisations in seeking injunctions should be enhanced.

Overall, there seemed to be a general call from the Summit participants for:
- stepping up enforcement of the existing rules;
- increasing consumers’ and traders’ awareness about their rights and duties;

- introducing targeted amendments to the existing directives;
- possibly bringing the current Directives into a single regulatory instrument, provided the level of consumer protection is not reduced and the necessary margin of manoeuvre is left to Member States to tackle national specificities

More information on the 2016 Consumer summit is available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34204

The event was web-streamed and a video of the conference is available online https://webcast.ec.europa.eu/european-consumer-summit

7. European Economic and Social Committee (EESC)

Following the request from the Commission, the EESC prepared an information report on Consumer and Marketing law (fitness check). In order to ensure complementarity of evidence gathering, the Commission and the EESC agreed on a coordinated approach.

The EESC information report evaluates *how civil society organisations across the EU perceive and experience the implementation of European consumer and marketing law at Member State level*, in particular of the UCPD, CSGD, UCTD and MCAD.

The EESC information report is based on primary data collected through a survey, fact-finding missions and an Expert Hearing and secondary data collected from existing sources, such as EESC opinions, reports of conferences, missions and public hearings and any other relevant work carried out by other EU institutions or expert studies and articles.

The survey (via EU Survey tool) aimed collect the views of those civil society organisations in the Member States, to which the members of the EESC are affiliated, regarding the effective implementation of the above-mentioned legislation. It ran over three weeks in September 2016.

5 Member States were chosen for fact-finding missions: Greece (9 September), France (14 September), Lithuania (16 September), Portugal (19 September) and Belgium (20 October).

The Expert Hearing was held at the EESC in Brussels on 5 October 2016. Participants included the members of the EESC study group, experts representing organisations of employers, employees and various interests (including consumer organisations), as well as academia.

Results of these activities suggest that the transposition of the directives is deemed to be acceptable, apart from some cases of over-regulation. The main problems seem to arise at the implementation and enforcement stages. There is no consensus between stakeholders, be they ‘professionals’ or ‘consumers’, on how best to harmonise the EU law in the field of consumer protection. Particular attention should be paid to small, micro and nano-enterprises. However, no consensus has emerged on whether these enterprises, when they act as end-users, should be given the same rights as consumers, or have a special status when consumer legislation is transposed.

The full information report of the EESC is available:

http://www.eesc.europa.eu/?i=portal.en.int-opinions.39556

8. European Parliament

On 5 September 2016, DG JUST presented the preliminary outcome of the Lot 2 priority 1 study (on the costs and benefits of minimum harmonisation under the CSGD and of potential full harmonisation and alignment of EU rules for different sales channels) to European Parliament's **Internal Market and Consumer Protection Committee (IMCO) and Legal Affairs Committee (JURI)**. DG JUST subsequently shared the final results of this part of the study with the European Parliament and the Council at the end of September 2016 in order to inform their ongoing legislative negotiations on the Proposal on distance sales of goods.

Subsequently, at the IMCO meeting of 29 November 2016, DG JUST presented the outcome of the 2016 Consumer Summit and the state of play of the Fitness Check. IMCO members called for focusing the efforts on the following key consumer challenges: information overload, both at pre-contractual stage and in the area of terms and conditions that prevents consumers from getting the information they need at the right time; platforms and their often opaque marketing practices, including on ranking criteria, and B2B challenges where it appears that mainly bigger companies are against extending the B2C rules, whereas smaller ones are asking for increased protection. IMCO Members stressed that EU consumer law is one of the biggest Internal Market achievements and that it is crucial to avoid cutting back on the existing rights.

9. Overall messages from the consultation

The consultation activities were highly valuable sources of a broad range of opinions, information and data that complemented the findings from desk research and literature review. Consultation contributed to solid and evidence-based answers to the evaluation questions of this Fitness Check.

The consultation shows that all stakeholder categories are largely in agreement that the substantive EU consumer law remains relevant and fit for purposes. However, its effectiveness is hampered by problems in the area of enforcement and lack of awareness. These problems should be addressed as priority. Notwithstanding this, stakeholder across all categories are also open minded, and sometimes even call for modernisation of some of the current rules, in particular with a view to ensuring greater clarity, for example, as regards consumer information requirements.

Most of the information received via consultation activities was qualitative, i.e. it consisted of opinions and experiences. It was more difficult to gather quantitative data, in particular on business costs and the external contractors had to invest significant endeavours in order to get also sufficient quantitative data.

For other identified areas of improvement the views vary, sometimes significantly, between the main stakeholder groups, i.e. public authorities, consumers and their organisations, and businesses and their associations. On some points, such as the need for stronger regulation of B2B relations, there were even differences between the opinions of individual companies (in the online public consultation) and (most of) major business associations.

The Fitness Check included an event at the highest political level, namely the Consumer Summit. This helped raise awareness of this evaluation and enabled getting the general views of the interested politicians and leaders of consumer and professional movement. In contrast, the specifically established Fitness Check Stakeholder expert group enabled detailed and technical discussions with the main interested non-governmental stakeholders. The online

public consultation provided considerable added value as it enabled the Commission to receive the formal public positions of the various stakeholders.

The main messages of the **online public consultation** could be summarised as follows:

- Stakeholders generally agreed that: the consumer *acquis* should be streamlined and consolidated where possible; information requirements are currently too extensive and overwhelming for consumers and traders; the consumer *acquis* needs to be updated to better address the challenges of the digital market; better and more consistent enforcement of the rules across Member States is needed.
- Business stakeholders commented that current protections against unfair commercial practices were sufficient, but should be better enforced. Consumer organisations and public authorities saw opportunities to improve protection under the UCPD. While most business respondents agree that businesses are well protected against comparative and misleading advertisements of other businesses, 39 % of businesses indicated that they were confronted with misleading B2B marketing in the last 12 months.
- Stakeholders argued that price indication requirements should be consolidated and streamlined and commented that the PID should be made more consistent across the EU with respect to the units and exemptions.
- The most agreed upon potential areas to improve EU consumer and marketing rules for the benefit of consumers are that the information given at the advertising stage should focus on the essentials while more detailed information should be required only at the moment before the contract is concluded, and that information requirements in the UCPD/PID/CRD should be regrouped and streamlined.
- Consumer organisations emphasised that the UCTD should remain minimum harmonised, and proposed improvements for consumers, including an extension to cover the adequacy of the price, the main subject matter, individually negotiated terms and a blacklist of unfair terms, and suggested that the presentation of standard terms and conditions should be simplified. Business stakeholders were generally in favour of the status quo regarding the UCTD and considered an EU-wide blacklist of unfair terms to be unworkable in practice.
- Respondents' opinions are largely divided with respect to potential areas of improvement for the protection of businesses. The most agreed upon potential areas are the introduction of a blacklist of prohibited B2B practices (39 % of agreement among all respondents) and the introduction of a cooperation enforcement mechanism for cross-border B2B infringements (38 %). Most business stakeholders (especially business associations) opposed an extension of the UCTD to B2B relations.
- Regarding injunctions, business stakeholders generally argued to preserve the status quo, and did not want revisions to include stronger sanctions or EU-level class action lawsuits in particular. Consumer organisations and public authorities thought that injunctions were useful, but needed improvement, e.g. in relation to the associated costs and risks, effect on trader behaviour and substantive redress for consumers. Close to half of all respondents agreed that there was a need to ensure coherence and clarify the interplay between the ID and other enforcement mechanisms.
- Consumer associations considered injunctions to be effective enforcement measures, but emphasised that their effectiveness could be increased. Consumer organisations also emphasised that enforcement must be clearly linked with substantive remedies/redress. Businesses and business associations generally considered the current range of enforcement and redress options to be sufficient, and emphasised that most problems are ideally solved through direct negotiation between the trader and consumer, with court action as a last resort.

The main messages of the **targeted stakeholder consultation** can be summarised as follows

- Consumer organisations especially, but also enforcement agencies and some business stakeholders, were in favour of an update of the blacklist of the UCPD, to address new problematic practices in the context of digital markets, e-commerce and innovative marketing methods. However, other stakeholders did not report any necessity to expand or amend the blacklist, and rather expressed their opposition to changes.
- Stakeholders generally noted that the European Commission's Guidance document facilitates more effective application of the implementing national legislation.
- Stakeholders were divided in their opinion on whether or not there is a need to develop contractual consequences linked to the use of unfair practices.
- In most Member States, stakeholders considered that there were no major problems in respect to unit price information. However, they emphasised that the amount of information that must be provided to consumers under Article 7(4) UCPD and/or CRD is pushing the 'information-model' to its limits, creating 'information overload' and confusion among consumers and also creating costs for businesses.
- Stakeholders in a significant number of Member States confirmed that overall the principle-based approach of the MCAD is effective and that the MCAD provides a rather solid framework for a considerable part of the B2B advertising market.
- While stakeholders in some Member States saw a need for an extension of the UCPD to B2B transactions or a revision/extension of the MCAD with a view to ensuring more extensive protection for traders and competitors, stakeholders in other Member States did not consider a better protection of businesses against unfair commercial practices during and after the transaction to be necessary.
- The overall effectiveness of the principle-based approach under the UCTD was confirmed by stakeholders across the EU.
- Stakeholders, however, identified needs for clarifications or guidance regarding the interpretation and application of the UCTD, including in relation to the legal consequences of a lack of transparency, the general test of unfairness, the exact scope of the obligations of the national courts, and the indicative list of unfair terms.
- Some stakeholder groups (mostly consumer organisations and public authorities, as in the open consultation) showed preference for a blacklist of unfair terms and, to a lesser extent, grey list over a mere indicative list. Stakeholders also indicated that black and grey lists need to be updated regularly to be effective.
- Regarding injunctions, stakeholders named court fees and lawyers' fees for injunction procedures brought by consumer organisations and even by public authorities as key obstacles to the effectiveness of the injunction procedure generally, including domestically.
- Stakeholders regarded sanctions for the breach of an injunction order as an effective element of the injunction procedure.
- It appears from the country research, and from earlier consultations and studies, that stakeholders continue to disagree on the desired level of harmonisation of EU consumer legislation.

Annex 4 — Methods and Analytical approach used by consultants

1. Lot 1 study (covering UCPD, MCAD, UCTD, PID and ID)

Besides the consultation activities described in section 2.1 of Annex 2, this study relied on the following methods:

- legal analysis;
- literature review;
- costs and benefits analysis;

Furthermore, results from the Commission's online public consultation (see above point 5. of Annex 2) and discussions during the European Consumer Summit (see above point 6. of Annex 2) also were taken into account in this study.

A **country-level legal analysis** of the national horizontal and sector-specific consumer law (both substantial and procedural), civil and commercial law, and case-law in all 28 Member States was conducted for each Member State by a legal expert (in some cases complemented by a second legal expert or researcher) who collected information from the following three main sources:

- review of national legal provisions, case-law, reports of the Member State's enforcement authorities, etc.;
- literature review for the Member State;
- interviews with responsible ministries and authorities, consumer organisations and ECCs, sectoral regulatory authorities and business associations.

The legal country experts documented the results of their analysis in a reporting template, including fact sheets on the transposition of the five Directives and a specific table regarding the implementation of the Injunctions Directive. The country reports were reviewed and edited following an extensive quality assurance protocol, including the application of a check list of quality criteria, a peer review by a key legal expert and an English language check. The information from the country reports was then processed for use in the cross-cutting analysis, with the results of the legal analysis at country level directly informing the **EU-level legal analysis**.

The purpose of the **literature review** was to analyse the available legal literature, analyse studies and surveys to assess the level of traders' and consumers' awareness of the rules in the Directives subject to the study, compare the situation before the adoption of the Directives with the developments after their adoption and at present, and establish the trends and evolution of consumer problems that fall within the Directives.

Throughout the study phases, the evaluation team identified and reviewed relevant literature, including:

- cross-cutting and comparative/EU-level reports and analyses;
- data sources at the EU and national level for the analysis of levels of awareness and key trends since the adoption of key Directives; and
- relevant literature for each Member State, as the literature review at country level was one of the main sources of information for the legal analysis.

The complete list of the literature reviewed is presented in Annex I to the Lot 1 Final report.

Costs and benefits analysis: The data for the assessment of costs and benefits of the five Directives subject to this evaluation for businesses and consumers was collected from the following sources:

- literature review;
- sectoral business interviews;
- stakeholder interviews (at EU and country level);
- survey of qualified entities;
- country reporting;
- consumer survey to support the Fitness Check undertaken in Lot 3;
- Eurobarometer survey data.

The data collected via the different primary and secondary sources of information listed above was combined and analysed.

The contractor conducted a **compliance cost analysis**, distinguishing between the one-off costs incurred by businesses when entering another EU country's market for the first time to sell the company's products/services and the costs incurred on a regular basis by businesses for checking that the company's advertising/marketing and standard contract terms still comply with national legislation and adjusting business practices. In the second step the results were extrapolated to the EU level.

The contractor also conducted a **panel data analysis** with the aim to conclude whether the identified changes towards achieving the objectives of greater consumer trust and cross-border shopping can be reasonably attributed to the Directives (specifically the UCPD) rather than to any other factors.

Extrapolation of business costs to the EU level (costs related to marketing and standard terms)

First, costs were extrapolated at company level per sector. Staff time was monetised into labour costs, separated for professional staff and for administrative or sales staff. Second, the amount of other costs per business was calculated. Lastly, total costs per business were calculated by summing the values for the three items, i.e. the labour costs for professional staff, the labour costs for administrative or sales staff and the other costs incurred.

Having calculated the annual costs per business per sector, these costs were multiplied by the number of businesses in each sector that check for compliance on a regular basis. This number was calculated by multiplying the total number of businesses in each sector in the EU, based on Eurostat data, by the share of surveyed businesses in each sector that indicated they check for compliance as a percentage of the total number of businesses interviewed in each sector[212].

The following equations were used for these calculations:

$$Labour\ costs_s^{staff} = WD_s^{staff} \times \frac{1}{Pop_{EU}} \sum_{EU\ MS} Mean\ daily\ labour\ costs_{MS}^{staff} \times Pop_{MS}$$

[212] Due to data limitations, compliance rates were derived by sector and not by sector and size class.

Where:

s denotes the sector;
staff denotes the staff category;
WD denotes the number of working days;
Pop denotes the number of businesses in the five selected sectors.

$$Compliance\ costs\ per\ business_s = Labour\ costs_s^{prof} + Labour\ costs_s^{admin} + Other\ costs_s$$

Where:

prof denotes professional staff;
admin denotes administrative or sales staff.

$$Total\ compliance\ costs_s = \sum_{size} Compliance\ costs\ per\ business_{s,size} \times Number\ of\ businesses_{s,size}$$

Where:

s denotes the sector;
size denotes the size class.

See a more detailed description in Part 4 of the Lot 1 study.

Impact of UCPD on consumer trust/ cross-border e-commerce

Panel data analysis (regression analysis) was used by the Lot 1 contractor to measure the impact of the UCPD on consumer trust and cross-border trade using the available Eurobarometer survey data. The panel analysis explores whether the identified changes towards achieving the objectives of the Directive can be reasonably attributed to the UCPD rather than any other factors.

The UCPD was chosen for this analysis as the Directive presents several characteristics that would make it relatively more amenable to assessment via a panel data regression model, such as its relatively recent adoption and its full harmonisation character. Furthermore, the differences in its transposition dates provide a degree of variation allowing for a more accurate estimation of impacts.

A panel data regression model was developed for the UCPD based on Eurobarometers and Eurostat between 2006 and 2014 for all 28 Member States. It focused on two variables ‘consumer trust’ and ‘cross-border online purchases’. Additional independent variables were included in the panel data analysis.

Three separate but related panel regression techniques were chosen to model the potential impact of the UCPD on consumer trust and cross-border purchases. These three techniques are as follows: the two-way fixed-effects model; the least-squared dummy variables (LSDV)

model; the random effects model. In addition, a more distinct fourth model — a fixed-effects logistic regression — was conducted to supplement the results of the first three models.

The **two-way fixed-effects model** was estimated separately for each outcome variable. These regressions took the following general form:

- For the consumer trust model:

$$Cons_Trust_{it} = \beta_0 + \beta_1 UCPD_inplace_{it} + \beta_2 Internet_{it} + \beta_3 ConsumpPC_{it} + \beta_4 Unempl_{it} + \beta_5 Finance_{it} + \beta_6 Interest_{it} + \beta_7 Incident_{it} + \beta_8 Year_{it} + \varepsilon_{it}$$

- For the cross-border online purchases model[213];

$$Ln(XBorder)_{it} = \beta_0 + \beta_1 UCPD_inplace_{it} + \beta_2 Internet_{it} + \beta_3 ConsumpPC_{it} + \beta_4 Unempl_{it} + \beta_5 Finance_{it} + \beta_6 Interest_{it} + \beta_7 Incident_{it} + \beta_8 Cons_Trust_{it} + \beta_8 Year_{it} + \varepsilon_{it}$$

Where:

- the variables are as defined in Tables 1 and 3;
- *i* represents the country of the observation;
- *t* represents the year;
- $Year_{it}$ represents the set of time dummy variables; and
- ε_{it} represents the idiosyncratic error term.

The **LSDV model** was estimated separately for each outcome variable. These regressions took the following general form:

- For the consumer trust model:

$$Cons_Trust_{it} = \beta_0 + \beta_1 UCPD_inplace_{it} + \beta_2 Internet_{it} + \beta_3 ConsumpPC_{it} + \beta_4 Unempl_{it} + \beta_5 Finance_{it} + \beta_6 Interest_{it} + \beta_7 Incident_{it} + \beta_8 NMS_{it} + \beta_9 Country_{it} + \beta_{10} Year_{it} + \varepsilon_{it}$$

- For the cross-border online purchases model:

$$Ln(XBorder)_{it} = \beta_0 + \beta_1 UCPD_inplace_{it} + \beta_2 Internet_{it} + \beta_3 ConsumpPC_{it} + \beta_4 Unempl_{it} + \beta_5 Finance_{it} + \beta_6 Interest_{it} + \beta_7 Incident_{it} + \beta_8 Cons_Trust_{it} + \beta_8 NMS_{it} + \beta_9 Country_{it} + \beta_{10} Year_{it} + \varepsilon_{it}$$

Where:

- the variables are as defined in Tables 1 and 3;
- *i* represents the country of the observation;
- *t* represents the year of the observation;
- $Country_{it}$ represents the set of country dummy variables;
- $Year_{it}$ represents the set of time dummy variables; and
- ε_{it} represents the idiosyncratic error term.

The **random effects regressions** take the same general form as the fixed-effects models, which are the following:

[213] As the data for cross-border online purchases exhibited a strong positive skew, a log transformation was used to make the data conform to a more normal distribution. This has implications for the interpretation of the regression coefficients, which is discussed with the results in Section 4.3. of Part 4 of the Lot 1 report.

For the consumer trust model:

$$Cons_Trust_{it} = \beta_0 + \beta_1 UCPD_inplace_{it} + \beta_2 Internet_{it} + \beta_3 ConsumpPC_{it} + \beta_4 Unempl_{it} + \beta_5 Finance_{it} + \beta_6 Interest_{it} + \beta_7 Incident_{it} + \beta_8 Year_{it} + \varepsilon_{it}$$

For the cross-border online purchases model:

$$Ln(XBorder)_{it} = \beta_0 + \beta_1 UCPD_inplace_{it} + \beta_2 Internet_{it} + \beta_3 ConsumpPC_{it} + \beta_4 Unempl_{it} + \beta_5 Finance_{it} + \beta_6 Interest_{it} + \beta_7 Incident_{it} + \beta_8 Cons_Trust_{it} + \beta_8 Year_{it} + \varepsilon_{it}$$

Where:

- the variables are as defined in Tables 1 and 3;
- *i* represents the country of the observation;
- *t* represents the year of the observation;
- $Year_{it}$ represents the set of time dummy variables; and
- ε_{it} represents the idiosyncratic error term.

The general form of the **fixed-effects logistic regression** for each of the new outcome variables is the following:

For the consumer trust model:

$$logit(TrustINC_{it}) = \beta_0 + \beta_1 UCPD_inplace_{it} + \beta_2 Internet_{it} + \beta_3 ConsumpPC_{it} + \beta_4 Unempl_{it} + \beta_5 Finance_{it} + \beta_6 Interest_{it} + \beta_7 Incident_{it} + \varepsilon_{it}$$

For the cross-border online purchases model:

$$logit(XBorderINC)_{it} = \beta_0 + \beta_1 UCPD_inplace_{it} + \beta_2 Internet_{it} + \beta_3 ConsumpPC_{it} + \beta_4 Unempl_{it} + \beta_5 Finance_{it} + \beta_6 Interest_{it} + \beta_7 Incident_{it} + \beta_8 Cons_Trust_{it} + \varepsilon_{it}$$

Where:

- $TrustINC_{it}$ and $XBordertINC_{it}$ in the above models are the constructed dummy variables that equal 1 when the respective outcome variable has increased since the last time period and 0 otherwise;
- the independent variables are as defined in Tables 1 and 3;
- *i* represents the country of the observation;
- *t* represents the year of the observation; and
- ε_{it} represents the idiosyncratic error term.

The results of the specific analyses conducted for assessing the costs and benefits are presented in Part 4 of the Lot 1 final report.

Overall analysis

Evidence obtained from the different methodological tools served to answer the evaluation questions, arrive at conclusions, and develop recommendations for EU legislative and/or non-legislative actions as regards identified gaps, obsolete provisions or codification needs of the current rules.

To prepare the basis for the overall analysis, the team first processed and cross-checked the evidence collected from stakeholder interviews, country reporting and country transposition fact sheets, data extracted from the literature, results of the open public consultation, data on costs and benefits, results of the survey of qualified entities, results of the panel data analysis, and other relevant evidence collected. Having a clear overview of results obtained throughout the previous tasks separately, the team started applying triangulation techniques to corroborate the findings across the tools applied. Throughout the study, the evaluation team verified the information collected and compared processed information with the source documents in order to safeguard the integrity of data and provide a sound evidence base for the further evaluation process. This process also allowed the evaluation team to identify gaps and contradictions in the data, which were subsequently addressed in follow-up correspondence with interviewees and members of the evaluation team.

The answers to the evaluation questions, the problem definition and the baseline scenario were established based on the results of the data gathering. In this process, the team made sure that the conclusions reflected the findings of the evaluation and that the recommendations addressed the problems highlighted in the analysis.

2. Lot 2 study (CSGD)

Besides the consultation activities described in section 2.2 of Annex 2, Lot 2 study also relied on desk research which consisted of the following three components:

- legal mapping;
- literature review; and
- analysis of statistical and survey data.

Legal mapping: The following sources were used to map out how the key provisions of the CSG Directive have been transposed into national law:

- the 2015 Consumer Market Study on Legal and Commercial Guarantees;
- the Consumer Law Compendium;
- notifications from Member States to the Commission under the Consumer Rights Directive (2011/83/EU) on the points where they have gone beyond the CSG Directive; and
- the 2016 Study on all mandatory rules applicable to contractual obligations in contracts for sales of tangible goods sold at a distance and, in particular online

Literature review: Relevant evidence on the benefits, costs (legal, compliance and other), barriers to traders and consumers of the current regulatory framework was extracted from the following sources:

- Impact Assessment for the Proposal on online and other distance sales of goods;
- Impact Assessment for the Proposal on a Common European Sales Law (CESL);
- Impact Assessment for the Proposal of the Consumer Rights Directive;
- European Parliament, A Longer Lifetime for Products: Benefits for Consumers and Companies (2016);
- relevant — though limited — sources at national level, including reports and data from France (UFC QueChoisir, a business association), the Netherlands (disputes and complaints from de Geschillencommissie) and the UK (Which?), though evidence at national level is rather scant;

- the 2015 Consumer Market Study on Legal and Commercial Guarantees.

Analysis of statistical and survey data: Quantitative data were drawn from the following sources:

- Eurostat statistics on the number of retailers (NACE Rev 2 G47) and population;
- microdata of Flash Eurobarometer 359 'Retailers' attitudes towards cross-border trade and consumer protection' (2013);
- microdata of Flash Eurobarometer 396 'Retailers' attitudes towards cross-border trade and consumer protection' (2015);
- microdata of the consumer survey carried out as part of the 2015 Consumer Market Study on Legal and Commercial Guarantees;
- microdata of the Consumer Market Study to Support the Fitness Check of Consumer Law (Lot 3).

Business costs related to consumer sales and guarantees

The Lot 2 contractor performed 375 business interviews to identify business costs related to the application of the CSGD. This targeted companies active in the retail trade and e-commerce and trading both domestically and cross-border.

These interviews sought information on:

- cost of adapting to and complying with different national consumer protection rules across the EU;
- costs of potential changes in EU legislation.

For each question, businesses were asked to indicate whether they experience or expect costs or benefits, specifying whether these are major/medium/minor or non-existent. Businesses were also asked to indicate the order of the magnitude of the costs of specific provisions as a percentage of their turnover, however only leading to a small sample size of answers.

Regarding the cost of legal advice and adapting the conditions of sale to different national rules, contract law-related costs per company for entering the market of one Member States have been calculated based on the responses gathered in the context of a SME Panel Survey in 2011.

Consumer detriment related to defective goods

The Lot 2 contractor used microdata from the consumer survey (under the Lot 3 study) related to consumer detriment to construct the following indicators of consumer detriment:

- incidence of problems relating to defective goods i.e. share of respondents experiencing problems relating to defective goods;
- share of relevant respondents receiving redress;
- net financial detriment — gross financial detriment less the monetary value of any remedies received; and,
- other costs — The amount of time and money spent by consumers as a consequence of the problem relating to defective goods (administrative follow-up, legal follow-up and product follow-up costs).

Responses were isolated for consumers buying goods through face-to-face channels.

A bivariate regression analysis was used to analyse the relationship between the level of consumer protection provided by national legislation and consumer detriment. This statistical method makes it possible to test if two variables are associated. If the outcome of such test is

positive (i.e. the results are statistically significant), then it means that the association between the two variables is caused by something other than random chance. Hence a bivariate regression can provide a quick and useful first insight on the relationships between any two variables. This method however, does not describe causality between variables (i.e. the influence of one variable over the other or vice versa).

The bivariate regression was carried out in STATA. As such these calculations were automated; not manual. The statistical formula is as follows: $Yi= \beta 0+ \beta 1X1i + \beta 2X2i + \ldots + \beta kXk\ i+ \varepsilon i$.

- Y is the explained / dependent variable.
- $X_1, X_2, \ldots, X_k$ are explanatory / independent variables that help explain any change in the explained variable, Y.
- $\beta_0, \beta_1, \beta_2, \ldots, \beta_k$ are constants describing the functional relationship in the population.
- The value β_0 is, in mathematical terms, the intercept. In the equation above, it gives the value of Y when $X_1, X_2, \ldots, X_k, = 0$.
- The values $\beta_1, \beta_2, \ldots, \beta_k$ identify the change along the Y scale expected for every unit changed in fixed values of $X_1, X_2, \ldots, X_k$
- ε represents an error component. It relates to the portion of the dependent variable, Y, that cannot be accounted for or explained by the independent variables $X_1, X_2, \ldots, X_k$.
- i is used to denote each individual Member State.

For more information, see the final reports of the Lot 2 study.

3. Lot 3 study (Consumer market study)

The Lot 3 final report is based on the results of a consumer survey, two mystery shopping exercises and four experiments that were carried out between June 2016 and January 2017. The Study covered four main research topics and four directives — UCPD, UCTD, PID and CSGD. Figure 31 below shows the coverage of each activity and the relevant research topic (pink means that the activity covered the research topic; and grey — that it did not cover the respective research topic)

Figure 31. Overview of the studies and their input to the research topics

Research Topic	Consumer survey	Mystery Shopping	Behavioural experiments		
	UCPD UCTD PID CSGD	UCPD	Exp. 1 PID	Exp. 2 UCTD	Exp. 3 Consumer information about durability/ reparability
1 Relevance of consumer rights					
2 Consumer perception of traders' compliance with consumer rights					
3 Consumer problem					

	resolution					
4	The effect of national regulatory differences on cross-border commerce					

One additional mystery shopping exercise and one experiment under the Lot 3 study dealt with the CRD in the context of its parallel separate evaluation.

Consumer survey (from 13 June until 29 June 2016)**:** The survey covered four directives: the Unfair Commercial Practices Directive, the Unfair Contract Terms Directive, the Price Indication Directive and the Consumer Sales Directive. It was completed by a representative sample of 23 501 consumers from the EU-28 countries, plus Iceland and Norway.

The consumer survey dealt with the consumer awareness of their rights, willingness and ability to make use of these rights, the nature and prevalence of problems consumers encounter when executing their rights, and benefits the respective EU law instruments bring to consumers. The survey collected data on consumer experiences in a wide range of markets covering both *goods and services*, bought both *offline and online* in both the respondents' *own country and another EU country.* This setup delivered a broad picture of the European consumer situation and representative insights into consumer attitudes and experiences related to their consumer rights.

The survey responses were collected online using a sample from the GfK panels. The sample was representative for all the national populations in terms of age and gender, and the spread of region and urbanisation was taken into account. The target number of completes was achieved in all countries. 19 countries had about 1 000 interviews each, 7 countries had 500 interviews each, and the smallest 4 countries in the survey had 250 interviews each.

The criterion used for assigning number of interviews per country was population aged 18+. The countries with an 18+ population over 4 million had 1 000 interviews each, while countries with a population aged 18+ between 1 million and 4 million had 500 interviews each. The 4 smallest countries all had a population aged 18+ of less than one million. In terms of confidence intervals when analysing sample size within a specific country, one can say with 95 % confidence that the margin of error attributable to sampling and other random effects is +/-3.1 % in the 19 countries with about 1 000 interviews, +/-4.4 % in the 7 countries with 500 interviews and is +/-6.2 % in the 4 countries with 250 interviews.

The surveyed respondents represented the national population of consumers aged 18+ in all countries. In order to ensure this, quotas were set on age (based on three age groups: 18-34, 35-54, and 55+). The quotas were implemented by asking the age and gender of the respondents at the beginning of the questionnaire, so that respondents from the over-represented groups could be screened out at this stage[214].

The results of this survey were not only analysed per country, but also compared between EU-15 and EU-13 countries. 60 % of the respondents of the survey lived in a EU-15 country, while 40 % lived in a EU-13 country. EU-15 countries have been part of the EU before 2004, EU-13 countries acceded to the EU after 2004.

More details on the methodology can be found in Part 2, Chapter 1 (Consumer Survey) of the Final report. The complete survey questionnaire can be found in Annex 1 to the Final report.

[214] In addition, the data at EU-28 level and at the level of all countries was weighted on the country population.

UCPD mystery shopping: The sectors studied in this mystery shopping included clothing (including branded clothing and footwear), electronic goods (non-ICT/recreational), information and communication technology (ICT) goods, software, goods bought via online auctions and prize competitions.

The investigated misleading practices were limited to those that could result in purchase/spending of money so that the trader's reaction to the claim for remedy could be immediately tested. To identify such cases of misleading practices, three rounds of desk research by two country experts in each target country were carried out in consultation with the EC. In order to enlarge the evidence base, 4 additional countries (BE, IE, MT, UK) were added to the originally planned 8 countries[215]. In total 56 cases were completed during the fieldwork.

The mystery shopping started with ensuring the mystery shopper's agreement to participate and him or her being assigned to a specific task. Once a task had been assigned, the exercise was broadly structured around three stages:

1) in the first stage, mystery shoppers visited the website concerned and made a purchase based on the misleading practice;
2) during the second stage they complained to the retailers and reported about the retailers' reaction;
3) during the third stage, they withdrew from the contract in accordance with the Consumer Rights Directive and reported about the outcome of the withdrawal.

Chapter 2 of Part II of the Final report provides a more detailed description of the methodology and Annex 3 to the Final report provides the briefing and assessment sheets.

Consumer behavioural experiments were carried out online in 8 Member States[216].

Experiment 1 on PID, with 4 149 online respondents, tested respondents' choices and willingness to pay for two products (i.e. cookies and laundry detergent) depending on the availability of unit price information. It tested different price-unit relationships (i.e. situations where larger packages had both lower and higher unit price than smaller package sizes) and different types of unit price information (e.g. price per litre or price per wash-load). In addition, the respondents' awareness of the unit price information, their ability to determine the item with the lowest unit price (unit price comprehension) and the effect on their product choices were assessed.

Part 2, Chapter 4 of the Final Lot 3 report describes the methodology and results of Experiment 1 in detail.

Experiment 2 on UCTD involved 7 234 online respondents. It was conducted to examine respondents' responses to the use of fair v unfair standard contract terms (T&Cs) and whether respondents were influenced by different presentations of the T&Cs. Respondents were presented with the T&Cs for a consumer credit and for an ADSL internet subscription. The presentation of the T&Cs and the fairness of the T&Cs were manipulated between respondents. Namely, respondents had to make their purchasing decision on the basis of either the traditional (long) version of the T&Cs, a summarised version of T&Cs or a summarised version of T&Cs accompanied with graphical icons; each of these types of T&Cs were either fair or included unfair clauses. The experiment assessed the respondents' intention to buy depending on the type of T&Cs they were presented as well as the respondents' readership of T&Cs, perceived fairness of the T&Cs and comprehension of the fairness of the T&Cs.

[215] Belgium, Ireland, Malta, United Kingdom, Bulgaria, Finland, France, Germany, Greece, Netherlands, Poland, and Portugal.
[216] Bulgaria, Finland, France, Germany, Greece, Netherlands, Poland, and Portugal.

Part 2, Chapter 5 of the Final Lot 3 report describes the methodology and results of Experiment 2 in detail.

Experiment 3 involved 7 234 respondents. It investigated whether consumers take durability and reparability information into consideration if such information is provided. Respondents were given a decision-making task for three different products (large consumer good: washing machine, medium consumer good: TV and small consumer good: smartphone) with each having 6 product options that varied by brand, price and product characteristics, in particular as regards durability and reparability aspects. The durability information was manipulated between subjects, i.e. the information was either absent, presented by years or presented by usage units (e.g. washing cycles). The reparability information was also manipulated between subjects, i.e. it was either absent or presented in terms of availability of spare parts or costs of replacing key parts. The effect of the presence of durability and reparability information was measured by assessing respondents' product choice and willingness to pay.

Part 2, Chapter 6 of the Final Lot 3 report describes the methodology and results of Experiment 3 in detail.

Experiment 4b (concerning the UCPD) only consisted of a survey and did not include any manipulations. Respondents were shown an advertisement screen, containing information required by the UCPD (Article 7(4)). Next, respondents saw the product information screen with the information required by the CRD. Subsequently, respondents were asked to answer questions on the (perceived) redundancy of the information provided on the advertisement screen. (Experiment 4a concerned only the CRD and its results fed into the separate evaluation of the CRD.)

Part 2, Chapter 7 of the Final Lot 3 report describes the methodology and results of Experiment 4b in detail.

The selection of Member States for the consumer experiments was designed to include a balance of region, level of consumer knowledge of their rights, trust in public authorities to protect their rights, experience of unfair practices and the number of consumer complaints. The respondents were a representation of the national population of consumers aged 18+ in the respective countries. In order to ensure this, quotas were set on age (based on three age groups: 18-34, 35-54, and 55+) and gender. Furthermore, when recruiting sample from the panel, a spread of education, work status and financial situation was taken into account.

The main results of the Lot 3 activities are presented in Part 1 of the Final report, while the detailed methodology and findings including differences and similarities between countries and socio-demographic profiles can be found in Part 2 of the Final report.

Annex 5 National rules going beyond the minimum requirements and use of regulatory choices/ derogations

Table 17: UCPD — national transposition laws going beyond minimum harmonisation requirements in the areas of financial services or immovable property

Country	Provisions going beyond minimum harmonisation requirements	
	Regarding financial services	Regarding immovable property
Austria	No [a)]	No
Belgium	No	No
Bulgaria	No	No
Croatia	No	No
Cyprus	Yes	No
Czech Republic	No	No
Denmark	Yes	Yes
Estonia	No	No
Finland	No	No
France	Yes	Yes
Germany	No	No
Greece	No	No
Hungary	Yes	Yes
Ireland	No	Yes
Italy	No	No
Latvia	No	No
Lithuania	No	No
Luxembourg	No	No
Malta	Yes	Yes
Netherlands	Yes	No
Poland	No	No
Portugal	Yes	No data available
Romania	No	No
Slovakia	No	No
Slovenia	No	No
Spain	Yes	Yes
Sweden	No	No
United Kingdom	Yes	Yes

Source: Country reports' fact sheets on transposition of directives in Member States' law — UCPD Notes: See Annex III for further details, where provided by the legal country experts. a) Austria: This derogation is not explicitly taken advantage of within the UWG, the statute in which the UCPD was implemented. However, a comprehensive look at the provision regarding the conduct of financial intermediaries and real estate brokers shows that there are stricter rules to a minor extent.

Table 18: UCTD — overview of Member States with 'black' or 'grey lists' of standard terms

Country	Provisions going beyond minimum harmonisation requirements	
	'Blacklist' of terms considered unfair in all circumstances	'Grey list' of terms which may be presumed to be unfair
Austria	Yes	Yes
Belgium	Yes	No
Bulgaria	Yes	No
Croatia	No	Yes
Cyprus	Yes	Yes
Czech Republic	Yes	No
Denmark	No	No
Estonia	Yes	Yes
Finland	No	No
France	Yes	Yes
Germany	Yes	Yes
Greece	Yes	No
Hungary	Yes	Yes
Ireland	No	Yes
Italy	Yes	Yes
Latvia	Yes	No
Lithuania	No	Yes
Luxembourg	Yes	No
Malta	Yes	No
Netherlands	Yes	Yes
Poland	No[a)]	Yes
Portugal	Yes	Yes
Romania	No	Yes
Slovakia	Yes[b)]	No
Slovenia	Yes	No
Spain	Yes	Yes[c)]
Sweden	No	No
United Kingdom	Yes	Yes

Source: Country reports' fact sheets on transposition of directives in Member States' law — UCTD. Notes: a) UOKiK published a registry of court decisions on standard terms and conditions that have been assessed as unfair *in abstracto*; this worked as a de facto blacklist — even though only a given trader was prohibited from applying this term. b) There is not a clear consensus whether the list is 'black' or 'grey' one. c) Articles 85 to 90 of the Royal Legislative Decree 1/2007 specify a series of clauses that are unfair by combining the technique of 'blacklist' and that of 'grey list'. Alongside clauses whose unfair character results from the application of objective criteria or a mechanical process consisting of including a specific case within the rule (blacklist), other rules cannot be automatically applied because of their vagueness and a task of interpretation and assessment is needed (grey list).

Table 19. UCTD — overview of Member States extending the application of the Directive

Country	Provisions going beyond minimum harmonisation requirements	
	Extensions of the application of Directive to individually negotiated terms	Extensions of the application of Directive to terms on the adequacy of the price and the main subject matter
Austria	Yes	No
Belgium	Yes	No
Bulgaria	No	No
Croatia	No	No
Cyprus	No	No
Czech Republic	Yes	No
Denmark	Yes	Yes
Estonia	No	No
Finland	Yes	Yes
France	Yes	No
Germany	No	No
Greece	No	No
Hungary	No	No
Ireland	No	No
Italy	No	No
Latvia	No	No
Lithuania	No	No
Luxembourg	Yes	No
Malta	Yes	No
Netherlands	No	No
Poland	No	No

Portugal	No	Yes
Romania	No	No
Slovakia	No	No
Slovenia	No	Yes
Spain	No	Yes
Sweden	No	No
United Kingdom	Yes	No

Source: Country reports' fact sheets on transposition of directives in Member States' law — UCTD. Notes: See Annex IV for further details provided in the country reports.

Table 20. CSGD — overview of the transposition and main provisions

Member States	Key provisions of the CSG Directive			
	Duration of legal guarantee (years)	Notification obligation on consumers	Reversal of burden of proof period	Hierarchy of remedies
Austria	2	No	6 months	Yes
Belgium	2	Yes[217]	6 months	Yes
Bulgaria	2	Yes[218]	6 months	Yes
Croatia	*2*	Yes	6 months	Free choice
Cyprus	2	Yes	6 months	Yes
Czech Republic	2	Yes[219]	6 months	Yes
Denmark	2	Yes	6 months	Yes[220]
Estonia	2	Yes	6 months	Yes[221]
Finland	No fixed time limit	Yes	6 months	Yes
France	2	No	2 years	Yes
Germany	2	No	6 months	Yes
Greece	2	No	6 months	Free choice

[217] The trader and the consumer may agree that the lack of conformity has to be notified by the consumer within two months since he became aware of it. Wet betreffende de bescherming van de consumenten bij verkoop van consumptiegoederen/Loi relative à la protection des consommateurs en cas de vente de biens de consummation (2004), see: http://www.ejustice.just.fgov.be/cgi_loi/loi_a.pl?language=nl&caller=list&cn=2004090138&la=n&fromtab=wet&sql=dt=%27wet%27&tri=dd+as+rank&rech=1&numero=1.

[218] See Article 126 of the Consumer Protection Act. However the existence of that rule was not formally notified to the European Commission.

[219] The Czech law indicates 'the consumer has to contact the trader without undue delay after discovery of the defect '.Act No 89/2012 Coll., the New Civil Code ('Nový občanský zákoník', and NCC).

[220] In Denmark the consumer may claim a refund if the defect is significant, but not if the seller offers to repair or replace the product. Article 78 of the Sale of Goods Act (Købelov): http://www.sprog.asb.dk/sn/Danish%20Sale%20of%20Goods%20Act.pdf.

[221] The Estonian rules are based on the idea of a free choice of remedy, giving, however, the seller the possibility to deal with the fault by way of repair or replacement.

Member States	Key provisions of the CSG Directive			
	Duration of legal guarantee (years)	Notification obligation on consumers	Reversal of burden of proof period	Hierarchy of remedies
Hungary	2	Yes	6 months	Yes
Ireland	6*	No	6 months	Yes + short term right to reject[222]
Italy	*2*	Yes	6 months	Yes
Latvia	2	Yes	6 months	Yes[223]
Lithuania	2	Yes[224]	6 months	Free choice
Luxembourg	2	Yes[225]	6 months	Yes[226]
Malta	2	Yes	6 months	Yes
Poland	2	No	1 year	Yes[227]
Portugal	2	Yes	2 years	Free choice
Romania	2	Yes	6 months	Yes
Slovakia	2	Yes	6 months	Yes
Slovenia	2	Yes	6 months	Free choice
Spain	2	Yes	6 months	Yes
Sweden	3	Yes	6 months	Yes
the Netherlands	No fixed time limit	Yes	6 months	Yes
United Kingdom	6 (5 in Scotland)*	No	6 months	Yes + short term right to reject[228]

**The seller's liability in these Member States is only limited by the prescription period.*

Green shading denotes Member State going beyond minimum standards of Directive 1999/44/EC.

[222] S.I. No 11/2003 — European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003, http://www.irishstatutebook.ie/eli/2003/si/11/made/en/print.
[223] Since a legislative change in 2015.
[224] Consumer has to notify within a reasonable time, according to Article 6.327 of the Civil Code No. VIII-1864 of 18 July 2000.
[225] The consumer has to inform the seller about any non-conformity of the product within a 'reasonable period' but since this period is not defined, it effectively means two years after the delivery. Under Art. L. 212-6, subparagraph 2 there is a second two-year time-limit for bringing an action to enforce a guarantee; it runs from when the consumer reported the non-compliance of the goods to the trader.
[226] Remedies should be carried out within one month by the seller. If this is not the case, the consumer can request a replacement and receive a full refund of the product price, or keep the product and obtain a partial refund. However, the consumer can obtain further price reductions for damages if the consumer can provide proof that the non-conformity of the faulty good created additional costs or was dangerous to health.
[227] The Polish rules applicable since December 2014 are based on the idea of a free choice of remedy, giving, however, the seller the possibility to deal with the fault by way of repair or replacement.
[228] Consumer Rights Act 2015, Section 20 on the Right to Reject, see http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted

Table 21. PID — Overview of Member States provisions regarding specific regulatory choices/ derogations

Country	Provisions going beyond minimum harmonisation requirements		
	Extension of the application to other sectors	Derogation for small businesses	Use of other specific regulatory choices/derogations
Austria	No	Yes	Yes
Belgium	No	Yes	Yes
Bulgaria	No	No	No
Croatia	No	No	No
Cyprus	No	No	No
Czech Republic	Yes	Yes	Yes
Denmark	Yes	No	Yes
Estonia	No	No	Yes
Finland	No	No	No
France	Yes	No	Yes
Germany	Yes	Yes	Yes
Greece	No	Yes	Yes
Hungary	Yes	No	Yes
Ireland	No	No	Yes
Italy	No	No	Yes
Latvia	Yes	Yes	Yes
Lithuania	No	Yes	Yes
Luxembourg	Yes	Yes	Yes
Malta	No	Yes	Yes
Netherlands	Yes	Yes	Yes
Poland	No	No	Yes
Portugal	Yes	No	Yes
Romania	No	No	No
Slovakia	No	No	No
Slovenia	No	Yes	No
Spain	No	No	Yes
Sweden	No	No	No
United Kingdom	No	Yes	Yes

Annex 6 — Overview of consumer information requirements

	Consumer Rights Directive	Unfair Commercial Practices Directive	Price Indication Directive
I. Information about the trader			
Identity, Address and contact details	Article 5(1)(b)[229] The identity of the trader, such as his trading name, the geographical address at which he is established and his telephone number; Article 6(1)(b) The identity of the trader, such as his trading name; Article 6(1)(c) The geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting; Article 6(1)(d) If different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;	Article 7(4)(b) The geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;	

[229] Article 6(1) sets out the information requirements for distance and off-premises contracts while Article 5(1) sets out these requirements for other (on-premises) contracts.

	Consumer Rights Directive	Unfair Commercial Practices Directive	Price Indication Directive
II. Description of the product			
II.1. **Main characteristics**	Article 5(1)(a) and Article 6(1)(a) The main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;	Article 7(4)(a) The main characteristics of the product, to an extent appropriate to the medium and the product;	
II.2. **Functionality**	Article 5(1)(g) and Article 6(1)(r) Where applicable, the functionality, including applicable technical protection measures, of digital content;		
II.3. **Interoperability**	Article 5(1)(h) and Article 6(1)(s) Where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.		
III. Price			
III.1. Product price	Article 5(1)(c) and Article 6(1)(e) The total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges [*only Art. 6(1)(e)* — and any other costs] or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges	Article 7(4)(c) The price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;	Article 3(1) The selling price and the unit price shall be indicated for all products referred to in Article 1, the indication of the unit price being subject to the provisions of Article 5. The unit price need not be indicated if it is identical to the sales price.

	Consumer Rights Directive	Unfair Commercial Practices Directive	Price Indication Directive
	may be payable. [*only Art 6(1)(e)*- In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided];		
III. 2 **Cost of using the means of distance communication**	Article 6(1)(f) The cost of using the means of distance communication for the conclusion of the contract where higher than basic rate		
IV. Performance of the contract			
IV.1. **Delivery and payment**	Article 5(1)(d) and Article 6(1)(g) [*Only Art 5(1)(d)* — Where applicable,] the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services	Article 7(4)(d) The arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;	
IV.2. **Complaint handling**	Article 5(1)(d) and Article 6(1)(g) […] where applicable, the trader's complaint handling policy		
IV.3. **Financial guarantees**	Article 6(1)(q) where applicable, the existence and the conditions of deposits or		

	Consumer Rights Directive	Unfair Commercial Practices Directive	Price Indication Directive
	other financial guarantees to be paid or provided by the consumer at the request of the trader;		
IV.4. **Legal guarantee**	Article 5(1)(e) and Article 6(1) (l) […] a reminder of the existence of a legal guarantee of conformity for goods […];		
IV.5. **Commercial guarantee and after-sales services**	Article 5(1)(e) […]the existence and the conditions of after-sales services and commercial guarantees, where applicable; Article 6(1)(m) Where applicable, the existence and the conditions of after sales customer assistance, after-sales services and commercial guarantees		
V. Validity of the contract			
V.1. **Duration and termination of the contract**	Article 5(1)(f) and Article 6(1)(o) The duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; Article (6)(1)(p) Where applicable, the minimum duration of the consumer's obligations under the contract;		
V.2. **Right of withdrawal**	Article 6(1)(h) The conditions, time limit and procedures for exercising the right of withdrawal, as well as the	Article 7(4)(e) For products and transactions involving a right of withdrawal or cancellation, the	

	Consumer Rights Directive	Unfair Commercial Practices Directive	Price Indication Directive
	model withdrawal form; Article 6(1)(i) Obligation for consumer to bear the cost of returning the goods and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods; Article 6(1)(j) Obligation to bear trader's reasonable costs in case of withdrawal Article 6(1)(k) Absence of the right of withdrawal and conditions of losing this right;	existence of such a right.	
VI. Legal terms			
VI.1. **Codes of conduct**	Article 6(1)(n) The existence of relevant codes of conduct, and how copies of them can be obtained, where applicable;		
VI.2 **Out-of-court complaint and redress mechanisms**	Article 6(1)(t) Available out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.		