European Commission

Study for the Fitness Check of EU consumer and marketing law

Final report Part 1 – Main report

Prepared by Civic Consulting
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CIVIC CONSULTING

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Study for the Fitness Check of EU consumer and marketing law

Final report Part 1 – Main report

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Abstract

This evaluation study was conducted by Civic Consulting in cooperation with KU Leuven CCM in the framework of the Fitness Check of EU consumer and marketing law. It assesses the effectiveness, efficiency, coherence, relevance and EU added value of five EU consumer and marketing law directives – the UCPD, PID, MCAD, UCTD, and ID. A range of methodological tools were employed, including legal analyses in all Member States, a broad interview process at EU and MS level, an open consultation, a survey of qualified entities, and a comprehensive analysis of costs and benefits of the legislation covered. The study concludes that the assessed legislative framework is considered to be broadly fit for purpose. During the last decade, in spite of the financial crisis, consumer trust has increased across the EU, corresponding to the significant benefits in terms of improved levels of consumer protection that the directives have brought for many Member States. All directives subject to this study are also considered to have contributed to removing obstacles to the Internal Market. In light of technological innovations in the online environment, and the increase of EU cross-border B2C trade, the relevance and the added value of EU action in the area of consumer protection has even become more pronounced. Certain problems were also identified regarding effectiveness, coherence and, consequently regarding efficiency, in terms of overlaps and inconsistencies between rules. Specific recommendations focus on improvements of the EU legislative framework regarding unfair commercial practices and marketing, contract conclusion and performance, and injunctions.

Résumé

La présente étude d'évaluation a été réalisée par Civic Consulting en coopération avec l'institut CCM de l'Université Catholique de Louvain (Belgique) dans le cadre du bilan de qualité concernant le droit européen en matière de protection des consommateurs et de marketing. Elle évalue l'efficacité, l'efficience, la cohérence, la pertinence et la valeur ajoutée européenne de cinq directives relatives au droit européen en matière de protection des consommateurs et de marketing, à savoir les directives UCPD, PID, MCAD, UCTD et ID. Un ensemble d'outils méthodologiques ont été utilisés, dont des analyses juridiques dans l'ensemble des États membres, des entrevues à grande échelle aux niveaux européen et des États membres, une consultation ouverte, une enquête d'entités qualifiées, et une analyse complète des coûts et avantages liés à la législation couverte. L'étude conclut que le cadre législatif évalué est considéré comme généralement adapté à l'objectif poursuivi. Malgré la crise financière, sur la dernière décennie, la confiance des consommateurs s'est accrue à travers l'Union européenne (UE), en correspondance avec les avantages significatifs en termes d'amélioration des niveaux de protection des consommateurs obtenus grâce aux Directives pour de nombreux États membres. Toutes les directives soumises à la présente sont également considérées comme ayant contribué à éliminer les obstacles au marché intérieur. Étant donné les innovations technologiques de l'environnement en ligne et l'augmentation du commerce européen B2C (business-to-consumer, entreprises vis-à-vis des consommateurs) transfrontalier, la pertinence et la valeur ajoutée de l'action de l'UE dans le domaine de la protection des consommateurs sont même devenues encore plus évidentes. Certains problèmes ont également été identifiés en ce qui concerne l'efficacité, la cohérence et, par conséquent, l'efficience, en termes de chevauchements et de contradictions entre les règles. Les recommandations spécifiques se concentrent sur les améliorations du cadre législatif européen concernant les pratiques commerciales déloyales et le marketing, la conclusion de contrats et leur exécution, et les actions en cessation.

1. Introduction

The European Commission's Directorate General for Justice and Consumers has commissioned a study to support the Fitness Check of EU Consumer law, conducted by Civic Consulting in cooperation with KU Leuven CCM. This report is the final deliverable of the study.

The report presents the background and methodology of the study, provides detailed answers to the evaluation questions, as well as conclusions and recommendations. It also describes the work carried out and provides a technical overview of the evaluation process. The report consists of four parts:

Part 1 of the report is structured as follows:

Section 2 describes the evaluation;

Section 3 describes the background of the study;

Section 4 presents the evaluation themes and questions;

Section 5 describes the methodology of the study;

Section 6 presents answers to the evaluation questions;

Section 7 provides the problem definition; and

Section 8 presents study conclusions and recommendations.

The Annexes of this part of the report present information on the methodological tools applied and other relevant study results.

Part 2 of the report provides the detailed results of the open public consultation on the Fitness Check of EU consumer and marketing law (consultation report).

Part 3 of the report presents the 28 country reports prepared in the context of this study.

Part 4 of the report presents additional evidence collected, including:[1]

- The results of the survey of qualified entities;
- The results of the business interviews and of the extrapolation of business costs to the EU level;
- The results of the panel data analysis.

[1] As is the case with the results of the public online consultation (Part 2) and the country reporting (Part 3), the evidence presented in Part 4 feeds into the cross-cutting analysis of Part 1. It presents methodological details and a full set of results per analysis, for reference purposes.

2. Description of the evaluation

This section outlines the objectives and scope of the study, as indicated in the TOR. It then describes the thematic coverage, and presents the tasks to be performed.

2.1. The Fitness Check of EU Consumer Law

According to the TOR of the present study, the Fitness Check of EU consumer law covers the following EU consumer and marketing law directives:

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

Also relevant are the most recent instrument of the EU horizontal consumer legislation, the Consumer Rights Directive 2011/83/EU, and existing sector-specific consumer protection rules and other EU legislation related to retail commerce (see below).

In contrast, the following are or have recently been subject to separate reviews/assessments and therefore outside of the scope of this Fitness Check:

- Package Travel Directive 90/314/EEC, which will be replaced by a new Directive 2015/2302/EU as from 1 July 2018;
- Timeshare Directive 2008/122/EC, which was recently assessed by the Commission (report of 16 December 2015);
- Consumer Protection Co-operation (CPC) Regulation 2006/2004/EC that the Commission has proposed to replace with a new CPC Regulation (COM (2016)283 final);
- Communication and Recommendation on Collective Redress – the Commission is currently assessing how the Recommendation has been implemented and if any further action, potentially including legislative measures, is needed;
- The Digital Contracts Proposals of December 2015 for 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 negotiations in the European Parliament and Council[2].

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

The Fitness Check will assess whether the objectives of the covered directives have been efficiently achieved and fully delivered, and whether the directives have efficiently achieved consumer protection and market integration objectives. It will analyse whether they have usefully contributed to the Single Market by enhancing consumers' trust, as well as by removing unjustified regulatory obstacles hindering cross-border trade in goods and services.

In addition, the Fitness Check will assess the complexity and potential for rationalisation and improving coherence as well as simplification of the current regulatory framework and the reduction of regulatory costs and burdens including administrative burdens, while guaranteeing a high level of consumer protection. The Fitness Check will also explore whether and to what extent codification or recast of EU consumer law into a horizontal EU instrument could bring added clarity, remove overlaps, and fill any gaps in order to increase transparency, legal certainty and accessibility of the EU acquis in this area.

The Fitness Check will also identify and recommend ways to facilitate uniform enforcement and application of the consumer law directives, for instance through further harmonisation, targeted legislative adjustments on procedural aspects and/or further guidance for enforcement authorities and stakeholders, self- and co-regulatory actions and awareness-raising/training activities. In this respect the Fitness Check will consider different aspects of private and public enforcement in particular in domestic context. The Fitness Check will further assess how well these legal instruments fit within the entire EU regulatory framework in this policy area and sector.

Several studies are undertaken by the Commission to support the Fitness Check and the evaluation of the Consumer Rights Directive. These include:

- A *consumer market study to support the Fitness Check* (lot 3) which explores to what extent consumers are aware of their rights, are willing and able to make use of them, what is the nature and prevalence of problems consumers encounter when executing their rights, and what benefits the respective EU law instruments bring to consumers;
- A separate evaluation study of the Consumer Rights Directive, which will feed into the Report on the implementation of the Consumer Rights Directive;
- The evaluation study of the Sales and Guarantee Directive (lot 2), which assesses the costs and benefits for consumers and traders of aligning the rules of the Directive for face-to-face sales of goods to those in the proposed Directive on online and other distance sales of goods (which is part of the Digital Contracts Proposals);[3]
- The present *study to support the Fitness Check of EU Consumer law* (lot 1 or 'main study') dealing with the remaining five of the six above-mentioned directives subject to Fitness Check.

The studies are interlinked and serve the overall goal of creating a solid evidence base for the Fitness Check.

2.2. Objectives and thematic scope

As indicated in the TOR, this evaluation study supports the European Commission's Fitness Check on EU consumer law and assesses the effectiveness, efficiency,

[3] See: http://ec.europa.eu/justice/contract/digital-contract-rules/index_en.htm.

coherence, relevance and EU added value of the following five EU consumer and marketing law directives in line with market and technology developments:

- Unfair Contract Terms Directive;
- Unfair Commercial Practices Directive;
- Price Indication Directive;
- Misleading and Comparative Advertising Directive; and
- Injunctions Directive.

The TOR highlight that while the Consumer Rights Directive is not covered by the present study as it is subject to a separate evaluation, the present study needs as part of the coherence assessment to examine specific aspects of interplay between the Consumer Rights Directive and the five directives covered in this study. Furthermore, the evaluation of the Sales and Guarantee Directive is carried out through a separate study, due to requirements linked to the adoption of the Commission proposal on online and other distance sales of goods on 9 December 2015.

As indicated in the TOR, the present study also addresses the interplay between the directives subject to this study with the existing sector-specific consumer protection rules in passenger transport, electronic communications, energy and consumer financial services and the relevant rules in the E-Commerce Directive 2000/31/EC and Services Directive 2006/123/EC.

2.3. Geographical coverage and time period

The evaluation study covers the EU 28 and its methodology ensures a geographically balanced representation of Member States' authorities, businesses and consumers, while providing (insofar as possible) quantifiable and representative results.

The evaluation covers the current situation, also considering developments in the recent past that are relevant for the assessment.

2.4. Tasks to be performed

The TOR define six main tasks, of which several consist of multiple sub-tasks, and relate to the general and specific evaluation questions presented in the next section. The six tasks are:

- Legal analysis (Task 1);
- Literature review (Task 2);
- Consultation – interviews, surveys, stakeholder events and case study interviews (Task 3);
- Costs and benefits analysis (Task 4);
- Recommendations for future action (Task 5);
- Establishing problem definition and baseline scenario (Task 6).

They are described in more detail in the table on the following pages.

Table 1: Overview of tasks for the study to support the Fitness Check of EU Consumer law as provided in Terms of Reference

Task	Description	Sub-tasks/details
1. Legal analysis	To respond to the general and specific evaluation questions, the Contractor will carry out an analysis of the national horizontal and sector-specific, both substantive and procedural consumer law, and civil and commercial law and case law, i.e., enforcement decisions of national authorities (consumer protection and sector specific regulators) and court rulings, in the 28 EU Member States.	The Contractor will use the information contained in the Commission's Consumer Law Databases (Consumer Law Compendium, Unfair Commercial Practices databases) and updated information. The Contractor should also use the available national case-law databases. The analysis should include, for example, comparison of how many business-to-consumer (B2C) disputes have been decided by the national jurisdictions on the basis of Consumer law directives covered by this study in comparison with the total B2C disputes decided on the basis of other national legislation. Regarding the transposition of the directives covered by this Study into national law, the Contractor will: - Produce an overview of the national laws transposing the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the Price Indication Directive and the Injunctions Directive. Except to the extent necessary to fulfil this task, the contractor will not engage in a general transposition check of the national transposition laws. - On the basis of the texts of national law provisions to be supplied by the Commission, the Contractor will provide an overview of national laws of the Member States going beyond the minimum harmonisation requirements of the directives covered by this study; - Update the available information on the national law requirements going beyond the Unfair Commercial Practices Directive in the areas of immovable property and financial services; - Update the information on Member States which have entirely or partly applied the Unfair Commercial Practices Directive to B2B transactions and to business transactions with other entities (legal persons, such as schools, hospitals, NGOs, civic associations or unions of flat owners, who are acting for not-for-profit purposes but do not qualify as "consumers" under the current definition). The Contractor will, in particular, update the information used in the 2013 Communication and Report of the Commission and will take into account the national transposition rules of the Misleading and Comparative Advertising Directive; - Update the available information on the transposition and national law

		requirements going beyond the Misleading and Comparative Advertising Directive, where those measures are not an application of the Unfair Commercial Practices Directive to B2B; - Analyse national laws and self-regulatory measures that control the fairness of B2B relations in a way comparable with the rules of the Unfair Contracts Terms Directive, including in specific sectors, such as the food supply chain, where specific legislative and self-regulatory measures have been introduced, and in business transactions with the other above-mentioned non-consumer entities.
2. Literature review	To respond to the general and specific evaluation questions, the Contractor will analyse the available (both online and offline) legal literature in the 28 Member States, such as reports by public authorities, consumer and business organisations, academic organisations and legal practitioners. The Contractor will also analyse relevant reports produced in third countries and international organisations which deal with EU consumer law, in particular insofar as they describe any effects of EU consumer law on the development of consumer protection outside EU.	Furthermore, the Contractor will analyse the available recent studies and surveys to assess and give an overview of the level of traders' and consumers' awareness of the rules in the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the Misleading and Comparative Advertising Directive and the Price Indication Directive, as in particular demonstrated by their practical application. For each of these directives, the Contractor will also analyse the available (both online and offline) sources, at EU level (in particular, Eurobarometer surveys, consumer market and conditions scoreboards, other reports) and at national level (in particular, reports by enforcement authorities, academic research) to compare the situation before their adoption with the developments after their adoption and at present. This should include the consumer welfare, the level of compliance of businesses, factors that have either contributed or stood in the way of achieving their objectives and any other major effects. Furthermore, using the available resources (such as the ECC reports, harmonised complaints database52, Eurobarometer surveys, consumer market and conditions scoreboards, other reports) the Contractor will establish the trends and evolution of consumer problems within the scope of these four Directives – both per directive and subject area whenever possible (for example, problems related to unfair commercial practices in the energy or in the travel sector).

3. Consultation – interviews, surveys, stakeholder events and case study interviews	To respond to the general and specific evaluation questions, the Contractor will carry out as a minimum the following data collection activities in the 28 Member States, based on questionnaires to be prepared in coordination with the Commission: - Interview national consumer enforcement authorities, responsible ministries and the relevant national regulatory authorities in the selected areas where sector-specific EU consumer protection rules exist as well as the European Consumer Centres (ECCs); - Interview national consumer associations (as well as their EU umbrella associations), including associations active in the selected areas where sector-specific EU consumer protection rules exist; - Interview business associations (as well as their EU umbrella associations), including associations in the selected areas subject to sector-specific EU consumer protection rules (i.e., all major business organisations in each of the Member States); - Perform "case studies" with individual companies: at least 5 small-size and 5 micro companies per Member State, active in retail trade and e-commerce as well as trading cross-border in the EU. The Contractor will prepare, in coordination with the Commission, an appropriate questionnaire for each target group.	A consumer survey (as well as mystery shopping and behavioural experiments) on the issues covered in the general and specific evaluation questions will be carried by means of a separate study (Consumer Market Study). The Commission will provide the Contractor with the outcomes of these activities that the Contractor will integrate into its conclusions. In the course of the study the Contractor will participate in two stakeholder events in Brussels (at the Commission's premises) dedicated to the presentation and discussion of 2nd interim report of the study: (1) a workshop with the Member States' authorities (provisional time – beginning October 2016), and (2) the "Consumer Summit" organised by the Commission and dealing with the Fitness Check (provisional dates – 19–20 October 2016). For both events, in consultation with the Commission, the Contractor will provide for up to 5 senior speakers (covering their full individual costs) who will deliver detailed presentations and, where necessary, moderate certain discussions. The Contractor will prepare synthesis reports of these stakeholder events and will take their conclusions into account in the final report of the study. The Commission will organise an online public consultation of 12 weeks. The Contractor will translate the replies received in languages other than EN, FR, DE into English, analyse and summarise the responses submitted in this public consultation. It will prepare a separate analysis of this online public consultation (not exceeding 10 pages) for integration into the final report. Furthermore, the Contractor will draw up the overall synopsis report (not exceeding 10 pages, also to be integrated in the final report) covering the results of all the different consultation activities that it undertook directly as well as those activities in which it was involved (i.e. the online public consultation, stakeholder workshops). The synopsis report must consist of the following elements: Documentation of each consultation activity undertaken, Information on which stakeholder groups participated, which interests they represented and whether all identified stakeholder groups have been reached, Description of the results of each consultation activity and, if different consultation activities have been undertaken on the same consultation

		scope, a comparison of their results including interdependencies, consistencies or contradictions, For ad hoc contributions received outside the formal consultation context, a description of the origin of the contributions received including identification of the type of stakeholder and their represented interests, Feedback on how the results of the consultation have fed into the report. In carrying out these consultation activities and in producing the respective documents, the Contractor will co-operate closely with the other contractors involved in the complementary studies that contribute to the Fitness Check mentioned above, including in integrating their output in the documents and reports that it will produce.
4. Costs and benefits analysis	The objective of this analysis is to respond both on a monetary and non-monetary basis (on economic, social, and environmental aspects) to the general and specific evaluation questions to support the assessment of the implementation of the individual directives, as well as their combined impact.	No additional sub-tasks or details provided in the TOR.
5. Recommendations for future action	On the basis of the overall findings of the study, the Contractor will make recommendations for EU legislative and/or non-legislative actions as regards identified gaps, obsolete provisions or codification and recast needs of the current rules. In each case, the Contractor will carefully weigh the pros and cons. The analysis shall be backed by legal and, where appropriate, economic and policy-based arguments assessing the overall expected impacts of the different recommendations.	No additional sub-tasks or details provided in the TOR.
6. Establishing problem definition and baseline scenario	For this task the contractor will follow the latest Better Regulation Guidelines (2015) and the accompanying Toolbox which provides complementary guidance on specific impact assessment elements. Based on the results of the data gathering and in consultation with the Commission, in the context of this task the Contractor will provide: 1) Description of the problem and why is it a problem (problem definition); 2) Description of the baseline scenario, i.e. no change to the existing rules	The problem definition will consider the following aspects: What is the issue or problem that may require action? What is the size of the problem? Why is it a problem? What are the main drivers? Who is affected by the problem, in what ways, and to what extent? What is the EU dimension of the problem? How would the problem evolve, all things being equal?

Source: Civic Consulting, based on TOR.

3. Background of the evaluation

In this section we describe the background of the Fitness Check. We describe the development of the EU consumer acquis before the Fitness Check, the directives subject to analysis, and the legal framework and lifecycle of a commercial transaction.

3.1. Development of the EU consumer acquis until the Fitness Check

The EU consumer acquis developed in several phases. At the outset, under the principle of unanimity, minimum harmonisation directives with little detail were adopted. After the Single European Act and the introduction of majority voting in the area of internal market, the level of detail of consumer legislation increased greatly. The last phase, beginning roughly with the E-Commerce Directive of 2000, was marked by the trend towards total harmonisation where Member States could agree on a single set of rules.

The step by step development of EU consumer law had led to inconsistencies in the legal framework. Moreover, market studies revealed that in many areas of business, cross-border trade and therefore the internal market developed only slowly. Therefore, since the 2000s, the EU has attempted to make the system of EU law more coherent, one result of which was the Consumer Rights Directive of 2011 with horizontal rules for a number of core issues of consumer law, such as the notion of consumer.

At the same time, it became clear that rules for “normal” goods and services do not always fit for financial services, and while there are still common features of “normal” consumer law and financial services law, the recent trend has been to deal with them in separate legislation, which was, for example, marked by the exemption of financial services from the scope of application of the Consumer Rights Directive 2011/83/EU and also from their different treatment in the Unfair Commercial Practices Directive 2005/29/EC. Similarly, special rules have been adopted for consumer protection in the area of services of general interest because services such as the supply with energy and the provision of telecommunication services show some special features as compared with “normal” goods and services.

The special treatment of financial services was also the result of behavioural research that provides evidence for special vulnerabilities of consumers in general but particularly in that area. Increasing knowledge of “irrational” behaviour of consumers is also considered in EU legislation, in particular through the recognition of the “vulnerable consumer” in the UCPD but also in other areas of consumer law.

Assessments of the (then existing) Consumer Acquis have been made before, in particular with 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, and with the Consumer Law Compendium of 2008. That review, however, was limited to consumer contract law, while the law of unfair competition was, again, developed separately, although instruments of EU consumer contract law and of unfair commercial practices law overlap, in particular in regulating the pre-contractual phase.

Finally, societal and technological developments, and in particular the “digital revolution”, trigger the need for a new and broader assessment of the suitability, or “fitness”, of the current legal framework to achieve its goals.

3.2. The directives subject to this study

Five directives are subject to this study: the Unfair Contract Terms Directive 93/13/EEC, the Unfair Commercial Practices Directive 2005/29/EC, the Price Indication Directive 98/6/EC, the Misleading and Comparative Advertising Directive 2006/114/EC, and the Injunctions Directive 2009/22/EC. Of course, as indicated above, these legislative acts cannot be assessed in isolation of each other but also of other legislation which does not form part of this assessment, in particular the Consumer Rights Directive 2011/83/EC and the Consumer Sales and Guarantees Directive 1999/44/EC.

Only the *Unfair Contract Terms Directive* belongs to the area of consumer contract law. It protects consumers against the use by traders of standard contract terms which are considered to be unfair (see box below for more details). It has been reviewed several times, first in 1999 at which time already recommendations were made on its improvement, and again in the above-mentioned review of the Consumer Acquis.

The Directive also has, in the interpretation of the Court of Justice, a strong procedural dimension. It is within this dimension that it overlaps to a certain extent with the Injunctions Directive 2009/22/EC, although the procedural elements of the Unfair Contract Terms Directive reflect the weaker position of consumers rather than qualified entities.

Unfair Contract Terms Directive (93/13/EE, UCTD)

The Unfair Contract Terms Directive applies to business-to-consumer transactions. 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.

In addition, the Directive requires written contract terms to be drafted in plain and intelligible language. Contract terms whose meaning is unclear must be interpreted as favourably as possible for the consumer, and contract terms which are not transparent and do not allow consumers to understand their rights and obligations under the contract may be considered as unfair.

The UCTD applies to both online and offline environments, and to all products, including digital content. It contains an indicative and non-exhaustive list of standard terms that may be considered as unfair.

The UCTD is a minimum harmonisation instrument and Member States can provide in their national legislation for stricter consumer protection rules. Many of them have used this possibility by, for example, introducing ‘black lists’ of unfair terms (contract terms considered unfair in all circumstances) and/or ‘grey lists’ of contract terms (terms presumed to be unfair unless proven to the contrary).

The *Injunctions Directive* was first adopted in 1998 and recast in 2009. It imposes on Member States the obligation to enable so-called ‘qualified entities’ to seek an injunction in front of a court or of an administrative authority to stop an act contrary to the EU consumer laws, which harms the collective interests of consumers (see box below for more details).

Being from the same phase of EU consumer law as the Unfair Contract Terms Directive, the Injunctions Directive is a minimum harmonisation instrument, and Member States have introduced a variety of collective instruments with effects beyond injunctions; an issue that the European Commission has taken up in its 2013

Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

Moreover, private and public law enforcement under the Injunctions Directive has been complemented, at the EU level, with the regime of the Consumer Protection Cooperation Regulation.

Injunctions Directive (2009/22/EC, ID)

The Injunctions Directive imposes on Member States the obligation to enable qualified entities (in particular consumer organisations and/or public bodies) to seek an injunction in front of a court or of an administrative authority to stop an act contrary to the EU consumer laws (as listed in the Annex to the Directive and as transposed into national legal orders of the Member States), which harms the collective interests of consumers. Accordingly, the Injunctions Directive provides for a tool of enforcement of the consumers' rights granted, among others, by the Unfair Commercial Practices Directive, the Sales and Guarantees Directive, the Unfair Contract Terms Directive and the Consumer Rights Directive.

It also facilitates the use of injunctions in a cross-border context by allowing a qualified entity from one Member State to seek an injunction in another Member State where the infringement originated.

Both the Unfair Contract Terms Directive and the Injunctions Directive interact, or overlap, with the *Unfair Commercial Practices Directive* 2005/29/EC, and the Unfair Commercial Practices Directive also interacts in many ways with other consumer contract law instruments such as the Consumer Rights Directive and the Consumer Sales and Guarantees Directive.

The Unfair Commercial Practices Directive protects consumers against practices by businesses which are contrary to requirements of professional diligence and which affect consumer behaviour, such as misleading and aggressive commercial practices (see box below for more details).

The Directive interacts with all consumer contract law directives that provide for pre-contractual information obligations in that it treats a breach of such duties as a misleading omission. Moreover, in the case of *Nemzeti Fogyasztóvédelmi Hatóság,* the Court of Justice has treated erroneous information in an individual case as an unfair commercial practice in the terms of the Unfair Commercial Practices Directive. At the same time, at least under some national case law, the use of unfair contract terms constitutes an unfair commercial practice in the terms of Directive 2005/29/EC, and the same was held to apply to breaches of the Consumer Sales and Guarantees Directive. Consequently, the remedies of both the consumer contract law directives and the Unfair Commercial Practices Directive apply to such breaches. Moreover, the Unfair Commercial Practices Directive is one of the legislative acts which can be enforced by use of the Injunctions Directive.

Member States have adopted or maintained additional rules in the areas of financial services and immovable property (which are exempted from the full harmonisation approach of the Directive), and also the EU has adopted sector specific legislation in these areas such as the Consumer Credit Directive. Moreover, some Member States have extended the personal scope of application of the Directive by using the same or similar rules for business-to-business relationships.

Unfair Commercial Practices Directive (2005/29/EC, UCPD)

The UCPD applies to business-to-consumer transactions. It applies to all commercial practices before, during and after the transaction, including in the online environment, and to all products, including digital ones. It provides for full harmonisation of Member States' legislation that protects consumers against unfair commercial practices harming consumers' economic interests, with the exception of the areas of financial services and immovable property, where Member States may go further than the Directive.

The Directive protects consumers against unfair commercial practices of traders by: providing, in Annex I, a black-list of 31 specific commercial practices which are prohibited in all circumstances; prohibiting commercial practices which are considered as misleading or aggressive; and 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 unfairness of a commercial practice is assessed against the 'average consumer' benchmark, which has been developed by the Court of Justice of the EU. The average consumer is 'reasonably well-informed and reasonably observant and circumspect', taking into account social, cultural and linguistic factors. If a commercial practice is directed at a particular group of consumers then an average member of that group is the benchmark. The Directive also provides specific protection for certain groups of consumers defined as particularly vulnerable.

Business-to-business relationships are partially addressed by the *Misleading and Comparative Advertising Directive* 2006/114/EC. Being the successor of the Misleading Advertising Directive of 1984 as amended in 1997, its substantive scope of application is much more limited than the one of the Unfair Commercial Practices Directive (see box below for more details).

Overlaps with the regime of the Unfair Commercial Practices Directive can stem from two reasons: First, as mentioned above, some Member States have extended the regime of the Unfair Commercial Practices Directive to business-to-non consumer relationships. Second, by using unfair commercial practices against consumers, businesses may also violate the interests of their honest competitors, thus, of other businesses.

Misleading and Comparative Advertising Directive (2006/114/EC, MCAD)

The MCAD provides a minimum legal standard of protection of businesses against misleading marketing. Member States can provide in their national legislation for stricter rules to protect businesses in this area.

The MCAD also lays down fully harmonised uniform rules on comparative advertising ensuring that it compares "like with like", is objective, does not denigrate or discredit other companies' trademarks and does not create confusion among traders. Whilst the latter rules have fully harmonised the law of the Member States, the rules on misleading advertising constitute a minimum standard.

As a number of consumer contract law directives and the directives dealing with unfair commercial practices, the *Price Indication Directive* applies at the pre-contractual stage. The Price Indication Directive deals with the indication of the selling price and the price per unit of measurement of products (see box below for more details).

It is a minimum harmonisation directive which also includes important regulatory options that many Member States have used in their national implementation, and the 2006 Communication on the Price Indication Directive concluded that due to extensive use of those options, the national price indication rules diverge significantly.

Price Indication Directive (98/6/EC, PID)

The PID requires traders to indicate the selling price and the price per unit of measurement of products offered to consumers, both at the marketing and pre-contractual stages. The objectives of this Directive are to improve consumer information and to facilitate comparison of prices; objectives that are also pursued with pre-contractual information obligations.

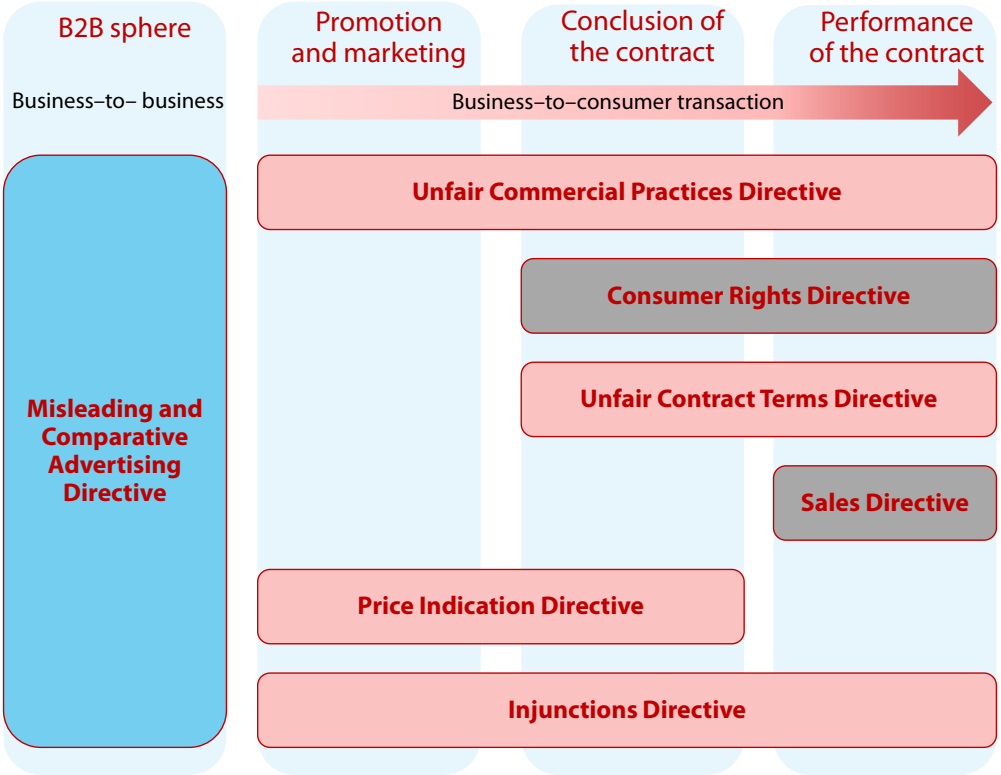
The PID provides for minimum rules and it also includes regulatory options for Member States to derogate from its requirements, in particular the option to exempt small businesses from the obligation to indicate the unit price.

3.3. Legal framework and lifecycle of a commercial transaction

As the TOR indicate, the five Directives analysed in this Fitness check overlap on the time-scale of the lifecycle of a commercial transaction, and they also overlap with other EU consumer legislation such as the Consumer Rights Directive.

Several phases of a commercial transaction can be distinguished, as is depicted in the following figure.

Figure 1: lifecycle of a commercial transaction



Source: Civic Consulting based on TOR.

First, there is the stage of *promotion and marketing* at which the potential contracting partner is still unknown. This stage is covered, in business-to-consumer relationships, thus when it comes to marketing towards consumers, by the Unfair Commercial Practices Directive, otherwise by the (less comprehensive) Misleading and Comparative Advertising Directive. If a commercial communication is addressed to both consumers and non-consumers, both directives apply cumulatively.

The Price Indication Directive applies cumulatively with the Unfair Commercial Practices Directive, as it deals with the indication of prices with products offered by traders to consumers, including during the advertisement stage. As the Unfair Commercial Practices Directive, it aims at improving consumer information, and in particular at facilitating the comparison of prices.

Those general rules are complemented by sector specific advertising rules, such as the advertisement rules of the Consumer Credit Directive and the Mortgage Credit Directive. Moreover, the E-Commerce Directive provides for certain rules that apply even before the pre-contractual stage.

Once the trader offers to purchase a specific product at a stated price, specific information obligations of the Unfair Commercial Practices Directive for “invitations to purchase” come into play. In the pre-contractual stage, they overlap with pre-contractual information obligations that form part of almost all consumer contract law Directives, in particular the Consumer Rights Directive, the Timeshare Directive, the Package Travel Directive and all the directives related to financial services, such as consumer credit, mortgage credit and payment services. Moreover, the Price Indication Directive still applies. Beyond information, rules on specific commercial practices such as tying and bundling can be found in sector specific legislation, such as Directive 2014/92/EU in relation to basic bank accounts, whilst they are also subject to the general Unfair Commercial Practices Directive.

The second phase of a commercial transaction indicated in the figure above is the *conclusion of the contract*, i.e. the formation, the form, the effect and validity of a contract. Specific issues regarding the conclusion of B2C contracts (such as the confirmation of the contract) are regulated by the Consumer Rights Directive and the E-Commerce Directive.

Rules that apply during the *performance of a contract* (the third stage of a B2C commercial transaction indicated in the figure above) or in the case of non-conformity of goods or services with the contract, are dealt with by, for example, the Consumer Sales and Guarantees Directive, by financial services legislation such as the Consumer Credit Directive and the Mortgage Credit Directive and by services of general interest legislation such as the Electricity Market Directive or the Gas Market Directive. Moreover, the Unfair Contract Terms Directive is of great relevance as it deals with the fairness and therefore validity of contract terms that regulate the rights and obligations of parties during the contract.

As mentioned above, non-compliance with rules on the contractual stage may at the same time constitute an unfair commercial practice, which was one of the novelties introduced with the Unfair Commercial Practices Directive. The Unfair Commercial Practices Directive, however, does not (expressly) require Member States to afford the individual concerned a remedy. Thus, the same situation may not only come under different remedial systems but those remedies may also be pursued by different actors.

In the situation where a dispute between the parties arises, EU law provides for a number of instruments including the ADR Directive, which covers disputes concerning contractual obligations stemming from sales or service contracts between EU consumers and traders, and the ODR Regulation, under which the European Commission launched the ODR platform. The other directives do not normally deal with this situation except that they require Member States to provide for effective penalties and sanctions for the breach of the provisions of a particular legislative act that can then be interpreted as the necessity of an effective remedy, as in the recent consumer credit law case of *LCL Le Crédit Lyonnais*.

In contrast, this is not the realm of the Injunctions Directive that applies independently from a dispute between the parties of an individual contract. The Injunctions Directive lies somewhat besides the life-cycle of a particular transaction since it addresses structural problems at all stages of that life-cycle but at a collective level (the cross-cutting nature is indicated in the figure). Thus, with an injunction under the Injunctions Directive, a qualified entity may address, for instance, misleading lottery advertising, incorrect pre-contractual information or unlawful contractual conduct.

4. Evaluation themes and questions

In this section, we provide an analytical summary of the general and specific evaluation questions.

The TOR set out 17 general evaluation questions for the Fitness Check which serve as a basis for the 99 specific evaluation questions for the study, grouped into 14 evaluation themes under the five evaluation criteria effectiveness, efficiency, coherence, relevance and EU added value. The specific evaluation questions refer to the five directives covered by the study or are cross-cutting in nature and form the overall structure for the evaluation.

For an overview of general and specific evaluation questions, please refer to the following table.

Table 2: Overview of general and specific evaluation questions for the Study to support the Fitness Check of EU Consumer law

Evaluation criteria	General Evaluation Questions in the Terms of Reference	Evaluation themes	Specific Evaluation Questions in the Terms of Reference
Effectiveness	▪ What progress has been made over time towards achieving the objectives of the directives subject to Fitness Check? Is this progress in line with the initial expectations? ▪ What is the level of compliance of businesses with their provisions? ▪ Which main factors (e.g. implementation by Member States, action by stakeholders) have contributed to or stood in the way of achieving these objectives? ▪ Beyond these objectives, have these instruments led to any other significant changes, both positive and negative?	Practical effectiveness of current rules: Rules for consumer protection	UCTD: 6 Evaluation Questions (EQs) UCPD: 8 EQs PID: 2 EQs ID: 6 EQs
		Practical effectiveness of current rules: Rules for business protection	MCAD: 7 EQs
		Practical effectiveness of the current rules in eliminating obstacles to the Internal Market	Cross-cutting: 2 EQs UCTD: 3 EQs UCPD: 3 EQs MCAD: 4 EQs ID: 3 EQS
Efficiency	▪ What are the costs and benefits (monetary and non-monetary) associated with the application of these legal instruments in the Member States? ▪ What good practices in terms of their cost-effective application can be identified? ▪ What, if any, specific provisions in these instruments can be identified that make a cost-effective implementation more difficult and hamper the maximisation of the benefits? In particular, what is the (unnecessary/cumulative) regulatory burden identified? ▪ What are the specific challenges to SMEs, in particular micro enterprises, with respect to the implementation of these instruments?	Costs and benefits for consumers	2 EQs
		Costs and benefits for traders	6 EQs
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	Interplay amongst the information requirements in the horizontal consumer law instruments	5 EQs

	complementary to other Union initiatives in the area of 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 and other distance sales of goods under the DSM Strategy, and other pieces of Union legislation? How do they affect the application/performance of these instruments? ▪ How do the general EU regulatory framework and the interactions between the different instruments subject to Fitness Check affect their separate and overall impacts?	Interplay between the Injunctions Directive and other enforcement instruments of consumer law	4 EQs
		Interplay with other EU horizontal legislation with a consumer dimension	2 EQs
		Interplay with EU sector-specific consumer protection legislation	4 EQs
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?	Relevance for transactions other than business-to-consumer (B2C)	UCPD/MCAD: 7 EQs UCTD: 8 EQs Cross-cutting: 3 EQs
		Potential codification or recast*	3 EQs
		Relevance of the Injunctions procedure	ID: 2 EQs (with a total of 11 sub-questions/items)
		Contractual consequences of unfair commercial practices	3 EQs
		Specific protection for vulnerable consumers	3 EQs
EU added value	▪ What has been the EU added value of the consumer law directives in the context of national horizontal and sector-specific, both substantive and procedural consumer law, and civil and commercial law?		3 EQs
Total	*17 general EQs*		*99 specific EQs*

Source: Civic Consulting, based on TOR. (*) Note: While this table reflects the EQs and their structure provided in the TOR, the issue of whether a single horizontal EU instrument could bring added clarity, remove overlaps and fill the identified gaps in the existing rules is presented separately in the evaluation due to its general nature and importance for simplification and legal certainty. It has also been clarified that the discussion of coherence will consider the issue of cross-border enforcement co-operation, and that information regarding administrative burdens/compliance costs reported in the business interviews will be considered in the discussion of efficiency and resulting recommendations.

5. Methodology

In this section we provide an overview of the methodological approaches applied for implementing the evaluation and addressing the specific tasks provided in the Terms of Reference.

5.1. Structuring the evaluation

The aims of the structuring phase of the study were to conduct an initial literature review and exploratory interviews concerning the functioning of the EU consumer and marketing law framework, to refine the intervention logic for the evaluation and to finalise the methodological approach and related tools for the next project phases.

A total of seventeen exploratory interviews were conducted with EC policy officers and key stakeholders. During this stage, we also informed key stakeholder organisations at both EU and national levels by email about the evaluation and the consultation tools planned in the framework of this study. Concurrently, the Commission informed members of the Consumer Policy Network (CPN), of the Consumer Protection Cooperation network (CPC), of the European Consumer Consultative Group (ECCG) and of the European Consumer Centres (ECCs) about the launch of the online public consultation for the Fitness Check of consumer and marketing law and about the studies undertaken by the Commission, including the present study.[4]

The intervention logic of the EU consumer and marketing law Directives was refined in light of the results of the exploratory research and discussion with the Commission to ensure an in-depth understanding of the context within which the Directives were adopted, the underlying 'theory' of the intervention (how it was expected to work), and their practical implementation, including possible implementation issues at the Member State level. The analytical framework for the evaluation was also revised in light of the exploratory research. The intervention logic of the EU consumer law and marketing Directives is presented in Annex VI and the analytical framework of the evaluation is presented in Annex VII.

Based on the results of the structuring phase, the evaluation team confirmed the applicability of the methodological approach and prepared the methodological tools, such as questionnaires for interviews, and for the survey of qualified entities (see below).

5.2. Legal analysis

The study comprises 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 as well as a cross-cutting EU level legal analysis.

For each Member State, the country-level legal analysis was conducted by a legal expert (in some cases complemented by a second legal expert or researcher) who collected information from the following three main sources:

[4] For further details, please refer to the synopsis report.

- 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.

5.3. Literature review

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 trends and evolution of consumer problems within the scope of the Directives.

Throughout the study phases, we 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;[5] 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.

5.4. Consultation

The following data collection activities were carried out as part of the consultation task for this study based on tailored questionnaires developed for each target group in coordination with the Commission:

- Interviews with national consumer enforcement authorities, responsible ministries and the relevant national regulatory authorities in the selected areas where sector-specific EU consumer protection rules exist as well as the European Consumer Centres (ECCs) in all 28 Member States;

[5] For the full results of the analysis of levels of awareness and key trends, please refer to Annex VIII.

- Interviews with national consumer associations in all 28 Member States as well as their EU umbrella associations, including associations in the selected areas subject to sector-specific EU consumer protection rules;
- Interviews with business associations in all 28 Member States as well as their EU umbrella associations, including associations in the selected areas subject to sector-specific EU consumer protection rules;
- Sectoral business interviews with individual companies in all 28 Member States;
- Evidence collection survey of qualified entities.

The questionnaires are presented in Part 4 of this report.

Legal country experts and researchers in the Member States contacted responsible ministries and authorities, consumer organisations and ECCs, sectoral regulatory authorities and business associations by phone or face-to-face,[6] and conducted 243 interviews in total. The results of these interviews fed into the country-level legal analysis, which was further analysed and synthesised at the EU level in the cross-cutting analysis. The list of interviews conducted with relevant organisations in the framework of this evaluation is presented in Annex II.

Business interviews targeting companies in five sectors (large household appliances, electronic and ICT products, gas and electricity services, telecommunication services, and pre-packaged food and detergents) were conducted to better understand their experience with legislation regarding advertising, marketing, standard contract terms and price indication, and to collect data concerning related costs and benefits. 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. The interviews were conducted by phone using a questionnaire that was developed on the basis of the exploratory research and tested during test interviews with businesses.[7] The final version of the business interview questionnaire is presented in Part 4 of this report. In total, 282 business interviews were completed, checked for quality and analysed. The results of the business interviews are presented in Part 4 of this report and fed into the cross-cutting analysis of costs and benefits.

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. In total, 29 qualified entities from 21 Member States completed the questionnaire. The results of the survey are presented in Part 4 of this report and fed into the cross-cutting analysis on the Injunctions Directive.

Furthermore, from May to September 2016, the European Commission carried out an open public consultation for the Fitness Check of EU consumer and marketing law and covering also the evaluation of the Consumer Rights Directive. The 436 responses to the online survey received from stakeholders across the EU, as well as from non-EU countries, were analysed by the study team, both overall and by type of stakeholder. Additionally, the 55 open submissions received in the context of the consultation, either by email or submitted together with an online survey response, were reviewed in depth, categorised according to recurring topics, and summarised by key theme and

[6] The interviews lasted on average one to several hours, depending on the country and the interviewee.

[7] While the interview questionnaire was designed for interviews to last for around 25-30 minutes on average, interviewers often had to contact interviewees several times to complete the questionnaire and ask for clarifications. Information was also provided in writing.

by type of respondent. The report on the consultation results is presented as Part 2 of this report.

Lastly, initial evaluation results were presented at the Consumer Summit organised by the European Commission on 17 October 2016.[8]

5.5. Analysis of costs and benefits

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.

We 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 (if needed), and we extrapolated the results to the EU level.

We also conducted a panel data analysis with the aim to conclude whether the identified changes towards achieving the objectives of the UCPD can be reasonably attributed to the Directive itself rather than to any other factors, by focusing on the outcome variables of consumer trust and cross-border shopping.

The methodology and results of the specific analyses conducted for assessing the costs and benefits are presented in Part 4 of this report.

5.6. Overall analysis, conclusions, and recommendations

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, we first processed and cross-checked the evidence collected under Tasks 1 to 4. This concerned 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

[8] The presentations as well as the outcomes of the workshops are available on the Consumer Summit webpage: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34204.

evidence collected. Having a clear overview of results obtained throughout the previous tasks separately, we 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.

We also organised an online workshop on the concepts of 'consumer', 'average consumer' and 'vulnerable consumer' on 7 December 2016, where we presented initial conclusions of the evaluation regarding these concepts and insights from behavioural research, and discussed these results with experts in the areas of consumer policy and behaviour, economic decision-making, neuroscience, behavioural law and economics, and the key legal experts. The aim of the workshop was to consider 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. We have taken the results of the workshop into account in the cross-cutting analysis and the related recommendations. The workshop document that was used as the basis for discussion is included in Part 4 of this report.

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, we made sure that the conclusions reflected the findings of the evaluation and that the recommendations addressed the problems highlighted in the analysis.

Further information regarding the methodological approaches applied is provided in the context of the specific report sections presenting results by methodological tool.

6. Answers to the evaluation questions

In this section we present the cross-cutting analysis of the evaluation. It combines evidence collected from all methodological tools and provides detailed answers to the evaluation questions for each of the three analytical clusters: unfair commercial practices and marketing, contract conclusion and performance, and injunctions. The sections below provide answer to the evaluation questions concerning effectiveness, efficiency, coherence, relevance and EU added value.

6.1. Effectiveness

6.1.1. Unfair commercial practices and marketing

6.1.1.1. *Effectiveness of the UCPD in contributing to a high level of consumer protection*

- The overall effectiveness of the principle-based approach under this Directive;

The UCPD prohibits unfair business-to-consumer commercial practices and has a two-layer structure, testing unfairness against: (i) an exhaustive black list of 31 per se misleading or aggressive practices; (ii) general prohibitions of misleading or aggressive practices or practices contrary to the requirements of professional diligence that affect the consumer' economic behaviour (transactional decisions). Importantly, the UCPD is based on full harmonisation, meaning that Member States must adopt national provisions replicating exactly the standard set by the Directive and amend or repeal national provisions that go further than the Directive.[9]

Pursuant to Article 3(1), the UCPD covers all “business-to-consumer commercial practices … before, during and after a commercial transaction in relation to a product”. The concept of “business-to-consumer commercial practices” (hereinafter also referred to as commercial practices) is defined particularly widely as “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers”. According to settled CJEU case law, this concept covers any “commercial acts which clearly form part of an operator’s commercial strategy and relate directly to the promotion thereof and its sales development.”[10] The UCPD covers the full life-cycle of business-to-consumer commercial transactions, i.e. commercial practices at the time of promotion, negotiation, conclusion, performance and enforcement of the contract. In 2013, the European Commission conducted research into how the UCPD was implemented in the Member States and analysed problems in how the Directive was applied and enforced. In the resulting 2013 Communication on the application of the Unfair Commercial Practices Directive, the Commission concluded that the Directive "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", and stated that the benefits of the Directive mainly stem from its horizontal "safety net" character and its combination of principle-based rules with a black list of unfair commercial practices.[11]

[9] See also the section of the background of the study.

[10] See the landmark judgment of the CJEU, Joined Cases C-261/07 and C-299/07, 23 April 2009, para 50, and subsequent UCPD case law.

[11] COM(2013) 138 final.

The reasoning behind the Directive's principle-based approach is focused on the inability of rigorous rules to regulate adequately each and every case. It allows combating of unfair practices that do not fall under any of the black listed items, and is 'future-proof' in that it allows national authorities and courts to adapt their assessments to the rapid evolution of new products, services and selling methods. This open text approach of the UCPD also offers leeway to competent authorities to develop their enforcement strategy.

In practice, decisions of enforcement authorities and courts often involve an application of the principle-based approach of the Directive, as evidenced in the country research. It is, however, not possible to estimate the share of cases involving the principle-based approach of the general prohibitions in the total number of cases decided on basis of the UCPD. Even general statistical data on the practical application of the UCPD in Member States is scarce and often incomplete. In most Member States, quantitative court data and ADR statistics are either not available or do not provide a sufficient level of detail. 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 disputes decided on basis of the UCPD was 20% or more of all B2C cases. The highest share was reported from Estonia, where according to Consumer Complaints Committee statistics 98% of the 538 cases in 2015 were decided on basis of the UCPD (i.e. 527 cases).[12] In France, according to statistics of the national enforcement body (the DGCCRF) 28% of the 9 960 investigations in the same year were conducted on basis of the UCPD (i.e. 2 802 cases).[13] Even in some countries with a low share of cases decided on basis of the UCPD, the absolute number of cases was considerable. For example in Portugal, it is estimated that 1% of relevant court cases (10 of 1 000) in 2015 were decided on basis of the UCPD, and 5% of the ADR cases (750 of 15 000, including the so-called 'Peace Courts'). In other countries, though, the absolute number of B2C disputes documented was low (e.g. in Slovenia, Bulgaria and Croatia less than 30 cases were reported in total in each).[14]

To some extent, the principle-based approach is considered to have contributed to enforcement difficulties. In the country research for this evaluation some enforcement authorities and other stakeholders pointed to a key disadvantage: The principle-based approach may diminish legal certainty. While several Member States already had a principle-based approach within unfair marketing law before the UCPD (including Austria, Denmark, Germany) and do not report any problems with its application, in other Member States general clauses were at odds with their legal traditions since they leave much room for the judiciary to interpret the clauses at the expense of the legislator, as is reported from France. The openness of the clauses is reported to encourage traders to enter time-consuming discussions on the fairness of a practice and the outcome of an action is considered to be uncertain, discouraging enforcement bodies from taking action on the basis of the general clause.[15] Consumer organisations also consider that the principle-based approach does not prevent certain practices that border on unfairness but fall just outside the scope of what constitutes an unfair commercial practice.[16] Especially during the first years of implementation some enforcement authorities and courts had difficulties to "circumstantiate" the principle-based rules of the UCPD to the concrete case. In the meantime, however, they have gained more expertise and practical experience to handle the principle-based

[12] Country report Estonia.

[13] Country report France.

[14] Country reports.

[15] Country report France.

[16] Country report Netherlands.

approach.[17] Stakeholders have also noted during the country research that the European Commission's Guidance document[18] facilitates more effective application of the implementing national legislation.

In some Member States, enforcement authorities are also reported to lack sufficient financial and personnel resources, which in turn affects enforcement of the Directive. Already the 2013 Communication of the Commission indicated 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".

In spite of the reported difficulties with the application of the principle-based approach, the country research for this evaluation confirms that the Directive's principle-based rules (in combination with the black list, see next evaluation question) 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).[19] 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.

This is largely acknowledged by stakeholders: a great majority of participants in the open public consultation assessed the impact of EU consumer and marketing law on the protection of consumers against unfair commercial practices as very or rather positive (79%). Nearly all participating consumer associations (19 of 20) assessed the impact as very or rather positive (95%, the remaining association marked 'neutral').[20,21]

- The practical benefits for consumers of the black list of unfair commercial practices annexed to this Directive, in particular its application in practical cases;

[17] E.g. country reports Belgium, Romania.

[18] SWD(2016) 163 final.

[19] In these countries the UCPD mostly brought less or no significant benefits, according to our country research. In some countries that relied on outright bans on specific practices, which were abolished under the Directive's maximum harmonisation provision, enforcement regarding these practices became even more difficult, as reported by stakeholders. For example, commercial practices formerly prohibited by French law (sales with gifts, commercial lottery and sweepstake advertising, tied sales) must now be reviewed under the general clauses of the implementation legislation of the UCPD. However, this abolishment of outright bans on specific practices, even if it creates to some extent legal uncertainty, can also benefit consumers (e.g. the more flexible and realistic definition of reference price in French law).

[20] The vast majority of all respondent categories agree that EU consumer and marketing law has had a positive impact on the protection of consumers against unfair commercial practices. 95% of consumer associations, 81% of consumers and 82% of public authorities indicated a positive impact on this aspect. More than 70% of all other respondent categories also indicated a very or rather positive impact in this regard. See Report on the open public consultation for the Fitness Check of EU consumer and marketing law, Part 2 of this study.

[21] This view was also represented in the outcomes of Workshop 2 on Increasing fairness of commercial practices and of contract terms at the 2016 Consumer Summit. The workshop participants generally considered the co-existence of the principle-based approach and the black list to be useful against unfair commercial practices.

As mentioned, the UCPD contains a list of 31 misleading and aggressive practices that are banned in all circumstances. These are the only practices which can be deemed to be unfair vis-à-vis consumers without a case-by-case assessment. In its 2013 Communication, the Commission stated that the black list has "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".

In legal scholarship, the black list is generally considered to generate practical and significant benefits.[22] For practices on the list there is no need to apply the transactional decision test in order to take action, which facilitates enforcement and may avoid costly and time-consuming litigation. This assessment is confirmed through our country research. Stakeholders often assess the idea of a black list as positive, as it provides certainty and offers some clarity, predictability and – simply put – examples and illustrations for what is prohibited behaviour of traders. Country reports frequently emphasise that the black list has important practical benefits for authorities, as well as for consumers and traders: *Authorities* in many Member States (including Czech Republic, Cyprus, Estonia, Greece, Netherlands, Romania, Slovakia, Slovenia) consider the black list to be useful and to simplify their work. Reasons provided include that they can easily control those commercial practices that are blacklisted, that the black list alleviates burden of proof, leads to avoiding arguments over whether a particular practice should be considered unfair or not, and simply provides a welcome addition to the toolbox for enforcement purposes. Regarding *consumers,* country reports indicate benefits such as the possibility to check the list and find out whether certain behaviour of a trader may be suspected as unfair, thereby increasing predictability and clarity of consumer protection rules. For *traders*, the black list is considered to facilitate identification of unfair commercial practices and thereby increases legal certainty, awareness and compliance. For example, a Bulgarian enforcement authority reports that some traders, before undertaking certain marketing actions (for example, discount campaigns), are proactively checking the list to see whether the planned actions can be qualified as any of the unfair practices included into the black list and are in addition searching for experts' advice from the competent authorities regarding this matter.

In consequence, the introduction of the black list contributed to diminishing the presence of such practices on various national markets (reported e.g. from Croatia, Czech Republic, Estonia, Hungary, Poland). For example, in the Czech Republic stakeholders indicated that a major retailer stopped engaging in all the practices which were on the black list, because the Czech Trade Inspection Authority monitors these unfair practices very often, and sanctions them very strictly.[23] The black list might cause rogue traders to stop the blacklisted practices but they might continue other genuinely unfair practices that are currently not blacklisted, which supports the view that there is a need to provide for a mechanism to quickly adapt the black list (see further below).

In spite of these reported benefits, several factors contribute to limitations in the application of the black list:

- Some of the blacklisted practices are considered to be quite peculiar or addressing very specific situations which might not be relevant for the situation in the particular Member State.[24] Blacklisted practices that are reported to be

[22] See *inter alia* B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 385 e.s., with further references.

[23] Country report Czech Republic.

[24] As is reported from e.g. Denmark, Germany and Finland.

irrelevant or incidental in practice include No. 1 ("Claiming to be a signatory to a code of conduct when the trader is not") and No. 3 ("Claiming that a code of conduct has an endorsement from a public or other body which it does not have").[25]

- From several countries it is reported that a significant number of blacklisted practices are difficult to apply or barely applied in practice, due to the vague/open-textured and/or too detailed/narrow conditions of the commercial practices included in the black list.[26]
- An enforcement authority also highlighted that some of the provisions of the black list are formulated in a way which still requires an assessment *in concreto* of the unfairness of the behaviour of the traders, and are therefore not considered compatible with the nature of the black list: see e.g. the formulations contained in the No. 7 ("falsely stating"), 17 ("falsely claiming"), 18 ("inaccurate information"), 22 ("falsely claiming") and 23 ("creating the false impression").[27]

However, as regards the latter example of difficulties in applying the black list, the advantage of not having to analyse the effect on the transaction decision still remains. The black list is further discussed below.

- The practical benefits for consumers arising from the Member States' use of the minimum harmonisation clauses for financial services and immovable property;

Article 3(9) UCPD provides for an important limitation on the full harmonisation character of the UCPD by stating that, in relation to financial services and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates. Thus, minimum harmonisation applies to these two sectors. As Recital 9 explains, "financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders".

A 2011 study on the application of Directive 2005/29/EC on Unfair Commercial Practices[28] provided details regarding Member States' legislation in the areas of financial services and immovable property that goes beyond the protective standards of the UCPD. It concluded that few Member States have made explicit use of Article 3(9) UCPD (in the sense of actually including special rules for financial services and/or immovable property in their legislation that transposes the UCPD). However, in a number of Member States numerous pre-existing and also new rules can be found that operate separately from the legislation implementing the UCPD, such as national public/state regulatory trading laws, rules of professional regulation, and rules belonging to the wider sphere of contract law, in particular pre-contractual information duties and prohibitions of certain terms in standard contracts.

In the context of this evaluation, country reports provide updated information on provisions regarding financial services or immovable property in the national laws

[25] Country report Spain.

[26] E.g. country reports Austria, France, Portugal.

[27] Country reports Italy, Belgium, Greece (where multiple legal bases are sometime used in court or when administering fines in situations where the blacklist would have sufficed).

[28] Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU, Civic Consulting 2011.

transposing the UCPD going beyond minimum harmonisation requirements, which is provided in the following table:

Table 3: Overview of Member States rules in the national laws transposing the UCPD regarding financial services or immovable property going beyond minimum harmonisation requirements

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.

Based on the table and the findings of the country research the following observations can be made:

In several Member States (including Cyprus, Denmark, France, Hungary, Malta, Netherlands, Portugal, Spain, the UK, and to a very limited extent Austria), stricter provisions concerning unfair commercial practices with regard to financial services were maintained or introduced, taking advantage of the minimum harmonisation clause, whereas a smaller number of Member States seem to have maintained or introduced stricter provisions concerning unfair commercial practices with regard to immovable property. As mentioned before, such rules can be found in national unfair commercial practices law, or outside of it, e.g. in national public/state regulatory trading laws, rules of professional regulation etc. It is unclear which practical benefits arise for consumers in these countries from maintaining this legislation. Benefits for consumers in this group of countries are likely to differ, due to the differences in national rules falling under the exemption under Article 3(9) UCPD, and would appear to include a higher level of protection in some Member States regarding particular vulnerabilities, better enforcement and market transparency, and increased stability of financial markets, as concluded by the 2011 Study on the application of Directive 2005/29/EC.[29]

In those Member States that do not make use of the exemption provided by Article 3(9) UCPD with regard to financial services and immovable property, neither in unfair commercial practices law, nor in other relevant legislation (i.e. where no legislation would need to be withdrawn if Article 3(9) was deleted), by definition there cannot be any practical benefits for consumers from the exemption because national laws are not providing a higher level of consumer protection than the UCPD.

- The effectiveness and practical benefits for consumers of the application of Directive's rules in tackling misleading environmental claims / in addressing misleading practices in the energy market; [*Key aspects to consider are: To which extent has the UCPD been applied in the context of environmental claims/in the energy market? How effective was it? What are the problems, if any?*]

The sectors of environmental claims and energy market where specifically selected for this study due to the complexity of applying the UCPD.

In several Member States, the application of the UCPD to environmental claims is not an issue since such claims are rarely used or not used at all (e.g. in Czech Republic, Greece, Portugal, Latvia), in others the UCPD has not been applied yet regarding such claims (e.g. Malta, Slovenia).[30] Where there is little or no experience with cases on misleading environmental claims, practical benefits of the Directive for consumers in this respect cannot be established.

In contrast, in other Member States, along with increasing consumer sensitivity to environmental concerns, the number of environmental claims in packaging and

[29] The 2011 Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU In concluded that "it would be undesirable to remove the exemptions for financial services and immovable property due to: the 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".

[30] See country reports of the listed countries.

marketing materials has increased in the last few years, as have complaints that many of these claims are vague or misleading.[31]

Relevant cases and complaints identified in the country research for this evaluation concern a wide variety of misleading environmental claims and misleading practices in the energy market, including:

- False labelling of food or misleading information on products as being "organic" or "bio-product", "eco", "healthy", "natural", "homemade" (reported e.g. from Bulgaria, Croatia);
- Advertising for rental apartments falsely claiming to be built with ecological materials (Bulgaria);
- Use of the brand 'PlantBottle', when the bottle contained only 15 per cent plant material (Denmark);
- Misleading claims about the environmental impact of a herbicide (France);
- Misleading information about the capacity of a device to save electricity ("Energy-saving Box", Bulgaria) or devices claimed to reducing the energy bill (Greece);
- Misleading environmental claims in relation to an initiative to install dividers in households which are users of district heating system, namely, that installation of dividers is obligatory, that they are energy efficient and that in saving the energy they also save money (Croatia);
- Claims like "hair drying against nuclear power" or "ironing for health" because the claims suggest that the companies in question are not delivering nuclear electricity, although they actually do (Germany);
- Advertising on fuel-saving properties of fuel that was not sufficiently disclosing the conditions to which those fuel-saving properties were subject to (Cyprus);
- A commercial communication falsely stating that a certain type of fuel is capable of saving as much as 1 litre per fuel tank and that using a certain type of fuel definitely decreases fuel consumption (Hungary);
- A claim that there is no CO_2 emission from an electric car without noting that there is CO_2 emission from the production of electricity (Denmark);
- Claims of selling bio-diesel fuel which were difficult to verify as the criteria for labelling a fuel as bio-diesel were intransparent (Greece);
- The Volkswagen case, where the responsible authority is still working on the case, but is likely to base it on the infringement of a prohibition of misleading commercial practices (Poland).

In Member States where environmental claims are more often made or questioned, experiences with the application of the UCPD differ: Practical benefits for consumers in the application of the UCPD's rules in tackling misleading environmental claims are reported e.g. in Croatia and Lithuania where the application of the UCPD in the energy and environmental markets is considered as rather effective. In Italy, the UCPD has been applied for tackling both misleading environmental claims and for addressing misleading practices in the energy market, and in Germany, interviewed stakeholders stressed that the current legal system in Germany is fit to deal with such claims. In the Netherlands and Sweden, the relevant authority has not applied the UCPD in the

[31] European Commission 2014 Consumer market study on environmental claims for non-food products. Available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/green-claims-report.pdf

context of environmental claims, but in the consumer energy market traders have been fined for unfair practices.

A general theme reported in several of the country reports are practical problems when challenging green claims. It often appears difficult to substantiate the misleading nature of the commercial practice (as is reported e.g. from Austria, Italy). Expensive testing might be required before legal action can be taken. Also, sometimes environmental claims are considered to be too vague to be regarded as unfair (reported e.g. from a stakeholder in Germany).

To reduce related uncertainty, the Danish Consumer Ombudsman has issued *Guidance on Environmental and Ethical Marketing Claims* in August 2014.[32]

The Commission established a Multi-stakeholder Dialogue on Environmental Claims in 2012 to investigate the problem. A dedicated Commission 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.

At EU level, the mentioned multi-stakeholder group concluded its work in 2016 with agreed Compliance Criteria on Environmental Claims[33] to support the application and enforcement of the UCPD against misleading and unfounded environmental claims. The criteria have fed into the mentioned 2016 UCPD guidance document, which contains a detailed section on environmental claims. In the country research, no experiences with the application of the guidance in this respect were reported.

- The practical benefits for consumers of the "average consumer" as the reference point for assessing whether a commercial practice is likely to materially distort economic behaviour; [*Key aspects to consider are: How does the concept of 'average consumer' work in practice? Is the concept applied in some countries rigidly?*]

The general prohibitions of the UCPD include the "average consumer" benchmark (previously developed by the CJEU) as the reference point 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", as emphasised in Recital 18 of the Directive. Article 5(2)(b) of the Directive 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 average consumer benchmark is a normative benchmark. Nonetheless, this concept clearly contains an empirical reference as well. The 2016 revised UCPD Guidance document[34] contains examples of national courts applying the "average consumer" benchmark, and provides further clarifications. The guidance emphasises that the average consumer under the UCPD is "not somebody who needs only a low level of protection because he/she is always in a position to acquire available information and act wisely on it [...] the average consumer concept under the UCPD should always be interpreted having in mind Article 114 of the Treaty, which provides for a high level of consumer protection.

[32] Official guidance documents in relation to misleading environmental claims are also reported from other countries (e.g. France). See country reports of the mentioned countries.

[33] http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/files/mdec_compliance_criteria_en.pdf

[34] SWD(2016) 163 final.

At the same time, the UCPD is based on the idea that, for instance, a national measure prohibiting claims that might deceive only a very credulous, naive or cursory consumer [...] would be disproportionate and create an unjustified barrier to trade".

It is notable that CJEU case law and the UCPD had changed the consumer model in marketing law in some Member States, as these countries applied previously stricter benchmarks. For example, traditionally in Polish law average consumers were often seen as not careful and forgetful,[35] Austrian law also protected the careless consumer,[36] and in Germany, historically, the consumer model applied was based on an uncritical and superficial consumer. If 10-15% of consumers were misled, this was deemed sufficient in order to regard a commercial practice as misleading.[37]

However, the country research for this evaluation indicates that the benchmark of the average consumer allows in practice a significant degree of flexibility in its application. As pointed out in the UCPD guidance document with reference to Recital 18 of the Directive, the "average consumer test is not a statistical test. This means that national authorities and courts should be able to determine whether a practice is liable to mislead the average consumer exercising their own judgment by taking into account the general presumed consumers' expectations, without having to commission an expert's report or a consumer research poll". In practice, the assessment whether a commercial practice is unfair vis-à-vis the “average consumer”, as defined in CJEU case law, is very often at the heart of the dispute. In that assessment due account has to be taken of the factual context of the commercial practices. For example, the Polish Supreme Court refers to the need to look first to the type of consumer product or service being advertised, and second to the type of medium used for this advertisement. Together, these criteria will allow defining the intended and actual recipients of the advertisement. The model of an average consumer will then be created based on the qualities that a consumer to whom the advertisement is directed, and whom it reaches, should have.[38] For example, in Slovakia, it was held that the “average consumer” on the internet does not materially differ from the average consumer in the “brick and mortar" or “walk-in” shops nowadays, as the great number of consumers use the online sales and online services without any special education.[39]

The country research provides a number of examples how the “average consumer” benchmark allows national enforcement authorities and courts to consider the specific circumstances in their Member States. For example, Polish courts, taking into account the possibility to account for social, cultural and linguistic factors as per Recital 18 of the UCPD, held that average Polish consumers due to cultural and social factors have a low awareness of law; as well as, that Polish average consumers are not comparable with regard to their knowledge, carefulness and awareness to Western European average consumers, who for decades have been exposed to consumer education.[40] In the same vein, when cheap and mass-consumption goods are involved, Portuguese case law defines the average consumer as hasty and distracted or absent-minded and it also takes into account the targeted population group. The use of the "average consumer" benchmark allows authorities and courts to render a flexible decision,

[35] Country report Poland.

[36] Country report Austria.

[37] Country report Germany.

[38] Country report Poland.

[39] Country report Slovakia.

[40] Country report Poland.

specifying the content of this concept in a manner that is best suited for the specific case. This is an obvious advantage given to the authorities and courts that are not bound by formalistic and overly rigorous rules, when evaluating the nature of the supposedly unfair practice, which can be clearly to the benefit of consumers. The disadvantage is that nuances of that evaluation often remain unknown to those who read the decision, since the precise limits of the concept are usually not uncovered. It is noted that for a bystander it may be difficult to grasp how the concept of “average consumer” is applied in a particular case by a competent enforcement authority or court, as highlighted in the country report Latvia. Sometimes this ambiguity is used against consumer protection authorities, as is reported from Estonia, where there is currently an administrative procedure pending against an Estonian mobile phone operator who is claiming that the regulator is not able to show who is an “average consumer” of their services. The regulator had relied on statistics concerning what services an average mobile service client is using and what price he or she is ready to pay for that.[41]

Based on the country research it appears that in a significant number of countries the "average consumer" benchmark is considered to work in practice and no major problems are reported, at least in the perspective of consumer protection authorities or courts (e.g. Austria, Bulgaria, Germany, Italy, Latvia, Lithuania, Netherlands, Sweden). 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, with no or only few examples of case law or (explicit) relevant administrative decisions (e.g. regarding Croatia, Estonia, Denmark, Greece, Malta). Few problems with an overly rigid application of the concept are reported, although the country report France concludes that some interviewees indicated that the concept is applied in the country in a flexible, rather protective way, whereas other interviewees (mainly consumer organisations) consider the application to be rather strict.

The results of the open public consultation illustrate that stakeholders are divided in their general assessment of the appropriateness of the benchmark. While most business organisations (70%) either 'tended to disagree' or 'strongly disagreed' with the statement that "the notion of 'average consumer' should be reviewed/updated", most public authorities (68%) and consumer associations (70%) either 'strongly agreed' or 'tended to agree' that there is need for a review.[42] In the interviews conducted as part of the country research, consumer organisations in several Member States elaborated their concerns. For example, it was noted by the Danish Consumer Council that the average consumer in real life is not reasonably well informed and reasonably observant and circumspect – and it is usually acting under time constraints. It is argued that the many consumer protection rules primarily benefit “stronger” consumers and not more vulnerable consumers who really need the protection, suggesting that a lower standard for the average consumer should be applied. Other consumer organisations often shared a critical view of the "average consumer" benchmark in our country research (reported e.g. from Czech Republic, Italy, Malta, Netherlands, Poland, Slovenia), and position papers submitted by some consumer organisations in the framework of the open public consultation further elaborated: They put into question whether the "‘average consumer-model’ is adequate to serve as a standard of consumer protection" (BEUC), suggested that the rational and utility-maximising consumer is more "fiction than reality" (VZBV,

[41] Country report Estonia.

[42] See Report on the open public consultation for the Fitness Check of EU consumer and marketing law, Part 2 of this study.

Germany), and proposed to "modernise the UCPD in line with the way that consumers behave in the real world" (Which?, UK).[43]

The discussion concerning the appropriateness of the "average consumer" benchmark is also led 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.[44] In addition, results of behavioural research – to which some of the consumer organisations refer – 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". Consumers' behavioural biases are widely documented in the academic literature[45] and have been confirmed by a wide range of behavioural experiments, including those commissioned by the European Commission in its recent study on consumer vulnerability.[46] They are also acknowledged in the above quoted UCPD guidance document, which refers to the relevance of behavioural biases such as consumer overconfidence when considering self-reported assessments of "well-informed", "observant" and "circumspect" as indicators for establishing the characteristics of the average consumer. There are also national cases that illustrate that the idea of the 'rational decision maker' as average consumer benchmark leads to outcomes that are not favourable for consumers and demand a level of attention that is not realistic for real life consumers.[47] For example, in a Belgian case about an advertisement for an eco-friendly washing product, the question arose of whether the advertisement was addressed to anyone shopping in a supermarket or whether it targeted eco-conscious consumers and so that the proper benchmark would be the average 'green' consumer, who is sensitive to environmental considerations.[48] Applying the latter standard to an advertisement that read '100% of surfactant of plant origin, 100% biodegradable', a commercial court held that the normally attentive and diligent green (online) consumer would be able to understand the link made in the advertisement between surfactants and biodegradability and would not be misled by the claim. The court thus held that the average green consumer would *not* make the mistake of thinking that the advertised product is entirely biodegradable. They would know that the claim of total biodegradability relates only to the surfactant agents contained in the washing product, not to the product as a whole. The country report for Belgium rightly points out that "this is a rather formidable assumption, not only as

[43] Position papers submitted by consumer organisations in the framework of the open public consultation in the framework of the Fitness Check of EU consumer and marketing law.

[44] See inter alia Jorge Morais Carvalho, Manual de Direito do Consumo, 2016, p. 85; H.-W. Micklitz, "The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in Civil Law: A Bittersweet Polemic", J. Consum Policy 2012, 283; Lisa Waddington, "Vulnerable and confused: the protection of "vulnerable" consumers under EU law", European Law Review 2013, 765; Eliza Mik, "The erosion of autonomy in online consumer transactions", Law, Innovation and Technology 2016, 1-38.

[45] E.g. For an overview of relevant results of behavioural economics research see Kahneman,D., Slovic, P., and Tversky, A. (Eds.) (1982). Judgement Under Uncertainty: Heuristics and Biases. Cambridge University Press); Kahneman, D., 'Maps of Bounded Rationality: Psychology for Behavioral Economics', American Economic Review, 93 (2003), 1449; for a summary treatise see Dowling, J., and Chin-Fang, Y., Modern Developments in Behavioral Economics, Singapore World Scientific, 2007; with a specific view to law see Sunstein, C., (ed.), Behavioral Law and Economics, Cambridge University Press, 2000; Lunn, P. and Lyons, S. (2010); 'Behavioural Economics and „Vulnerable Consumers": A Summary of Evidence', Economic and Social Research Institute (ESRI).

[46] European Commission, Study on consumer vulnerability across key markets in the European Union Final Report, 2016.

[47] See country report Belgium for more examples.

[48] Prés. comm. Nivelles 12 January 2011, case note by C. DESMECHT, Le consommateur moyen: origine et portée d'une notion clé, Pratiques du marché, Kluwer, 2011.

to consumers' technical knowledge but also and more importantly as to their level of attention and immunity from predictable errors due to mental shortcuts." [49]

In the Finnish and more generally Nordic tradition, the consumer is thought to be a non-professional that glances at marketing rather than carefully considering it as a basis for a rational decision. The consumer concept, thus, is not based on the ideal 'homo economicus'; rather, the concept is influenced by behavioural economics. The Finnish legislator finds that the concept of the 'average consumer' in CJEU case law, which is understood to be 'reasonably well-informed, reasonably observant and circumspect taking into account social, cultural and linguistic factors', is in line with the Finnish 'consumer' concept. National law continues to refer to the traditional concept of 'consumer' to avoid confusion. In Finland, it was noted that the CJEU case law leaves room for national courts to assess the level of attentiveness a consumer pays in different contexts.[50]

See also Section 7 on the problem definition and Section 8 on conclusions and recommendations.

- The practical benefits for consumers of the specific protection of "vulnerable consumers" introduced by the directive; [*Key aspects to consider are: Have enforcement authorities/courts at EU and national level recognised new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted)?*]

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 Unfair Commercial Practices Directive, 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". In 2016, the Commission paid particular attention to the "vulnerable consumer" benchmark in the revised UCPD Guidance document.

On the basis of the country research for this evaluation, the following conclusions can be drawn:

First of all, the vulnerable consumer benchmark is considered to be of limited relevance in practice, as appear to be the practical benefits of this provision for

[49] There do not seem to be empirical studies demonstrating the behavioural implausibility of the assumption of the Court of Nivelles specifically. However, besides common sense, such implausibility would seem to result by analogy from a well-documented behavioural phenomenon called 'attribute substitution'. This judgement imperfection refers to the fact that, when confronted with a difficult question, subjects tend to answer instead a related but distinct question whose answer comes more readily to mind. For instance, a person who is asked "How dangerous is the intersection near your home?" may answer as if they were asked how many accidents or near-accidents at that intersection they can readily recall. See A. Tor, The Methodology of the Behavioral Analysis of Law (July 11, 2008). Haifa Law Review, Vol. 4, p. 237, 2008, Available at SSRN: https://ssrn.com/abstract=1266169, p. 245, citing D. Kahneman and S. Frederick, "Representativeness Revisited: Attribute Substitution in Intuitive Judgment", Heuristics and Biases: The Psychology of Intuitive Judgment (Thomas Gilovich, Dale Griffin, and Daniel Kahneman- eds., 2002), p. 51. In the case of advertisement for the green washing product, the Court assumes that the average green consumer is immune from a phenomenon that could be termed 'predicate substitution' [i.e. the average consumer would assign the attribute (biodegradability) to the correct predicate (surfactant) rather than to the incorrect one (washing product), thereby not falling for a shortcut that comes readily to mind]. On the prevalence of mental shortcuts generally, see. D. Kahneman, Thinking Fast, Thinking Slow, NY: Farrar, Straus and Giroux, 2011.

[50] Country report Finland.

consumers so far.[51] 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. Article 5(3) UCPD is 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) *in fine* UCPD). National courts and enforcement authorities tend to apply the *modulated* average consumer benchmark, instead of the "vulnerable consumer" benchmark of Article 5(3) UCPD. Recital 18 UCPD states: "Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group." The fact that consumers do not form a homogenous group justifies a different assessment of the unfairness of a practice targeted at a particular group of consumers. The country research shows that, in applying this modulated benchmark, all relevant circumstances of the case and the vulnerability of the concerned person is often taken into account. The modulated average consumer test provides "a means to take into account relevant social, cultural or linguistic characteristics of targeted groups"[52], in line with ECJ case law.

There is little indication that new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted) have been recognised by administrative practice or case law within the scope of the UCPD. This should not come as a surprise since the list of specific vulnerabilities in Article 5(3) is traditionally considered to be exhaustive[53] even if the new UCPD Guidance document states that the list of Article 5(3) is only indicative.

The country research also indicates that in a broader context (i.e. not necessarily regarding unfair commercial practices) the concept of "vulnerable consumers" has been used in Member States most notably in respect of persons with mental or physical diseases, elderly people, children and young persons, but also in respect of unemployed persons, migrants and poor and indebted people. For example in Greece, there have been many legislative initiatives for the protection of vulnerable consumers during the last years in response to the financial crisis, e.g. related to over-indebted households, which has generated a great influx of cases both for courts, consumer associations, and relevant authorities (however, this legislation is not related to the vulnerability of consumers in the context of unfair practices).[54] In several instances the issue of vulnerable customers in the energy sector was highlighted in the country research, i.e. households that receive allowances for electricity, heating or natural gas under certain social law provisions. Taking into account these provisions (having their origin in EU law) as well as the fact that e.g. in Bulgaria a significant part of the population is below the threshold of "energy poverty" (meaning facing difficulties to keep their homes warm at reasonable cost), it is considered likely that the new

[51] This opinion was also raised in the position papers submitted to the online public consultation: all three consumer organisations that submitted position papers, as well as two public authorities, considered the current definitions of 'average consumer' and 'vulnerable consumer' to be of limited effectiveness for consumer protection.

[52] European Commission, UCPD Proposal, COM 2003 (356) final, para 30

[53] B. Keirsbilck, The New European Law of Unfair Commercial Practices and Competition Law, Oxford, Hart Publishing, 2011, 290.

[54] Country report Greece.

category of "energy poor" consumer will be recognised in national administrative practice and case law in the coming years.[55]

- How and which self-and co-regulation actions in EU countries or at EU level have been effective in addressing unfair commercial practices? [*Key aspects to consider are: To what extent do self/co-regulation actions work in practice, are they useful according to stakeholders?*]

The results of the open public consultation illustrate that stakeholders are again divided in their assessment. While 79% of business associations found self- and co-regulation initiatives to be either "very effective" or "rather effective" in protecting consumer rights,[56] only 30% of consumer associations found such initiatives to be effective in protecting consumer rights (50% found them "rather not effective" or "not at all effective"). Public authorities are split, with 39% considering them as "rather effective", and 33% having an opposing view.

According to the country research for this study, experiences vary by Member State and sector. In those Member States where there is long-standing tradition of self- and co-regulation (including the Netherlands, the United Kingdom, Denmark, etc.), this approach seems to work fairly well in addressing unfair commercial practices. From Lithuania it was also reported that self- and co-regulation is actively promoted, showing positive effects for consumer protection.[57] In contrast, in other Member States where there is no such tradition (including Austria, Bulgaria, Belgium, Czech Republic, Germany, France, Malta, Poland, Portugal, Romania etc.) codes of conduct appear to be often of limited practical relevance – with notable exceptions such as the advertising self-regulatory organisations,[58] which exist in most EU Member States, and self-regulatory organisations that promote the enforcement of unfair competition law by pursuing unfair commercial practices (for example existing in Germany).[59]

- In a forward looking perspective: Is there a need to extend or modify the black list of the UCPD? If so, please indicate the practice(s) to be added to the list. Should there be a mechanism for subsequent inclusion of new practices into the UCPD black list to respond to new developments?

In the answer to a previous evaluation question (see above) it was already highlighted that there are certain limitations in the application of the black list due to the peculiar character or little practical relevance of some of the blacklisted practices, the vague/open-ended and/or too detailed/narrow conditions of the commercial practices included and the need of an assessment *in concreto* of the unfairness of the behaviour of the traders for some practices. This indicates that there is a need to review the

[55] Country reports Bulgaria, Greece.

[56] The effectiveness of self- and co-regulation was also emphasised by business stakeholders in their position papers submitted to the consultation; see e.g. position papers for EMOTA, FEDMA and the European Advertising Standards Alliance.

[57] Country report Lithuania.

[58] Such as the Autorité de Régulation Professionnelle de la Publicité in France, the Conseil de la publicité / Raad voor de Reclame in Belgium, the Civil Institute of Advertising Self-Regulation and the Supply Chain Initiative in Portugal, or the Rada Pre Reklamu in Slovakia.

[59] The Zentrale zur Bekämpfung unlauteren Wettbewerbs ('Wettbewerbszentrale'), see country report Germany.

practices on the UCPD black list and/or include new practices. In the country research for this evaluation, especially consumer organisations, but also enforcement agencies and some business stakeholders were in favour of an update of the black list of the UCPD, to address new problematic practices in the context of digital markets, e-commerce and innovative marketing methods. However, other of the interviewed stakeholders did not report any necessity to extend or modify the black list, and rather expressed their opposition to such a move.

Several options for regular reviews and updates of the black list were identified, either through a special mechanism to be included in the Directive and applied for updating the black list (e.g. delegated/implementing acts), or the use of generic legislative procedures for amendment of the EU/national legislation (i.e. without a special mechanism). Another possibility brought forward by some interviewees in the country research (mainly consumer organisations) is to change the UCPD into a minimum harmonisation directive, affording room for national law and reactions to changes in commercial practices. It was noted that it seems to be a challenge that there is only one black list for all Member States as there is a vast diversity in traditions and marketing cultures in various Member States (e.g. in relation to the regulation of sales). In this connection it was also suggested that a notification requirement be introduced whereby the Commission and other MS are duly notified of any new unfair practices. This would have the benefit of alerting all MS of new practices considered as unfair which may possibly also impact other MS, and could feed into an updating of the black list in regular intervals.

The country research identified the following commercial practices currently not covered by the black list that are considered to be problematic and were proposed as potential candidates for an extended black list. This list summarises suggestions from different authorities, consumer organisations and other stakeholders interviewed in the Member States.

Practices related to promotion, marketing, and contract conclusion:

- Aggressive and misleading commercial practices in direct sales of dietary supplements and non-prescription drugs (reported from Austria);
- Unfair practices related to organised selling events and 'presentations and advertisement actions' at restaurants, hotels or during the excursions (Czech Republic, Slovakia[60]);
- Unfair door-to-door sales practices, e.g. related to energy, gas and water (Poland, Slovakia);
- Creation of consumer credit groups (Hungary);
- Some aspects of sales promotions, e.g. holding any sales promotions without the advanced notice, or false sales promotions (Hungary);
- The practice of imposing disproportionately high charges compared to the service provided (Hungary);
- Sellers pretending to be an authority or organisation (Sweden);
- Indicating that the selling company is acting on someone's behalf, which is not the case (Sweden);

[60] In Slovakia for instance, traders organise various ‘presentations and advertisement actions’ in spaces accessible to the public, such as restaurants, hotels or during excursions. In reality these actions were labelled as e.g. ‘cookery show’ or ‘wine tasting’ and involved very aggressive sales practices. In the Czech Republic, such events are frequent and are considered to ae use of misleading practices targeted at vulnerable consumer groups. In both countries, the legislator imposed that such events be registered to authorities in advance.

- Subscription traps, such as luring customers with a gift for free, but in reality, the customer agrees to buy 30 pieces of this product (Sweden);
- Claims that the seller can deliver a product even though they cannot guarantee it (Sweden);
- Claims about a product that blatantly go against current scientific knowledge and capabilities (such as claims that a device can turn water into fuel, reported from Greece);
- Subliminal advertising (i.e. promotional messages the recipient is not aware of, reported from Slovakia);
- Hiding (essential) information on a website and making the information only accessible after several click-throughs (France);
- Negative sales methods (with a so called 'negative contractual effect'), where a consumer is bound to a contract because of his or her inaction (except for renewals of insurance or subscriptions, as reported from Sweden);
- Violation of a code of conduct to which a professional has adhered (Belgium);
- Violation of the rules on guarantees contained in Directive 99/44/EC (Belgium);

Practices related to contract performance/extension:

- Unfair practices related to digital contracts, e.g. geoblocking and discrimination in the delivery of digital content (Bulgaria);
- Unilateral change of contract requirements without right to termination (Czech Republic);
- Contract switches with prolongation of the contract in an “uninvited” doorstep selling situation (Czech Republic);
- “Tying lending“ of technical equipment with a punitive lending fee in case the customer does not return the equipment at the end of the contractual relationship (e.g. in the telecommunications sector, reported from Czech Republic);
- Deviation between the actual internet speed and the advertised one (Austria);
- Practices related to the enforcement of consumer debts, in particular the use of humiliation in such contexts (Slovakia)[61];
- Practices of refusing certain means of payment, e.g. cash or certain banknotes with high denominations (Belgium);

Practices related specifically to TV contests/games:

- Television contests, games or fortune-telling, where practices of non-transparent fees, manipulation with connection to TV studio or intentional disinformation occur or intentional provision of false or incorrect information about the way how to proceed in the game or to solve the task in order to prevent the consumer to gain envisaged benefits (Slovakia).

Practices related specifically to price transparency:

- Change of price a number of times a day (e.g. the price of gas for cars, as reported in the country report Austria);
- Sales with bonuses (Austria);

[61] E.g. by sending shaming notices in the envelopes labelled as ‘how to get rid of debts’ or addressed explicitly to ‘the debtor’.

- Promotional activities where there are problems relating to price transparency, e.g. 2-for-1 offers, claims that a product is offered 20% cheaper made without specification of how this is to be calculated (Greece);
- Artificial reduction of prices ("Black Fridays", reported from Portugal);
- Advertising that specifically promotes the sale of the tied or bonus product in order to distract consumers' attention from the main contract (Belgium);

While this list is neither complete nor based on any consensus view (but rather summarises suggestions from different authorities, consumer organisations and other stakeholders), it highlights that a considerable number of commercial practices could be reviewed and further scrutinised to consider a possible blacklisting. Although all of the above-mentioned practices were mentioned in the country reports as currently not covered by the black list, as being problematic and as being potential candidates for an extended black list, several of them appear already covered by the existing black list or are rather subject to the rules on unfair contract terms.

Some practices regarding pricing also seem particularly difficult to address since they operate on the fringes of what is allowed under the UCPD, as is highlighted by some of the following additional examples identified by the country research:

- Small letter size of unit price indication (Austria, Croatia, Cyprus, Germany, Greece).
- Erroneous or misleading price indication on websites. For example, some components of the price are not presented transparently (hidden surcharges) (Portugal, Netherlands).
- Indication of a price that will only apply if a certain method of payment is used, or discount that is applied only on a conditional basis, for instance, a discounted price applies when the consumer pays in cash, or a discount is only applicable to the holders of a loyalty card and for others a higher price will apply (Portugal, Lithuania).
- Price obfuscation, price partitioning and other practices which may confuse consumers and which may interfere with their ability to assess the full price, concerning e.g. air travel, magazine subscriptions and other revolving and/or fixed term contracts (Netherlands).[62]

Traders make use of practices such as price obfuscation and price partitioning to boost demand for ancillary services and products and to increase demand for the main product on offer as well. Price partitioning with locked-in customers is an example, where for instance the price for home printer hardware is kept artificially low in order to persuade customers to buy a particular brand of printer hardware, while the unit price of subsequent printer ink cartridges is kept high. The UCPD does not oblige traders to mention a 'price per printed sheet'. Practices which are not within the PID scope also concern dynamic pricing. Since the UCPD does not oblige traders to offer their products at identical prices to different customers, traders can offer different prices depending on variables such as the time of day of the purchase.[63] An example of a Member State having rules in this respect is Austria. According to a regulation of price increases for motor fuel,[64] prices at gas stations can only be changed once a day so that consumers can make an informed decision where to buy gas. However, it is

[62] See generally Van Boom 2011.

[63] Country report Netherlands.

[64] Act on Price Transparency of Motor Fuel ("Preistranzparenzverordnung Treibstoffpreise") Federal Law Gazette (BGBl.) II, No. 246/2011, recently amended by Ordinance of 19.12.2013, Federal Law Gazette (BGBl.) II No. 471/2013.

disputed among Austrian legal scholars whether this regulation violates the UCPD. The Austrian Federal Administrative Court (*Verwaltungsgerichtshof*) requested the CJEU for a preliminary ruling in this matter but later, on 02.03.2016, withdrew this motion.[65]

In light of the issues reported concerning the relevance and wording of the practices on the current UCPD black list, a key challenge for any revision or extension of the black list would be to avoid to the extent possible the use of terms:

- Which need to be interpreted, or are otherwise vague and open-ended, while on the other hand are also not being too narrow or specific;
- Which need an assessment of the unfairness of the behaviour of the specific trader in question.

It would also appear that in light of the diversity of reported problems and the significant consequences of inclusion of specific practices into a revised black list there is a need for an open, transparent and inclusive consultation process on possible additions.

6.1.1.2. *Effectiveness of the UCPD in eliminating obstacles to the Internal Market*

What is the effectiveness of the UCPD (i.e. the national laws transposing it) in eliminating obstacles to the Internal Market in terms of:

- Whether the application of the principle-based approach under this Directive in different Member States shows disparities in the understanding of its principles and, if so, whether these disparities have an impact on cross-border trade;

As mentioned, the UCPD is based on the principle of full harmonisation. Article 4 provides: "Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive." With reference to this provision, the CJEU consistently rules that "the Directive fully harmonises those rules at the Community level. Accordingly, […] Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection."[66] A uniform regulatory framework harmonising national rules concerning unfair B2C commercial practices was established at EU level, in order to eliminate obstacles to the internal market as well as to increase legal certainty for both consumers and traders.[67] In 2013, the Commission came to the conclusion that "by replacing the divergent regulations of the Member States on unfair commercial practices with one set of rules, the Directive has simplified the regulatory environment and helped to remove obstacles to cross-border commerce."[68]

Remarkably, however, <u>the UCPD combines the principle of full harmonisation with a principle-based approach</u>. Hence, the issue is whether this approach leads to divergent application of these uniform principles and, if so, whether these disparities have a negative impact on cross-border trade. It goes without saying that the success of the UCPD in terms of removing obstacles to cross-border trade depends on the way the uniform principles are applied at the national level: the full harmonisation UCPD (uniform *law in the books*) will not achieve its internal market goal if it is being applied

[65] VwGH 21. 10. 2015, 2012/17/0097 and ECLI:EU:C:2016:227 for the withdrawal of the case. See country report Austria.

[66] Joined Cases C-261/07 and C-299/07, Judgment of 23 April 2009, para. 52.

[67] See in particular Recitals 5, 12 and 13 of the Directive.

[68] COM(2013) 138 final.

differently throughout the Member States (no uniform *law in action*). Many legal scholars have therefore observed that the Directive's principle-based approach seems to be incompatible with the principle of full harmonisation.[69]

However, only in a minority of Member States, it is reported that the principle-based approach actually leads to divergent application of the same principles and that this divergent application actually has a negative impact on cross-border trade. In Denmark, for example, business organisations, the Danish Competition and Consumer Authority and the Danish Consumer Ombudsman have emphasised such differences that entail that Danish businesses are met with "unfair competition" from foreign businesses (marketing that is considered unfair under Danish law, but not under the law where the trader is established).[70] In Italy, it is concluded that national differences play a detrimental role for businesses, as they have to adapt their commercial behaviour to different national regulatory environments.[71] From other Member States the view is reported that the principle-based approach actually leads to divergent application of the same principles, but that no major problems due to a resulting negative impact on cross-border trade are reported[72] or experienced[73] by stakeholders. For example, in Slovenia, business representatives have not reported any impact on cross-border trade due to the existing differences in the application of the UCPD; it seems that such differences are taken as a given and a cost of doing business and do not influence business strategies.[74] The interviews conducted in the framework of the study with businesses in all 28 Member States confirm that overall, costs of businesses for complying with the national legislation implementing the UCPD appear to be limited, as are related costs when expanding business activities to other EU Member States.

Finally, from a number of other Member States it is reported that it not clear whether the principle-based approach actually leads to divergent application of the same principles (that could in turn have a negative impact on cross-border trade). There are no specific statistics or studies about the issue.[75]

Where interviewed stakeholders did not consider that the existing differences in the application of the UCPD had any impact on cross-border trade, it was sometimes added that the absence of any impact on cross-border trade results from the fact that companies do not do that much retail business abroad[76] and/or the fact that there is no real cross-border competition at the retail level in certain sectors.[77] Moreover, it is sometimes stated that language barriers and other obstacles outside the legal sphere (e.g. costs for postage services) may also prevent consumers from purchasing in other

[69] See *inter alia* H. Collins, "Harmonisation by example: European Laws against Unfair Commercial Practices", *MLR* 2010, 89-118; B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 560.

[70] Country report Denmark.

[71] See, for an explicit confirmation of this view, country report Italy. See also country report Czech Republic.

[72] Country reports Slovenia, Czech Republic.

[73] Country reports Estonia, France.

[74] Country report Slovenia.

[75] Country reports Germany, Latvia, Poland, Sweden.

[76] Country reports Slovenia, Czech Republic, Poland.

[77] Country reports the Netherlands, Italy.

Member States.[78] However, as is described in detail in the analysis of levels of awareness and trends since the adoption of key Directives,[79] cross-border shopping over the internet has more than doubled since 2006, due in part to technological progress and the mainstreaming of internet shopping in general: In 2014, 16% of all Eurobarometer respondents reported that they made an online purchase from another EU country, compared to only 6% in 2006.[80] Also, in the business interviews conducted for this study (which targeted companies that sell products or services to consumers in five selected sectors), 28% of respondents indicated to sell their products and/or services in other EU Member States, a comparatively high figure. In other words, both B2C cross-border shopping and selling has become more prevalent in recent years, which could make disparities in the understanding of the principle-based approach more relevant in the future. However, it would seem that so far CJEU jurisprudence, the UCPD Guidance document[81] and the exchange of ideas amongst national enforcement authorities within the CPC Network contribute to a common understanding of the principle-based UCPD across the EU, limiting disparities in its application and related impacts.

- The effects of the uniform black list of unfair commercial practices annexed to this directive on the free movement of goods and services;

As mentioned, the UCPD contains an exhaustive black list of 31 outright prohibitions. From a theoretical perspective, the black list is more likely to contribute to the free movement of goods and services as the rule-based approach provides more legal certainty and uniformity than the principle-based approach under the Directive's general clauses. This assessment is confirmed through our country research. Stakeholders often assess the black list as positive in terms of the Directive's goal of removing barriers to the internal market. By reducing uncertainty and diversity, the uniform black list is a helpful tool for fostering cross-border trade, complementing the Directive's general clauses.[82]

In spite of these reported benefits, a number of above-mentioned factors contribute to limitations in the application of the black list not only in terms of achieving the goal of consumer protection but also in terms of achieving the internal market goals. For example, it is reported that in several countries the black list is difficult to apply or barely applied in practice.[83] It is only to the extent that the black list is relevant for uniform application, that it is likely to facilitate the free movement of goods and services.[84]

[78] Country reports Austria, Germany.

[79] For the full results of the analysis of levels of awareness and key trends, please refer to Annex VIII.

[80] Special Eurobarometer 252 and Flash Eurobarometer 397.

[81] It is notable that seven of the position papers submitted by business stakeholders in the open public consultation in the framework of the Fitness Check indicated that guidance documents were very helpful for businesses in this regard, e.g. from Assonime, the association of Italian joint stock companies: "The adoption of guidance documents by the Commission, both for the UCP and the Consumers' Rights directives, is a useful tool to increase awareness of undertakings and consumers. Guidance by the Commission can also promote a greater convergence in the interpretation and application of the substantive rules at the national level."

[82] E.g. country reports Croatia, Estonia, Italy, Latvia, Slovenia.

[83] E.g. country reports Austria, France, Portugal.

[84] E.g. country reports Cyprus, Czech Republic.

From Belgium it is reported that the debate on the compatibility of the regulation of blackout periods with the UCPD causes both legal uncertainty and disparities in regulation between Member States. Actual effect of such discrepancy on cross-border trade is uncertain. On the one hand, regulations such as these, because they pertain to certain selling arrangements and do not discriminate between domestic and imported goods or between domestic traders and traders from other Member States, are presumed innocuous under *Keck*. On the other hand, the Commission has, not so long ago, objected to the prohibition on resale at a loss on grounds of its effect on free movement. Business associations in Belgium do not seem to have gathered empirical evidence which would go one way or another.[85]

- Whether the minimum harmonisation derogation under this directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade.

Article 3(9) UCPD provides for a limitation on the full harmonisation character of the UCPD by stating that, in relation to financial services and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates. Thus, minimum harmonisation applies to these two sectors.

As mentioned above, in the one group of countries where the minimum harmonisation clause is not applied in unfair commercial practices law or other relevant legislation (neither in relation to financial services, nor in relation to immovable property), that clause quite logically does not imply the creation of barriers to cross-border trade. In the second group of Member States that did make use of the minimum harmonisation clause, the country research for this study has not identified significant problems in this respect, while from a theoretical perspective, it remains possible to make a case that the minimum harmonisation clause may have at least some negative effective on cross-border trade. It is notable that interviewed stakeholders in several countries could not report on practical experience on this issue, so that a definitive conclusion is difficult. For example, authorities and other stakeholders in Bulgaria did not report such problems; however this may simply be a lack of statistical data available, and does not necessarily mean that such problems do not exist.[86]

6.1.1.3. *Effectiveness of the PID in contributing to a high level of consumer protection*

What is the effectiveness of the PID (i.e. the national laws transposing it) in terms of:

- Whether and to what extent consumers are effectively informed about the unit selling price;

Recital 6 of Directive 98/6/EC on consumer protection in the indication of prices of products offered to consumers (PID) stresses that the obligation to indicate the selling price and the unit price contributes substantially to improving consumer information, as this is the easiest way to enable consumers to evaluate and compare the price of products in an optimum manner and hence to make informed choices on the basis of simple comparisons.

[85] Country report Belgium.

[86] Country report Bulgaria.

The PID is a minimum harmonisation directive (Article 10). It imposes in Article 3 for products offered by traders to consumers (to be understood as goods, as the PID does not relate to services and real estate) the obligation to indicate (i) the *selling price*, i.e. the final price for a unit of the product, or a given quantity of the product, "including VAT and other taxes". And (ii) subject to certain exceptions, the *unit price*, i.e. the final price, including VAT and all other taxes, for one kg, one litre, etc. The Directive contains the possibility for Member States to waive the obligation of unit pricing for products for which such indication would not be useful (Article 5) and to provide, for a transitional period, a derogation for small shops (Article 6). Pursuant to Article 3(4) of the PID any advertisement which mentions the selling price of products shall also indicate the unit price subject to Article 5.[87] In the context of this evaluation, the focus of the assessment as regards the PID is on the obligation to indicate the unit price, as the selling price is also covered by the UCPD and the CRD.

The extent to which consumers are effectively informed about the unit selling price, can be assessed at several levels: the extent to which consumers are aware of the unit selling price and use it; the extent to which problems with the indication of unit prices exist, and the assessment of stakeholders regarding the effectiveness of consumer information about the unit selling price.

Consumer awareness of the unit selling price is only sporadically addressed in European consumer surveys. In 2001, 68% of consumers surveyed in the EU15 indicated that they were at least 'a little' interested in being able to use displayed unit prices to compare goods.[88] According to a Special Eurobarometer conducted in 2010, 48% of surveyed consumers responded that they consulted the unit price 'always' or 'often' when comparing goods.[89] In the consumer market study conducted for the Fitness Check in 2016, consumers were asked whether they thought it was legal for a supermarket to display prices for bottled water per bottle (where the bottle was not 1 litre) instead of per litre.[90] Two-thirds of respondents (67%) correctly answered that the supermarket was obliged to show prices per litre. The proportion of correct responses was identical in the EU15 and EU13. 58% of consumers in the survey indicated that they benefited at least "moderately" from the right to see prices per unit, the highest level of benefit indicated for any the Directives under consideration in

[87] In in a recent judgment Citroën Commerce (C-476/14, EU:C:2016:527, Judgment of 7 July 2016), the CJEU has given guidance on the interpretation of the obligation of to indicate the selling price. First, the Court derived from Article 3(4) PID (any advertisement which mentions the selling price of products shall also indicate the unit price) that, although that provision lays down no general obligation to mention the selling price in advertising, nevertheless an advertisement, mentioning both the characteristics of the product on offer and a price appearing, will appear to a reasonably well-informed and reasonably observant and circumspect consumer, to be the selling price of that product. In such a case, the price so indicated must satisfy the requirements of Directive 98/6. Second, while according to Article 2(a) the selling price means "the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes", the Court ruled - against the opinion of Advocate General Mengozzi - that costs in connection with the transfer of a motor vehicle from the manufacturer to the dealer, which are payable by the consumer, must be included in the selling price of that vehicle indicated in an advertisement made by the trader when, having regard to all the features of that advertisement, in the eyes of the consumer it sets out an offer concerning that vehicle.

[88] Flash Eurobarometer 113. Question: In some shops, unit prices by the kilo or by the litre are displayed in addition to the price to pay for the pack, can, or bottle. This gives you a better opportunity to compare competing products. Does this double display interest you personally?

[89] Special Eurobarometer 342. For more details, refer to the Section Analysis of levels of awareness and key trends since the adoption of key directives, presented in Annex VIII.

[90] Question: You went to the supermarket to buy water. The shelf displayed the prices for some brands per bottle and per litre, whilst for others the price was only given per bottle. Should prices also be indicated per litre for all of the bottles of water (except where their volume is 1 litre)? [Yes, the supermarket must show litre prices for bottles that are not 1 litre bottles, that is the law – No, the supermarket is allowed to choose whether or not they show litre prices – Don't know]

this study.[91] It can therefore be concluded that a majority of consumers are informed about the unit selling price, use this information and consider it beneficial.[92,93]

Consumer problems related to the unit selling price are not tracked in Eurobarometers. However, the above mentioned 2016 consumer market study found that 30% of consumers had encountered problems with the unit price at least "sometimes" in the last year, including 11% who had encountered problems "often" or "very often".[94] 59% of consumers reported that their problems with the unit price related to food products, compared to drinks (41%), detergents/cleaning products (28%) or other products (8%).

The existence of problems with unit price indication is confirmed by reports and investigations at the national level. In Germany, the Consumer Centres (*Verbraucherzentralen*) 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. The main problems identified were:[95]

- Unit price missing entirely (19% of price tags checked);
- Mathematical errors in the unit price calculation (9% of price tags checked);
- Unit price calculated using the wrong reference, e.g. dehydrated soup priced per weight of the soup mix rather than by volume of the end product (34% of price tags checked);
- Unit price calculation not matched with the product, e.g. where the product is sold in different sizes with unit prices given as a range, making the unit price of any one product unclear (5% of price tags checked).

In the UK, the consumer organisation Which? filed a 'super-complaint' regarding misleading and confusing unit price indication in supermarkets 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 2000 UK adults on their experiences using unit price indications in supermarkets. Three main problems were identified in their report:[96]

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[91] Question: Based on your experience as a consumer, please indicate to what extent you have benefitted from the following consumer rights. 'The right to see the price of products also per unit.'

[92] In the online public consultation as well, 72% of respondents considered the right to get information about the unit price of goods was 'rather' or 'very' beneficial, including 95% of consumer associations, 89% of consumers, and 67% of individual businesses.

[93] The results of the behavioural experiments carried out as part of the consumer market study conducted for the Fitness Check in 2016 also showed that respondents were highly aware of the presence of unit prices, and that the majority of respondents who were not shown a unit price when asked to make a purchase decision reported calculating or estimating the unit price themselves. The results also showed that the presence of unit price information reduced the average price paid per unit by the respondent during the course of the experiments.

[94] 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? 'Lack of indication of the unit price.'

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

[96] 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. See also the position paper submitted by Which? to the public online consultation.

- Unit price not displayed clearly on the grocery price tag, making it difficult for consumers to find or read the price (noted by 23% of poll respondents);
- Unit price of like products displayed in different units. For example, packaged food may be priced per weight or per item, or certain goods may be priced per 100g or 100ml (noted by 35% of poll respondents);
- Updated unit prices often not provided for products that are part of a special offer (noted by 33% of poll respondents).

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.[97]

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 with enforcement, particularly for smaller retailers, as these countries had chosen not to use the derogation for small businesses at the time.[98] Additionally, in Belgium, Spain and Italy, compliance was found to be higher for food products than for non-food products.[99]

The mentioned evidence from the recent consumer survey and the results of investigations in two Member States therefore suggest that consumers continue to encounter problems with unit price indication.

Complementary assessments of the effectiveness of consumer information about the unit selling price were provided by stakeholders in the country research for this study. In most Member States, consumers are reported to be effectively informed and aware about the unit selling price or at least stakeholders consider that there are no major problems in this respect. From Bulgaria it was reported that in the last few years there has been a significant improvement in informing consumers about the unit selling price, especially concerning packaged goods. The enforcement authority in this country pointed out that during the early years after entering into force the first set of rules on price indication (1999) quite a large volume of the work of the authority was related to violations of these rules, whereas such cases are rarely encountered in their practice nowadays.[100] However, in some countries the assessment is less positive or unclear. For example, in Cyprus there was consensus amongst the stakeholders interviewed that consumers lack sufficient understanding of the function of the unit price, in Malta and Romania there was disagreement amongst interviewed stakeholders in this respect, in Hungary problems are reported to occur occasionally with regard to the size of the unit price indication or failure to indicate unit prices all together,[101] and from some countries a lack of evidence was reported (e.g. Spain, Italy).[102] It is notable that in spite of the mostly positive assessment a number of countries report regular complaints regarding price indication (e.g. Croatia, France).

[97] 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

[98] The derogation is now in force in Belgium and authorities did not express concerns in the country research, see country report Belgium.

[99] 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.

[100] Country report Bulgaria.

[101] Country report Hungary

[102] Country reports Cyprus, Italy, Malta, Spain.

The country research also identified a number of current problems related to price indication, from small letter size of unit price indication to sales practices such as dynamic pricing, which often are outside the scope of the PID and are mostly considered to fall within the UCPD framework (see above).

In conclusion, the available evidence indicates that by and large consumers appear to be effectively informed about the unit selling price. While in the country research stakeholder mostly considered price indication rules to be effective and from most countries no major problems in this respect were reported, investigations at the national level (in the UK and Germany) indicate that a considerable level of infringements of price indication rules occurs in practice.

- Where a recognised measurement unit for a product's performance exists and is displayed to consumers (e.g. number of washloads for detergents), should the "unit price" for such product be indicated per such "performance" measurement units rather than per 1 kg or 1 litre?

A legal obligation to the effect that a price per performance unit is displayed to consumers for specific products does not seem to exist in the vast majority of the Member States. The most relevant product for which unit prices according to performance were reported are detergents. In Belgium a Royal Decree on textile detergents of 2012 provides for the obligation to indicate the price per washload (following a Code of practice that existed since the early 2000s).[103] For this product type, performance is often considered to be a more accurate basis for unit pricing, especially since there are concentrated detergents on the market which are of much smaller volume than traditional, non-concentrated ones, yet they typically have the same or even higher performance in terms of number of washloads. For example in Bulgaria, a recent survey conducted by a consumer association revealed a big price fluctuation between unit price per kilogram and unit price per performance for some of the products. The conclusion of the survey based on the conducted tests was that the most objective way of presenting the unit prices of detergents is the price per performance unit (i.e. per single washload).[104] During the open public consultation for the Fitness Check, several business stakeholders that provided detailed position papers were also of this opinion, as the price per (performance) measure is considered to be "more accurate" than price per wieght/volume, and a "unit of measurement other than the price per use may be misleading".[105] On the other hand, it was suggested by some stakeholders in our country research that performance units are unreliable, as the number of washloads for detergents depends on various factors like the type and program of the washing machine, the hardness of the water and the degree of stains on the clothes to be washed.

From Austria it was reported that prices of detergents are usually indicated by the performance of the sold product, and this is considered to be advantageous. Also, German law already foresees this kind of price indication for products such as household detergent pursuant to Sec. 2 para. 4 cl. 1 PAngV as an option, which allows deviation from Sec. 2 para. 3 PAngV and indication of the price in relation to a “common usage”. The intention of the German legislature was that the utility of these

[103] Country report Belgium.

[104] More details about the tests and the survey please find on - http://aktivnipotrebiteli.bg/ [last visited on 17.07.2016]

[105] See Report on the open public consultation for the Fitness Check of EU consumer and marketing law, position papers submitted by e.g. BusinessEurope, EuroCommerce and European Brands Association, and Feedback to the Fitness Check Roadmap by A.I.S.E.

products varies broadly and the relation to a weight does not provide consumers with comprehensible information.[106]

However, while for example in Cyprus all interviewed stakeholders agreed that the unit price should be indicated per performance unit especially where the weight or volume of a product is not relevant to its performance, it was also pointed out that if that approach is to be followed, it would have to be a legal obligation so that it is used by all relevant traders, as otherwise the function of a unit price for better comparison of products would be weakened. In contrast, in several other countries there was less consensus among stakeholders, with some proposing performance based unit prices for specific products and some indicating that the exact weight or quantity of the product was still more transparent, because of the ease of comparing with other similar products (e.g. in Greece, Malta, Slovakia). In a third group of countries stakeholders emphasised that currently the unit price is based on '1 litre' or '1 kg' and that both traders and consumers have got used to it, so that there was no need for change (e.g. Estonia, Slovenia).

It was proposed by stakeholders in several countries to provide both types of unit prices (on basis of weight and of performance), e.g. in Cyprus, Croatia, Netherlands, Romania. This was also seen as an option by a regulator in Poland that otherwise opposed performance based unit prices for fear of increased opportunities for misleading practices and confusion of consumers. However, other stakeholders warned concerning information overload (e.g. in Italy). It is notable that in France already some experience with indicating both prices exist. Art. 4 of the *loi Hamon*[107] has introduced, on an experimental basis, a double price setting: during three years, from Jan 1st 2015 until Dec 31st 2017, sellers can opt to display both the weight/volume unit price and the price for the use of certain products. This initiative has been criticised for being very difficult to implement (what defines a product's use and can this be measured in advance? What does the concept of *'économie de fonctionnalité'* entail?).[108] The initiative has had only very limited success, according to stakeholders.[109]

In Hungary it is reported that stakeholders agree that unit pricing per performance is not necessary.[110] Likewise, interviewed stakeholders in Ireland have doubts about the practicality of such an obligation,[111] and in Greece opinions amongst stakeholders on this issue are divided.[112] In Luxembourg, a draft based on the detergents Regulation 648/2004 is reported to be in preparation.[113] In Finland, a consensus on introducing such an obligation could not be reached, but in 2016 businesses were allowed to

[106] *Gelberg* "§ 2 PAngV", rec. 20 in: Landmann/Rohmer (2016); *Weidert/Völker* "§ 2 PAnGV", rec. 18 in: Harte-Bavendamm/Henning-Bodewig (2013); *Völker* "§ 2 PAngV", rec. 52 in: Völker (2002).

[107] Loi n° 2014-344 du 17 mars 2014 relative à la consommation

[108] http://www.economie.gouv.fr/files/files/directions_services/cnc/avis/2015/Rapport_sur_le_double_affichage_des_prix_de_vente_et_d_usage_des_biens_de_consommation.pdf; http://www.economie.gouv.fr/files/files/directions_services/cnc/avis/2015/Avis_relatif_au_double_affichage_des_prix_de_vente_et_d_usage_des_biens_de_consommation.pdf

[109] Country report France.

[110] Country report Hungary.

[111] Country report Ireland.

[112] Country report Greece.

[113] Country report Luxembourg.

introduce additional information (i.e. in addition to the price per kg or per litre) for the purpose of performance comparisons relating to the number of washloads.[114]

It can be concluded that stakeholder opinions on the usefulness of the introduction of the indication of price per performance unit are divided, and no consensus exists regarding the preferred way forward. Most experience in Member States appears to exist regarding performance-based unit prices for detergents, where the need for such unit pricing is most obvious due to the existence of concentrated and non-concentrated (traditional) products on the market.

- The effects of the regulatory choices/ derogations (e.g. for small retail shops) allowed by the Directive and applied by Member States. [*For those countries that use derogation for small businesses: Is the derogation relevant? Do companies make use of it? Are there consumer complaints because of this?]*

The following table presents an overview of which Member States have implemented provisions going beyond minimum harmonisation requirements in terms of the extension of the application of the PID to other sectors and the use of the regulatory choices/derogations, in particular for small retail shops. It indicates that only 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/ derogations, e.g. in relation to specific kinds of products such as works of art, places/times of sales such as auctions, or packaging.[115]

[114] Country report Finland.

[115] See Annex III for further details on extensions and specific derogations provided in the country reports.

Table 4: 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 regarding the unit price	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	No	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

Source: Country reports' fact sheets on transposition of directives in Member States' law - PID. Notes: See Annex III for further details on specific derogations provided in the country reports.

In a few countries (e.g. Cyprus, Portugal) the existing exemption for small businesses has been abrogated years ago. In Cyprus this was back in 2005. According to the regulator there is however a leniency towards SME. In Portugal the law contained an

exemption for itinerant sales. However this exemption has been repealed in 2002. It is also reported from some countries in which currently no exemption exists that there is a policy of tolerance or lenience regarding small shops by enforcement authorities. Where the derogation for small retail shops exists, few practical problems and consumer complaints in this respect are reported from stakeholders.[116]

6.1.1.4. *Effectiveness of the MCAD in providing protection for businesses*

- The scope of protection under the Directive, in particular whether the scope limited to the notion of 'advertising' provides effective protection for businesses.

The 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,[117] similar to the provisions of the UCPD. The CJEU clarified that the MCAD refers to misleading advertising and unlawful comparative advertising as two independent infringements. Consequently, in order to prohibit misleading advertising, it is not necessary that it constitutes at the same time unlawful comparative advertising.[118]

In addition, while in view of the existence of the UCPD the misleading advertising provisions of the MCAD only aim at the protection of businesses, and not consumers, its provisions on comparative advertising have a mixed objective: guaranteeing consumers sufficient information through objective comparisons in advertising and protecting competitors against unlawful (in particular deceptive or denigrating) commercial comparisons.

The scope of the MCAD is limited to “advertising”, because this was the Union legislature’s approach in 1984 (the original Misleading Advertising Directive in which the comparative advertising provisions were inserted in 1997). Although the notion of “advertising” in Union law (including in the MCAD)[119] is rather broad, it is nevertheless narrower than that of “commercial practices” in the UCPD. The MCAD prohibits misleading advertising in a generic way. No examples are given, only features to be taken into account to determine whether an advertisement is misleading (Article 3). Comparative advertising[120] is authorised provided it fulfils certain (negative conditions) (such as not being misleading or denigrating) and positive conditions (such as being objective). The price is mentioned expressly as an element that can be the

[116] It is worth noting, however, that 72% of consumers responding to the public online consultation either ‘tended to agree’ or ‘strongly agreed’ that introducing an obligation for all businesses to display the unit price irrespective of size would improve EU consumer and marketing rules for the benefit of consumers. This view was also supported by 80% of consumer associations and 64% of public authorities, compared to 41% of individual businesses and 24% of business associations.

[117] Judgment in *Pippig*, EU:C:2003:203.

[118] Judgment in *Posteshop*, C-52/13, EU:C:2014 150 (the Italian version of the Directive could have suggested otherwise).

[119] See art. 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.”

[120] On the notion of comparative advertising see Judgment in Toshiba v Katun, C-112/99, EU:C:2001:566; see F. Henning-Bodewig, “The Notion of Comparative Advertising” in *Landmark Cases of EU Consumer Law, A*ntwerp, Intersentia, 2013, p. 345 et seq.

object of comparisons. The lawfulness of price comparisons has been largely defined in judgments of the CJEU.[121]

The provisions on comparative advertising in the MCAD also affect trade mark law and are affected by the protection granted by the Trade Mark law Directive (TMD).[122] The CJEU has ruled on the use of trade marks in comparative advertising.[123]

The case-law of the CJEU shows a rather high level of protection given to the reputation of trade marks, in which the consumer interest does not seem to play a role. In contrast, the Court's case-law on the conditions for the lawfulness of comparative advertising, in particular with regard to price comparison, is based on the premise that comparative advertising shall be authorised as much as possible because it is believed to contribute effectively to consumer information. For instance in *L'Oréal*,[124] the Court granted a broad protection to well-known trade marks against unfair competition (by taking unfairly advantage or affecting the reputation of the trade mark), irrespective of whether consumers are harmed. The trade mark protection has been strengthened by Directive 2015/2436 (under the previous directive 2008/95/EC the protection of well-known trade marks against taking unfairly advantage or affecting the reputation of the trade mark was an option for the Member States, now it is compulsory).

As regards the MCAD, its comparative advertising provisions have been declared by the CJEU to serve primarily the information of consumers as a result of which the Court has stressed that these provisions should be interpreted as much as possible in a sense that allows comparative advertising. This raises the question how a right balance can be struck between the protection of interests of trade mark owners, that flow from the extensive protection of well-known trademarks under the Trade Mark Directive, and that of consumers with respect to limitations on advertising for alternative goods while these goods may present advantages to them (especially in terms of price).

In its Communication of 27 November 2012 on "Protecting businesses against misleading marketing practices and ensuring effective enforcement" and "Review of Directive 2006/114/EC concerning misleading and comparative advertising",[125] the Commission identifies i.a. the following unfair practices between businesses: misleading payment forms, offers to extend internet domain names or protection of trademarks, and last but no least misleading directory companies.[126] The Commission proposed the introduction of a black list and provisions to improve enforcement.

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[121] See especially Judgment in *Lidl Belgium v Colruyt*, C-356/04, EU:C:2006:585; Judgment in *Lidl SNC v Vierzon*, C-159/09, EU :C :2010 :696; see G.-L. Ballon, "Comparative advertising: price comparisons", in *Landmark Cases of EU Consumer Law*, Antwerp, Intersentia, 2013.

[122] Directive 2008/95/EC recast in Directive 2015/2436 to approximate the laws of the Member States relating to trade marks.

[123] Judgment in *O2 Holdings v Hutchinson*, C-533/06, EU :C :2008:339: Judgment in *L'Oréal v Bellure*, C-487/07, EU:C:2009:378; see G. Straetmans,"Comparative Advertsing and the Use of Trade marks: Confusion, Imitation and Unfair Advantage", in *Landmark Cases of EU Consumer Law, A*ntwerp, Intersentia, 2013, 373 et seq.

[124] See Jugment in *L'Oréal v Bellure*, C-487/07, EU:C:2009:378.

[125] COM(2012) 702 final (based on a public consultation)

[126] For a detailed description of the practices of misleading directory companies, see Misleading practices of 'directory companies' in the context of current and future internal market legislation aimed at the protection of consumers and SMEs, Civic Consulting / European Commission, 2008.

The Communication of 27 November 2012 summarises the view of stakeholders as follows: Overall, there is almost a consensus among all stakeholder (including MS authorities) that, while the MCAD appears to provide a rather solid framework for a considerable part of the B2B advertising market, it does not efficiently capture all types of misleading marketing practices in all MS. There is a strong call for an increased protection of SME's and independent professionals against misleading marketing practices, such as misleading directory companies, and for a cooperation mechanism between MS in cross-border cases of misleading marketing.[127] The following drivers of the problem of cross-border misleading marketing practices are mentioned: lack of effective enforcement, unclear and insufficient rules on misleading marketing practices, insufficient awareness of SME's on unlawfulness of misleading marketing practices.

In a recent Communication on "Tackling unfair trading practices in the business-to-business food supply chain",[128] the Commission identified the following practices (of which SME are the main victims, either by conduct of their suppliers or their clients): the retroactive misuse of unspecified, ambiguous or incomplete contract terms, the excessive and unpredictable transfer of costs or risks to the counterparty, the use of confidential information and the unfair termination or disruption of a commercial relationship. In other words, the practices referred to are practices in a contractual relationship, more in particular they are examples of B2B unfair contract terms (which as such are not regulated at the EU level, while being regulated in some Member States, e.g. in Germany); whereas the MCAD (and the UCPD) relate essentially to non-contractual practices.

The country research for the present study corroborate the first finding of the 2011 public consultation presented in the 2012 MCAD Review Communication of the Commission, namely that the MCAD provides a rather solid framework for a considerable part of the B2B advertising market,[129] but does not corroborate the second finding, i.e. a strong call for an increased protection. According to the majority of country reports stakeholders are not aware of many complaints, and the limitation of the scope of the MCAD to "advertising", i.e. not extending to commercial practices, is not reported to cause major problems. The limitation to "advertising", as it is broadly defined in the MCAD, does therefore not seem to reduce significantly the MCAD's effectiveness as compared to a situation where its provisions would apply to e.g. "commercial practices" as in the UCPD. In this regard it is telling that the black list the Commission proposed in 2012 to append to the MCAD in order to protect businesses against the most common form of unfair commercial practices can all be qualified as forms of misleading advertising.

The practical lack of relevance of the limitation of the MCAD's scope to "advertising" can be explained by a number of factors: In several Member States there is one set of rules for misleading practices both for B2B and B2C, on the basis of the UCPD. Hence, the limitation to "advertising" does not seem to create a regulatory gap in these countries. In other Member States, the general clause on unfair competition complements the specific protection against misleading advertising. Finally, some other country reports stress that the definition of advertising in the MCAD and the

[127] It is also stressed that NGO's are not protected, in that they are considered to be neither consumers (protected by the UCPD) nor traders (protected by the MCAD).

[128] COM(2014) 472 final.

[129] Also, in the online public consultation conducted in the framework of the Fitness Check, 69% of businesses agreed that businesses are currently well-protected against unfair comparative advertising and 65% agreed that businesses are well-protected against misleading marketing practices, see Part 2 of this report.

national implementing law,[130] or in the national implementing law (said to be going beyond the minimum level of the MCAD)[131] is broad because it relates to "any form of representation".

Only a minority of country reports[132] indicate that the limitation to advertising limits the effective protection of businesses against misleading practices. According to Italian stakeholders the implementation of the MCAD provides a sufficient level of protection, but at the same time it is said that there is a lack of equilibrium between the protection on B2B and B2C relations.[133] Some country reports[134] expressly mention the stakeholders' opinion that the notion of advertising is broad enough to encompass most of the relevant practices or that the notion is in practice extended to practices not being advertising in the sense of the Directive. The country reports do not express concerns or positions on whether there is a need to regulate practices during contract conclusion/ performance in B2B transactions.

- The overall effectiveness of the principle-based approach to misleading advertising under this Directive;

Stakeholders in a significant number of Member States confirm that overall the principle-based approach of the MCAD is effective.[135] The country research also indicates that misleading advertising between businesses may often be challenged by actions brought under the UCPD, i.a. in situations where both consumers and businesses are misled.

However, several country reports stress the absence of application experience, due to lack of administrative enforcement,[136] or lack of case law[137] or settlements, whereas others emphasise do that in particular small enterprises are affected by misleading advertisements.[138] Also, in some Member States the principle-based approach of the MCAD is considered (in line with the experiences reported from some countries regarding the principle-based approach of the UCPD) to reduce legal certainty. For example, the country report Croatia emphasises that the principle-based approach to misleading advertising may prove to be challenging for courts, due to the fact that the general clause is open to different interpretations on a case-to case basis.[139] In the country report Latvia the "lower level of certainty" of the principle-based approach is acknowledged, but it is concluded that the "benefits of the approach outweigh this

[130] Country reports Latvia, United Kingdom.

[131] Country report the Netherlands.

[132] Country report Spain.

[133] Country report Italy.

[134] Country reports Croatia, Latvia, Poland, Romania, Slovakia.

[135] Country reports Austria (where the UCPD is extended to B2B relations), Belgium (at least businesses; authorities would prefer more rules or a codification of case law), Bulgaria, Czech Republic, Denmark (same observation as for Austria), Italy, France, Hungary, Lithuania, Malta, Poland, Slovenia, United Kingdom

[136] Country report Poland.

[137] Country report Croatia, Cyprus.

[138] Country report Austria.

[139] Country report Croatia.

disadvantage".[140] To reduce uncertainty, the Lithuanian legislator established that when determining whether advertising is misleading, account is taken of the criteria of (i) accuracy, (ii) comprehensiveness and (iii) presentation. The addition of these three main pillars allows to methodically, on the basis of these three major criteria, assess whether the particular advertising is misleading.[141] Another approach to create more legal certainty is suggested in the country reports Croatia and Romania, which consider, as a potential measure to improve the effectiveness of the MCAD, the introduction of a black list of B2B misleading practices (similar to the current approach of the UCPD). This is in line with the suggestion in the 2012 MCAD Review Communication of the Commission to introduce a black list of the most harmful misleading marketing practices (in addition to other proposed measures). A relevant question to stakeholders on this issue was also introduced in the open public consultation for the Fitness Check, the answers to which show that with 62% a clear majority of business respondents (i.e. individual companies) either strongly agree or tend to agree that business protection against unfair commercial practices should be strengthened by introducing a "black list" of B2B practices that are always prohibited. In contrast, less than one-third (27%) of business associations agree with this statement, while 47% either tend to disagree or strongly disagree.[142] This split of opinion is to some degree reflected in the country research for this study: in some countries, stakeholders do not perceive a need for further action to improve the effectiveness of the MCAD, while others consider that there is a need for additional provisions or clarifications (e.g. regarding rules applicable to social media). In some countries, misleading practices affecting SMEs have already led to additional legislative action. For example in Sweden, the legislator has proposed several amendments in private law, marketing law and penal law in order to address the problem of false invoices, such as invoices sent out from previously unknown suppliers, invoices deliberately designed to resemble an invoice from a reputable supplier and offers that have been designed as invoices but where it has been difficult to see that in reality it is an offer.[143]

- The effects of the minimum harmonisation provisions on misleading advertising; [*Which national rules that go beyond the MCAD, if any, have been providing a higher level of protection? If so, how? Are there other rules protecting B2B transactions applied by Member States (e.g. through extending the UCPD)]*?

The existence of minimum harmonisation provisions on B2B misleading advertising in the MCAD, while in B2C relations the UCPD provides maximum harmonisation, might potentially lead to the paradoxical situation where businesses are better protected than consumers. However, our country research does not indicate that this is the case.

As indicated above, in several Member States rules of the UCPD apply to B2B relations as well. Belgium has extended the general rules on misleading advertising of the UCPD (but with somewhat different criteria) as well as the prohibition of certain per se misleading practices (such as pyramid schemes and the use of invoices misleadingly giving the impression that the addressee has a debt) to B2B relations.[144] In Germany the protection against confusion given by the UCPD (Article 6(2)(a)) – which applies to

[140] Country report Latvia.

[141] Country report Lithuania.

[142] Part 2 of this report.

[143] Country report Sweden

[144] Country report Belgium.

B2B relations in this country – leads to a higher level of protection of businesses than the MCAD.[145] Interestingly, as mentioned in the country report Denmark, even where similar provisions apply to B2B and B2C relations, it may be that different standards are applied depending on whether the marketing is addressed to consumers or to businesses.[146] Where the UCPD is not applied to B2B relations, specific provisions going beyond MCAD minimum harmonisation requirements often reflect a broader approach. For example, in Lithuania the national law provides a broader definition of "advertising" in comparison with one provided in Article 2(a) of the MCAD,[147] and in Portugal national legislation relies on the UCPD's (broader) definition of misleading actions.[148] Likewise in Hungary in B2B relations the concept is "business practice" which corresponds to "commercial practice" in the UCPD.[149] In Finland the Market Court provides protection in B2B relations by applying the concept of acts "against good commercial practices".[150] In Cyprus, the Trade Descriptions Law contains provisions comparable to the ones on misleading omissions of the UCPD and to this extent, goes beyond the MCAD which does not touch upon misleading omissions.[151] Some country reports also indicate, as highlighted before, that the general clause on unfair competition,[152] or common law on passing off,[153] may provide for additional protection for businesses in the field of misleading advertising.

- The effects of the full harmonisation provisions on comparative advertising;

The comparative advertising provisions of the Directive have given rise to an important body of case-law of the CJEU which contributes to a uniform interpretation and clarity of the rules and this enhances the full harmonisation character and its positive effects (in the light of the rationale of these provisions which is to improve consumer information). Apparently, and notwithstanding the full harmonisation character of EU provisions on comparative advertising, there are important differences between Member States in the occurrence of comparative advertising. The differences may, to a certain extent, be explained by the traditional view on the permissibility of comparative advertising (under the standards of unfair competition). Allowing this form of advertising by clear legal rules does not necessarily seem to lead to an increase in practice. In Member States where, before the implementation of the Directive, comparative advertising was not allowed, the implementation of the Directive is often seen as beneficial (to consumers). In some Member States, this form of advertising remains exceptional or is not very often used (e.g. in Austria, Cyprus, Germany, Greece, Luxembourg, Malta, Slovakia).[154] Stakeholders in Italy contend that the strict conditions for comparative advertising posed by the Directive have de facto

[145] Country report Germany.

[146] Country report Denmark.

[147] Country report Lithuania.

[148] Country report Portugal.

[149] Country report Hungary.

[150] Country report Finland.

[151] Country report Cyprus.

[152] Country reports Greece, Italy, Slovenia.

[153] Country report Ireland.

[154] Country reports Austria, Cyprus, Germany, Greece, Luxembourg, Malta, Slovakia.

eliminated this type of advertising.[155] In France the legislature has not fully respected the full harmonisation character.[156] In contrast, after the *Pippig* judgement of the CJEU, which found the Austrian conditions for comparative advertising to be stricter than those of the MCAD, the UWG (the Austrian law on unfair competition and commercial practices) was amended in 2007 and corrected in 2010. The law is now believed to be in line with the MCAD.[157] In Belgium, finally, where, since the implementation of the Directive of 1997, this form of advertising is quite common, the authorities are not enthusiastic about full harmonisation. They seem to believe that the aim of the rules is not to allow comparative advertising.[158]

- Whether the comparative advertising rules provide an effective legal framework for modern types of marketing where a competitor or a product offered by a competitor can be identified;

Only limited information could be identified during the country research concerning this issue. In some Member States there is no practical experience in this field,[159] there is no relevant case law or academic literature, or no problems were reported by stakeholders.[160] While a definitive conclusion cannot be reached on this basis, the available evidence suggests that overall the existing comparative advertising rules are either not very relevant in countries where this practices is rarely used, or provide an effective legal framework to the extent that major problems have not been reported in those countries where comparative advertising is more prevalent.

In several Member States the existing rules are considered to be sufficient to cope with modern type of marketing,[161] including in the social media.[162] From Bulgaria[163] it is reported that in the practice of the Commission for Protection of Competition there are a significant number of cases related to online misleading/comparative advertising,[164] including social media marketing.[165] In contrast, the French country

[155] Country report Italy.

[156] Country report France: Article L 122-4 C. cons. prohibits comparative advertising on packaging, travel tickets, means of payment or admission tickets.

[157] Country report Austria.

[158] Country report Belgium.

[159] Country reports Greece, Luxembourg, Ireland, Lithuania, Sweden.

[160] Country reports Austria, Denmark, the Netherlands, Poland, Spain.

[161] Country reports Belgium, Finland.

[162] Country reports Czech Republic, Estonia.

[163] Country report Bulgaria.

[164] Decision № 501/20.04.2011 the Commission for Protection of Competition; Decision № 273 / 05.03.2014 the Commission for Protection of Competition; Decision № 329 / 18.05.2016 the Commission for Protection of Competition; Decision № 1478 / 26.11.2014 the Commission for Protection of Competition; Decision 06.01.2012 `Civil Case. № 58/2011 Sofia City Court.

[165] Decision № 1137 / 18.09.2013 the Commission for Protection of Competition; Decision № 791 / 29.09.2015 the Commission for Protection of Competition; Decision № 250 / 18.03.2015 the Commission for Protection of Competition; Decision № 291 / 11.05.2016 the Commission for Protection of Competition; Decision № 331 / 16.04.2015 the Commission for Protection of Competition; Decision № 860 / 04.11.2015 the Commission for Protection of Competition

report mentions problems with the application of existing rules to modern types of online comparative practices.[166] Also, some of the position papers submitted to the online public consultation in the context of the Fitness Check suggest that additional clarification in this area would be welcomed.[167]

- Whether the current rules on enforcement set in the Directive provide an effective enforcement framework, especially in the context of cross-border transactions.

According to the country research conducted for this study, answers to this evaluation question vary depending on the Member State concerned and mostly either consist of a positive assessment of the effectiveness of the current rules[168] or a conclusion that a lack of data or experience (as mentioned already before) does not allow a definitive assessment.[169] Often, there appear to be only limited practical experiences in cross-border enforcement. One report even mentions that, according to a business association, businesses would have no interest in conducting cross border comparative advertising. Where experience exists, practical problems seem to be considerable: Italian enforcement authorities report that they receive several complaints concerning cross-border infringements but that they are not able to react adequately, because of the lack of adequate instruments concerning cross-border cooperation.[170] According to a Portuguese enforcement authority, in administrative procedures involving traders located in other EU Member-States the trader's native language must be used in the notice. In several cases, the authority indicated, it is not possible to do so due to lack of resources. Although many traders do not raise this procedural question, when they do so, the procedure is closed. According to the country report, this example illustrates the need to simplify the procedural rules applying to cross-border infringements.[171] Another problem of cross-border enforcement is highlighted by a Latvian authority: in some cases foreign traders are using methods of advertising in breach of Latvian law, but not of that in other Member States. In such cases, foreign authorities cannot impose any sanction, if requested so by Latvian authorities. This allows traders to evade any sanction.[172]

In contrast the Belgian report mentions that, while a business association stated that the current rules on enforcement are insufficient in cross-border cases, there is a positive cooperation of government authorities within the Benelux.[173] The Finish report mentions that, according to business associations, the rules function well.

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[166] Country report France.

[167] E.g. it was stated by EuroCommerce that it "… supports the codification in the MCAD of the CJEU case law on comparative advertising [and] calls for the clarification of the conditions under which a retailer can lawfully use the following marketing practices involving a price comparison on the basis of the CJEU case law: comparison of the price of a selection/basket of products; comparison by a retailer between own-brands and other brands; operation of price comparison websites by a retailer."

[168] Country reports Austria, Czech Republic, Estonia, France, Malta.

[169] Country reports Cyprus, Ireland, Greece, Lithuania, Sweden, the Netherlands.

[170] Country report Italy.

[171] Country report Portugal.

[172] Country report Latvia.

[173] Country report Belgium.

Several country reports conclude that in view of the inapplicability of Regulation 2006/2004 on Consumer Protection Cooperation to B2B relations cross-border enforcement is less effective than it should/could be, or report that stakeholders consider it important to extend the scope of application of Regulation 2006/2004 at least to the relationships business-to-micro-enterprises and at best to all B2B disputes.[174]

6.1.1.5. *Effectiveness of the MCAD in eliminating obstacles to the Internal Market*

What is the effectiveness of the MCAD (i.e. the national laws transposing it) in eliminating obstacles to the Internal Market in terms of:

- Whether the application of the principle-based approach under this Directive in different Member States shows disparities in the understanding of its principles and, if so, whether these disparities have an impact on cross-border trade; Whether the minimum harmonisation character of provisions on misleading advertising represents a barrier to cross-border trade;

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 country research for this study 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 was available in this respect, or they had no opinion due to a lack of practical experience. The impacts of the minimum harmonisation character of provisions on misleading advertising were assessed similarly.

The results of the business interviews conducted in the framework of this study confirm that there seem to be no disproportionate burdens on businesses in this respect. The reported costs that businesses spend on average when entering another EU country's market for checking compliance with and adjusting their business practices to legal requirements of the other Member State related to advertising and marketing *targeted at businesses* were limited overall and typically less than half of the costs related to advertising and marketing targeted *at consumers* (for more details, see results of the business interviews in Part 4 of the report, and the answers to the evaluation questions related to efficiency below).

- Whether the fully harmonised provisions on comparative advertising provide an appropriate legal framework in cross-border trade for advertising where a competitor or a product offered by a competitor can be identified;

As to the fully harmonised MCAD provisions on comparative advertising, there do not seem to exist many problems. According to the country research the fully harmonised provisions on comparative advertising are considered to provide an appropriate legal framework, but it also has to be noted that relevant experience of stakeholders seems often to be limited, due to the limited use of comparative advertising in some Member States (see above), and/or the limited experience with cross-border trade in this respect. Several stakeholders have therefore emphasised that there is not sufficient information on this issue.

[174] Country reports Slovakia, Italy. Also, the country reports Croatia and Spain conclude that measures should be taken to improve effectiveness of cross-border enforcement by strengthening cooperation among competent authorities of Member States.

- Whether the lack of cross-border enforcement mechanism in B2B relations constitutes a barrier to cross-border trade.

According to the country research, there are either no relevant problems with / barriers to cross-border trade reported, or stakeholders had no data/no opinion regarding this question, due to the little relevance of cross-border trade in their country or the limited experience with cross-border enforcement. Only in some countries (e.g. Croatia, Italy), stakeholders suggested that the lack of cross-border enforcement mechanism in B2B relations does constitute a barrier to cross-border trade, but this view appears to be only partly rooted in the experience of relevant practical problems, and also be based on general considerations, e.g. concerning the need to institutionalise cooperation between public authorities regarding the interpretation of the legislation transposing the MCAD, and to detect and exchange information on new practices under the MCAD as well as to ensure sharing of experiences. In Latvia, stakeholders emphasised that this was not so much a problem of barriers to cross-border trade, but rather a problem of evasion from enforcement by certain traders, which may negatively affect cross-border trade indirectly, by distorting competition among traders in different Member States.[175]

See also the previous evaluation question regarding cross-border enforcement (above).

6.1.2. Contract conclusion and performance

6.1.2.1. *Effectiveness of the UCTD in contributing to a high level of consumer protection*

What is the effectiveness of the UCTD (i.e. the national laws transposing it) in terms of:

- The overall effectiveness of the principle-based approach under this Directive;

The UCTD was adopted in 1993 after a long period of negotiations and several proposals of the Commission. Different traditions existed in the Member States to deal with unfair contractual terms; different policy reasons (transactions costs; abuse of a weaker party) underpinned national systems for monitoring unfair contract terms. Both the scope of the UCTD and the wording of its provisions reflect the need to overcome the differences between legal traditions.

The UCTD controls contract terms which were not individually negotiated. It establishes a general norm that considers a contract term unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to the requirement of good faith (Art. 3 (1), the unfairness test). In addition to the general norm, the UCTD contains an indicative list of terms which may be regarded as unfair (Annex, Art. 3 (3)).

Contract terms reflecting mandatory statutory or regulatory provisions and provisions or principles of international conventions are excluded from review (Art. 1(2)). In addition, review of the main subject matter or adequacy of the price and remuneration is excluded, unless such terms were not drafted in plain, intelligible language (Art. 4

[175] See country report Latvia.

(2)). Transparency is moreover required for all written contract terms. In case of doubt, the interpretation most favourable to the consumer prevails (Art. 5).

There can be said to be a principle-based approach of the UCTD in the two broad senses to be discussed further below (the range of sectors and terms covered and the open-ended fairness test), and in both these senses this principle-based approach can be said to be broadly effective in contributing to a high level of consumer protection; while there are ways in which this effectiveness could be enhanced.

In the following, first the effectiveness of the principle-based approach of the UCTD is explored in light of the case law of the CJEU, before the results of the country research and the assessment of stakeholders concerning the principle-based approach are presented, including by considering related problems. Two different dimensions of the principle-based approach can be differentiated:

- The coverage of all sectors and most terms;
- The open-ended test of unfairness that enables a range of (EU and national) fairness criteria to be applied to any given term.

Concerning the first dimension, there is a principle-based approach in that (subject to specific exclusions having no relevance to consumer protection[176]) the UCTD applies to all trade sectors. Art 1 (1) refers simply to 'contracts concluded between a seller or supplier and a consumer'. This catches sale and supply of goods and services; and the sale, lease and mortgaging of land.[177] The benefits of this principle-based approach can be seen by considering the huge range of sectors in which national regulatory bodies have been able to carry out work to remove unfair terms.[178] Although the Directive is effective in that it is basically applicable to all types of contracts, the Directive uses the terms "seller and supplier" and "goods and services", which has led to some confusion and diverging national case law (e.g. regarding guarantee or suretyship contracts).[179] It was already suggested in the Consumer law compendium that a more neutral and uniform wording would avoid these discussions. Instead of the terms "seller/supplier", a uniform term could be used for all consumer protecting directives, to denote the contractual partner of the consumer, e.g. "business" or "professional"[180] or "trader".

The CJEU has also made clear in *Tarçau* that it is irrelevant for the application of the Directive whether the consumer pays a price.[181] This question is particularly relevant

[176] Contracts relating to employment, succession rights, rights under family law and the incorporation and organisation of companies or partnership agreements Preamble, recital 10).

[177] On land, e.g. CJEU in *Aziz, C-415/11*.

[178] See, e.g., the work of the UK general enforcer, the Competition and Markets Authority (CMA): CMA, Unfair Contract Terms, CMA37, at https://www.gov.uk/government/publications/unfair-contract-terms-cma37, the specialist work of the Financial Conduct Authority (FCA): FCA, Unfair Contract Terms, at https://www.the-fca.org.uk/firms/unfair-contract-terms, note that some land and insurance contracts were not always covered by prior UK domestic legislation (Unfair Contract Terms Act 1977, Schedule 1, 1 (a) & (b)), and, see, e.g., work on online contracts in Denmark (Danish report), but also in ia Germany (see COJEF report, http://www.beuc.eu/publications/beuc-x-2016-051_cojef_ii-enforcement_of_consumer_rights.pdf, p. 23 et seq).

[179] The CJEU has made clear in *Bucura,* C-348/14 and in *Tarcău,* C-74/15 that the Directive has a very broad scope of application and it applies to 'all contracts' between traders and consumers. Indeed, no provision in the directive specifies the type of contract to which it applies. It suffices that that contractual relation is concluded for non-professional purposes to qualify as a consumer.

[180] Consumer law compendium, p. 349.

[181] CJEU 19 Nov. 2015, *Tarcău*, ECLI:EU:C:2015:772, http://curia.europa.eu/juris/documents.jsf?num=C-74/15; Recital 10 Unfair Contract Terms Directive.

in the case of online services, as there is often no monetary consideration, but 'only' personal data in return for a service. However, the UCTD also applies in such circumstances.[182]

Also, Art. 1 (1) simply refers to 'terms' of a contract, so there is also a principle-based approach in that all terms not positively excluded[183] are covered. In contrast to an approach where only certain types of terms are tested for fairness,[184] the UCTD provides a more general principle of fairness. This covers the range of ways in which traders might exclude or restrict their liabilities or vary (so as to reduce) their responsibilities; or impose unfair obligations and liabilities on consumers: e.g. high default charges; price increases; full payment in advance terms; or unfair enforcement methods, e.g. allowing entry to the consumer's home, taking possessions, property etc. It is also 'future-proof' in that it catches new forms of the above sorts of terms, and also other types of terms (e.g. 'privacy policies', involving the right to use consumer information) which were not even contemplated when the UCTD was first adopted – all that matters is that the term is not a positively excluded one.

The UCTD does however refer to 'contract' terms, thus triggering the discussion whether terms in unilateral notices and terms that do not have contractual status are subject to review.[185] In some countries, the scope of the review was widened,[186] in other countries, a broad interpretation in case law assured the same effect.

It can be concluded that the broad scope of application has certainly contributed to the effectiveness of the Directive and the case law of the CJEU has confirmed such broad scope of application. The wording of the Directive is however ambiguous and the use of the terms "seller and supplier" and "goods and services" has led to some confusion and diverging national case law.

As indicated above, there is also a principle-based approach in that the test of unfairness is sufficiently open ended to enable a range of (EU and national) fairness criteria to be applied to any given term.

The open-ended fairness test has provided a platform for a partnership to develop between the CJEU and national courts in terms of interpretation and application.[187] So,

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[182] E. TERRYN, "'Consumers, by Definition, Include Us All' … But Not for Every Transaction", ERPL 2016, n 2, 271; M. LOOS & J. LUZAK, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts', Journal of Consumer Policy 2015.

[183] I.e. terms reflecting mandatory statutory provisions (art 1 (2)), individually negotiated terms (art 3 (1)) and main subject matter and price terms (art 4 (2)).

[184] E.g. the prior UK regime, UCTA 1977, covering only clauses excluding or limiting specific, positively defined, types of obligation or liability; and see discussion of this difference in T. Wilhelmsson and C. Willett (2016), in G. Howells, I. Ramsay and T. Wilhelmsson, Handbook on International Consumer Law, Elgar, ch. 11. Note, however, UCTA 1977, s 13.

[185] In Belgium, e.g., there is a line of caselaw that excludes the application of the rules on unfair contract terms to unilateral promises (Kortged, Antwerpen 8 October 2009, NJW 2010, 708). In another Belgian case, a (unilateral) declaration was however considered as an addendum to a contract between a hospital and a consumer so that its terms were subject to control (Gent 26 October 2012 *TGR* 2013, 46).

[186] Thus, in the UK, the Consumer Rights Act extends the scope of the review to a notice 'to the extent that it (a) relates to rights or obligations as between a trader and a consumer, or (b) purports to exclude or restrict a trader's liability to a consumer.' (s. 61 (4) Consumer Rights Act).

[187] NB that the points here as to this partnership also apply to any aspects of procedural fairness relevant to the test, but we focus here on the way in which this partnership developed in relation to substantive fairness.

in *Freiburger Kommunalbauten*[188], the fundamental ground rules for this partnership were laid down. It was said to be for the CJEU to *interpret* the unfairness test, but "it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question."[189] Therefore, while the CJEU has the role of unpacking the meaning of the concept of fairness, it is for the national court to apply this concept to the term in question, taking into account the circumstances – which will include the particular facts of the case, and the national legal context.

However, even early on, it could be seen that the open ended nature of the unfairness test, also enabled the CJEU to sometimes go beyond such an interpretive role, and to actually apply the test to the facts, e.g. in *Océano*[190] where the CJEU held to be unfair a jurisdiction clause, according to which the court at the seller's place of business had jurisdiction in respect of all disputes arising from the contract (meaning the consumer would need to travel hundreds of miles to plead their case). In the *Freiburger Kommunalbauten* case, the Court said the clause in *Oceano* was obviously unfair, being solely to the benefit of the trader, and containing no benefit for the consumer, making it unnecessary for it to be assessed in a national law context.[191] This was the earliest example of the flexibility of the principle-based approach being used to develop a protective approach to terms affecting the procedural ability of consumers to enforce their rights. We see this much more recently in *Sebestyén*[192] where, although CJEU left the assessment of unfairness of an arbitration clause to the national court, it provided very concrete criteria for this assessment, criteria that would be very likely to result in a finding of unfairness.

More recently, the open ended principle-based approach has allowed the CJEU to develop its interpretive role more generally, i.e. beyond jurisdiction and arbitration clauses and national procedural rules. These interpretations have been of a rather protective nature. In *Mohamed Aziz*, the Court said that "in order to assess whether the imbalance arises 'contrary to the requirement of good faith', it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations."[193] This 'agreement' test again potentially sets a reasonably high level of protection, at least if we assume that traders must surely appreciate that if consumers were really in a position to negotiate, then they would only agree to terms that protected their interests to a reasonable degree.

At the same time, some national courts have understood the agreement test as being less protective. So, in *Parking Eye v Beavis,*[194] the UK Supreme Court has considered

[188] Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-3403 (dealing with whether a contractual term in a building contract requiring the whole of the price to be paid before the performance by the seller or supplier, could be regarded as unfair).

[189] Freiburger Kommunalbauten, para 22.

[190] Joined Cases C-240/98 to C-244/*98* Océano Grupo Editorial SA v Roció Murciano Quintero and Salvat Editores SA v José M. Sánchez Alcón Prades, José Luis Copano Badillo, Mohammed Berroane and Emilio Viñas Feliú [2000] ECR I-4941.

[191] Freiburger Kommunalbauten, para 23.

[192] Case C-342/13 Katalin Sebestyén v Zsolt Csaba Kővári, OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt [2014].

[193] Case-415/11, Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa, para 69.

[194] UKSC 2015/0116

it relevant to whether a consumer would have agreed to a term that consumers *generally* accept this term (so apparently taking to be acceptable the power imbalance that leads to consumers generally accepting terms). The Supreme Court also elaborated on the Aziz test by referring not only to whether 'the' consumer would have agreed to the term, but to whether a 'reasonable' consumer would have agreed to it. This seems fine, until we see that the Supreme Court then took the view that such a 'reasonable' consumer would understand the need for an extremely high parking charge (£85) for any (even a few minutes) overstay beyond the initially 2 hour free period – it being (for the Supreme Court) understandable to the reasonable consumer that this was necessary to deter overstays and thereby enable efficient management of the parking area.[195] One must ask therefore whether the 'reasonable' consumer concept, at least on its own, leaves too much scope for a non-protective application.

Just as the open ended principle-based approach of the test of unfairness, has allowed for the development of the above general sorts of fairness norms (e.g. based on hypothetical agreement), it also leaves space for much more detailed specification by the CJEU as to what is 'fair' in relation to particular types of term-specification that often amounts to quite a high level of protection. This is demonstrated once again by the *Aziz* case, where particular types of term in a mortgage contract were at issue: One example is a term allowing for default interest (higher than the standard rate) to be charged. Here, fairness is to be assessed by determining whether the default interest rate exceeds what would apply under national standards;[196] and, if so, whether this can be justified on the basis that it is "appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them"[197] (presumably this means whether the trader has some legitimate interest in exceeding what would normally be allowed, e.g. perhaps the normal amount allowed is only what is needed to cover the trader's losses, but perhaps the trader has a legitimate interest in the circumstances, in charging more, so as to deter this sort of breach by consumers).[198]

So, we see a concept of protection addressing a particular type of problematic credit sector term. Again, however, there is the basis of a more general fairness norm for all sectors. In other sectors, the issue will not necessarily be default interest. Rather, it may simply be a more general default charge of the sort contemplated by Annex, para 1 (e): 'requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation'. The *Aziz* formula offers a way of understanding when a sum in any trade sector is 'disproportionately high', i.e. when it exceeds a national norm, and cannot be justified by reference to any particular legitimate interest of the trader.

Aside from the other credit specific and more generally applicable fairness standards that can be taken from *Aziz*, it is arguable that the foundations are now there for a general approach (applicable across all sectors) under which it can be taken that a term will often cause significant imbalance and violate the good faith requirement, <u>where it significantly deviates from any default position that would otherwise apply</u>.[199]

[195] Parking Eye, ibid.

[196] Presumably this might be a general default standard, e.g. that the amount should be a reasonable pre-estimate of the loss cause to the trader by the consumer's breach, or a more specific sum laid down by statute (see *Aziz* at para 74).

[197] Para 74.

[198] E.g. the UK *Parking Eye* case, where the SC believed the £85 charge was necessary to protect the legitimate interest of efficient parking management (the question again being whether legitimate interest' needs to be qualified by reference to the same sort of criteria discussed above-see note 17 above, and the preceding and subsequent text.

[199] *Aziz*, and some other country examples.

So, if the term excludes or restricts obligations or liabilities that would otherwise be owed, under the default rules, by the trader to the consumer, or if it imposes obligations or liabilities on the consumer, that would otherwise not be owed, under the default rules, then this is the sort of term that may very well cause significant imbalance and violate the good faith requirement. The broad logic here seems to be that default rules have been set based upon some process of balancing the interests of the trader and the consumer, so if a term deviates from such rules, to the detriment of the consumer, then it may well be unfair.[200] The focus on national default rules maintains national autonomy, while also presumably providing a reasonably high level of protection, based on the national traditions of protection upon which the default rules are based.

It should be noted also that in *Constructora Principado,*[201] the Court said that 'significant imbalance' does not require significant economic impact on the consumer, not even relative to the value of the transaction. It suffices that the term leads to a serious impairment of the consumer's legal position, relative to the relevant national law. This further emphasises the significance of national default rules as a fairness yardstick, while also emphasising a high level of protection: i.e. that there can be significant imbalance based on deviation from a national default rule (in a manner seriously detrimental to the consumer), even although there is no serious economic detriment to the consumer.

It can therefore be concluded that the CJEU has unpacked the potential of the principle-based approach in developing new substantive fairness norms, to help national courts to deliver the consumer protection goals of the UCTD, in ways that are anchored in national legal tradition, and thereby has safeguarded the effectiveness of the principle-based approach in contributing to a high level of consumer protection.

The overall effectiveness of the principle-based approach has also been confirmed through the country research for this evaluation, both in terms of its application in specific cases, and the assessment of stakeholders across the EU:

Decisions of enforcement authorities and courts often involve an application of the UCTD illustrating the effectiveness of the Directive's principle-based approach in practice. In Bulgaria, most collective actions, the majority of which are injunctions, between 2013 and 2015 (between 85% and 100%) were brought on the basis of the UCTD.[202] In Portugal it is estimated that 40% of relevant court cases (400 of 1 000) in 2015 were decided on basis of the UCTD, and 15% of the ADR cases (2 250 of 15 000, including the so-called 'Peace Courts').[203] For Romania, 5 930 cases based on the UCTD are reported for the same year.[204] A Significant number of cases are also reported from most other countries for which statistics were available (Finland, France, Lithuania, Slovenia).[205] Relevant quantitative data were available from only 11

[200] T. Wilhelmsson and C. Willett (2016), 'Unfair Contract Terms', above.

[201] Case C-226/12 Constructora Principado SA v José Ignacio Menéndez Álvarez [2014].

[202] Country report Bulgaria.

[203] Country report Portugal.

[204] Country report Romania.

[205] In France, according to statistics of the national enforcement body (the DGCCRF) 5% of the 9 960 investigations in 2015 were conducted on basis of the UCTD (i.e. 495 cases), in Lithuania, according to SCRPA's statistics, 11% of cases (140 of 1 284 cases), and in Slovenia 12% (3 of 25 court cases). In Slovenia, the decisions of the courts of first instance are not publicly available, so that the statistics only includes decisions of the Administrative Court, Higher Courts and the Supreme Court. See country reports France, Lithuania, Slovenia.

countries (Belgium, Bulgaria, Croatia, Estonia, Finland, France, Greece, Lithuania, Portugal, Romania, Slovenia), as court data and ADR statistics are either not available or do not provide a sufficient level of detail in other countries.

In the interviews conducted with relevant ministries, enforcement authorities, consumer associations, business organisations and other stakeholders in all 28 Member States, the assessment of the principle-based approach of the Directive was generally positive: the main advantages cited being the flexibility and breadth of coverage, enabling a variety of types of terms in different sectors to be controlled, and also the 'future proof' dimension, i.e. allowing control of new forms of unfair term that may develop.

This positive view was shared by those countries (e.g. Austria, Denmark, France and Germany) that had previously used a similar form of general clause aimed at unfair terms, and by those (e.g. Italy and the UK) for whom such a clause was more of a novelty.

One problem cited is as to the degree of reception by some national courts, e.g. in the Czech Republic, where national courts tend to continue to rely on general Civil Code norms and more concrete consumer protection rules (although the enforcement bodies are much more acquainted with the UCTD general clause); and, more seriously, in Cyprus, where it is reported that the courts are very much wedded to common law tradition, and struggle with the general clause, in particular showing a tendency to understand the notion of a violation of good faith as requiring subjective wrongdoing by the business. Another problem cited (e.g. in Bulgaria) is a lack of enforcement resources to make effective use of the general clause across all trade sectors.

In the public consultation conducted in the framework of the Fitness Check on EU consumer and marketing law, consumer associations unanimously agreed that the right to be protected against unfair clauses in the small print is 'very beneficial' to consumers. The majority (more than 70%) of all other respondent categories were also in agreement that the right to be protected against unfair clauses in the small print is 'very' or 'rather' beneficial to consumers.

In summary, <u>the principle based approach appears to be working well</u>, subject to problems as to limited enforcement resources to apply it to all trade sectors, and problems (some more serious than others) in national judicial reception of the general clause.

A further gap in the principle based approach, which may undermine its effectiveness in protecting consumers in certain situations, is that under Art. 4(1) the assessment of unfairness involves referring 'at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract'. So, no account can be taken of the fact that, although the term may have been a fair one to include at the time of conclusion of the contract, it has subsequently become unfair to rely on the term, due to changing circumstances. This is allowed in Nordic law, where the focus is on assessing the fairness of the consequences of applying a term: it not mattering whether the unfair consequences are related to the circumstances prevailing when the contract was made or to later changes in circumstances.[206] This aspect may be of increasing importance given the many modern contracts that involve long term relationships (e.g. financial services, tenancy etc) and where the scope for detrimental changes is significant.[207]

[206] See Nordic Contracts Act, s. 36.

[207] T. Wilhelmsson (2016), 'Unfair Terms', in G. Howells and T. Wilhelmsson, EU Consumer Law, forthcoming.

- The practical benefits for consumers [i.e. the practical effectiveness] of the indicative list of unfair terms annexed to the Directive, in particular its application in practical cases; [*Key aspects to consider are: How is the indicative list of the Directive interpreted in MS? Does this work in practice or are there problems?*]

The practical relevance of a list of unfair terms in concretising the principle-based approach, i.e. in 'fleshing out' the broad test of unfairness, by providing examples for consumers, businesses, courts and regulators of many of the most important types of potentially unfair terms has been stressed by stakeholders throughout the country research. Lists add legal certainty and several national enforcers have stressed that lists with concrete examples of open norms make it easier to enforce compliance than mere open norms.

An alternative to an indicative list is a 'black' list (terms automatically unfair), or a 'grey' list (terms presumed to be unfair-the terms on the indicative list seem to be something just short of this, not actually being presumed to be unfair). In those countries that have a national black or grey list and that thus provide more protection than the Directive (see following section), it is difficult to assess the effectiveness of the indicative list of the Directive, as stricter national provisions can be relied on. This does, however not mean that the indicative lists have no practical effect, to the contrary.

This is first of all due to the (recent) case law of the CJEU that attaches essential importance to the content of the Annex. Thus, in *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*[208] the CJEU stated that if "the content of the annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term."[209] This has been confirmed in several other cases and the CJEU now routinely makes reference to the list to explain its reasoning on the test of unfairness.[210] This case law of the CJEU has been referred to as a reason for giving the indicative list of the Directive greater prominence.[211]

The usefulness of the list is also often acknowledged by national courts.[212] For example, in the Netherlands also in lower case-law the fact that a term falls within the scope of a term on the indicative list is frequently seen as an important factor in the application of the unfairness test.[213,214] In Sweden, where the list is not annexed to

[208] (C-472/10) April 26, 2012.

[209] Cf. *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch) at [49] *per* Gabriel Moss QC "It follows from the judgment of the European Court of Justice [in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (C237/02) April 1, 2004] that even if Mr Bastin is correct in locating the present provision both within Schedule 2, paragraph 1(j) as a typically unfair provision but yet one which is not to be regarded as typically unfair by reason of Schedule 2, paragraph 2(b) , this takes the matter no further forward and is of no assistance to him."

[210] See inter alia REW, Aziz and Banco Popular Español.

[211] E.g. country report UK.

[212] See in the same sense also i.a. the Slovenian country report.

[213] See Loos 2013, no. 345.

[214] An example is Court of Appeal's-Hertogenbosch 9 January 2007, ECLI:NL:GHSHE:2007:AZ5890 (term requiring to notify a lack of conformity within a short period after delivery of a construction work under threat of losing a right to claim damages- qualified as a term limiting the legal rights of the consumer in case of the trader's non-performance, as per indicative list 1b). Another example is the evaluation of penalty clauses (indicative list, 1e). Dutch courts tend to consider such clauses to be unfair in particular where there is no maximum for the penalty, implying that the penalty in theory could be unlimited. See for instance District Court Groningen 31 March 2010, ECLI:NL:RBGRO:2010:BM1402, *TvC* 2010/5, p. 218 (case note M.B.M. Loos) (Visa Card Services/X); District Court Assen 20 July 2010,

the legal text, but can be found in the *travaux preparatoires* to the legal text, the Market Court has in several cases forbidden companies to use contract terms as they have been contrary to the indicative list.[215]

In some countries, an indicative list is in practice even used as a black list and therefore considered effective. Thus, e.g. in Slovenia, the indicative list of the UCPD was transposed in the Consumer Protection Act.[216] In principle, it should be applied as an indicative list, i.e. the elements of general clause should still be assessed. However, it seems that the courts often rely on examples from the list without proving that the term is unfair under the general clause.[217]

The indicative list is also considered useful in enabling enforcers to deal efficiently with unfair terms. An example here is the significant role that the list has played in the regulatory practice of the UK enforcement agency. The Office of Fair Trading (OFT) and now the Competition and Markets Authority have made use of the indicative list in their guidance[218] and enforcement activity.[219] The CMA has built a great deal of the analysis of unfairness around the list, e.g. the most recent guidance document contains almost 70 pages of commentary on the list.[220] The usefulness of the list for the practice of national enforcers was also confirmed in other country reports.[221]

Based on the country research it can be concluded that the indicative list is considered to have significant practical benefits in terms of consumer protection and legal certainty.

- Whether the "black" and/or "grey" list of unfair contract terms adopted in certain Member States represent an advantage for consumer protection compared to the purely indicative list of the Directive; [*Key aspects to consider for those MS in which a black/grey list exists are: How does the list work in practice? Does it make a difference to have such a list?*]

The indicative list of the Directive has been transposed in various ways in the different Member States, the Directive being a minimum harmonisation instrument. As the following table indicates, most countries have some form of black (automatically unfair) or grey (presumed unfair) list, in some cases even both (e.g. Austria, Estonia, France, Germany, Italy, Netherlands, Portugal, UK).

ECLI:NL:RBASS:2010:BN4807, *NJF* 2010, 368 (Visa Card Services/X); District Court Arnhem 15 December 2010, ECLI:NL:RBARN:2010:BO9665, *Prg*. 2011/60 (International Card Services B.V./X).

[215] See MD 2000:24, MD 2003:12, MD 2002:23 and MD 2004:22.

[216] Article 24 Consumer Protection Act.

[217] See e.g. Higher Court in Ljubljana, VSL II Cp 1753/2015, from 19 August 2015 and VSL II Cp 1647/2015 from 4 November 2015; Administrative court, UPRS I U 563/2013 from 1 April 2014.

[218] See, for example, CMA, 'Contract Terms Guidance: Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015' (CMA37 (2015)), p.63ff.

[219] See, for example, OFT, *Unfair Contract Terms Guidance*, (OFT311, (2008)).

[220] See the recent 2015 Guidance in particular: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf

[221] Country report Slovenia.

Table 5: Overview of Member States with 'black' or 'grey lists'

Country	Provisions going beyond minimum harmonisation requirements	
	'Black list' 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	No	Yes
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 black list – 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 "black list" 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 (black list), other rules cannot be automatically applied because of their vagueness and a task of interpretation and assessment is needed (grey list).

Consumers benefit in being provided with better protection from terms on the black or grey lists, without any need for them or the regulator to take time and resources to make the case under the general test, where there is always some scope for dispute,

e.g. as to whether in the national legal context, and on the facts of the case, the term causes significant imbalance, contrary to good faith.

The black or grey lists were reported to provide more legal certainty than a mere indicative list.[222] They facilitate the judicial task and provide foreseeability to consumers regarding the result of the procedure, and encourage businesses to adapt their contractual clauses to the standards legally established.[223] Black lists have helped to eradicate certain practices considered dangerous for consumers (e.g. arbitration clauses in consumer contracts).[224]

Public enforcers (both with general competence and with sector specific competence)[225] and consumer organisations[226] confirmed that a black list makes it easier to combat unfair terms. Black lists are generally considered to provide better protection to consumers.[227]

Grey lists are considered more effective than a mere indicative list, but provide less protection than black lists.[228] Thus in e.g. Slovakia, the preference of the black list over the grey list has been firmly established by recent court practice. This position was possibly strengthened by the overload of consumer cases in the Slovak courts, where the list of unfair terms proved to be very helpful.

From the country research and the results of the open public consultation in the framework of the Fitness Check of EU consumer and marketing law, in general a preference for a black list – and to a lesser extent grey lists – over a mere indicative list, is quite clear for some stakeholder groups (mostly consumer organisations and public authorities), which are also strongly in favour of a (limited) black list at EU level:[229,230] The majority (90%) of consumer associations participating in the consultation either strongly agreed or tended to agree that consumer protection against unfair contract terms should be strengthened by introducing a black list of terms that are always prohibited. 68% of public authorities also agreed with this statement. In contrast, 61% of business associations either tended to disagree or strongly disagreed.[231] Some business organisations only favour such black list at EU level if it were to be fully harmonised. In a minimum harmonisation approach, the

[222] Country reports Germany, Czech republic, Estonia, the Netherlands, Portugal.

[223] Country report Spain.

[224] Country report Latvia.

[225] Country reports Bulgaria, Czech Republic.

[226] See position papers submitted to the online public consultation by vzbv, Which? and BEUC.

[227] Country report Netherlands.

[228] In this sense, some stakeholders in Lithuania; country report Slovakia (Lazíková, Števček 2013); country report Sweden.

[229] See also country report Lithuania; country report Estonia; country report Slovakia; consultation paper Which? (submitted in the open public consultation in the framework of the Fitness Check of EU consumer and marketing law).

[230] General support for a black list at the EU level was also among the conclusions of Workshop 2 on Increasing fairness of commercial practices and of contract terms at the 2016 Consumer Summit. Some workshop participants specified that they would prefer a short black list at a minimum harmonisation level.

[231] It is notable, that half of the responding businesses (49%) agreed with the statement, therefore being more positive towards a black list than their organisations. However, only 32 individual businesses had an opinion in this respect, compared to 80 business associations, so that this divergence in opinions should not be over interpreted.

status quo is preferred.[232] However, maximum harmonisation is difficult to achieve in this area. As long as the contract law of the Member States has not been fully harmonised, it is not feasible to fully harmonise unfair contract terms, if only because of the importance attached by the CJEU to the default rule to determine the unfairness of a clause. The need to maintain a minimum harmonisation approach was stressed repeatedly in the country reports.[233]

Based on the country research it can be concluded that black and grey lists are considered more effective than indicative lists. However, in order to be effective, such lists (whether indicative, grey or black) need to be updated regularly, as was stressed several times.[234]

- The overall effectiveness of the contractual transparency requirements under the Directive;

According to Art. 5 UCTD, "contracts where all or certain terms offered to the consumer are in writing, […] must always be drafted in plain, intelligible language." In case of doubt, the interpretation most favourable to the consumer prevails.

This transparency requirement is to some extent linked to the unfairness test of the Directive. It arguably makes sense to think of transparency as being necessary if a term is not to be viewed as violating good faith under the UCTD test: i.e. that terms must be presented transparently if it is to be said that a trader is 'dealing fairly and equitably' and taking into account the 'legitimate interests' of the consumer.

This seems to have been recognised by the CJEU and at national level. The CJEU has clearly accepted that transparency has a role to play at least sometimes under the unfairness test. So, in *RWE*[235] the Court said that where a term reserved the right to vary the charge for the supply of gas, the term should "set out in transparent fashion the reason for and method of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made". This arguably sets quite a high level of transparency. It almost turns the "transparency requirement into a kind of duty of disclosure".[236]

Of course, this CJEU guidance is specific to particular sorts of terms. So, it is not completely clear whether the CJEU considers a good level of transparency to be required for all terms under the good faith requirement; or (if transparency *is* generally required), what exactly is needed generally for terms to be viewed as transparent. In contrast, some national approaches do provide clear criteria. For example, the UK Law Commissions have previously suggested a definition of transparency as follows: "'Transparent' means (a) expressed in reasonably plain

[232] Consultation paper Eurocommerce (submitted in the open public consultation in the framework of the Fitness Check of EU consumer and marketing law).

[233] The minimum harmonisation approach was also stressed by all three consumer organisations that submitted position papers to the online public consultation.

[234] Country reports Portugal, Romania, UK.

[235] Case C-92/11 RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV [2013].

[236] Thomas Wilhelmsson (2016), 'Unfair Terms', above.

language, (b) legible, (c) presented clearly, and (d) readily available to any person likely to be affected by the contract term or notice in question".[237]

Before dealing with the issues under Article 5 itself (as to advantages of transparency, and the queries as to its functions, and what sanctions are available for a lack of transparency), it is important to point out the linkage of transparency to the unfairness test (as this is relevant to the above evaluation question about the overall effectiveness of the principle-based approach in setting a high level of consumer protection under the unfairness test). As we have just seen, transparency is probably a requirement of good faith, and in this sense, the principle based approach is strengthened. But can transparency sometimes be enough to establish good faith? If so, and if (as is arguable) a term cannot be unfair unless there is not only a significant imbalance in rights and obligations, but also a violation of good faith, this would mean that even if a term is very substantively unfair, and so causes significant substantive imbalance, that there is nevertheless no violation of good faith because of the transparency. In short, the substantively unfair term is fair because of the transparency.

In response to this, the Aziz 'agreement' test refers to what consumers would agree to if they could negotiate, which surely refers to what *substantive* term they would have agreed to. So, if the term used is significantly less substantively fair than this, the CJEU view seems to be that (transparency notwithstanding) there is violation of the good faith requirement. There is further support for this approach in the Sebestyén case, where it was said that: "However, even assuming that the general information the consumer receives before concluding a contract satisfies the requirement under Article 5 that it be plain and intelligible, that fact alone cannot rule out the unfairness of a clause such as that at issue in the main proceedings". Now it is true that this refers to the relationship between the unfairness test, and the separate 'plain and intelligible language rule' from Article 5. However, it also implies that plain language at least, would not necessarily satisfy the good faith requirement under the general test of unfairness.

The above points notwithstanding, it cannot be said to be absolutely settled beyond all doubt, that a term that is sufficiently substantively unfair can be considered to violate the good faith requirement, where this term is transparent: in other words, it has not been made absolutely clear that transparency cannot legitimise a term that is substantively very unfair. In addition, the experience in at least some Member States is that the national courts (such as in the UK) have not taken a clear line on this, and indeed in others, there may even be a clear notion that a term is fair (or that no allegation of unfairness can be put forward) so long as the consumer has signed the contract, or has prior knowledge of the terms (Cyprus).[238]

Leaving aside the issue of the role of the transparency concept within the unfairness test, we now turn to its role under Art. 5.

In general, it can be said that the transparency requirement of the directive has contributed to achieving a high level consumer protection. The exact role of the transparency requirement in achieving this goal, however, differs in the Member States.

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[237] Draft Bill, 14 (3), p. 158. See also s 2(1) New Zealand Fair Trading Act: transparent, in relation to a term in a contract, means a term that (a) is expressed in reasonably plain language; and (b) is legible; and (c) is presented clearly; and (d) is readily available to any party affected by the term.

[238] E.g. the UK, see: C. Willett, 'General Clauses and the Competing Ethics of EU Consumer Law in the UK' (2012) Cambridge Law Journal, 71 (02) 412-440; C. Willett (2011) The Functions of Transparency in Regulating Contract Terms, 60(02):355 - 385. See also country report Cyprus.

In several Member States, a large number of cases are reported to be based on this provision.[239] In addition unfair and intransparent agreements are reported to have disappeared from the market.[240] It is only in a minority of Member States, that the principle is seldom applied by the courts.[241] Notwithstanding the fact that the transparency principle is in general considered to be effective, continuing problems with transparency are reported, especially in specific sectors, including digital products, energy, and telecommunications.

The lack of clarity surrounding the provisions on transparency in the UCTD, moreover seems to stand in the way of their full effectiveness. A recurring theme in the country reports is the uncertainty of this principle and the problems this causes in terms of disparity of interpretation, enforcement, but also compliance by traders. Some country reports stress that the uncertainty surrounding this principle makes it difficult to assess its effectiveness.[242] The uncertainty relates to the scope of the principle, its interpretation and especially its sanction.

Different functions have been read into the provision of Art. 5 UCTD that contracts "must always be drafted in plain, intelligible language". The European Commission as early as in its first implementation report, linked the principle of transparency both to the ability for the consumer to obtain, prior to the conclusion of the contract, the information needed to decide in full knowledge whether to enter the contract; and to a possibility to check the content of the contractual provisions.[243] Both functions have in the meantime been confirmed by the CJEU,[244] but neither function is completely clear from the wording of the UCTD.

The interpretation of the principle is also reported to be insufficiently clear. Thus, the influence of the use of a foreign language is unclear;[245] as is the possibility to combat terms that are too long or overly complex.[246] Businesses also complain about the difficulties to forecast whether a term will be considered transparent or not.[247]

Uncertainty moreover reigns with regard to the sanction for unclear contract terms.[248] A clear sanction is absent. Art. 5 provides merely for a rule on interpretation: where there is doubt about the meaning of a term, the interpretation most favorable to the

[239] E.g. Austria, Denmark (often used regarding subscription traps), Estonia (often used regarding terms in insurance contracts), France, Germany, Greece, Portugal.

[240] Country report Czech Republic (hidden arbitration agreements, hidden fines).

[241] E.g. Cyprus, Slovenia.

[242] E.g. The Netherlands.

[243] The first function demands an analysis on the basis of recital 20 ('"Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail"). The second function demands a reading in the light of the general criterion in Article 3, see: EC Commission, 'Report on the Implementation of Directive 93/13/EEC on unfair terms in consumer contracts' (COM (2000) 248 final), p.18.

[244] See ia Case C-26/13 Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt [2014]; Case C-96/14 Jean-Claude Van Hove v CNP Assurances SA [2015] and the analysis above.

[245] E.g. country report Sweden.

[246] E.g. country report Poland (UOKiK).

[247] E.g country report Austria.

[248] See e.g. Cyprus (concern of the regulator); France; Italy; The Netherlands.

consumer shall prevail.[249] This rule can however only be applied for unclear terms that can still be interpreted; it is useless for unintelligible terms.

Several Member States have adopted provisions that are stricter than the provisions of the UCTD. Such provisions have at times taken the form of clear rules on incorporation and pre-contractual information,[250] but also in the form of clear requirements with regard to the content of the transparency principle (e.g. in terms of format to be used);[251] or by adding that terms should also be 'easily noticeable',[252] and perhaps most importantly, in the form of a clear sanction (in addition to the rule of interpretation of the Directive).

Given the unclear consequences of a breach of the transparency principle, different positions have been taken and defended. Transparency has been dealt with in some Member States as an issue of incorporation.[253] Intransparent terms are simply no part of the contract and therefore not binding. In other Member States, transparency is dealt with as part of the unfairness test (Art. 3), albeit in different ways. Both the position that a lack of transparency is *as such* sufficient to conclude that the term is unfair and non-binding is defended and applied[254] and the position that the lack of transparency is as such not sufficient but one of the elements to be taken into account when assessing whether a term is unfair.[255] Also, pre-contractual liability was mentioned as an option in some Member States.[256]

The need to clarify the legal consequences of a lack of transparency emerges clearly from the country research. This is moreover in line with the conclusions that were

[249] This rule does not apply in the context of collective procedures of Art. 7(2) UCTD.

[250] Thus, e.g. in Portugal, see PEDRO CAETANO NUNES, "Comunicação de Cláusulas Contratuais Gerais", 2011, p. 518.

[251] Thus e.g. in Slovakia, Section 53c of the CC provides that ´If the consumer contract is made in writing, the subject-matter and the price must not be written in smaller letters than other parts of the same contract, except for the title of the contract and its parts. The provisions of a consumer contract, as well as provisions contained in general commercial terms and conditions or in any other contractual documents related to the consumer contract, must not be written in letters that are unreadable for the consumer or smaller than as set out in an implementing regulation'. Any contract made contrary to this provision shall be invalid.

[252] Thus e.g. Croatia.

[253] E.g. in Portugal, Estonia (§ 37 (3) of the Estonian Law of Obligations Act stipulates that standard terms the contents, wording or presentation of which are so uncommon or unintelligible that the other party cannot, based on the principle of reasonableness, have expected them to be included in the contract or which the party cannot understand without considerable effort are not deemed to be part of the contract).

[254] E.g. in Bulgaria.

[255] E.g. in France; the Netherlands ((cf. *Hoge Raad* 7 December 2007, ECLI:NL:HR:2007:BB5078 (X c.s./ABN Amro Bank N.V.); see also for the UK, Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at 6.51; the CMA (Consumer and Markets Authority) in the UK stresses the link between transparency and good faith: "In order to achieve the openness required by good faith, terms should be 'expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously' to the consumer. Consumers should not be assumed necessarily to be able themselves to identify (particularly in longer contracts) terms which are important, or which may operate to their disadvantage or which would be likely to surprise them, if drawn to their attention": CMA, 'Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (July 2015) para. 2.22.

[256] E.g. Italy, Belgium.

reached in earlier studies. The same conclusion was already reached in the Consumer Law Compendium.[257]

It can therefore be concluded that while the transparency principle is considered an important precondition for a high level of consumer protection, its full effectiveness is currently not reached by lack of clarity surrounding the provisions on transparency in the UCTD and the unclear consequences of a breach of the transparency principle.

- Whether the extensions of the application of this Directive (to individually negotiated terms or to terms on the adequacy of the price and the main subject-matter) put in place in certain Member States represent an advantage for consumer protection.

The following table presents an overview of Member States that have extended the application of Directive to individually negotiated terms and to terms on the adequacy of the price and the main subject-matter. It indicates that about a quarter of Member States have introduced relevant extensions (often either the first or the second extension, rarely both). In contrast, in about half of countries the scope of national implementation legislation is in line with the Directive in both respects.

[257] Consumer law compendium, p. 421.

Table 6: Overview of MS extension of 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	Yes	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.

The first extension concerns individually negotiated terms. The test of unfairness in Art. 3 of the UCTD does not apply to individually negotiated terms.[258] However, in reliance on the minimum clause, several Member States do provide for control of individually negotiated terms (see table above). Some Member States have even recently extended the scope of application, recognising the need for protection also against individually negotiated terms.[259]

Already in the first implementation report of the UCTD, this extension was proposed. The 2000 implementation report by the European Commission firstly mentioned that in the countries in which this exclusion was not transposed, this had not given rise to any problems in practice. After fifteen additional years of application to negotiated terms, this conclusion still stands. In the country reports, no specific problems were reported in those countries that have extended the scope of application. Quite to the contrary, the extension was reported to have increased consumer protection. Thus e.g. in France, the extension to individually negotiated terms (Art. L 212-1 C.conso.) was reported to be important according to different stakeholders since it prevents discussions and arguments on the negotiated status of contract clauses and lightens the burden of proof placed on the consumer. This point was also made in the reports from Austria and Malta, by way of explaining why not implementing the exclusion is seen to work well in those countries. The exclusion has recently also been removed in the UK, and the same reasoning as to interpretation difficulties and complexities was made by the English and Scottish Law Commissions in a report that recommended removal of the exclusion.[260] In addition, the 2000 implementation report mentioned that the exclusion encouraged misinterpretations and leads to abuses in the sense that some contracts include "terms by which the consumer declares that he has negotiated and expressly accepted the general contractual terms and conditions".[261]

The interpretation problems and these abuses continue to occur. The term “non-negotiated” can be interpreted in different ways[262] and a rigid reading of this requirement is detrimental to consumers. The risk of ‘pretend’ negotiation is still very present: even where terms are in reality standardised, traders seek to deter consumers/regulators from challenging them, by pretending/claiming that they are individually negotiated (e.g. having set up some formal sham, whereby the consumers signs a document acknowledging an alleged negotiation).[263] That this occurs in practice was confirmed in the country research.[264]

The original justification for the exclusion was to respect the freedom of contract ideal, specifically the idea that the unfairness problem only applies because of the lack of real consent in *standard* contracts. In consequence this implies that as soon as there

[258] Art 3 (1).

[259] In the UK, the CRA 2015 now makes it possible to assess negotiated terms and consumer notices (s. 61 CRA).

[260] English and Scottish Law Commissions, Unfair Terms in Contracts (2005), Law Com 292, Scot Law Com 199, 31-32 (on removal of the exclusion, Consumer Rights Act, ibid, and see the UK report).

[261] COM (2000) 248 final, Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[262] See for illustrations of the varying caselaw in Italy and the UK (preceding the extension of the control in the UK): P. Nebbia, Unfair contract terms in Europe, Oxford, 2007, 116 et seq.

[263] Willett, *Fairness in Consumer Contracts*, above; Commission Report on Unfair Terms (2000);

[264] Country report Croatia.

is negotiation, this problem disappears.[265] However, there will be an important number of cases in which the differences in bargaining power remain considerable. The consumer is usually less well informed; there may be a lack of true competition in the market; and the simple lack of confidence and experience also plays an important role. Even if there is negotiation, the resulting terms will still often favour the supplier's interests, and cause just as much detriment to consumers as standard terms. The same risk of a significant imbalance is therefore usually present with 'negotiated' terms.[266] In the literature, the problem was referred to as the underlying hypocrisy of the UCTD: 'if its purpose is to protect the structurally weaker party to the transaction, it is contradictory to imagine that a negotiation process which is based on the disparity of the parties can ensure a fair result'.[267] This analysis is supported by evidence from the country research. The Czech report, for instance, cited the need to protect consumers, as a reason for not excluding individually negotiated terms; while the French report states that it is unrealistic to expect consumers being capable of negotiating general contract terms. Another country not to implement the exclusion is Denmark, and a further important point, made in the Danish report, is that the general clause very flexible, so that if negotiation has been genuinely fair, and has resulted in fair terms, then this can be taken into account.

It can therefore be concluded that the extension of the application of Directive to individually negotiated terms in several Member States has been advantageous for consumers. It addresses existing problems as to complexity; and also as to sham negotiations, and the perennial imbalance between businesses and consumers, which are likely to mean that there is a high risk of a significant imbalance even with 'negotiated' terms. At the same time, there is no evidence from the country reports, that extension of the Directive to individually negotiated terms, causes problems in application or leads to unintended effects.

The second extension concerns the application of Directive to terms on the adequacy of the price and the main subject-matter. Art 4 (2) UCTD provides that: "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language." In several Member States (see table above), these exclusions from the test of unfairness do not apply, so the test of unfairness applies to price and main subject matter terms as described above, even where these terms are in plain and intelligible language.

Clearly then, these Member States grant a higher level of consumer protection than the UCTD does. The adequacy of the price and scope of the main subject matter, can be reviewed under the test of unfairness, as such test allows for a review of substantive fairness. This allows for control where the price or main subject matter are not subjected to market discipline – whether because there is no competition in the market, or because, despite the existence of competition (in the sense of various traders), consumers are unable to make meaningful comparisons, so that there is no pressure on traders to compete on the particular price and main subject matter issues in question.[268] Equally, it allows for control on other grounds, e.g. to protect low income consumers, or support the 'affordability' agenda in services of general interest

[265] H.E. Brander and P. Ulmer, The Community Directive on unfair Terms n Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission (1991) Common Market Law Rev 28, 647-662; and T. Wilhelmsson and Willett, 'Unfair Contract Terms', above.

[266] See also position papers submitted by Which? and BEUC.

[267] P. Nebbia, *Unfair Contract Terms in EC Law,* Oxford, 2007, 122-123.

[268] See e.g. position paper submitted by Which?.

arguably required for a high level of consumer protection. The ability to provide such consumer protection is seen as being important in the countries (Denmark, Finland, Portugal and Spain), where the Directive has been extended to price and main subject matter terms. In particular, the Danish report emphasises the flexibility of the general clause, which enables consideration as to whether the price or main subject matter really are genuinely fair (e.g. because they have been subject to market discipline, and they do not take advantage of low income consumers), then this can be decided under the general clause.

In conclusion, in the small number of countries where the Directive has been extended to price and main subject matter terms, the evidence suggests that this provides important consumer protection benefits, especially where these terms are not subjected to market discipline, and where other important policies of social cohesion are at stake. Further, there is no evidence that extension of the Directive to price and main subject matter terms, causes problems in application or leads to unintended effects.

- The effectiveness of the sanction foreseen by the UCTD for unfair contract terms (term is not binding). [*Key aspects to consider are: How does this sanction work in practice? Does it help consumers? Do the national courts take up the active role imposed by the Court of Justice (invoking unfairness ex officio, taking measures of instruction)? Is it sufficient to have CJEU guidance in this regard? Is there administrative remedy in this area for consumers?]*

In terms of sanctions, the Directive requires the Member States both to introduce individual and collective sanctions. Unfair contract terms shall 'not be binding' on the consumer (Art. 6 (1)). This neutral wording, more distant from national legal traditions, was meant to overcome the different connotations linked to more specific legal terms in the different legal traditions. In addition to this sanction, 'adequate and effective means' must be ensured to prevent the continued use of unfair contract terms. Such means must include the possibility for (private or public) organisations protecting consumers to stop the continued use of such terms either through an application in court or before administrative bodies (Art. 7).

Considering first the individual sanction, according to which an unfair term is non-binding. The Directive has been implemented differently in the different Member States. Different concepts of 'nullity' are used and exist in the different Member States, ranging from a 'relative nullity', whereby the term initially remains in force until the protected contractual partner invokes the nullity; to a 'protective nullity' whereby the court has jurisdiction to declare the terms void of its own motion and whereby the nullity can only be invoked to the advantage of the consumer. In addition, in some Member States, unfair contract terms are regarded as not being written (fiction of non-existence).[269]

The CJEU has clarified the meaning and requirements of the sanction that a clause is non-binding. The seminal case was *Océano* that concerned a jurisdiction clause. In this decision the CJEU held that "the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract (…) is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts".[270] In *Cofidis*,[271] the CJEU

[269] Consumer law compendium, p. 404.

[270] CJEU 27 June 2000, Joined Cases C-240/98 to C-244/98 - *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941, para. (29).

extended the competence to review further and made clear that this power to review is not limited to jurisdiction clauses. National courts must have the power to review the fairness of a clause on their own initiative generally. It followed from *Mostaza Claro*[272] and even more clearly *Pannon*[273] that a national court is under an obligation to invoke the unfairness of a term of its own motion. Again, such duty is not limited to jurisdiction clauses, but extends to other contractual clauses.[274]

In *Invitel*, the Court ensured the "consistency of assessment between collective and individual actions"[275] by also requiring national courts in actions for injunction. Such an active role not only implies to duty to invoke the unfairness of a term of their own motion, also in actions for injunction, but the Court in Invitel also required "national courts of their own motion to draw, including for the future, all the conclusions provided for in national law that follow from the finding, in an action for an injunction, that a term included in the general terms and conditions of consumer contracts is unfair, in order that such a term should not bind consumers who have concluded a contract containing those general terms and conditions".[276]

The obligation to take measures of enquiry seems however limited to the examination of *whether* the Directive is applicable. The obligation to investigate *ex officio* whether a contract term is actually unfair would remain dependent on the availability to the court of all legal and factual elements necessary for that task.[277] It can furthermore be inferred from the recent case *Tomášová*[278] that the failure by a court (adjudicating at last instance) to invoke the unfairness of a clause of its own motion can give rise to state liability. An infringement of EU law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter.[279] In *Tomášová* the Court has decided that the existence of a duty to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task, was clear since *Pannon.*

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[271] CJEU 21 November 2002, C-473/00 - *Cofidis v. Fredout*, [2002] ECR I-10875.

[272] CJEU 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421, para. (36).

[273] CJEU 4 June 2009, C-243/08, *Pannon,* EU:C:2009:350, para. 32.

[274] CJEU 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraphs 42 and 43; 21 February 2013, *Banif Plus Bank,* C-472/11, EU:C:2013:88, paragraph 22, and 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 41.

[275] CJEU 26 April 2012, Invitel, C 472/10, EU:C:2012:242, paragraph 43; and see also C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, para. 56:"Such a different attachment, as regards the law designated as applicable, of a term depending on the kind of action brought would have the effect in particular of abolishing the consistency of assessment between collective actions and individual actions which the Court has established by requiring the national courts of their own motion to draw, including for the future, all the conclusions provided for in national law that follow from the finding, in an action for an injunction, that a term included in the general terms and conditions of consumer contracts is unfair, in order that such a term should not bind consumers who have concluded a contract containing those general terms and conditions".

[276] *Invitel*, C-472/10, EU:C:2012:242, paragraph 43.

[277] R. STEENNOT, "Public and private enforcement in the field of unfair contract terms", *ERPL* 2015 (4), 606 and V. TRSTENJAK,"Procedural aspects of European Consumer Protection Law and the Case Law of the CJEU", *ERPL* 2013, 472, CJEU 21 February 2013, C-472/11, *Banif Plus Bank,* para. 32.

[278] CJEU 28 July 2016, C-168/15, ECLI:EU:C:2016:602.

[279] CJEU C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 57.

Although this duty to invoke the unfairness *ex officio* is now clearly established and although it is generally considered to contribute to the effectiveness of the sanction of the Directive, the actual effectiveness of course depends on whether national courts do take up this active role in practice. This varies in the different Member States, as evidenced by the country research for this study. In some Member States, there is ample awareness of the duty on the courts to take up such active role and evidence that courts do invoke the unfairness of the term *ex officio* (e.g. in Germany, Italy, the Netherlands, Latvia, Lithuania, Romania); or such rule may even be part of national procedural law (e.g. in Slovakia, UK). On the other hand, in other Member States this does not seem to happen, as is reported from e.g. Croatia, Cyprus and Slovenia or not to a satisfactory extent (e.g. in Czech Republic, France,[280] Poland).[281]

Different reasons have been invoked why national courts do not (sufficiently) comply with the obligation to investigate *ex officio* whether a contract term is unfair:

- The absence of an explicit law provisions in national law;[282]
- The deeply rooted civil procedure rule that courts cannot examine matters not pleaded by the parties;[283]
- The recent accession to the EU;[284]
- The lack of awareness of EU consumer legislation;[285]
- The lack of court cases in consumer law in general;[286]
- The lack of time and/or means to review the contract terms of their own motion.[287]

This last reason has been mentioned to be especially problematic in cases that are decided *in absentia*, where courts often do not have the time or the means and where the claim may be formulated rather vaguely so that it is not always clear at first sight whether a consumer is being sued.[288]

In some of the countries in which courts do test unfairness of their own motion (even in the absence of a legal rule codifying the CJEU jurisprudence), it was reported that decisions of the highest court confirming such a duty have played an important role in the awareness and compliance with such duty by lower courts.[289]

[280] Notwithstanding the explicit acknowledgement by the Cour de Cassation (after initial resistance) of the competence of national courts to apply the test of their own motion (Cass. Civ. 1re, 30 mai 2012, n° 11-12242).

[281] See country reports of the mentioned countries.

[282] Country reports Bulgaria; Cyprus.

[283] Country reports Cyprus; Czech Republic; Poland.

[284] Country report Croatia.

[285] Country reports Croatia; Poland (no specialised consumer courts).

[286] Country report Croatia.

[287] Country report France.

[288] In this sense, some of the magistrates interviewed in Belgium; also in the Netherlands R de Moor, 'Procesrechtelijke en materieelrechtelijke beschouwingen naar aanleiding van de tweede gratis-mobieltjes uitspraak van de Hoge Raad', TvC 2016/5, p. 232-235.

[289] Country report The Netherlands (*Hoge Raad* 13 September 2013, ECLI:NL:HR:2013:691, *NJ* 2014, 274 (case note H.B. Krans), *TvC* 2013/6, p. 262 (case notes M.B.M. Loos and R.M.M. de Moor) (*Heesakkers/Voets*)), country report Estonia; country report Latvia.

A need for increased awareness (in the form of legal training) and for guidance and codification of the exact scope of the obligations of the national courts was expressed by numerous stakeholders in the country research. In Latvia e.g., the fact that judges are increasingly participating in judicial training programs on consumer law was mentioned as one of the reasons for increasingly invoking unfairness *ex officio*.

The awareness and attention given to this duty in the Member States thus differs widely. In the Netherlands, two reports (2010 and 2014) have already been issued by a working group of first instance courts, summarising the main principles set out by the CJEU and providing guidance (and links to relevant CJEU and national cases) on clauses that are frequently used in order to ensure a uniform approach.[290] According to a survey in 2010, the guidance would broadly be adhered to.[291] This guidance did however not go unchallenged. The interpretation of some CJEU decisions was criticised,[292] and the Courts of Appeal considered such guidance by the courts would come too close to taking up a regulatory function.[293] In the legal doctrine, the important number of preliminary references to the Dutch highest court (*Hoge Raad*) on the exact task of judges in invoking unfairness *ex officio*, was held to illustrate the need for clarification.[294] The Recommendation of the Law Commission in the UK is illustrative for the situation reported in several Member States. As the duty to raise unfairness *ex officio* goes contrary to national procedural law, an express statement in the law is deemed necessary.[295] Following such recommendation, such duty was codified in the 2015 Consumer Rights Acts in the UK.[296]

The sanction that a term is non-binding has contributed to achieving a high level of consumer protection. Especially the interpretation by the CJEU that the directive requires this sanction to be invoked *ex officio* by the national courts has contributed to its effectiveness. The sanction has however not reached its full potential in all Member States, due to a lack of awareness of the effects of this sanction and a lack of compliance with this duty by national courts in some Member States.

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[290] See https://www.rechtspraak.nl/SiteCollectionDocuments/Rapport-ambtshalve-toetsing-II-versie-november-2014.pdf.

[291] https://www.rechtspraak.nl/SiteCollectionDocuments/Rapport-ambtshalve-toetsing-II-versie-november-2014.pdf, 3.

[292] C. PAVILLON, "Het LOVCK-rapport ambtshalve toetsing II kritisch getoetst", *TvC* 2015-3, 128-136.

[293] www.rechtspraak.nl/SiteCollectionDocuments/Rapport-ambtshalve-toetsing-II-versie-november-2014.pdf, 3.

[294] R. DE MOOR, 'Procesrechtelijke en materieelrechtelijke beschouwingen naar aanleiding van de tweede gratis-mobieltjes uitspraak van de Hoge Raad', *TvC* 2016.

[295] The Law Commission thus recommended in 2013: "We think that it would be helpful to have an express statement in legislation spelling out the effect of the CJEU case law. Although this is already the law, we think that it would be helpful to state it explicitly in order to bring this obligation to the attention of the courts. It should be particularly helpful in raising the awareness of the lower courts that this is in fact an obligation rather than just a power given to the courts". Law Commission, 'Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills' (2013) at 7.90.

[296] S.71 CRA: "Duty of court to consider fairness of term (1) Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract. (2) The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it. (3) But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term."

- The effects of limiting a court decision establishing the unfairness of an unfair term to the individual relationship between the specific trader and the consumer, rather than, for example, extending the effect of such court decision to all contracts concluded with a given trader, even outside injunctions under Article 7(2) of the Directive, or to all contracts containing the same contract term; [*Key aspects to consider are: Are there Member States in which court decisions establishing the unfairness of an unfair term were extended to all contracts concluded with a given trader? If, so, does this work in practice? What are the benefits for consumers/businesses? If no such court decisions exist: What are the effects of this situation?*]

The limited effect of judgments declaring a term unfair has been mentioned as one of the weaknesses of the Directive.[297] It is argued that it would contribute to the effective protection of consumers to extend *res judicata* of a decision declaring a term unfair and thus non binding to all consumers who have concluded a contract with the same seller or supplier, but this is not unequivocally accepted in all Member States and by all legal scholars.

In individual litigation (with in principle a concrete unfairness control) this is even more controversial as, in principle, individual circumstances are taken into account (Art. 4(1) UCTD). In collective litigation (actions for injunction), an abstract control would apply. However, this (doctrinal) distinction between a 'concrete control' and an 'abstract control' is not universally accepted.[298] It is furthermore important to note that the Court of Justice in *Amazon* stressed the importance of the consistency of assessment between individual and collective actions.[299]

For collective litigation, there is some guidance of the CJEU. In *Invitel*, the CJEU decided that where the unfair nature of a term in the general business conditions has been acknowledged in 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 general business conditions apply will not be bound by that term.[300] This applies not only to consumers who are parties to the action for an injunction but also to consumers who are not parties to the procedure but have concluded a contract with that seller or supplier to which the same terms apply. [301]

The consequences of *Invitel* are however not entirely clear. Are Member States just entitled – on the basis of the minimum harmonisation character of the Directive – to introduce an *erga omnes* (towards all) effect to an action for injunction declaring a term unfair or are they obliged to do so? Some scholars argue (on the basis of the judgment and the opinion read together) that there is an obligation. They admit

[297] Consumer law compendium, 431.

[298] See e.g. H. MICKLITZ, "Unfair terms in consumer contracts", in N. REICH, H. MICKLITZ, P. ROTT, K. TONNER, *European* consumer *law,* Antwerp, Intersentia, 2014, 148-149 – who pleads for an approximation of control standards with a generalisation of individual circumstances.

[299] CJEU 28 July 2016, C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, para. 56.

[300] CJEU 26 April 2012, C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, para. 44.

[301] CJEU 26 April 2012, C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt,* para. 41 et seq.; V. TRSTENJAK, "Procedural aspects of European Consumer Protection Law and the Case Law of the CJEU", *ERPL* 2013, 458.

however that the operative part of the judgment casts some doubts.[302] The case concerned an action brought by a national consumer protection authority. As collective actions brought by private consumer organisations are also brought to enforce a public interest, this seems to justify extending the *res judicata* effect also in such cases.[303]

The Court of Justice did furthermore not decide whether this would also apply to identical terms being used by *other* sellers or suppliers. Advocate General Trstenjak rejected an *erga omnes* effect of injunction proceedings brought in the public interest. She found an extension to other sellers or suppliers to be contrary to the right to be heard / right to a fair trial of other suppliers / sellers not involved in the proceedings.[304] In the legal literature, different views were expressed.[305]

The unclear implications of *Invitel* also entail that discussion exists on whether national provisions comply with EU law. Court or administrative decisions in the context of collective proceedings are in the vast majority of Member States only binding on the businesses who are party to the case.[306] Exceptions to this principle exist in some Member States.[307] This was already documented in the Consumer Law Compendium. Other examples follow from the country research for this evaluation. Thus, e.g. in Slovakia, sec 53 a, para 1 CC implies that the effect of a court decision establishing the unfairness of a term in an individual case is not limited to the individual relationship between the specific trader and the consumer, but to all contracts concluded with a given trader.[308] Similarly in Romania; declaratory judgements on unfairness of contract terms were reported to have *erga omnes* effect since November 1, 2013 when Law 82/2012 entered into force. *Erga omnes* effect of finding the term unfair implies that the business entity is ordered by court to amend all its contracts in force with its clients containing the challenged term and the contracts prepared to be used in future. However, it does not apply to other business entities which apply the same term with their clients. In some Member States measures were furthermore taken to 'implement' the *Invitel* decision. Thus, 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.[309] It was reported to be too early to judge the impact of these new rules.

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[302] H. MICKLITZ, N. REICH, The court and sleeping beauty: the revival of the unfair contract terms directive (UCTD)", *Common Market Law Review* 2014, 795.

[303] R. STEENNOT, 612; H. MICKLITZ, N. REICH, 785-796.=

[304] AG , para. 60.

[305] Pro extension: e.g. R. STEENNOT, 2015, 612 (pro extension to other sellers or suppliers using identical terms); H. MICKLITZ, N. REICH, 795-796. See on the other hand M. BOTTINO, "Arrêt Invitel: l'effet ultra partes des clauses déclarées abusives", *REDC* 2012, (587), 593.

[306] Consumer law compendium, 431, confirmed in the country reports for i.a. Austria (sec. 411 Austrian Civil Procedure Code, Sec. 12 ABGB); Belgium; Bulgaria (with limited exceptions); Cyprus; Denmark; Estonia; Italy; Latvia; the Netherlands.

[307] Consumer law compendium, 431; for example Bulgaria (claims in the collective interest of consumers – for consumer who do not opt-out); Croatia (Art. 117 Consumer Protection Act – in the framework of an injunction proceeding; Finland (decisions brought to the Market Court by the Consumer Ombudsman); Greece (according to art. 10 par.20 of N. 2251/94 the irrevocable decision on a collective action is applicable against everyone, even if they were not parties to the trial), also in Hungary the effect of court decisions establishing the unfairness of a term has been extended to all contracts of a business concerned .

[308] Country report Slovakia.

[309] Art. L. 524-1(2) and (3), L. 621-2(2), L. 621-8(2) C.conso.

In some countries, the initiatives taken to extend the effect of a judgment have been met with criticism. Thus, in Greece, art. 10 par.20 of N. 2251/94 provides that the irrevocable decision on a collective action is applicable against everyone, even if they were not parties to the trial. This rule was criticised in the literature and it was reported that the prevailing view is that it should be interpreted strictly not to contravene with general (Greek) rules on res judicata. Also in other countries, questions are sometimes raised concerning the compatibility of an *erga omnes* effect with certain fundamental rights. The recent CJEU case C-119/15 *Biuro podróży 'Partner'* is important in this regard, as it answers some of these questions. The case concerned the Polish system whereby terms that have been declared unfair are included in a public register. Other traders using equivalent terms may be fined for the use of such terms. The compatibility with EU law and especially with article 47 of the Charter (right to an effective remedy and to a fair trial) was challenged. The CJEU decided that such system is compatible with EU law if there is an effective judicial remedy against the decision declaring the terms equivalent and against the decision fixing the fine: "Article 6(1) and Article 7 of Council Directive 93/13/EEC, read in conjunction with Articles 1 and 2 of Directive 2009/22/EC […]and in the light of Article 47 of the Charter […], must be interpreted as not precluding the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in a national register of unlawful standard contract terms from being regarded, in relation to another seller or supplier which was not a party to the proceedings culminating in the entry in that register, as an unlawful act, provided, which it is for the referring court to verify, that that seller or supplier has an effective judicial remedy against the decision declaring the terms compared to be equivalent in terms of the question whether, in the light of all relevant circumstances particular to each case, those terms are materially identical, having regard in particular to their harmful effects for consumers, and against the decision fixing the amount of the fine imposed, where applicable."

The absence of an *erga omnes* effect of individual and / or collective proceedings does however not mean that individual court decisions do not have influence. Especially decisions of the highest courts are followed, even in countries in which there is no binding precedent.[310] In the countries that have a doctrine of precedent, this doctrine may of course impact on other consumers[311] also the (formal and informal) enforcement activity of national consumer authorities following a court decision may impact on other consumers.[312] In some countries, traders are reported to follow the case law, interestingly especially if the case is also within the competence of an administrative body that can impose a fine.[313] Also the effect of Supreme Court decisions on the behaviour of traders has been stressed.[314]

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[310] Thus e.g. country report Latvia;

[311] See, for example, in the context of UCTA 1977 *RÖHLIG (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18 at [23] *per* Moore-Bick LJ: "In principle the question must be considered separately in each case because the circumstances surrounding the contract may differ from case to case, but where a standard condition of this kind is involved I do not think that the court should be astute to draw fine distinctions between cases that in broad terms are very similar. It is important for those engaged in any commercial activity, whether as providers of goods or services or as customers, to know whether a particular clause will generally be regarded as reasonable in the context of contracts of a routine kind made between commercial parties."

[312] See OFT, *Unfair Contract Terms Guidance*, (OFT311, (2008)).

[313] Country report Czech Republic. Also in Finland, actions by the Consumer Ombudsman (other than decisions brought to the Market court that have collective effect by law) are reported to have a collective effect in practice. The dual role of the Consumer Ombudsman (supervisor of industry-specific contract terms and sanctioning authority) enhances the collective effect.

[314] Country report Estonia.

In the vast majority of Member States, court or administrative decisions in the context of individual and collective proceedings remain only binding on the businesses who are party to the case. This limited effect of judgments and decisions declaring a term unfair limits the effectiveness of the Directive.

6.1.2.2. *Effectiveness of the UCTD in eliminating obstacles to the Internal Market*

What is the effectiveness of the UCTD (i.e. the national laws transposing it) in eliminating obstacles to the Internal Market in terms of:

- Whether the application of the general fairness clause 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;

To develop wholly uniform European standards for unfair terms is difficult if (as is the case) application of the general clause to the facts is left to national courts. A comparative law study revealed several years ago noticeable differences in the way the different Member States interpret the general clause.[315] The "no show" clause that was seen as fair by a Belgian court[316] in the coordinated procedure against air carriers had for instance been deemed unfair by Austrian, German and Spanish courts.[317]

On the other hand, the case law of the CJEU has given significant guidance on the general fairness clause. In most Member States no significant problems were caused by different national approaches, according to the country research. Stakeholder concerns on this issue were however reported from several countries, e.g. France, Italy and the Netherlands. These concerns mainly referred to general considerations, e.g. in Italy interviewed stakeholders pointed out that national differences in the application/implementation of the directives play a detrimental role for businesses, as they are committed to adapt their commercial behaviour to different national legislations.[318] A Dutch ministry suggested that some consumers shopping cross-border might be affected by the fact that other Member States have different rules for standard terms then the Netherlands have. However, the country report also pointed out that there is no empirical evidence that unfair terms legislation – let alone diverging application or implementation of the UCTD – plays any role in the decision of businesses or consumers to conclude cross-border contracts.[319] In this context it can also be noted that one-off costs of businesses for checking compliance and adapting standard contract terms to the national legislation when entering another EU country's market appear to be limited, as the results of the business interviews and the assessment of compliance costs revealed.[320]

[315] Pavillon 2011.

[316] Cess. Pr. Com. Namur 10 mars 2010 - TA c. Brussels Airlines para. 8.

[317] BEUC, Unfair terms in air transport contracts, Letter sent to Mr. Tony Tyler, Chief Executive Officer/IATA (Ref. L2013_016/MGO/UPA/rs – 05/02/2013), p. 2-3.

[318] Country report Italy.

[319] Country report Netherlands.

[320] See results of the business interviews and the extrapolation of business costs to EU level in Part 4 of this report.

- Whether any of the extended indicative lists, "black" and/or "grey" lists of unfair contract terms adopted in certain Member States represent a barrier to cross-border trade;

If a contract term is considered (conclusively or presumptively) unfair in a given country, but not elsewhere, then 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 conceded there to be a lack of empirical evidence of any actual significant problem; and the general picture conveyed by the country research was that there was not a problem.

- Whether the other extensions of the application of this Directive (i.e. to individually negotiated terms and to terms dealing with the adequacy of price and main subject matter) in certain Member States represent a barrier to cross-border trade.

If Member States apply the Directive to individually negotiated terms, main subject matter or price terms, 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 country research was that no such problems were reported.

6.1.3. Injunctions

The Injunctions Directive was first adopted in 1998 and recast in 2009 with a consolidated Annex, after a number of amendments relating solely to the Annex. It has generally the purpose of improving the enforcement of consumer law (as listed in the Annex to the Directive and as transposed into the internal legal orders of the Member States), with a view to the better functioning of the internal market. It wants to achieve this aim by ensuring the possibility for so-called ‘qualified entities’ (consumer organisations and/or public bodies) to seek injunctions and related remedies in front of a court or administrative authorities.

Beyond that general approach to enforcement, the Injunctions Directive imposes on Member States the obligation to enable ‘qualified entities’ from other Member States to seek an injunction in front of a court or of an administrative authority to stop an infringement of said consumer laws that originates in that Member State (an intra-Community infringement) and that harms the collective interests of consumers.

Accordingly, the Injunctions Directive provides for a tool of enforcement of the consumers' rights granted by other consumer legislation, among others, by the Unfair Commercial Practices Directive, the Sales and Guarantees Directive, and the Unfair Contract Terms Directive. It facilitates the use of injunctions both domestically and in a cross-border context.

The present section provides for an analysis of the effectiveness of the Injunctions Directive in contributing to a high level of consumer protection and in eliminating obstacles to the internal market taking into account the impact of national enforcement systems of the Member States.

It covers the scope of application of the injunction procedure and its use across the EU, considering the five year period since June 2011. It also describes obstacles to the effective use of the injunction procedure across the EU and the effectiveness of national measures taken regarding modalities of the injunction procedure relevant to these obstacles.

Furthermore, it describes the impact of the injunction procedure in terms of reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment.

The analysis of the effectiveness of the Injunctions Directive is carried out in the light of its main objectives, namely:

- To impose on the MS the availability of injunction procedures (Articles 1 to 3) within a prescribed scope of application (EU consumer law as enumerated within Annex I to the Directive);
- To facilitate the use of the injunction procedure for cross-border infringements (Article 4);
- To promote the use of settlements (Article 5); and
- Ultimately to ensure better enforcement of EU consumer law by reducing the number of consumer law infringements and reducing consumers' detriment across the EU.

The analysis of the effectiveness of the Injunctions Directive is structured into six parts:

- The first part concerns the scope of application of the Injunctions Directive and the scope of application of injunction procedures as foreseen by national legislation of the Member States;
- The second part considers the use of the injunction procedure in Member States, considering the five year period since June 2011; to establish trends, data are compared to the previous Commission reports on the application of the Injunctions Directive, the extent possible, and the impact of the Directive is analysed;
- The third part analyses obstacles to the effective use of the injunction procedure across the EU, as reported by in the country reports and by stakeholders;
- The fourth part considers the role of settlements in stopping infringements to consumer law across the EU, including requirements to undertakings by traders;
- The fifth part analyses the impact of injunction procedures in terms of the reduction of the numbers of infringements of consumer law and of the reduction of consumer detriment;
- The sixth part considers the practical effectiveness of the current rules in eliminating obstacles to the Internal Market and discusses issues that are specific to infringements having cross-border implications, such as issues of jurisdiction, cross-border enforcement of decisions and sanctions and private international law.

6.1.3.1. *The scope of application of the injunction procedures*

- Analysis of the extent to which Member States have extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunctions Directive? If yes, what are the additional consumer rights covered?

The scope of application of the Injunctions Directive

The Injunctions Directive applies to both domestic and intra-Community (or intra-Union) infringements. Thus, the Directive requires injunction procedures in the laws of the Member States and it requires Member States to grant qualified entities from other Member States access to those procedures, while establishing minimum standards for these procedures.

The Injunctions Directive, however, only applies to infringements of specific consumer legislation as listed in the Annex I to the Directive and as transposed into the internal legal orders of the Member States. Annex I currently contains 15 pieces of legislation:

- The Doorstep Selling Directive 85/577/EEC and the Distance Selling Directive 97/7/EC, which are no longer in force, as they have been replaced by the Consumer Rights Directive 2011/83/EU. The Consumer Rights Directive has not been included in the Annex yet; however, according its Article 31, references to repealed Directives shall be construed as references to the Consumer Rights Directive.
- The Consumer Credit Directive 87/102/EEC which has been replaced by Directive 2008/48/EC, which has been noted in a footnote to the Annex, rather than considered in an amendment;
- The Broadcasting Directive 89/552/EEC, which has been replaced by the Audiovisual Media Services Directive 2010/13/EU, without the Annex having been amended; however, according to its Article 34, references to the repealed Directive shall be construed as references to the Audiovisual Media Services Directive.
- The Package Travel Directive 90/314/EEC which has been replaced by Directive 2015/2302, without the Annex having been amended; however, according to its Article 29, references to the repealed Directive shall be construed as references to the new Package Travel Directive 2015/2302.
- The Unfair Contract Terms Directive 93/13/EEC;
- The Consumer Sales Directive 1999/44/EC;
- The Electronic Commerce Directive 2000/31/EC;
- Directive 2001/83/EC on the Community code relating to medicinal products for human use (Articles 86 to 100);
- Directive 2002/65/EC concerning the distance marketing of consumer financial services;
- The Unfair Commercial Practices Directive 2005/29/EC;
- The Services Directive 2006/123/EC;
- The Time-share Directive 2008/122/EC;
- The ADR Directive 2003/11/EU; and
- The ODR Regulation (EU) No. 524/2013.

That list does not cover all EU law that could be classified as consumer law, and part of which is listed in the Annex to the Consumer Protection Cooperation Regulation (EU) No. 2006/2004. Of course, it does not either cover national consumer law that is not derived from EU law. Member States can, however, extend the scope of application of the Injunctions Directive, which is a minimum harmonisation instrument, in its national transposition.

The scope of application of the injunction procedure in the national legal orders of the Member States

Based on the country research for this evaluation, four groups of Member States can be differentiated.

The first group of Member States, consisting of Cyprus, Denmark, Ireland, Latvia, Romania and Sweden, has implemented the scope of application for both national and cross-border infringements as in Annex I of the Injunctions Directive.[321]

The second group of Member States has added specific, enumerated pieces of legislation for both national and cross-border infringements. For example, Malta has included legislation on home loans and air passengers' rights. Croatia has added the Bus Passengers Rights Regulation (EU) No. 181/2011. Austria has also extended the list to cover particular laws, such as the rules on investment and asset management services, payment services and the act of issuing e-money. Luxembourg has added price indication law and the general obligation to provide consumers with information before they sign a contract. In Belgium, the injunction procedure is used for a variety of matters within and beyond consumer law, including the protection of consumers of mobile telecommunications services, data protection law and anti-discrimination law.

The third group has different approaches for national and for cross-border infringements. The United Kingdom distinguishes "domestic infringements" from "Community infringements" and has vastly extended the scope of application for the former but only implemented Annex I of the Injunctions Directive for the latter. Similarly, in France and Lithuania, foreign qualified entities are limited to injunctions under Annex I of the Injunctions Directive while domestically, the infringement of any collective consumer interest is actionable. In the Netherlands, a distinction is made as to legal standing. Whereas only qualified entities can initiate injunction procedures in other Member States, legal standing in domestic cases is much broader.

The fourth group, consisting of Bulgaria, the Czech Republic, Estonia, Finland, Germany, Greece, Italy, the Netherlands, Poland, Portugal, Slovakia and Spain, has extended the scope of both domestic and cross-border injunction procedures to consumer law in general. In Hungary, the procedure is available for all matters that fall under the competence of courts. The extension certainly was widely used in Germany, for example in relation to all kinds of information obligations (e.g. related to energy efficiency), to rules concerning legal advice to consumers, to protection against real estate agents, price transparency rules. In Poland, the extension was used, for example, in construction law cases.[322] In contrast, in Estonia, despite the extended scope of application no injunction suit has been brought outside the scope of application of the Injunctions Directive until now.[323]

The last solution triggers the question of what 'consumer protection' entails. In Germany, the extension to consumer law in general led to discussions and litigation centring around the issue of whether or not a particular rule falls into the ambit of 'consumer protection'.[324] One example was data protection law, which German courts did not accept to be 'consumer protection', whereas the German legislator has in the meantime, in February 2016, included data protection expressly into the illustrative list of consumer protection laws for which the injunction procedure is available.

[321] Some country reports regard the addition of the Consumer Rights Directive 2011/83/EC to be an extension of the scope of the Directive, whereas this study argues that this Directive is part of the Annex, through its Art. 31.

[322] Country report Poland.

[323] Country report Estonia.

[324] For example, BEUC and the Federation of German Consumer Organisations (vzbv) argued in their position papers for the public online consultation that the scope of the Injunctions Directive should be expanded to cover gas and electricity supply, data protection, transport, financial services, and product liability.

A detailed overview of the Member States that have extended the scope of application of the injunction procedure beyond the pieces of EU legislation listed in the Annex I to the Injunctions Directive is provided in Annex V below.

Varieties of injunction procedures in Member States

With regard to qualified entities, the Injunctions Directive takes into account the specific features of national legal systems by leaving the choice between different options having equivalent effect to the Member States. According to Article 3, Member States can entrust any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular one or more independent public bodies, specifically responsible for protecting the collective interests of consumers, and/or organisations whose purpose is to protect the collective interests of consumers. Likewise, Member States can decide, according to Article 2(1), whether injunctions may be brought in court or in front of one or more administrative bodies or both before a court and an administrative body, depending on the infringement.

Beyond the minimum standards of the Injunctions Directive, Member States can also allow individuals or business organisations to seek injunctions in the collective interest of consumers. Professional organisations are also mentioned as potential enforcers in Art. 23(1)(c) of the Consumer Rights Directive. Business organisations have legal standing in Austria, Belgium, Germany, Italy, Luxembourg, Slovenia, Portugal, and Spain. Individual consumers can also claim injunctions in Belgium, Denmark, Hungary, Luxembourg, Poland (i.e. they may notify the President of the UOKiK, who may then seek an injunction), Portugal, and Spain.[325]

This has led to a variety of different enforcement systems in the Member States.

In most Member States, the injunction procedure is a court procedure (in Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Portugal, Slovenia, Spain, Sweden, and the UK). It is an administrative procedure in Latvia, Malta, Poland and Romania, and the legislation foresees both forms of the procedure in Estonia, France, Hungary and Slovakia.

In Austria, Germany and Greece, the enforcement of consumer law is entirely in the hand of consumer organisations and business organisations, although there are plans now in Germany to give consumer law enforcement powers to the Bundeskartellamt that is, at the moment, only competent for competition law. In contrast, Latvia seems to be the only Member State where only public authorities have enforcement powers. In Latvia, only the Consumer Rights Protection Center can bring injunction actions, either upon its own initiative or on the basis of a submission of the Association for Consumer Rights Protection, which seems to be the only consumer organisations entitled to do so.[326]

Most Member States have a mixed system in which both public authorities and consumer organisations can enforce consumer law at the domestic level. However, not all of these Member States have listed both types of enforcers as qualified entities for the purposes of Article 4 of the Injunctions Directive. For example, Belgium, the Czech Republic, Luxembourg, the Netherlands and Slovenia have only registered consumer organisations as qualified entities listed in the list published in the Official Journal of

[325] See country reports of the listed countries. It should be noted that their legal standing does not necessarily extend to all the infringements within the scope of application of the ID.

[326] See country report Latvia.

the EU, whereas at the domestic level, public authorities have enforcement powers as well. The reason is probably that public authorities use the CPC Network rather than the Injunctions Directive for infringements having cross-border implications. In contrast, Denmark, Estonia, Ireland, Lithuania, Sweden and the UK have only listed public authorities as qualified entities for the purposes of the Injunctions Directive, whereas consumer organisations can only take action at the domestic level.[327] In Poland, the injunction proceedings may only be commenced by the President of the UOKiK who also has discretion as to when to act, however, in some cases consumer organisations may also be involved in the proceedings. With injunctions against unfair contract terms in B2C contracts, the entities notifying about the unfairness may be allowed to participate in the procedure, if they applied for it and if the President of the UOKiK considers that their participation could help clarify matters. Regarding infringements of other collective interests of consumers, anyone may notify the President of the UOKiK, however in these cases there is no procedure to allow the notifying person/entity to participate in the injunction proceedings.

In Member States, where both public authorities and consumer organisations can enforce consumer law, consumer organisations often do not make use of their powers but rather approach the authorities, asking them to use their powers, rather than using the injunction procedure themselves. For example, in Ireland consumer organisations could apply to become enforcers but no consumer organisation has done that. In the UK, Which? applied to become an enforcer but has never brought a claim in court. The same approach is typical for many underfunded consumer organisations.[328] In Finland, where there is a mixed system, consumer organisations may not bring claims for injunctive relief. Only in a few Member States, a truly mixed system exists in practice where both the public authority and consumer organisations can seek injunctions against traders, for example in Bulgaria, the Czech Republic, Lithuania, the Netherlands and Slovakia.[329]

The type of enforcers that Member States have chosen also influences the choice between enforcement by way of judicial or administrative procedure. Obviously, consumer organisations cannot use administrative powers. Thus, in Member States where the enforcement of consumer law is entirely in the hand of consumer organisations and business organisations, consumer law is enforced in court procedures.

Public authorities often have administrative powers so that they can themselves issue injunction orders and impose fines on traders of their own motion.[330] In that case, their decisions can be appealed by the trader, usually in the administrative courts if the national legal system distinguishes administrative law litigation from private law litigation. Some Member States, for example the UK, have introduced a system where also the public authority has to apply for an injunction in court. In the Netherlands, the consumer authority had to use the court system in case of infringements that were not clear-cut, such as the “unfairness” of a term. There has, however, been a recent trend in Member States, that have initially only made injunction procedures in court

[327] See country reports of the listed countries. For an overview of the entities entitled to bring an action seeking an injunction under the Injunctions Directive in the Member States, see Annex V.

[328] Country report Cyprus, at 1.3.1., country report Slovenia. In Slovakia, this is true for interim measures, see Country report Slovakia. More generally, it was also reported in the country reports for Czech Republic, Estonia, Greece, Lithuania and Malta that consumer organisations/qualified entities have limited financial and human resources, see Section 6.4.4.

[329] Country report Lithuania, country report Slovakia.

[330] The country research for the present study does not provide for more precise country information on this topic, as these powers are outside the scope of the ID.

available, to confer public law powers (injunction orders or fines) to public authorities rather than them having to use the civil law injunction procedures in court.[331] This applies, for example, to the Dutch Autoriteit Consument en Markt[332] and to the latest reform of Swedish law that allows the Swedish consumer ombudsman to issue binding injunction orders in clear-cut cases whereas he only needs to take court action in borderline cases. In Poland, in a law reform of 2015, the President of the Polish Office of Competition and Consumer Protection was given the authority to act on any infringement of collective consumer interests, where he previously had to take judicial action.[333] In the UK, some regulators have public law enforcement powers whereas the Competition and Markets Authority (CMA) has to apply for an injunction in court.

Typically, where they have a choice under relevant national legislation, consumer authorities prefer to use their regulatory powers to issue injunction or compensation orders themselves rather than resorting to the injunction procedure in court because these measures are faster and cheaper for them. The injunction procedure has, for example, never been used in Cyprus and Romania and rarely been used in Estonia and Malta.[334] This partly explains the great variety in the use of the injunction procedures in the Member States.

Protection of collective business interests

Some Member States have extended the scope of application of injunction procedures to the protection of business' interests, and given business representatives legal standing to protect the collective interests of businesses.[335] Such extensions were however not discussed further in the country reports, which focused the discussion on the scope of the Directive on the coverage of Annex I of the Directive.

6.1.3.2. *Use of the injunction procedure across the EU*

- Analysis of the use of the injunction procedure across the EU;

No central database of injunction actions in Member States exists. As the 2012 report on the application of the Injunctions Directive highlighted, this is "due to the absence of a formal obligation on Member States to maintain a central database of the injunctions initiated on their territory and report this information to the Commission."[336] Within the 2012 Commission report, the estimate of injunction actions initiated in the previous 5-year reporting period was based on a survey of relevant stakeholders, and for this evaluation, a similar survey of qualified entities was conducted in all 28 Member States, based on the list of qualified entities in the 2016 Notification from the Commission as foreseen by Article 4(3) of the Injunctions Directive. In total, 29 qualified entities from 21 Member States responded.[337] Of these

[331] Country report France, Netherlands, UK.

[332] See Pavillon, Public interest litigation in the Netherlands – Recent developments in the collective enforcement of consumer rights, in: Schmidt-Kessel, Strünck and Kramme (eds), Im Namen der Verbraucher? Kollektive Rechtsdurchsetzung in Europa, 2015, 85, 94.

[333] Country report Poland, at 1.3.1.

[334] Country reports Cyprus, Estonia, Malta, Romania.

[335] In Austria, Belgium, Czech Republic, France, Germany (with regard to unfair commercial practices), Italy, Portugal (but only in the national legislation related to unfair contract terms).

[336] European Commission. (2012). Report concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest.

[337] 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.

entities, 57% were consumer organisations. The remainder consisted of public authorities/bodies (36%) and 'other' entities, such as business associations (7%).[338] Given that the survey did not cover all qualified entities listed in the 2016 Notification from the Commission, and in line with a caveat noted in the 2012 Commission report, the number of documented cases in the following report does therefore not necessarily mean that these are the only actions for injunctions that have actually been initiated.

The table below lists the number of responding qualified entities that initiated injunction actions since June 2011, as well as the total number of documented injunction actions initiated per year.

Table 7: Injunction actions initiated since June 2011

Year	Number of qualified entities that initiated injunction actions	Total injunction actions initiated
6/2011 - 12/2011	5	775
2012 (full year)	8	1 177
2013 (full year)	9	962
2014 (full year)	9	1 103
2015 (full year)	7	995
1/2016 - 5/2016	5	536
Total 5 year period	12	5 763

Source: Civic Consulting, Survey of qualified entities. Question: '*What is the total number of injunction actions initiated by your organisation since June 2011?*'

In the five year period since June 2011, responding qualified entities initiated a total of 5 763 injunction actions. Note that this total does not correspond to the sum of the yearly totals—some respondents did not provide yearly answers, and instead only provided answers for the total five year period. While in most countries the number of reported injunction actions is a few hundred or less, the notable exceptions are qualified entities in Germany which reported the highest number of injunction actions (4 579) of all Member States, and Latvia (794). The numbers of documented injunction actions by country are presented in more detail in the following table.

[338] For more details concerning the coverage of the survey, refer to Part 4 of this report.

Table 8: Injunction actions initiated since June 2011 (by Member State, in order of total number of actions)

Member State	Total injunction actions initiated
Germany	4 579
Latvia	794
Austria	150
Slovakia	100
Netherlands	54
Czech Republic	32
Lithuania	27
Bulgaria	16
Luxembourg	5
Malta	5
Croatia	1
Total	*5 763*

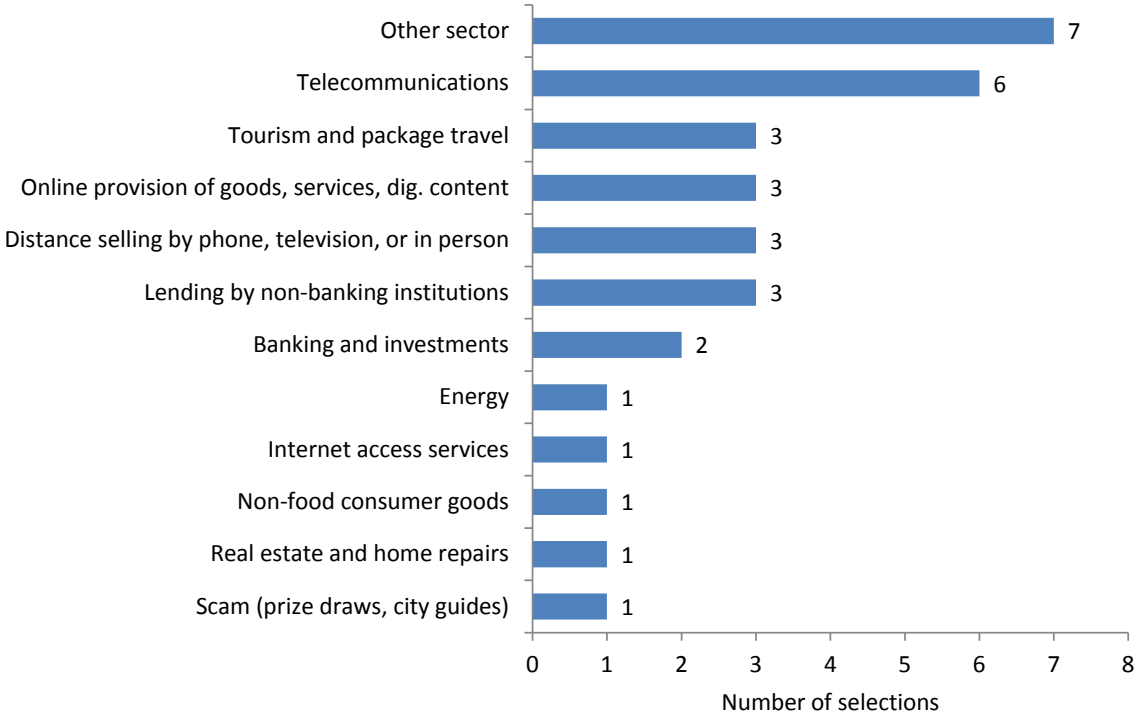
Source: Civic Consulting, Survey of qualified entities. Question: '*Please indicate the number of injunction actions initiated by your organisation since June 2011, differentiating between actions regarding national infringements and actions regarding infringements originating in another country.*'

Close to half of the responding qualified entities (14) indicated that they did not initiate any injunction actions since June 2011. Reasons due to which entities did not initiate any injunction actions included initiating other kinds of actions instead of injunctions and insufficient financing (see below for an in depth analysis of obstacles to the use of the injunction procedure).

- The three economic sectors most affected by the injunction actions (in order of importance);

In the survey, responding qualified entities elaborated upon the three economic sectors that were most affected by the injunction actions initiated by their organisation. The figure below presents the sectors that participants indicated in order of frequency. Seven responding qualified entities listed 'other' sectors such as dry-cleaning and medicinal products as one of the most affected; another six listed the telecommunications sector as one of the most affected sectors. Tourism and package travel, online provision of goods, services and digital content, distance selling by phone, television, or in person and lending by non-bank institutions each were selected three times.

Figure 2: Economic sectors most affected by injunction actions



Source: Civic Consulting, Survey of qualified entities. Question: '*What are the three economic sectors most affected by the injunction actions initiated by your organisation since June 2011 (in order of importance)?*'

Sectors that were never selected as being among the three most affected by injunctions included insurance, car sales/rental/parking, passenger transport, food and restaurant services, postal services, and timeshare.

It is notable that the economic sectors most affected by injunction actions are to a large extent also the sectors in which respondents to the open public consultation in the framework of the Fitness Check assessed injunctions as being most effective: While injunctions are viewed as either very effective or rather effective by 35% of respondents for the online provision of goods, services and digital content (third ranked by qualified entities as being affected by injunction actions), this assessment was provided by 33% of respondents for communications and internet access services (second ranked by qualified entities), and 30% of respondents for tourism and package travel (also third ranked by qualified entities). Injunctions were perceived as least effective in the financial services sector, with 27% of respondents considering them to be very or rather effective. In all sectors except the online provision of goods, services and digital content, more than half of respondents either did not respond or selected "no opinion/don't know".[339]

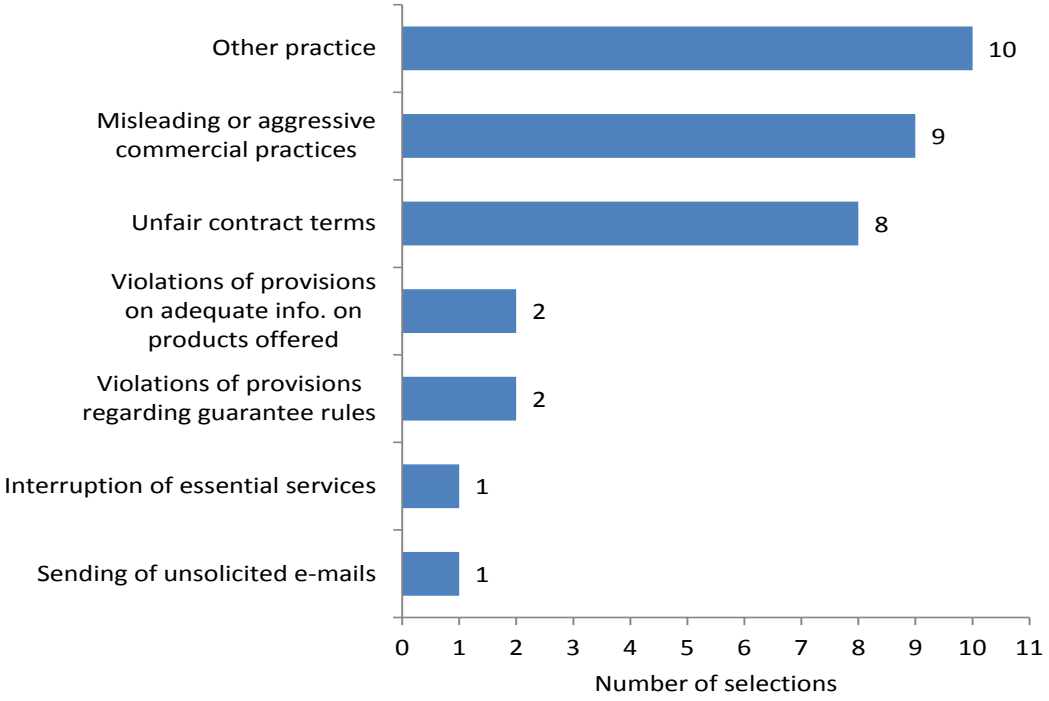
- The three types of allegedly unlawful practice most challenged by the injunction actions (in order of importance);

Responding qualified entities were also asked to specify the three types of unlawful practices that were most frequently challenged by the injunction actions their organisations initiated. As shown in the figure below, ten responding qualified entities

[339] For more details, see Part 2 of this report.

named 'other' practices such as non-delivery of goods as one of the most frequently challenged, nine listed 'misleading or aggressive commercial practices', and eight listed 'unfair contract terms'. 'Violations of provisions regarding price indication regulations' were never listed as one of the most frequently challenged unlawful practices.

Figure 3: Unlawful practices most frequently challenged by injunction actions



Source: Civic Consulting, Survey of qualified entities. Question: '*What are the three types of unlawful practices most frequently challenged by the injunction actions initiated by your organisation since June 2011 (in order of frequency)?*'

Again, these survey results can be compared with the assessment of respondents to the open public consultation in the framework of the Fitness Check regarding the effectiveness of injunction actions against a variety of illegal practices. According to the respondents, 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%). These are also the three practices most frequently challenged by injunction actions, according to the surveyed qualified entities.

- The number of injunction actions for infringements related to Internet and digital technologies;

Since June 2011, responding qualified entities initiated a total of 656 injunction actions for infringements related to internet and digital technologies, according to the qualified entities responding to the survey.

- The number of purely national injunction actions (i.e. without any external or cross-border element); the number of injunction actions related to intra-EU cross-border infringements (within the category of actions related to the cross-border infringements distinction should be made between actions brought by qualified entities in another Member State and actions brought within their own jurisdictions); the number of injunction actions having an extra-EU element (e.g. traders originating from third countries);

The responding qualified entities also provided a breakdown of injunction actions initiated by their organisations with respect to actions regarding national infringements and actions regarding infringements originating in another country. Since June 2011, responding qualified entities initiated a total of 2 421 injunctions regarding national infringements, 217 injunctions regarding infringements originating in another EU country, and 53 injunctions regarding infringements in a non-EU country (see the table below). Most actions concerning cross-border infringements were brought in the domestic courts of the Member State where the qualified entity is domiciled.

Table 9: Injunction actions initiated since June 2011 – national infringements vs. infringements originating in another country

Infringement	Total injunction actions initiated	Percentage of total
National infringements	2 421	90%
Infringements originating in another EU country	217	8%
Infringements originating in a non-EU country	53	2%
Total	*2 691*	*100%*

Source: Civic Consulting, Survey of qualified entities. Question: '*Please indicate the number of injunction actions initiated by your organisation since June 2011, differentiating between actions regarding national infringements and actions regarding infringements originating in another country.*' Note that the sum of these injunctions does not correspond to the total sum of injunctions in the previous table, as they refer to different questions in the survey.

- The number of cases in which a settlement with the alleged perpetrator of the infringement was reached (distinction should be made between settlements reached directly between the qualified entities and traders, and settlements reached with the help of the third party, e.g. a court or an out-of-court dispute resolution body);

Responding qualified entities indicated the number of injunction actions initiated by their organisation in which a settlement with the alleged perpetrator of the infringement was reached since June 2011. In total, 2 509 injunction actions were settled directly between the responding qualified entities and traders, while for 331 injunction actions, settlements were reached with the help of a third party.

Public authorities appear to be particularly successful in reaching settlements when having public law enforcement mechanisms, such as injunction orders and fines, available. For example, according to the Irish report, no court action has ever been necessary to solve a problem. Similar, in the UK only a few court actions have been brought by the responsible consumer authority (the Office of Fair Trading, now the CMA). The same was reported from Poland.

Consumer organisations reach settlements mainly in the case of clear infringements, thus, where the trader will predictably lose a lawsuit.

- Analysis of the trends in the use of the injunction procedures as defined by the Injunctions Directive in terms of their number and characteristics, as described in the previous bullet point (e.g. economic sectors affected, unlawful practices challenged, national versus cross-border character of injunction actions; the role of settlements) compared to the periods covered by the two previous Commission reports;

Trends in the use of the injunction procedure can be analysed in reference to the two previous Commission reports on the application of the Injunctions Directive from 2008 and 2012.

The following table presents key information from the two reports and the current survey:

Table 10: Trends in the use of the injunction procedure

Item	2008 Report from the Commission[a)]	2012 Report from the Commission[b)]	This study[c)]
Time period covered	Not specified (but covering experiences since entry into force of Directive 98/27/EC)	Since 2008	Since June 2011
Total number of actions for injunction reported	Several MS stated that [actions for injunction] are used fairly successfully for national infringements	In total, 5632 actions for injunction were reported. The vast majority of these were national.	In total, 5 763 actions for injunction were reported. The vast majority of these were national.
Cross border injunctions	Used only rarely for cross-border infringements (no specific data provided)	Respondents reported only around 70 injunctions with a cross-border dimension	217 injunctions regarding infringements originating in another EU country, and 53 injunctions regarding infrin-gements in a non-EU country
Economic sectors affected	n.a.	The economic sectors most affected by injunctions are telecommunications, banking and investments, Tourism and package travel. Other sectors mentioned by several respondents are distance selling, insurance, energy, non- food consumer goods and passenger transport.	Most affected sectors include the telecommunications sector, tourism and package travel, banking and investments, online provision of goods, services and digital content, distance selling by phone, television, or in person and lending by non-bank institutions. Also important were 'other' sectors such as dry-cleaning and medicinal products
Unlawful practices challenged	[Injunctions] often [used] in order to have misleading advertising stopped or to annul an unfair term in a contract	In order of importance: Unfair contract terms, unfair commercial practices and misleading advertising. To a much lesser extent, violations of provisions regarding guarantee rules, price indication regulations or the sending of unsolicited e-mails.	The highest number of entities named 'other' practices such as non-delivery of goods as one of the most frequently challenged practices, followed by misleading or aggressive commercial practices, unfair contract terms and violations of information provisions on products
Role of settlements	n.a.	n.a.	In total, 2 509 injunction actions were settled directly between the responding qualified entities and traders, while for 331 injunction actions, settlements were reached with the help of a third party.

Source: a) European Commission (2008). Report concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest b) European Commission (2012). Report concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest. c) Civic Consulting survey of qualified entities.

As the table indicates, the number of injunction actions that concerned national infringements appears to have been relatively stable since 2008 (the previous data does not allow a comparison). The number of cross-border injunction actions had been insignificant from the outset, and has remained low, although it has increased from 70

to 217 injunctions from the 2012 report to the current survey.[340] These cross-border actions, however, have not been taken under the system of the Injunctions Directive but by taking action against foreign traders in domestic courts.

By and large, the most affected sectors are the sectors that had also been mentioned in the 2012 report of the European Commission. The telecommunications sector still features on top of the ranking and other sectors such as banking and investments, tourism and package travel also continue to remain relevant. Likewise, the types of infringements that were challenged by way of injunction procedures does not appear to have changed significantly, although the category of 'non-delivery of goods' does not feature in the 2012 report of the European Commission. Misleading and aggressive practices and unfair contract terms have remained prominent types of infringements since the 2008 report of the European Commission.

The vast majority of injunction actions (4 579 out of 5 763) is reported from Germany, where no other enforcement mechanisms are in place and where the consumer organisations are reasonably well funded and litigation costs are limited. Only from three other Member States – Lithuania, Austria and Slovakia -, one hundred or more injunctive actions have been reported, and the reason is by and large the same: No other enforcement mechanisms are in place. In other Member States, enforcement of consumer law takes place in other forms.

- Presentation of at least two injunctions cases for each Member State that took place after June 2011, considered as the most effective given the consumer protection objective (if possible the presentation should cover one case with cross-border element and one case where a settlement was reached);

In the survey of qualified entities conducted within this study, responding qualified entities were asked to provide comments on the most effective injunction action and the second-most effective injunction their organisation initiated since June 2011. Examples of responses included an action against a telecommunications operator that applied unfair contract terms regarding the notification period requirements preceding the automatic continuation of the contract length, as well as an action against online shops that failed to reimburse consumers for returned products. The table below presents the details regarding the injunction actions initiated by responding qualified entities that they consider as being the most or second most effective given the consumer protection objective.

[340] It is unclear whether this indeed represents a trend or is related to the fact that responding organisations were not always identical in both surveys.

Table 11: Injunction actions initiated by responding qualified entities that they consider as being the most or second-most effective

Country	Type of entity	Brief description of case	Cross-border element	Settlement reached
Bulgaria	Consumer organisation	A telecommunications operator providing TV services applied unfair contract terms regarding the notification period prior to the automatic renewal of contracts	No	Yes
Bulgaria	Consumer organisation	A non-banking financial institution included unfair contract terms with respect to promissory notes	No	Not indicated
Germany	Consumer organisation	A telecommunications firm provided its terms and conditions only in English, which were not comprehensible to a majority of German consumers	Yes	No
Latvia	Public authority/body	Customers of a distance-selling company who purchased mattresses were made to sign documents that contained credit agreements upon delivery of their purchase, though they were not informed they were signing credit agreements; the creditworthiness of these customers also was not assessed	No	Yes
Lithuania	Public authority/body	Consumers did not receive products they ordered or reimbursements for products returned from various online stores	No	Yes
Luxembourg	Consumer organisation	Violations of various provisions regarding guarantee rules for consumer goods	No	No
Malta	Public authority/body	Telecommunications operators used the word 'unlimited' to describe offers for SMS, minutes and data, when in reality there was a limit imposed by the operators	No	No
Slovakia	Consumer organisation	Unfair terms and commercial practices for non-bank institutions and telecommunications operators	No	No

Source: Civic Consulting, Survey of qualified entities.

As the table indicates, only one of the reported effective injunction actions included a cross-border element. This concerns an injunction action brought by a German consumer organisation in a domestic court against a telecommunications firm which provided its terms and conditions only in English. For three of the actions, respondents indicated that a settlement was reached (reported from Bulgaria, Latvia and Lithuania).

6.1.3.3. *Obstacles to the effective use of the injunction procedure across the EU the effectiveness of the Injunctions Directive and of relevant national measures*

- Analysis of the advantages in terms of the effectiveness of the injunction procedure of the specific national measures, if taken by MS, regarding the cost of the procedure, summary procedure, the publication of the decision and/or the publication of a corrective statement, the sanctions for non-compliance with the injunction order (Art. 2(1) of the Injunctions Directive), the prior consultation (Article 5 of the Injunctions Directive), and the effects of the injunction order; Analysis of the obstacles to the effective use of the injunction procedure across the EU, in particular by analysing how much progress in removing obstacles has been made and/or new difficulties that emerged compared to periods covered by the two previous Commission reports;

This section analyses the effectiveness of the measures envisaged in the Injunctions Directive, remaining obstacles, and also ways in which some Member States have tried to overcome these obstacles.

Obstacles to the effective use of the injunction procedure stem from different reasons as will be shown in the following. Some of these reasons are not touched upon at all in the Injunctions Directive or specific consumer law instruments. In other cases, the Injunctions Directive itself does contain a rule which may, however, not be strict or detailed enough, for example the rule on the publication of decisions.

Moreover, as a minimum harmonisation instrument, the Injunctions Directive allows Member States to maintain or introduce additional measures, and again Member States have made use of that freedom.[341]

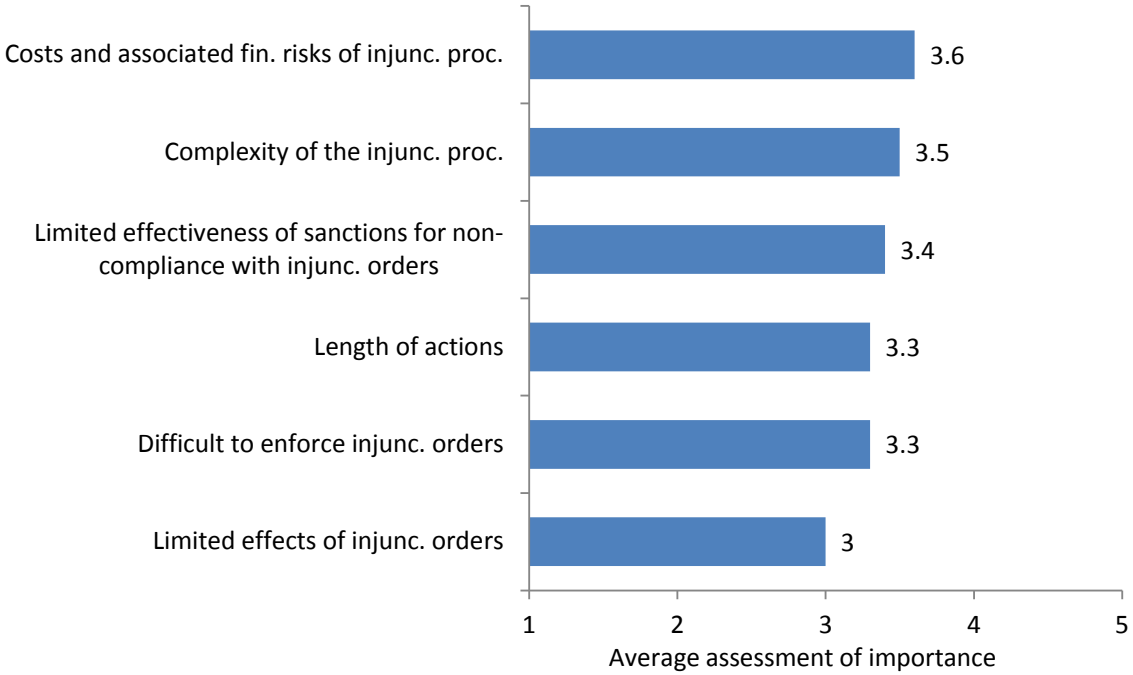
Overview of obstacles to the effective use of the injunction procedure

In the survey of qualified entities, respondents were asked to assess a number of potential obstacles to the effective use of the injunction procedure (both with respect to national infringements and with respect to infringements originating in another EU country) on a scale of one to five (from 'not at all important obstacle' to 'very important obstacle' where only the endpoints of the scale were labelled). Concerning the use of the injunction procedure with respect to national infringements, 'costs and the associated financial risks of the injunction procedure' (with an average rating score of 3.6 out of 5) and 'complexity of the injunction procedure' (with an average rating score of 3.5 out of 5) were viewed by responding qualified entities, on average, as the most important obstacles to the effective use of the injunction procedure with respect to national infringements (see the figure below). The answers of respondents differed depending on whether the qualified entity had initiated injunction procedures before, or not. Responding *qualified entities that had initiated injunction actions* on average viewed the following as the most important obstacles to the effective use of the injunction procedure with respect to national infringements (with an average score of 3.8 out of 5 for each): 'complexity of the injunction procedure', 'limited effectiveness of the sanctions for non-compliance with the injunction orders', and 'difficulties with the enforcement of the injunction orders'. Responding qualified entities that *did not* initiate any injunction actions assessed these obstacles on average as less important (with average scores of 3.4, 2.9 and 2.6 out of 5 respectively). In contrast, they

[341] Several of the national measures discussed in the following subsections were also brought up during Workshop 3 on Enhancing the effectiveness of the injunction procedure at the 2016 Consumer Summit as examples of well-functioning national varieties of the injunctions procedure, including: the option for swift out of court settlement, final decision according to the rules applicable to summary proceedings, the *erga omnes* effect of injunctions decisions, the individual's right to rely on the decision in later proceedings, periodic penalties or criminal fines for non-compliance, and a duty to remove the consequences of the breach.

viewed 'costs and the associated financial risks of the injunction procedure' (3.4 out of 5) as the most important obstacle to the effective use of the injunction procedure with respect to national infringements.

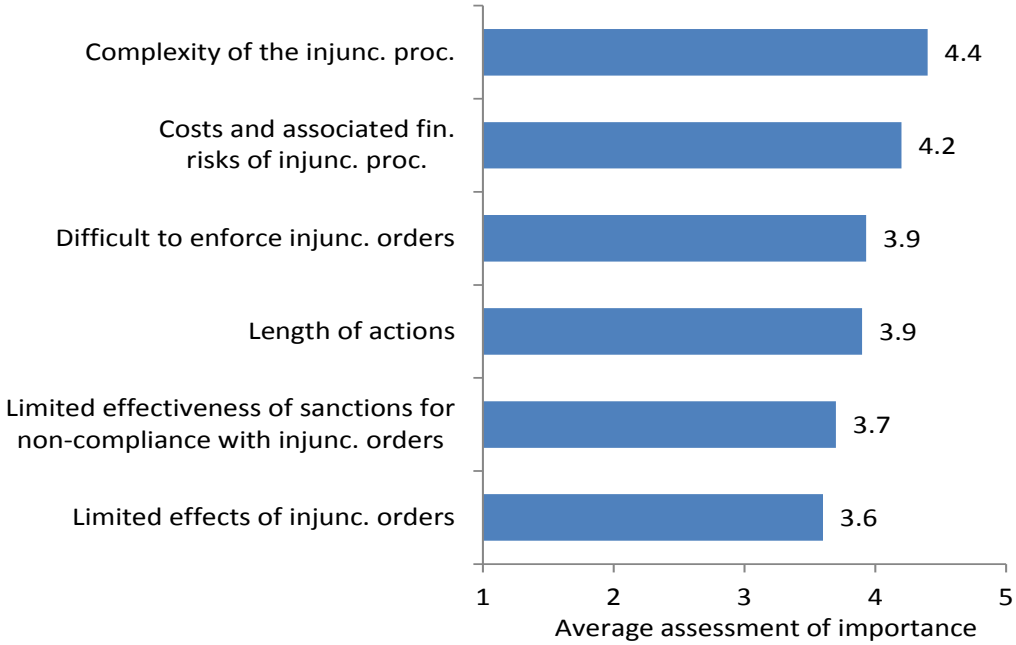
Figure 4: Importance of potential obstacles to the effective use of the injunction procedure related to national infringements



Source: Civic Consulting, Survey of qualified entities. Question: '*On a scale of 1 to 5, please indicate the importance of the following potential obstacles to the effective use of the injunction procedure related to national infringements.*'
Note: respondents were shown a scale from 1 (Not at all important) to 5 (Very important) where only the endpoints of the scale were labelled.

Concerning infringements originating in another EU country assessments are similar in that the two most important obstacles are again the 'complexity of the injunction procedure' (4.4 out of 5) and the 'costs and the associated financial risks of the injunction procedure' (4.2), although the order changed. It is notable that all obstacles were ranked higher (i.e. being assessed as a more important obstacle) in the cross-border context than in the domestic context. It is also notable that 'difficulties to enforce injunction orders' is a more relevant obstacle for injunction procedures concerning infringements originating in another EU country (considered on average as the third most important obstacle).

Figure 5: Importance of potential obstacles to the effective use of the injunction procedure related to cross border infringements



Source: Civic Consulting, Survey of qualified entities. Question: '*On a scale of 1 to 5, please indicate the importance of the following potential obstacles to the effective use of the injunction procedure related to infringements originating in another EU country*.' Note: respondents were shown a scale from 1 (Not at all important) to 5 (Very important) where only the endpoints of the scale were labelled.

Additional obstacles that were identified in the process of the country research are:

- Insufficient competence of judges and lack of specialisation of courts in the area of consumer law;[342]
- Consumer organisations cannot take action themselves but have to apply to a consumer protection authority that then has discretion as to whether it wants to take action or not;[343]
- Lack of awareness of injunction procedures, e.g. by underfunded consumer organisations in Member States that mainly rely on public enforcement;[344]
- Short prescription periods, as well as deterring sanctions on (allegedly) frivolous claims brought by consumer organisations.[345]

In the following sub-sections, each of the main obstacles is considered separately, including a discussion of measures taken at Member State level to address them.

[342] Country reports Belgium, Bulgaria.

[343] Country report Poland.

[344] Country report Malta. More generally, it was also reported in the country reports for Cyprus, Czech Republic, Estonia, Greece, Lithuania and Slovakia that qualified entities have limited financial and human resources, see Section 6.4.4.

[345] Country report Greece.

- The cost and the associated financial risks of injunction procedure;

Financial risk related to the injunction procedure and in particular court fees and lawyers' fees have been identified as key obstacles to injunction procedures in the previous Commission reports on the Injunctions Directive.[346]

Court fees and lawyers' fees for injunction procedures brought by consumer organisations and even by public authorities have been named by stakeholders in our country research (and also in the open public consultation) as key obstacles to the effectiveness of the injunction procedure generally, including domestically.[347] As a consequence, many qualified entities only litigate bullet-proof cases; which reduces their opportunity to clarify and shape the law.[348] In that context, a number of country reports refer to the fact that qualified entities in their countries lack financial and personal resources.[349]

The Injunctions Directive or the specific EU consumer law instruments that foresee injunction procedures do not touch on the issue of costs. In most Member States, the normal cost rules, the loser-pays-principle, apply.[350] In Austria, the consumer organisation even has to pay for the publication by the trader of the court decision if it loses the case.

Some Member States have considered the public interest function of injunction procedures in the collective interest of consumers in their cost rules. Qualified entities are exempted from fees for the administrative procedure in Malta and Poland. Consumer organisations are exempted from court fees in Hungary, Slovakia and Spain. Still, they may have to pay for the defendant trader's lawyers' fees if they lose the case. In Portugal, consumer organisations had originally been exempted from court fees as well but that exemption was repealed in 2008. Nowadays, only the relevant public authorities are exempted.

In Germany, the loser pays principle applies but litigation costs are limited indirectly in that courts attach a fairly low value to the litigation of an allegedly unfair term, which then limits the court fees as well as the lawyers' fees that are related to that value.

In contrast, in systems where a consumer can complain to a consumer protection authority, that procedure is free of charge and therefore far more attractive.[351]

One related problem is the recovery of expenses for the preparation of the claim, even in case of a winning judgment. In most Member States, qualified entities cannot claim any kind of compensation or damages for these expenses. Exceptions are France and

[346] See the 2008 report, at p. 6, and the 2012 report, at p. 11.

[347] Country reports Austria, Bulgaria, Czech Republic, Slovenia; position paper Which? (submitted in the open public consultation in the framework of the Fitness Check), at p. 10 f.

[348] Comment from the Which? position paper submitted as part of the open public consultation: "Recognition is needed that enforcers - whether consumer organisations or public bodies - pursue injunction actions not in their own commercial interest but in the public interest. The cases that proceed to court will be those where there is a serious dispute about the law which needs to be resolved in order to provide clarity for consumers, traders and enforcers alike. These are the most beneficial cases for shaping the regulatory landscape, but they are also the most risky. At present, enforcers are heavily incentivised to bring only those actions where they are certain of success."

[349] See country reports Cyprus, Czech Republic, Estonia, Greece, Lithuania, Malta and Slovakia.

[350] For an overview of the situation in the Member States see table in Annex V.

[351] Country report Romania.

Greece where consumer organisations can claim the damage to the collective interest of consumers or "moral damages" into their own purse.[352] Even in Greece, however, where consumer organisations can obtain damages part of which, however, go to the public purse, the consumer organisations argue in favour of a higher percentage of the compensation awarded to them to enable them to cover their expenses and act as an incentive to pursue collective action.[353]

In contrast, in the Netherlands, according to the case law of the Dutch Supreme Court, pre-trial costs of investigation and claim collection can be fully claimed from the defendant if the court finds that the defendant indeed acted wrongfully vis-à-vis the constituency of the representative organisation, provided the costs are reasonable, it was reasonable to incur them and they directly relate to the case. This decision made it possible for consumer organisations to claim such pre-trial costs, for example, for consultants, evidence, experts and logistics. [354]

In conclusion, and in line with the finding of the previous reports by the European Commission on the application of the Injunctions Directive, the country research for this study indicates that the loser-pays-principle has a significantly chilling effect on the consumer organisations' activities. Measures such as exempting qualified entities from court fees are not very effective if the exemption does not include the defendant's lawyers' fees too, as they will be much higher than the court fees.[355] The only system with a cap on *lawyers' fees* (indirectly achieved through the limitation of the value of collective claims) appears to be Germany, and that measure can be regarded as effective, as it has clearly contributed to the large number of injunction procedures that German consumer organisations have initiated.

- The length of actions sought by qualified entities in their own jurisdictions and in another Member State;

Length of court procedures has been criticised in some country reports[356] and by stakeholders.[357] It ranks third in the problems mentioned by qualified entities. In some cases court proceedings are reported to be so slow that the infringement has often ended before a judgment is handed down, even with a summary procedure.[358]

[352] See also infra.

[353] However, reservations to this approach have been expressed in Greek academic writing as some authors see it as undesirable that collective action could become a vehicle for consumer associations to make a profit. See country report Greece.

[354] See country reports of the mentioned countries.

[355] This was also noted by consumer organisations in the position papers submitted to the online public consultation, for example, from the UK consumer organisation Which?: "The principal reason why the power to take injunctive action has been so little used in the UK is because enforcers face substantial cost risk. Court action in the UK is very expensive. Not only does the enforcer have to bear its own costs of bringing proceedings, if the enforcer loses the action then it also has to pay the trader's legal costs, which could be very significant. (…) For Which?, the cost of litigating, and our exposure to the risk of paying the trader's costs, has inevitably been a key consideration when contemplating action."

[356] Country reports Croatia, Greece, Italy, Poland.

[357] See position paper BEUC (submitted in the open public consultation in the framework of the Fitness Check), at p. 11.

[358] Country report Bulgaria.

Other country reports do not mention the length of actions as a problem as such. A lengthy procedure may, of course, reduce the effectiveness of an injunction order that only stops infringements from a later point in time onwards. Whether or not that is actually the case will depend on additional factors, in particular on the availability of additional remedies such as compensation orders that mitigate the negative effects of lengthy procedures.

The Injunctions Directive deals with the length of procedures by requiring that claims for the cessation or prohibition of any infringement must be dealt with "with all due expediency, where appropriate by way of summary procedure".

Member States have chosen different ways to deal with this provision. Some, for example Slovakia and Spain, have introduced summary procedures, that is, procedures that are faster and less complex than the regular civil procedure. Mixed experience with the summary procedure is reported.[359] Although the existence of a summary procedure is generally welcomed and often made use of,[360] it may not always be much faster than the normal procedure.[361]

In Belgium, a summary procedure is available but it is not used often since the ordinary court procedure is considered to be fast enough by the courts. In Portugal, it is for the court to determine, within its management powers, the pace of the procedure.

In other Member States, the regular civil procedural law applies. Usually, interim procedures will then be available,[362] which however pose the problem that the interim decision could be overturned by the decision in the main procedure. For example, in Germany, the interim procedure is often used in unfair commercial practices cases but not in unfair contract terms cases. In Poland, they only seem to be available in unfair commercial practices law and concerning the law implementing the Consumer Rights Directive but not in unfair contract terms cases.

Only few Member States have introduced express time limits for the decision on an injunction claim. In Romania, the procedure may only take 20 days.[363] In Poland, the decision must be taken within three months, or four months in complex cases.[364]

The overall procedure will of course take longer if the trader appeals the decision. In fact, injunction procedures may take very long if the litigation is taken through several instances up to the highest court of a Member State, possibly with a detour via the Court of Justice. As such, this must be regarded as justified. It should however be noted that there is a relationship, in terms of the effectiveness of the injunction procedure, between the length of proceedings and the available remedies. If the injunction procedure is limited to the pure omission to continue a breach, a lengthy procedure means that traders can continue the breach for the duration of the litigation; which means for several years, which may cause significant unlawful gains and consumer detriment. In that case, the system can only be regarded to be effective if that effect is mitigated by ways in which consumers can recover their

[359] Country reports Belgium, Bulgaria, Cyprus, France, Greece, Portugal, Spain.

[360] Country report Slovakia.

[361] Country report Bulgaria.

[362] E.g. country reports Austria, Cyprus, Germany, Slovakia.

[363] E.g. country report Romania.

[364] E.g. country report Poland.

losses afterwards or in which the qualified entity can recover the consumers` losses for them or skim off the unlawful profits (see below).

Overall, while the availability of speedy procedures can be considered a necessary ingredient of effective injunction procedures, given the need to stop infringements of the collective consumer possible as fast as possible, it seems clear that not all infringements of consumer law are clear-cut, and that in some instances complex legal issues need to be resolved. In some cases this may even require the clarification of underlying EU consumer law by the Court of Justice. In such cases, the injunction procedure can only be regarded as effective if the unlawful situation until the final judgment is corrected by way of additional remedies of consumers or qualified entities.

- The effects of the injunction orders;

Stakeholders have argued that the effectiveness of the injunction procedure is limited because – in their Member States – the court decision has only effect *inter partes* (between the parties).[365] They see it as a problem that, firstly, the qualified entity would have to sue each trader individually for the same infringement, for example, for identical unfair contract terms. Secondly, consumers may not be able to rely directly on a judgment that was handed down in collective proceedings.[366] Moreover, it was argued that in order to allow individual consumers to rely on judgments that were made in collective proceedings, it would be necessary to bar the prescription of their claims while the collective proceedings are pending.[367] Qualified entities have also often mentioned as a deficit that injunctions as such have no compensatory effect.[368] Both problems have also been identified in the 2008 and 2012 reports of the European Commission.[369]

Finally, limitations have been introduced in some Member States, the compliance of which with the Injunctions Directive has been doubted by stakeholders. For instance, the Austrian Supreme Court allows traders a transitional period of about four months to adjust contracts to the law (as interpreted by the court).[370]

These aspects are separately discussed in the following sub-sections.

The inter partes effect of injunction orders

The *inter partes* effect of injunction orders has two dimensions. The first dimension relates to the effect on individual consumers that are affected by the infringement of consumer law by the defendant in the collective action. The second dimension relates to the effect of a decision in an injunction procedure on other traders than the defendant who are engaging in the same infringement.

[365] Country report Austria; position paper BEUC, at p. 11.

[366] See also position paper vzbv (submitted in the open public consultation in the framework of the Fitness Check), at p. 21.

[367] See position paper vzbv, at p. 22.

[368] E.g. country reports Austria, Estonia, Greece, Italy, Latvia, Slovenia. See also position paper BEUC, at p. 12; vzbv, at p. 22.

[369] See 2008 report, at p. 8; 2012 report, at p. 13.m

[370] Country report Austria.

The primary effect of an injunction order is, of course, that the trader is prohibited to continue the infringement. The Injunctions Directive and the provisions on injunction procedures in specific EU consumer law instruments do not explicitly require Member States to give decisions effects beyond that immediate relationship; which is in line with traditional civil procedural law.

The prohibition to rely, vis-à-vis a consumer, on a term that was declared unfair in collective proceedings would however seem to be required under EU law, according to the decision of the Court of Justice in *Invitel*.[371] In its judgment, the Court held that where the unfair nature of a term in the trader's standard terms has been acknowledged in collective proceedings, 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.

In most Member States, the decision in an injunction procedure, however, still has only effect *inter partes*.[372] In practice, this means that even after a decision against a trader has been handed down in a collective action brought by a qualified entity, the trader may still reject the individual claim, and the consumer may have to litigate against that trader for the same issues, which increases their litigation risk and also causes costs to the court system as such. For reasons that have been well-researched in the past,[373] such as rational apathy vis-à-vis smaller claims, many consumers are unlikely to engage in such litigation, the result being that consumers do not receive compensation for their loss and unlawful profits remain with the trader; which may even create an incentive to take a hard stance against consumers even after an injunction order. See also the discussion in the efficiency section.

For example, it was reported from Hungary that in the well-known 'yellow cheque' case,[374] according to a stakeholder, only around 5% of consumers claimed compensation from the company. In Germany, *Günter Hörmann*, the former head of the Consumer Centre of Hamburg reported on two mass problems, unfair price increasing terms in gas contracts – an issue that reached the Court of Justice in the case of *RWE*[375] –, and unfair terms in capital life insurance contracts. Both problems were well-known through broad media coverage. With regard to the dominating gas supplier in Hamburg, 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 have therefore 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, Hörmann estimated that only between 1 and 2m out of approximately 17m gas customers joined the protest, and of

[371] CJEU, judgment of 26 April 2012, Case C-472/10 Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, ECLI:EU:C:2012:242. See also H.-W. Micklitz, in: N. Reich, H.-W. Micklitz, P. Rott and K. Tonner, European Consumer Law, 2nd ed. 2014, at para 3.22b; vzbv, at p. 21.

[372] For an overview of the rules in the Member States in this regard, see table in Annex V.

[373] See, for example, Wagner, in: Casper u. a. (eds), Auf dem Weg zu einer europäischen Sammelklage?, 41, at 51 ff. See also Civic Consulting, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union.

[374] In this case a mobile phone company unfairly charged consumers in various ways including by imposing a special charge on payments done in post offices by yellow cheques – the so called yellow cheque case. The company imposed a charge although the method of payment in question did not actually cost anything for the company neither did it provide a separate service for the charge. Metropolitan Court of Appeal (Fővárosi Ítélőtábla), decision no. 14. Gf. 40.605/2013/7.

[375] CJEU, judgment of 21.3.2013, Case C-92/11 *RWE*, ECLI:EU:C:2013:180.

those only a small part actually managed not to pay the increased price in the end.[376] In the context of capital life insurance contracts, the Consumer Centre of Hamburg had represented 80 customers, for which they achieved compensation of a total of 74,000 Euro. The damage caused by the defendant alone was estimated to be between 1 and 4 billion Euro. Hörmann estimated that only between 100,000 and 200,000 customers pursued their claims.

This, however, also seems to be an issue of business culture, and it is reported, for example from Finland, that established traders do comply with injunction orders and that subsequent litigation by individual consumers is not necessary. Moreover, it would seem that public authorities could react more easily with public law instruments such as fines if traders do not implement an injunction order on request of consumers.

Some Member States have made explicit the connection between the injunction procedure and the subsequent dealing with claims of individual consumers on the same matter. In Hungary, if a court rules that a clause in a contract between a company and a consumer is unfair, it may declare this clause null and void in all contracts concluded by that company. In Austria, Germany and Slovakia, omission of future infringements includes the omission to enforce an unfair term in an already concluded consumer contract, for example, charging the consumer an unlawful penalty, or the omission to collect money from an unlawful distance selling contract.[377] Thus, consumers can rely, in individual litigation, on a judgment made in collective proceedings; which does not mean that traders would necessarily satisfy those individual claims without forcing the consumer into litigation.[378] The prohibition to enforce a term that was declared unfair in an already concluded consumer contract also applied in Polish law where the legislator has codified that effect in a law reform of 2015.[379]

Greece has established a specific instrument, a declaratory action by qualified entities on the basis of which individual consumers can notify their claims for damages to the trader in writing with supporting evidence.[380] Should the trader not respond to the notification after 30 days, the consumer can request a court order for payment. A similar procedure exists in Hungary. In Lithuania, the facts that are established in the injunction order become prejudicial facts and cannot be contested in subsequent individual litigation. In Slovenia, the injunction procedure as a court procedure goes beyond the Injunctions Directive by providing the possibility to bring an action for finding the contract between a defendant and a consumer invalid.

In other Member States, such as Austria, Cyprus, the Czech Republic, and the Netherlands the connection is less clear but courts would regard the decision in the collective proceedings as strong evidence or informal *res judicata* for the subsequent individual litigation. In the UK, although preventive proceedings do not generally bind subsequent individual proceedings by way of *res judicata*, such an injunction can cover existing as well as future contracts.

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[376] G. Hörmann, Massenschäden in der Praxis – aus Sicht der Verbraucherzentralen, Verbraucher und Recht 2016, 81 f.

[377] See country reports of the mentioned countries.

[378] See Hörmann on the conduct of E.ON even after an injunction order concerning their price increase terms in gas supply contracts.

[379] Country report Poland, 1.2.1.

[380] Individual consumers in Greece can only follow this procedure once there is an irrevocable decision on a class action (see N.2251/94, art.10 para.20).

When considering the effectiveness of such a connection between the injunction procedure and the subsequent dealing with claims of individual consumers on the same matter, a caveat must be made, as already mentioned, in terms of the relationship between the right to rely on an injunction order in individual litigation and national rules on prescription. In some legal systems, prescription periods are shorter than the injunction procedure (through all the instances) may take. For example, in Germany, the regular prescription period is three years, beginning at the end of the year, in which the infringement occurred, whereas litigation of an injunction claim can last much longer than that. In the case of *RWE* that reached the Court of Justice,[381] the first injunction claim was brought on 30 October 2006, whereas the Bundesgerichtshof rendered the last instance on 31 July 2013. Under German law, prescription of individual claims is not suspended while a collective action on the same issue is pending.[382]

Prescription is an issue that the Injunctions Directive does not deal with. It has, however, frequently been discussed by the Court of Justice under the heading of the "principle of effectiveness". Generally speaking, EU law of course allows claims to be prescribed at one point. The Court of Justice has, however, decided on limitations to prescription. For example, in *Heininger*, the Court indicated that a consumer will not be able to make use of a remedy – then: a withdrawal right – until he or she knows that that right exists in the first place (on which the trader has to inform the consumer).[383] In unfair terms cases, the situation will often be similar, because the consumer will not know that there is an infringement before a court has clarified this by holding the term unfair. Or, if the trader wrongfully rejects a consumer's complaint, giving legal reasons that do not withstand the scrutiny of the courts later, the consumer may be inclined to believe the trader and only find out later, once he or she obtains knowledge of a judgment on the matter, that the trader's response was incorrect.

In the context of infringements of consumer law, it is highly likely that a trader that does not accept the opinion of a qualified entity concerning the unlawfulness of his conduct will not accept claims of individual consumers either. Given that individual consumers may have to act before the collective action has been finally decided upon so as to avoid prescription of the claim, they would face the full litigation risk and would most likely not take action. Again, the result will be that consumers do not receive compensation for their loss and unlawful profits remain with the trader; which may even create an incentive to delay litigation by taking a case through all the instances of the court system. In fact, in the German context, there is ample evidence that traders, after years of litigation, settle, or withdraw their appeals, shortly before the final judgment of the highest civil court in order to avoid a negative judgment that would create legal certainty for consumers and therefore might increase the consumers' readiness to engage in follow-on litigation against the traders in question.

In brief, <u>a system where individual claims are prescribed before a final decision in the collective action is made, appears to be ineffective in protecting the consumers' interests</u>.

[381] CJEU, judgment of 21/3/2013, Case C-92/11 *RWE*, ECLI:EU:C:2013:180.

[382] For more details, see Rott, Gutachten zur Erschließung und Bewertung offener Fragen und Herausforderungen der deutschen Verbraucherrechtspolitik im 21. Jahrhundert, 2016, http://www.svr-verbraucherfragen.de/wp-content/uploads/2016/11/Rott-Gutachten.pdf, at 23 f.

[383] CJEU, judgment of 13/12/2001, Case C-481/99 *Heininger*, ECLI:EU:C:2001:684.

The effect on other traders engaging in the same infringement

The situation under EU law relating to other traders engaging in the same infringement is less clear. As mentioned above, most Member States only recognise an *inter partes* effect of decisions in injunction procedures. This means that qualified entities have to bring separate claims against all traders that engage in the same unlawful practice, for example, by using identical unfair terms; which may exceed their human and financial resources and is also a burden to the court system. Indeed, experience in the Member States shows that traders often do not stop their own practices only because a competitor has been convicted, in an injunction procedure, for the same practice. Even more likely, they do not compensate consumers for an infringement that was at stake in litigation between a qualified entity and another trader but rather try to stress, or to pretend, that their case was different. For example, a number of German banks refused to recognise that a judgment of the highest civil court, according to which a standard term on credit handling fees constituted an unfair term, also applied to their standard terms on credit handling fees; which has been confirmed in subsequent litigation.

Some Member States have reacted to the problem. In Spain, if a specific activity or behaviour is deemed illicit, the court shall determine whether this declaration shall have procedural effects beyond those who had been parties in the proceedings. Courts have concluded that the extension of the effect of a decision on the unfairness of a contract term applies to other traders who use the identical term but not to those who use similar terms.[384] Also, in Greece, the judgment has an *erga omnes* effect.[385] The situation may be similar in legal systems with a doctrine of precedent, such as the UK as courts are bound by the precedent in their later decisions.[386] Moreover, it would seem that in Member States where consumer authorities can issue injunction orders themselves, they will usually apply, for the sake of consistency, their reasoning in a previous case to subsequent cases.

In Polish law prior to a law reform of 2015, when the specialist court in Warsaw ruled that a clause in a contract is unfair in abstracto, this clause was then entered into the register of unfair terms. It was claimed in academic writing and also suggested in earlier judgements of the Polish Supreme Court that this registered unfair contract term could then have an *erga omnes* effect. This was, however, rejected by the Polish Supreme Court in a judgment of November 2015 and this position has been codified through a legal reform of 2015. Under the new system of Polish unfair terms control, where the President of the Polish Office of Competition and Consumer Protection can issue injunction orders by way of administrative decision, the President may of course issue injunction orders against all traders using identical terms. The register of unfair terms will continue to exist until 2027 but only for cases that have started before 17 April 2016. Newer unfair terms will not be entered in the register anymore.

The possibility of Member States to introduce an *erga omnes* effect of injunction decisions was subject of the recent judgment of the Court of Justice in the case of *Partner*.[387] The case turned on the previous Polish law, under which judgments by the court in Warsaw relating to the unfairness of terms were entered in a public register. The President of the Office of Competition and Consumer Protection found that Biuro

[384] Country report Spain, 1.3.1.

[385] In Greece, the erga omnes effect has been subject to critique as authors thought it to be in conflict with the general rules on res judicata.

[386] Country report UK.

[387] CJEU, judgment of 21.12.2016, Case C-119/15 Biuro podróży 'Partner' sp. z o.o. sp.k. w Dąbrowie Górniczej v Prezes Urzędu Ochrony Konkurencji i Konsumentów, ECLI:EU:C:2016:987.

Partner, who had not been a party to the first proceedings, had used terms in its standard conditions of business which were considered equivalent to terms previously declared unlawful and then entered in that public register of unfair terms. The President of the Office of Competition and Consumer Protection therefore imposed a fine on Biuro Partner.

The CJEU established that a public national register of unfair contract terms that have been considered unfair in court decisions enhances consumer protection provided that it is managed in a transparent manner and kept up to date.

The main point of discussion was, however, whether or not such a procedure was compatible with the Charter of Fundamental Rights of the European Union and, more specifically, with Article 47 thereof, in so far as the seller or supplier would not have the opportunity thereunder to present arguments about the lack of unfairness of the standard terms in question and would thereby be deprived of its right to be heard. The Court considered both the trader's right of effective judicial protection including the right to be heard and the aims of the UCTD and the Injunctions Directive, which both require the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. It concluded that a system as the one in question did not disregard the right of effective judicial protection provided that that trader has an effective judicial remedy against the decision declaring the terms compared to be equivalent in terms of the question whether, in the light of all relevant circumstances particular to each case, those terms are materially identical, having regard in particular to their harmful effects for consumers, and against the decision fixing the amount of the fine imposed, where applicable.

In conclusion, while injunctions as such can be considered an effective remedy to stop infringements for the future, as evidenced in the country research for this study, only some Member States have introduced broader effects of injunction orders. If relevant decisions had an *erga omnes* effect so that qualified entities would not have to pursue identical infringements by various traders individually, this would increase the effectiveness of injunctions considerably. Moreover, in many Member States injunctions lack the protective effects on individual consumers who are affected by the infringement in question. This appears not to be consistent with the interpretation of EU unfair contract terms law by the CJEU in *Invitel*.

The lack of compensatory effect

A frequent critique by qualified entities of the remedy of injunction is that it is not sufficiently effective and deterrent as it only produces effects for the future but does not cover the compensation of the victims of the infringement; which leads to a situation where dishonest traders can often keep their unlawfully gained profits, to the detriment of consumers.[388] In the survey of qualified entities, this issue of additional remedies ranked highest on the list of future harmonisation measures that would be most beneficial.[389]

[388] See Part 2 of this report, Section 6.6.2. From the position paper submitted to the public consultation by the vzbv: "In order to avoid incentives to commit infringements, it is necessary in particular to prevent enterprises from being able to retain the gains they have made as a result of the infringement. Consumer associations should therefore be placed in the position to skim off such illegal gains if or in so far as individual compensation of consumers does not occur. Such a claim to skimming off gains should not – as hitherto in German law – depend on an intentional infringement. Furthermore, the skimming off of gains should in principle be possible as a result of all infringements of European consumer law and in particular include infringements in the field of unfair contract terms (general business conditions)."

[389] See figure 40 in Part 4 of this report.

Indeed, as was shown above, the effectiveness of the injunction procedure in terms of reducing consumer detriment as well as in terms of its preventive, deterrent effect is clearly limited if the only legal consequence is the prohibition to continue the infringement. Due to the reluctance of consumers to engage in individual litigation, traders can easily gain unlawful profits without fear of having to return them.

This lack of compensatory as well as of deterrent effect has been the reason for additional measures that have been introduced by Member States in recent years and which can often be claimed as part of the injunction procedure, as described in the following.

For example, the UK has, first, introduced restitution orders in the financial services sector. According to s 382 Financial Services and Markets Act 2000,[390] the court can, on application of the FCA or the Secretary of State, order a person that has contravened a relevant legal requirement, or been knowingly concerned in the contravention of such a requirement, to pay to the Authority such sum as appears to the court to be just, having regard to the profits appearing to the court as having accrued to him or the extent of the loss or other adverse effect to one or more persons. The amounts paid to the FCA following such an order must be paid by the FCA to such qualifying person or distributed by it among such qualifying persons as the court may direct. In order to establish the amounts accrued on the infringer, or the loss suffered by others, the court may also require the infringer to supply it with such accounts or other information. Restitution orders thus have a compensatory or restitutionary function, in particular in cases where the victims of an infringement do not avail of the resources to take individual action.[391] Moreover, in academic writing they have been attributed a deterrent effect on potential infringer.[392] For example, in the case of *Financial Services Authority v Anderson*,[393] the Financial Services Authority succeeded in claiming restitution of £115 Mio.

Redress or compensation orders can also be issued as a public law remedy, thus, without the involvement of a civil court, by certain UK regulators, in particular by the FCA and by the Office of Gas and Electricity Markets (Ofgem).[394]

Moreover, in the UK, so-called “Enhanced Consumer Measures” have been introduced generally in 2015 for injunctions for the breach of consumer law.[395] These can be obtained together with injunctions in court procedures, and they are fairly flexible. Next to redress orders, which include either the compensation of consumers where they can be identified or otherwise measures intended to be in the collective interests

[390] For details, see https://2sbwww27nmts1j4cfl1tbmvh-wpengine.netdna-ssl.com/wp-content/uploads/old/Investor%20remedies.jan%202011.rtf.

[391] See *Financial Services Authority v Shepherd* [2009] EWHC 1167 (Ch), [2009] All ER (D) 15 (Jun), para. 29.

[392] See *Money-Kyrle*, Collective Enforcement of Consumer Rights in the United Kingdom, in: Schmidt-Kessel, Strünck and Kramme (eds), Im Namen der Verbraucher? Kollektive Rechtsdurchsetzung in Europa (2015), 45, at 61.

[393] [2010] EWHC 1547 (Ch). On the distribution of the sums paid under s 382(2) FSMA 2000 to the depositors of the Ponzi scheme at issue, see *Financial Conduct Authority v Anderson* [2014] EWHC 3630 (Ch).

[394] See s 384 Financial Services and Markets Act 2000 and s 30G ff. Gas Act 1986 and s. 27G ff. Electricity Act, introduced by s 144 with schedule 14 Energy Act 2013. For detailed analysis, see C. Hodges, Mass Collective Redress: Consumer ADR and Regulatory Techniques, European Review of Private Law 2015, 829; P. Rott, Behördliche Rechtsdurchsetzung in Großbritannien, den Niederlanden und der USA, in: H. Schulte-Nölke (ed.), *Neue Wege zur Durchsetzung des Verbraucherrechts*, 2017, forthcoming.

[395] See new s 219A Enterprise Act 2002.

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. No experience with these "Enhanced Consumer Measures" is available yet.

In Spain, it is possible to bring injunctions together with claims for absolute and relative nullity, termination, restitution of profits and damages. These secondary actions will be solved by judges responsible for the injunction claim.[396] For instance, in SAP Alava 21.11.2013 (AC 2014\624), two consumers who had concluded a loan with Banco Bilbao Vizcaya Argentaria, S.A. brought a claim accumulating an injunction to declare the nullity of a mortgage-floor clause (principal action) and an action to recover the amount unduly paid because of the application of this clause (accessory action). The first instance court, the appeal court and the Supreme Court ruled in favour of the consumers. STS, 1ª, 25.3.2015 (RJ 2015\735) stated that, when according to STS, 1ª, 9.5.2013, a floor clause was deemed unfair and therefore null and void, the borrower was entitled to recover interests that had been unduly paid from the date in which the STS, 1ª, 9.5.2013 had been published.

In Hungary, the law provides for the possibility of combining the injunction order with a restitution order, that is, an order to restore the situation as it was prior to the infringement. In Latvia, the enforcement authority has successfully claimed the compensation of consumers together with injunction orders in interim court procedures. In Estonia, the Consumer Protection Board is entitled to order airlines to compensate passengers for cancelled or delayed flights, under the Air Passengers Rights Regulation (EC) 261/2004. In Slovenia, draft legislation, according to which qualified entities shall obtain the right to claim compensation for consumers is currently in the legislative process.

In Germany and Slovakia, there has been an academic debate about whether the obligation to remove the consequences of the breach could also cover the reimbursement of unlawfully obtained money.[397] Whilst this possibility was rejected by a Slovakian court, the German district court of Leipzig has awarded the claim in a case where a bank had unlawfully charged consumers 30 Euros each against long established case law of the Federal Supreme Court, arguing, amongst others, that the individual consumers concerned would be highly unlikely to bring individual claims against the bank.[398]

In France and Greece, qualified entities cannot claim compensation of consumers but they can recover the damage done to the collective interest of consumers. In France, as provided under Article L. 621-1 of the *Code de la consommation*, a registered consumer association can bring an action to recover the damage done to the collective interest of consumers. The action has no effect on individual claims that consumers may wish to bring. Instead, the consumer association can claim damages into its own purse. The damages that can be obtained do not correspond with the aggregated damages to victims; they are much lower. In Greece, recognised consumer associations can sue for "moral damages". According to the Greek Supreme Court, these moral damages have a punitive character, they are not meant to compensate the consumers' losses, and they are not distributed to the consumers who have

[396] See Article 12.2 of Act 7/1998 for unfair contract terms law; Article 53 of Royal Legislative Decree 1/2007, as amended by Act 3/2014, for general consumer law.

[397] Country report Slovakia.

[398] See LG Leipzig, 10/12/2015, Verbraucher und Recht 2016, 109.

suffered damage. Instead, 35% of the awarded damages go to the purse of the consumer association, 35% to a second consumer association, and the rest to the State budget, where it is used for the purposes of consumer protection. Individual consumers do not take part in the litigation and do not benefit directly from the litigation. The amounts obtained through this system are higher than in France, and it appears to have some deterrent effect on traders although, as mentioned, no compensatory effect for consumers.

Compensation orders, or redress orders, can also be obtained by the relevant consumer authority, the Federal Trade Commission (FTC), in the United States. First, the FTC may seek consumer redress from the trader in court for consumer injury that was caused in breach of an injunction order issued by the FTC itself. In such a suit, the FTC must demonstrate that the conduct was such as "a reasonable man would have known under the circumstances was dishonest or fraudulent." Second, the same applies where the FTC directly brings a claim for an injunction order in court. The court can grant monetary equitable relief, that is, restitution and rescission of contracts) to remedy past violations.[399]

Finally, in the broader context of collective redress mechanisms, Member States have introduced various types of collective actions, such as group actions, actions in the collective interest of consumer, or skimming-off procedures, some of which have also been given in the hand of qualified entities, whereas others can be brought by other claimants, such as groups of consumers. This trend continues, and in December 2016, the German Ministry of Justice and for Consumer Protection has tabled draft legislation for a collective declaratory action (Musterfeststellungsklage) which would grant legal standing to qualified entities only.

Most of these collective redress procedures are entirely independent from injunction procedures.[400] In Bulgaria, the injunction procedure and the procedures for collective redress can be joined into one procedure if the court finds that suitable;[401] but they are, in principle, distinct procedures, and in practice, courts often keep them separate.[402] For example, the civil case #3912/2008 District Court-Sofia between “Federation of Consumers in Bulgaria” and “Central Heating Company’ Sofia” (Топлофикация- София ЕАД) started with joined actions for injunction (Art. 186 of the Consumer Protection Act and for consumer collective redress (Art. 188 of the Consumer Protection Act, the Sofia City Court however split these actions, kept the collective redress one for hearing and sent the injunction one to the District Court-Sofia.

In Germany, the skimming-off procedure under unfair competition law will usually only be brought as a second step, once the relevant infringement of consumer has first been confirmed in an injunction procedure.

- Publication of the decision and/or the publication of a corrective statement;

The Injunctions Directive envisages, “where appropriate, measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or

[399] See Section 19 of the Federal Trade Commission Act, 15 U.S.C. Sec. 57b. See also FTC, A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority, sub II. A. 1. (a) and A. 2.

[400] This separation is criticised in the country report Belgium where it is suggested that groups of consumers that can bring a group action for redress should also have legal standing in injunction procedures.

[401] See Art. 210 of the Bulgarian Civil Procedural Code.

[402] Country report Bulgaria, Annex A, table 2.

the publication of a corrective statement with a view to eliminating the continuing effects of the infringement".

Publication of the decision or a corrective statement is not an unconditional right of qualified entities in all Member States but sometimes publication is at the discretion of the court.[403] There are Member States where courts seem to be very reluctant to order a corrective statement.[404] In Portugal, the law provides for the mandatory publication of decisions concerning practices that violate consumers' rights and in Finland, all decisions are published on the websites of the Competition and Consumer Authority.

Generally speaking, the publication of the decision or of a corrective statement is regarded to be useful both in order to inform consumers and to deter traders who fear damage to their reputation.[405] The usefulness of the publication of the decision or of a corrective statement in reaching these goals, however, appears to depend on practicalities. It was reported that the publication must be intelligible to consumers who do not necessarily understand legal language.[406] Also, it is only useful if publication takes place in popular newspapers with wide circulation[407] rather than an official gazette that consumers would not take notice of.[408] Finally, it was argued that newspapers must be under an obligation to publish the decision; otherwise, conflicts of interest may arise when newspapers are business partners of the infringer.[409]

Other country reports refer to the benefits of the publication of decisions but also undertakings by traders on the website of the central consumer authority.[410]

The practical effectiveness of publication also appears to depend on national business culture. The country report Malta stressed that the size of the country matters, and that in a small Member State, traders are more sensitive to the risk of negative publicity.[411]

Overall, from the country research it appears that publication of the decision and, where applicable, of a corrective statement is an effective remedy both in terms of informing consumers of the infringement and acting as a deterrent to traders who fear of bad reputation. Legal uncertainty and discretion by the court with respect to publication of the decision may, however, reduce the effectiveness of the remedy.

Information of "the public" has been complemented in some Member States by information of individual consumers that are or have been affected by the

[403] Country reports Belgium, Croatia, Germany, Spain. See also Annex V for an overview of the measures regarding the publication of the decision and/or the publication of a corrective statement in the Member States.

[404] Country report Greece.

[405] Country reports France, Lithuania, Poland.

[406] E.g. country report Bulgaria.

[407] Country reports Bulgaria, Italy.

[408] Which is the legal situation in Germany.

[409] E.g. country report Bulgaria.

[410] Country report Latvia.

[411] Country report Malta.

infringement. These measures aim at making the individual victim aware of that infringement so that he or she can take follow-on action.

In Poland, the trader can be ordered to inform consumers about the unfairness of a standard term. In France, the trader is obliged to inform consumers by all appropriate means about the unfairness of contract terms. In Germany, there is a rule, according to which the injunction claim includes the claim to remove the consequences of the breach. That claim has been interpreted in recent decisions of German instance courts to cover the information of individual consumers (by letter) of infringements that affected their rights, for example, of the correct legal situation as opposed to the legal situation that the trader had explained in a previous letter.

In conclusion, publication of decisions and of corrective statements can be a useful tool but the situation is not satisfactory at the moment in a number of Member States. Moreover, publication as such may not be sufficient to make the individual victim of a consumer law infringement aware of that infringement so that some Member States have added, in appropriate cases, the trader's duty to inform all victims individually of the infringement.

- Sanctions for non-compliance with the injunction orders;

Generally speaking, close to all Member States foresee sanctions for non-compliance.[412] It has, however, sometimes been doubted that they are sufficiently deterrent to discourage continued infringements; a finding that has also been made in the 2012 report of the European Commission.[413] Stakeholders have asked for making the provision of sanctions mandatory.[414]

The Directive itself suggests that sanctions for non-compliance with injunction orders may be a useful instrument but leaves much leeway to the Member States who should foresee, "in so far as the legal system of the Member State concerned so permits", an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions (Article 2(1)(c)).

In some Member States, mostly but not exclusively with an Anglo-Saxon law background, infringement of the injunction order is treated as 'contempt of court' or as a criminal offence and can be sanctioned with public law fines and even imprisonment.[415] In France, non-compliance with a court order is punishable by a prison term of two years and a fine of EUR 300,000. In Luxembourg, criminal sanctions for non-compliance with the injunction order can amount up to EUR 120,000. Moreover, criminal sanctions may have an impact on the incorporation permit or licence of the trader.[416] In Germany, the sanction is up to EUR 250,000 or

[412] Except in Estonia, Hungary and Sweden. For more details, also see corresponding overview table in Annex V.

[413] See 2012 report, at p. 13 f. See also country reports France and Ireland, and results of the consultation in Part 2 of this report.

[414] See position paper BEUC, at p. 12.

[415] Country reports UK, Cyprus, France, Luxembourg.

[416] Country report Luxembourg.

imprisonment of up to six months. The amount is determined by the court but can be challenged by the qualified entity if the qualified entity feels that it does not have the necessary deterrent character.[417]

Beyond this, the law of Cyprus provides that, in the case of the infringement of an injunction order, the court can also order the payment of compensation to any person who suffered damage as a result.

Generally, the penalty for the infringement of an injunction order is either determined by law or it is determined together with the injunction order, but in some Member States, in case of a breach the qualified entity needs to apply to the court again to obtain a penalty order, the amount of which will depend on the severity of the infringement.[418] In some Member States, the sanction is calculated per day of breach of the order.[419]

Generally, sanctions are paid into the public purse rather than to the consumer organisation that had obtained the judgment,[420] exceptions being Greece and France.[421]

The threat of a penalty for non-compliance with an injunction order is regarded to be a deterrent to the continuation of the breach.[422] Occasional earlier problems with insufficient sanctions have been resolved by raising the amount of sanctions that can be applied.[423]

Overall, sanctions for the breach of an injunction order are a necessary element under the principle of effectiveness as established by the CJEU. They are also regarded as an effective element of the injunction procedure by stakeholders in the country research. Thereby, it seems that systems with clear legal rules on sanctions and systems where the sanction for breach are determined in the injunction order are considered to be more effective than systems where the pursuing of a breach requires a separate court procedure to obtain a penalty order.

6.1.3.4. *Role of settlements in stopping infringements to consumer law across the EU*

- Analysis of the advantages in terms of the effectiveness of the injunction procedure of the prior consultation;

According to Article 5 of the Injunctions Directive, Member States may introduce or maintain in force provisions whereby the party that intends to seek an injunction can only start this procedure after it has tried to achieve the cessation of the infringement in consultation with the defendant. In contrast, the Directive does not deal with the

[417] See OLG Dusseldorf, 24.10.2014, I-6 W 47/14, Verbraucher und Recht 2015, 71.

[418] E.g. country reports Austria, Germany. See also overview table on sanctions for non-compliance in Annex V.

[419] Country reports Bulgaria, Poland, Spain.

[420] E.g. country reports Spain, Germany. See also overview table on sanctions for non-compliance in Annex V.

[421] See above in the section on the lack of compensatory effect.

[422] E.g. country report Poland.

[423] Country report Latvia. Increased amounts of the sanctions that can be applied are also reported in the country reports Estonia and France.

requirements relating to the undertaking of the trader that would make a subsequent injunction procedure unsuccessful.

Prior consultation

Member States have reacted in different ways. Prior consultation is mandatory in Croatia, Cyprus, Ireland, Italy, Lithuania, Malta, the Netherlands, Poland, Slovakia,[424] Sweden and the UK. It is, however, also encouraged in other Member States by the legal environment, such as cost rules. For example, in Germany, consumer organisations may risk costs for unnecessary litigation if the trader accepts the claim immediately. Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, France, Greece, Hungary, Latvia, Luxembourg, Portugal, Romania, Slovenia and Spain do not require prior consultation at all.

Even where the law does not require or encourage prior attempts to find an extra-judicial or otherwise amicable solution, such attempts seem to be common practice. Public authorities are reported to normally approach traders informally first, and prior consultation of the trader has in a number of Member States been regarded as particularly helpful by public authorities as it often avoids formal proceedings; which is another reason why the number of injunction procedures in some Member States is minimal.[425] It is generally seen as useful.[426]

In Belgium there is a procedure of reconciliation, where parties try to reach an agreement together with a judge.

In some Member States, public authorities also use the prior consultation of the trader to negotiate a settlement that may even involve repayment of unduly collected fees.[427]

Undertakings

Generally speaking, an undertaking is the promise of the trader not to engage in the relevant practice anymore, for example, not to use a particular term and not to rely on it in disputes with consumers.

Some Member States have adopted specific rules on undertakings, the prime example being the UK. In the UK, an enforcer can accept an undertaking and can publish it. If the trader does not comply with the undertaking, the enforcer can obtain an enforcement order from the court. Thus, the enforcer does not need to show that the incriminated conduct actually constitutes an infringement of consumer law. In Latvia, undertakings are published in the same way as injunction orders. In Germany, rules have been developed by the courts. Under their case law, undertakings only remove the risk of continued breach and therefore only make the injunction claim unfounded if the trader's promise is supported by the promise of a sufficiently penalty in the case of a breach of the undertaking.

Trends

As mentioned above, 2 509 injunction actions were settled directly between the responding qualified entities and traders, while for 331 injunction actions, settlements

[424] In Slovakia, prior consultation with the trader is mandatory only before a request for an interim measure to the national authority is filed.

[425] Country reports Bulgaria, Croatia, Hungary, Ireland, Poland, UK.

[426] See also country report Lithuania.

[427] Country reports Poland, Netherlands.

were reached with the help of a third party. No trends in the role of settlements can be indicated, as the two Commission reports did not provide specific data in this respect.

It seems, however, clear that public authorities are particularly successful in reaching settlements when they have deterrent enforcement mechanisms, such as injunction orders and fines, available, and as there has been a trend in recent years to make such enforcement mechanisms available to public authorities, it should be expected that the role of settlements is increasing.

Consumer organisations reach settlements mainly in the case of clear infringements, thus, where the trader will predictably lose a law-suit. In contrast, traders that may benefit from lengthy court procedures because they can, in the meantime, benefit from infringements and where these benefits are unlikely to be reclaimed by individual consumers will be unlikely to be ready to settle.

6.1.3.5. *Impact of the Injunctions Directive on EU consumers in terms of reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment*

- Analysis of the impact of the Injunctions Directive on EU consumers in terms of reduction in the number of infringements to consumer protection rules and reduction in consumers' detriment;[428]

The 2012 Report on the application of the Injunctions Directive,[429] in particular, showed that the introduction – thanks to the Injunctions Directive – of the injunction procedure in EU Member States has brought substantial benefits to European consumers. This has been confirmed by the results of the survey of qualified entities presented above. Injunctions proved to be a successful tool for policing markets, especially to ensure fair contract terms. However, as indicated in the previous sections, the injunction procedure has been largely used for national infringements and is not evenly used across Member States: In several countries the injunction procedure is not at all used (in Cyprus, Malta, Romania and Slovenia) or only very rarely (in Croatia, Czech Republic and Lithuania). Qualified entities in other countries use the injunction procedure to some extent (in Bulgaria, Estonia, Hungary, Luxembourg, Poland, Slovakia, Spain and the UK), and <u>only in some countries the injunction procedure is considered to be largely used</u> (in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Netherlands, Portugal and Sweden) – regarding national infringements. Member States where the injunction procedure has been used at least to some extent include:[430]

- Member States that rely on private enforcement of consumer law and where consumer organisations are the main players in the enforcement of consumer law (Germany and Austria).
- Member States with an emphasis on administrative enforcement (e.g. Bulgaria, Estonia, Latvia, UK).
- Member States that had a tradition of using injunction procedures preceding the Injunctions Directive (e.g. Denmark, France, Netherlands, Italy and Sweden).

[428] Consumers' detriment should be understood as consumers' financial loss caused or that could have been caused by the infringements as defined by article 1(2) of the Injunctions Directive.

[429] 2012 European Commission report concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest.

[430] For more details, refer to the country reports of the listed countries.

In these cases, the injunction procedure is by and large considered being effective in reducing the number of infringements to consumer protection rules in a domestic context, or at least as being an important part of the "consumer protection armoury", as is reported from the UK.

Regarding settlements, public authorities appear to be particularly successful in reaching settlements when having public law enforcement mechanisms, such as injunction orders and fines, available.[431]

In principle, the reduction in the number of infringements could be expected to also lead to a reduction in related consumer detriment. However, this is 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.[432] Of course, in those countries, in which the injunction procedure is never or only very rarely used, and in a cross-border context, where the number of actions is low, any significant reduction in infringements and resulting consumer detriment cannot be expected.

A similar assessment was made by qualified entities themselves. In the survey, they were asked to assess the impact of the injunction procedure on consumers in their countries in terms of the reduction in the number of infringements to consumer protection rules in the past five years on a scale of one to five (from 'no reduction at all' to 'very significant reduction' where only the endpoints of the scale were labelled), with respect to both national infringements and infringements originating in another EU country. On average, responding qualified entities rated the impact (from no reduction at all to very significant reduction) of the injunction procedure on reducing national infringements as 2.4 out of 5; the average assessment of the impact of the injunction procedure on reducing infringements originating in other EU countries was lower, at 1.2 out of 5 (i.e. close to no reduction at all). On average, *responding qualified entities that initiated injunctions* rated the impact of the injunction procedure on reducing national infringements as 2.6 out of 5 (compared to 2.0 out of 5 for *qualified entities that did not initiate any injunction action*) and the impact of the injunction procedure on reducing infringements originating in other EU countries at 1.0 out of 5, i.e. no reduction at all (compared to 1.3 out of 5 for *qualified entities that did not initiate any injunction action)*.

Qualified entities were then asked to assess the impact of the injunction procedure in terms of the reduction in consumers' detriment in the past five years on a scale of one to five ('no reduction at all' to 'very significant reduction'), once again with respect to both national infringements and infringements originating in another EU country.[433] On average, responding qualified entities rated the impact of the injunction procedure on reducing detriment with respect to national infringements as 2.6 out of 5, while 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 were also asked to provide a monetary estimation of the average reduction in detriment through the injunction actions their organisations brought regarding national infringements since June 2011. 44% of respondents (of which two

[431] E.g. in Ireland, Poland, the UK. See Section 6.1.3.2.

[432] 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.

[433] Survey question: *'On a scale of 1 to 5, please assess the impact of the injunction procedure on consumers in your country in terms of reduction in consumers' detriment in the last five years.'* Respondents were shown a scale from 1 (No reduction at all) to 5 (Very significant reduction) where only the endpoints of the scale were labelled. The score should be interpreted as a rating and not as a robust quantitative measure of the reduction of detriment.

fifths did indeed initiate injunction actions) answered with 'no or negligible reduction in detriment', while the other half (56%) answered with 'don't know'.

Finally, the open public consultation conducted in the framework of the Fitness Check provides some complementary evidence, although the question did not differentiate between domestic and cross-border injunction procedures. Respondents were asked to assess the extent to which the right of consumer organisations and public bodies to take legal actions which can stop infringements of consumer's rights (the right to seek injunctions) is beneficial to consumers. Consumer associations were close to unanimous in their agreement, with 95% of these respondents indicating that this right is very or rather beneficial to consumers. Another 81% of consumer respondents and 79% of public authorities also agree that this right is beneficial to consumers. Least positive were business associations: while 49% view the right to seek injunctions as beneficial to consumers, 14% of business associations view this right as rather not beneficial or not beneficial at all, and 22% selected "no opinion/don't know".[434]

In other words, all available evidence confirms that while the injunction procedure is by and large considered being effective in those countries where their use is common (and stakeholders in the consultation agree that the procedure is beneficial for consumers), the impact of the Injunctions Directive in terms of its aim to facilitate cross-border injunction procedures can still be considered as being minimal. In most Member States, the qualified entities have never brought injunctions to deal with cross-border infringements, and if they have dealt with cross-border infringements, they prefer to use their own courts rather than litigating in a foreign country. Further alternative strategies are the use of the CPC Network (as far as consumer protection authorities are concerned) and co-operation with partner organisations from other Member States.

6.1.3.6. *Conclusions regarding the effectiveness of the Injunctions Directive in a domestic context*

The effectiveness of the injunction procedure very much depends on the particular choices that Member States have made. Where Member States have only implemented the bare minimum standard, effectiveness is low.

The costs of court procedures are still an unresolved problem, whereas the German example shows that with a limitation on litigation costs, injunction procedures against infringements of consumer law become more feasible and larger numbers of them can be initiated. Likewise, the length of court procedures is a problem as injunction orders as such only produce effects for the future whereas infringements that occur before the final judgment may go unsanctioned. Both aspects may contribute to the rise of public law enforcement of consumer law, as public authorities can act more speedily and cheaper.

The increased use of public law enforcement may also have contributed to a significant number of settlements in the course of prior consultation of the trader. Where qualified entities have to litigate in court, traders may see an incentive in a lengthy court procedure in order to reap the benefits of an infringement, unless there is a real risk of having to return those benefits.

[434] The Injunctions Directive was also addressed in 12 out of the 38 position papers received by business stakeholders (predominantly business associations) as open submissions to the public consultation. Seven indicated that they considered the Injunctions Directive to be functioning effectively. The position papers submitted by consumer organisations and public authorities commented that while they considered the injunction procedure to be a useful tool, its effectiveness could be improved.

A clear trend in recent years is the complementation of the injunction procedures with additional remedies, in particular with compensation orders, either by courts or by public authorities. This reflects the reality that otherwise, consumers have little prospect of compensation of the harm they suffered from the infringement. Experience with those Member States that had already introduced compensation orders show that this instrument is suitable to increase the effectiveness of the injunction procedure and reduce consumer detriment significantly.[435]

6.1.3.7. *Practical effectiveness of the current rules in eliminating obstacles to the Internal Market*

What is the effectiveness of the ID in eliminating obstacles to the Internal Market in terms of:

- The effects of the Injunctions Directive provisions facilitating the use of the injunction procedure for cross-border infringements (Article 4 of the Injunctions Directive);

During the country interviews conducted for this evaluation, stakeholders unanimously agreed that the Injunctions Directive has not had much effect in the pursuit of cross-border infringements. In close to all Member States, it has never been used at all.[436] The survey of qualified entities shows one case in the last five years (and four actions in another country via cooperation with another qualified entity from another EU country);[437] which means that there was not a single action under the system of the Injunctions Directive. In those Member States where qualified entities have addressed cross-border infringements in the last five years, they have only done so by suing foreign traders in their domestic courts.

Consumer protection authorities have made it clear that they prefer to use the CPC Network when it comes to cross-border infringements,[438] and consumer organisations often prefer asking their national authorities to get in touch with other authorities through the CPC Network or asking consumer organisations from the trader's Member State to help.[439] Also, the activities of the European Consumer Centres were mentioned to be useful to pursue cross-border infringements without taking formal action.[440]

For a better understanding of the limited effect of the Injunctions Directive for cross-border infringements, it is necessary to analyse in more detail how such infringements can be dealt with by qualified entities. They can take action against foreign traders in their domestic courts, or they can take action in the courts or in front of administrative

[435] See the examples presented supra, at 6.1.3.3. under the heading "Lack of compensatory effect".

[436] In the country research for this study, instances of the use of the cross-border procedure are only reported from Spain.

[437] This cross-border action was initiated by a private association who commented with respect to this action that they wished to execute a title, but were unsuccessful. See results of the survey of qualified entities, Part 4 of this report.

[438] Country reports Denmark, France, Lithuania. See also e.g. the position paper submitted by the Danish Ministry of Business and Growth: "The Danish consumer enforcement authorities have never used the Injunctions Directive. In connection with the revision of the CPC Regulation it should be considered whether the Injunctions Directive is relevant, or if it might be appropriate to incorporate some of the provisions into the CPC Regulation."

[439] E.g. country report Lithuania.

[440] Country report Czech Republic.

bodies of the Member State where the trader is domiciled. Both ways pose different problems.

Litigation in the Member State of the trader

With regard to litigation in the Member State of the trader, qualified entities face so severe obstacles that they do not use the system of the Injunctions Directive but resort to other mechanisms (if any), in particular the CPC Network (if they have access to that instrument) or lawsuits in their domestic courts against foreign traders.

The complexity of cross-border injunction procedures brought in the Member State where the trader is domiciled mainly stems from the application of foreign procedural law. According to the principles of international procedural law, each court applies its own procedural law (*lex fori*), and the same applies to administrative bodies. Thus, a qualified entity would not reasonably sue in another Member State without seeking advice from a lawyer who is domiciled in that Member State. Still, the qualified entity would incur travel costs, costs for translations etc. These costs have often been mentioned to be an obstacle to the use of the cross-border injunction action.[441] Consumer organisations therefore prefer to litigate in the courts of their own Member States.[442]

The complexity of the injunction procedure in particular Member States was not mentioned by qualified entities as an obstacle, and the reason would seem to be that there is no knowledge on the foreign procedural rules of particular Member States in the first place. 68% of qualified entities that responded to the survey were not aware of the procedural modalities of the injunction procedure in other EU countries, which was cited by one responding public authority/body as a key obstacle to the effective use of the injunction procedure, as well as an obstacle to cross-border cooperation. Consequently, close to two-thirds of responding qualified entities (62%) were unable to assess the practicability of procedural modalities of the injunction procedure in other EU countries.

There is no information available either regarding the length of injunction procedures in another Member State as such procedures have barely ever been tested by qualified entities. It seems obvious, however, that the necessity to arrange for translations and the like would add to the duration of an injunction procedure, thereby reducing its effectiveness.

Litigation in the Member State of the qualified entity

Litigation in the domestic courts is the preferred option of consumer organisations in cross-border cases. The clear advantage is that the qualified entity is familiar with the applicable procedural law and can use its own language in court. Still, some problems remain.

- *Jurisdiction.* For qualified entities, it is far more attractive to sue a foreign trader in the courts of the Member State where the qualified entity is domiciled; which is possible under EU international procedural law. In a conflict with the German trader Karl Heinz Henkel, the Austrian consumer organisation Verein für Konsumentenrecht (VKI) tried this route and sued Mr. Henkel in the Austrian courts; an approach that the Court of Justice confirmed. According to the Court of Justice, the VKI could rely on the special rules on jurisdiction in

[441] Country reports Austria, Bulgaria, Lithuania, Slovakia.

[442] E.g. country report Austria.

tort law matters.[443] According to the old Article 5 No. 3 of Regulation (EC) No. 44/2001, now Article 7 No. 2 of Regulation (EU) No. 1215/2012, a person domiciled in one Member State can be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur. The relevant place in this context is the Member State in which consumers may suffer harm from an unlawful practice. Consequently, almost all law-suits with a cross-border element have been brought in the domestic courts of the Member State where the consumer organisation is domiciled. In contrast, this option is not available to public law enforcement, due to the public international law principle of territoriality. Thus, consumer authorities can either bring claims in the civil courts, if their Member States allows so (for example, the UK Consumer and Markets Authority), or they have to resort to the system of the Injunctions Directive or to the CPC Network.

- *The applicable substantive law.* Qualified entities have long been deterred from cross-border litigation due to uncertainty about the law that applies to an injunction procedure, irrespective of whether the qualified entity takes cross-border action in the foreign or the domestic court;[444] a problem that was already mentioned in the 2008 and 2012 reports of the European Commission.[445] Two questions must be distinguished: the law that applies to the collective action, and the law that applies to the potential infringement. Both were subject to a CJEU preliminary reference procedure from Austria in a law-suit that, again, the VKI had brought against Amazon, which is domiciled in Luxembourg, and that the Court decided on in July 2016.[446] In line with its above-mentioned judgment in the case of *Henkel*, the Court of Justice treats the injunction claim of a consumer organisation as a non-contractual obligation because the consumer organisation, unlike individual consumers, does not have a contract with the trader. Thus, the rules of the Rome II Regulation apply. Article 6(1) of that Regulation determines that the law applicable to non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. This is usually the law of the Member State where also the consumer organisation is domiciled, and which it is familiar with. The Court, however, also decided that the law that applies to the potential infringement is to be determined separately. The reason is the harmonious application of the law. A trader should not be punished in a collective action for something that the trader can legitimately do in an individual contract. If, for example, a trader can lawfully include a choice of law clause in his or her standard terms, according to which the contract shall be governed by the law of the Member State where the trader is domiciled, that choice of law clause must also be considered in a collective action, and the potential infringement must then be assessed under the chosen law.[447] Consumer organisations therefore may have to research foreign consumer law and, depending on the procedural law of the court, may even have to convince the court of the correct solution under that foreign law. This clearly has a chilling effect on cross-border injunction litigation.

[443] See CJEU, judgment of 1/10/2002, case C-167/00 *Verein für Konsumenteninformation v. Karl Heinz Henkel*, ECLI:EU:C:2002:555.

[444] Country report Austria.

[445] See 2008 report, at p. 7; 2012 report, at p. 12.

[446] CJEU, judgment of 28/7/2016, case C-191/15 *Verein für Konsumenteninformation v. Amazon EU Sàrl*, ECLI:EU:C:2016:612.

[447] See CJEU (n. 39) – *VKI v. Amazon*, at paras .56 ff.

- *Enforcement in cross-border cases.* In principle, once a qualified entity has obtained a winning judgment in its own Member State, the Brussels I Regulation (EU) No. 1215/2012 would seem to facilitate its enforcement in the Member State where the trader is domiciled. There is, however, some legal uncertainty in this, and, as mentioned before, 'difficulties to enforce injunction orders' is the third most important obstacle for injunction procedures concerning infringements originating in another EU country, according to the qualified entities responding to the survey. First of all, the Brussels I Regulation (EU) No. 1215/2012 only applies to decisions in matters of civil and commercial law but not to public law decisions. Thus, the system of the Brussels I Regulation cannot be applied to injunction orders or fines by consumer authorities. Second, the enforcement of sanctions for non-compliance with an injunction order issued by a civil court is unclear. Where that sanction has a criminal law or public law character, its enforcement through the system of the Brussels I Regulation is not possible either. Finally, in the case of a judgment from a Member State where the sanction for non-compliance with the judgment is not included in the judgment itself but determined in a separate procedure, like in Austria and Germany, it is unclear the courts of which Member State (the Member State where the original judgment was handed down or the Member State where the judgment is to be enforced) are competent to determine and enforce those sanctions.[448]

- The level of awareness of consumer organisations which are qualified entities as defined by the Injunctions Directive, regarding the legal possibility to bring injunction actions in another Member State and the procedural modalities of the injunction procedure in other Member States, as in particular demonstrated by their practical application;

Consumer organisations are, in principle, aware of this possibility but shy away from taking action in another Member State because of the costs and the complexity of such actions. As a result, consumer organisations from most Member States have never taken cross-border actions (as indicated before). Experienced consumer organisations from a few Member States, including Austria and Germany, have resorted to litigation in the courts of their own Member State against traders from other Member States.

- The effectiveness of the Commission measures encouraging consumer organisations to better use injunction procedure in a cross-border context (CoJEF I, CoJEF II and CLEF).[449]

A number of consumer organisations have reported that, in case of a cross-border infringement, they have not taken action themselves but have liaised with a partner organisation in the Member State in which the trader was domiciled. For example, a coordinated "cross-border" action was initiated in May 2009 by a consortium made of France's UFC-Que Choisir, Portugal's DECO and Belgium's Test-Achats. The action

[448] Country report Austria.

[449] The Consumer Justice Enforcement Forum II (CoJEF II) is a project run by BEUC and 10 national consumer organisations, predominantly financed (80%) by the Commission under the Civil Justice program 2007-2013. It is the continuation of the previous CoJEF I and of the Consumer Law Enforcement Forum (CLEF).The information on CoJEF may be found at: http://www.cojef-project.eu/.

concerned airlines' general conditions of carriage and was brought before a Belgian court.[450]

The majority of responding qualified entities, however, have *not* cooperated on specific injunction actions with qualified entities from other EU countries. 71% of responding qualified entities have not cooperated with consumer organisations in other EU countries on injunction actions, while 72% of participants have not cooperated with independent public bodies in other EU countries on such actions.

Some consumer organisations are reported to have expressed the need for better information exchange and coordination between consumer organisations of different Member States.[451] In fact, the majority (67%) of responding qualified entities have not informed qualified entities from other countries if an infringement affected consumers from their country since June 2011.

As to participation in EU financed measures, under half of all respondents (40%) have participated in the Consumer Justice Enforcement Forum and the Consumer Law Enforcement Forum. In terms of the effectiveness of these measures, 36% of responding qualified entities viewed them to be 'very effective', stating, for example, that these forums facilitate the exchange of best practices and relevant information, which is particularly helpful for smaller consumer organisations. It can therefore be concluded that the Commission measures have been effective insofar as participants from different Member States have been able to exchange best practices and information, so that the injunction procedure can be better used. However, these measures have not been sufficient to significantly reduce the obstacles to the use of the injunction procedure in a cross-border context, which are largely beyond the control of the participating organisations (for a detailed analysis of the obstacles, see Section 6.1.3.3 above and the problem definition, Section 7).

6.2. Efficiency

6.2.1. Unfair commercial practices and marketing

6.2.1.1. *The economic rationale of providing an EU legal framework regarding unfair commercial practices and marketing*

From an economic perspective, the behaviour of traders towards consumers with respect to communication, advertising, and marketing in general is likely to have a large impact on the functioning of consumer markets, or markets more generally, since the influence on consumers' information and decision-making in such markets is very significant. Consumer policy has therefore the potential to positively interact with market forces in order to foster competition and improve both allocative and productive efficiency.

This efficiency-enhancing function may be performed at the national level, but also at the EU level. In general, reasons for taking policy measures at the EU level are twofold. First, because within the EU, the size and intensity of cross-border trade are high enough (in fact, higher than in any other large trading area in the world)[452] to make such economic activity in the Single Market vulnerable to inconsistent policy

[450] Country report France.

[451] Country report Bulgaria.

[452] Wold Trade Organization, International Trade Statistics 2015, available at https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf

choices by Member States or even mere diversity between those choices. Second, traders' behaviour in communicating with consumers and in pre-contracting activity is not bound by Member States' borders; thus, it directly impacts cross-border trade, leading to issues that national lawmakers and regulators are ill-placed to adequately address.

The trade dimension is fundamental, given the great theoretical and practical relevance of cross-border trade in the EU. In 2015, intra-EU28 trade in goods reached EUR 3 070 billion.[453] Because Member States do not have uniform endowments with technologies, production capacities, tastes and preferences, and natural resources, some economies are relatively better placed than others for the production of certain goods and services. Trade at the European (and international) level allows parties to exchange goods and services without the need for each Member State to produce everything it is consuming. For businesses, cross-border trade can reduce input costs and increase the potential customer base. For consumers, access to goods cross-border can lower prices and increase choice.[454] Consumer policy at EU level therefore aims both at a proper functioning of the internal market and at safeguarding a high level of consumer protection (see also the intervention logic for the Directives subject to this study, Annex VI).

In the area of unfair commercial practices and marketing, the core challenge for consumer policy is how to design and apply an optimal system of information duties and behaviour for traders that allows for informed consumer choices and minimises the occurrence of misleading and aggressive marketing practices, and at the same time does not interfere with the pressures of competitive markets, which, overall, are the major factors in attaining optimality in the relationship between traders and consumers.

In the following sub-sections, we will first consider costs and benefits of the legal framework regarding unfair commercial practices and marketing for traders before assessing them from a consumer perspective.

6.2.1.2. *Costs and benefits for traders*

- Costs and burdens for traders due to the need to respect the requirements under the relevant directives (UCPD, MCAD, PID)

While the directives subject to this evaluation apply to almost all business-to-consumer transactions (or business-to-business transactions, in the case of the Misleading and Comparative Advertising Directive), this does not imply that the costs and benefits are uniform in nature and magnitude across economic sectors or size classes. To explore them in more detail, a total of 282 business interviews covering all

[453] Eurostat, Intra-EU28 trade (exports), by Member State, total product, Code: tet00047, http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tet00047&language=en, accessed on 20.1.2017

[454] This is especially obvious in the area of e-commerce. A 2011 study concluded that total welfare gains for EU consumers resulting from lower online prices and increased online choice under a hypothetical situation of a 15% share of internet retailing (then at 3.5%) and a Single EU consumer Market in the e-commerce of goods amount to 204.5 billion Euro per year (equivalent to 1.7% of EU GDP). This was estimated to be four times higher compared to a situation where, with a similar share of internet retailing, the (still rather) fragmented national consumer markets of the Member States would continue to exist. See: Civic Consulting 2011, Consumer market study on the functioning of e-commerce and internet marketing and selling techniques in the retail of goods.

Member States were conducted, focusing on the five following sectors:[455] large household appliances, electronic and ICT products, gas and electricity services, telecommunication services, and pre-packaged food and detergents. Target companies were businesses that sell products or services to consumers in the selected sectors. While slightly more than two thirds of interviews focused on micro, small and medium-sized enterprises, the remainder focused on large businesses with 250 or more employees.

The businesses interviewed also differ in their cross-border activity: a minority sells their products and/or services in other EU Member States (28%), whereas about three quarters restrict their sales to their domestic market (72%).[456] The importance of this segmentation of traders into those that are active cross-border and those that are not is that the first group need to incur certain costs to get informed about the requirements for their activity and to direct sales to another Member State, whereas these costs are not relevant for the second group. In the following, we first analyse the one-off costs for traders when entering another EU country's market.

One-off costs when entering another EU country's market for the first time

Even in countries that share to a large extent a common legal framework, as is the case in the area of consumer protection in EU Member States, regulatory content and application of rules differ substantially. Businesses need to assess whether their existing practices (promotion materials, marketing strategies, and the like) comply with the rules in the new market and, if there is no perfect compliance, whether and how to make changes and adjustments in existing practices so as to satisfy the requirements in the new national market. The size of those one-off costs when entering another EU country's market for the first time will depend on many factors that have to do with the density and complexity of the regulatory requirements in the target Member State, as well as the flexibility of the business organisation and the specific practice at stake, and with the scale and reach of the intended operations in the new market. What is clear is that costs will be incurred, which may include external legal advice as to the requirements in the new market and the compliance of the intended practices with them.

In the business interviews, we explored these one-off costs incurred by businesses 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, expressed in terms of working days of professional staff time (e.g. legal or management), working days of administrative or sales staff time, and Euro amounts for other costs (e.g. related to legal advice). After monetising labour costs, total one-off costs per business per country entered were calculated. The table below presents one-off costs per business by sector, based on median values, for businesses that sell their products and/or services in other EU Member States.

[455] 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 this study.

[456] The reasons for companies to choose not to sell cross-border are manifold. Roughly a quarter (26%) of the businesses that do not sell their products/services in other EU countries indicated that it is 'too complicated'. Other reasons cited by businesses for not selling products/services in other EU countries include differences in legal requirements regarding advertising/marketing and standard contract terms (15%) and other differences in legal requirements (17%). More than four in ten businesses (45%) also cited 'other obstacles', by which most businesses meant that it was not part of their current strategy to sell their products/services in other EU countries.

Table 12: 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

Source: Civic Consulting based on business interviews. Sample of interviewed businesses that sell their products and/or services in other EU Member States (N = 9 in the sector for large household appliances; 19 in the sector for electronic and ICT products; 8 in the sector for gas and electricity services; 9 in the sector for telecommunication services; and 23 in the sector for pre-packaged food and detergents). Notes: These best estimates are based on median values, irrespective of size class. The median is the value separating the higher half of the sample from the lower half. For detailed results and additional explanatory notes, refer to Part 4 of this report.

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, followed by 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, and are lowest in the sector for electronic and ICT products, with median one-off costs of EUR 1 727.

These results can be compared to the assessment made in the recent Impact Assessment for the Digital Contracts Proposals (2015)[457] that looked into contract-law related costs incurred by EU traders engaged in cross-border B2C trade for entering the market of one Member State. The Impact Assessment focused on the costs related to the Consumer Sales and Guarantees Directive, which is not covered by this study. Based on the results of the responses gathered in the context of a SME Panel Survey, it estimated the one-off contract law-related costs due to differences in contract law rules at around EUR 9 000 per business for entering the market of one Member State.

The costs listed in the table above exclude costs related to the translation of contracts and correspond to costs when entering *one* other EU country's market. Total costs may therefore be substantial if a trader plans to operate at an EU-wide level.

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

It also has to be emphasised that it is practically impossible for businesses to attribute their costs to specific EU legal instruments. Therefore the interviews explored more generally the costs for checking compliance with and adjusting business practices to legal requirements in the other EU country's market regarding *advertising/marketing* and *standard contract terms.* Consequently, the estimates provided are likely to cover the combined effects of national legislation and the underlying EU directives affecting this area (most notably the UCPD, UCTD and MCAD, but also sectoral legislation).

As indicated in the business interviews, of these costs, two thirds or more relate to compliance checks and adjusting business practices concerning advertising and marketing (of which the larger part is related to advertising and marketing targeting consumers).[458] In absolute terms, median one-off costs with respect to compliance checks and adjusting business practices concerning advertising and marketing targeted toward both consumers and businesses are therefore estimated to range between EUR 1 160 and EUR 8 060 per business across the five sectors covered.[459]

These are sizable amounts which suggest that a reduction in those costs per country could positively impact the costs faced by cross-border active businesses in entering additional markets within the Single Market. The growing trend in cross-border online demand by consumers, and the increased confidence by consumers in purchasing from EU traders in a different Member State (see the analysis of levels of awareness and key trends, Annex VIII Section on general trends in cross-border purchases) seem to reinforce the importance of measures allowing cross-border sellers to reduce their costs of doing business in other Member States.

The determinants of these costs can be further considered taking the example of the UCPD. The UCPD is a full harmonisation directive,[460] and this is reflected especially in the general substantive clauses it contains, and in the blacklisting of certain practices in Annex 1. This means that in the context of marketing practices targeted to consumers, the UCPD has reduced legal diversity across Member States. However, this reduction is not (and could not be) complete. Firstly, because enforcement is still being carried out at the national level. And secondly, because legal culture, tradition and experience still influence how the Directive's general clauses are given content, even taking into consideration the potentially harmonising effects of CJEU case law. Therefore, even if the legal standard is set at the same level for all Member States, the law as outcome may well differ to some degree. Thus, traders operating across the border in a new market will not be able to entirely do away with investing time, effort, and money in verifying how the courts and public authorities in a given Member State understand the meaning of the rules on commercial practices and how, in light of such rules, they consider a given type of practice. But it is very likely that such an exercise is facilitated, and thus less costly, as a result of the harmonisation of pre-existing rules accomplished by the UCPD. The scope and the degree of diversity in this area

[458] Only for two of the five sectors a sufficient number of estimates was available: In the pre-packaged food and detergent sector, businesses that sell their products/services in other EU countries indicated that they spend the highest share (62%) of their one-off costs for compliance checks and adjusting business practices when entering another EU country's market on advertising and marketing *targeted at consumers*, and about 22% of these costs to advertising and marketing *targeted at businesses* (with the remaining 17% of costs relating to standard contract terms in consumer contracts). Businesses in the electronic and ICT sector also spend the highest share of their one-off costs related to advertising and marketing *targeted at consumers*, although this share amounts to less than half of these costs (49%). In this sector, businesses spend the lowest share of their one-off costs for compliance checks and adjusting business practices on advertising and marketing *targeted at businesses* (17%) and about a third of their one-off costs on standard contract terms in consumer contracts. For more details, see Part 4 of this report.

[459] Based on an estimated share of two thirds of the one-off costs. Not for all sectors an estimate was available.

[460] Except for the sectors of immovable property and financial services. The other directives considered here (MCAD and PID) are based on minimum harmonisation.

have been narrowed, and thus the ensuing analysis, compliance and adjustment costs are likely to have come down correspondingly.

The extent of this reduction is difficult to quantify, as the interviewed businesses typically considered the requirements of the overall legal framework concerning unfair commercial practices and marketing as a whole, not differentiating between specific directives and whether rules were originating at EU or domestic level. However, as the analysis of benefits (below) indicates, a large majority of interviewed businesses that sell their products/services in other EU countries indicated that they benefitted most from the harmonised legislation that facilitates selling cross-border to consumers in other EU countries (with 63% indicating they benefitted at least slightly in this respect), implying a recognition of this cost reduction effect. This is also emphasised by the fact that in open public consultation conducted for the Fitness Check many business stakeholders advocated for pursuing full harmonisation where possible in order to eliminate barriers to cross-border trade.[461]

Costs incurred by businesses on a regular basis

Of the sample of interviewed traders, almost three-quarters do not operate cross-border in the EU, and these may also face compliance costs in the area of commercial practices and marketing (both in terms of checking and verifying compliance in the country where they operate, and in terms of adjustment and changing practices). In the business interviews, these regular costs of businesses were also explored.[462] 73% of the interviewed businesses reported checking that advertising/marketing and standard contract terms still comply with national legislation at least once per year, whereas 19% indicated that they never check compliance. The table below presents the total annual costs for compliance checks and adjusting business practices incurred by these businesses that check for compliance on a regular basis, calculated on the basis of median values, by sector (as above, including both costs related to advertising/marketing and standard contract terms).

[461] See Part 2 of this study.

[462] The analysis includes both businesses not operating cross-border, and those that do, as both incur regular costs in this respect. For the latter category it was clarified that costs invested when entering another EU country's market are not to be considered in the estimate, to avoid double-counting.

Table 13: 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)

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

Source: Civic Consulting based on business interviews. Sample of interviewed businesses that check for compliance on a regular basis (N = 19 in the sector for large household appliances; 40 in the sector for electronic and ICT products; 51 in the sector for gas and electricity services; 35 in the sector for telecommunication services; and 39 in the sector for pre-packaged food and detergents). Notes: These best estimates are based on median values, irrespective of size class. The median is the value separating the higher half of the sample from the lower half. Interviewed businesses were asked to report total amounts for all EU countries they target, including the country in which they are registered.

Similar to the pattern for the one-off costs presented above, regular compliance costs are substantially higher in the two network services sectors. Results also indicate that median annual costs increase with size in nearly all sectors, with the exception of small deviations in the sectors for pre-packaged food and detergents and telecommunication services. The table below present results by size class of enterprises (see detailed results in Part 4).

Table 14: 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 by size class of enterprises – total amounts for all EU countries targeted)

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
Telecommunica-tion 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

Source: Civic Consulting based on business interviews. Sample of interviewed businesses that check for compliance on a regular basis: 19 in the sector for large household appliances; 40 in the sector for electronic and ICT products; 51 in the sector for gas and electricity services; 35 in the sector for telecommunication services; and 39 in the sector for pre-packaged food and detergents. Notes: These estimates are based on median values. The median is the value separating the higher half of the sample from the lower half. Interviewed businesses were asked to report total amounts for all EU countries they target, including the country in which they are registered.

Subsequently, the results obtained at the business level for the selected sectors were extrapolated to the EU level, covering costs for regular compliance checks regarding advertising/marketing and standard contract terms.[463] In total, the annual costs incurred by businesses in the EU28 for checking that their advertising/marketing and standard contract terms still comply with national legislation and adjusting business practices if needed amount to EUR 278 million in the five sectors reviewed (best estimate).[464]

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 and 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.

The costs of regular compliance checks therefore appear very proportionate compared to the approximate annual turnover of EUR 1 180 billion in these five sectors,[465] when taking into account the importance of these rules for the functioning of consumer

[463] The methodology of the extrapolation and detailed results are presented in Part 4 of this report.

[464] For an estimated number of 962 261 businesses in the five selected sectors. Note however that the total costs at the EU level are calculated based on costs per business by size class, which vary greatly as shown in the previous table, and on the number of businesses per sector and size class, which has a strong influence on the results; for more details see Part 4 of this report.

[465] 2013 data for turnover. The comparison 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 we have used more granular data, i.e. at class level, for the extrapolation.

markets. The estimated overall costs of regular compliance checks amount to approximately 0.024 percent of turnover, with 0.011 percent relating to rules concerning advertising and marketing targeted at consumers, 0.004 percent relating to rules concerning advertising and marketing targeted at businesses, and 0.009 percent relating to rules concerning standard contract terms.

It has to be emphasised that these estimates refer to the overall compliance costs for businesses related to the national legal framework, and therefore are caused by the combined effects of EU and Member States legislation in the area of consumer and marketing law as well as sectoral legislation. Member States legislation may add additional requirements (where minimum harmonisation applies), and national case law and interpretation of the general clauses will affect both areas where minimum harmonisation prevails, and where fully harmonised rules exist. Furthermore, in those sectors where relevant sector specific EU consumer protection legislation exists, in particular, gas and electricity services and telecommunications, the company estimates about their costs are likely to also include requirements from such sectorial EU legislation and their national implementation.

Because of this combined effect of national and EU legislation, the costs estimated above cannot directly be attributed to specific EU directives. It is likely that, when the UCPD and the other relevant EU directives were transposed into national legislation, this had an impact on these regular costs since the existing rules, at least to some extent, had to be revised and changed to comply with the new EU requirements. After this phase, however, there is no indication that the directives would increase such costs in absence of major legislative changes. It is even possible (although not certain) to anticipate that the "Europeanisation" of a large bulk of the substance of the rules dealing with commercial practices brought stability and consistency to this area, and thus, reduced the need for and cost of such regular compliance checking and adjustment.

Costs for (unit) price indication were separately assessed and are not included in the previous estimate. There is incidental evidence from the country research that compliance with the obligations of the PID is less of a burden for large retailers, due to economies of scale. Existing exemptions for small retailers seem to alleviate the burden on those retailers. The business interviews conducted for this study give some additional insights.[466] The interviews focused on the costs for businesses in the pre-packaged food and detergents sector (for which unit price indication is most relevant) and explored amongst other burdens the specific costs of providing price information at points of sale and/or on websites. 75% of relevant businesses interviewed across the EU reported that they indicate unit prices for pre-packaged food and/or detergents to consumers to comply with legislation, while 15% do not and 9% either did not know or did not provide an answer. On the basis of the quantitative data provided, median costs (e.g. to prepare and change price labels) of interviewed businesses that indicate unit prices in the pre-packaged food and detergents sector, are EUR 2 178 per business per year (covering staff costs and other costs such as for electronic price labels).[467] Respondents indicated that, on average, 30% of these costs are specifically related to unit price indication. These figures are comparatively low, which is partly explained by the fact that in line with the size distribution of companies in the food retail sector the business interviews focused mostly on SMEs and that large companies in the sector that were interviewed had difficulties providing estimates regarding the cost of price indication. Other reasons include that price information is often provided automatically either on websites or in some cases on electronic labels, using special

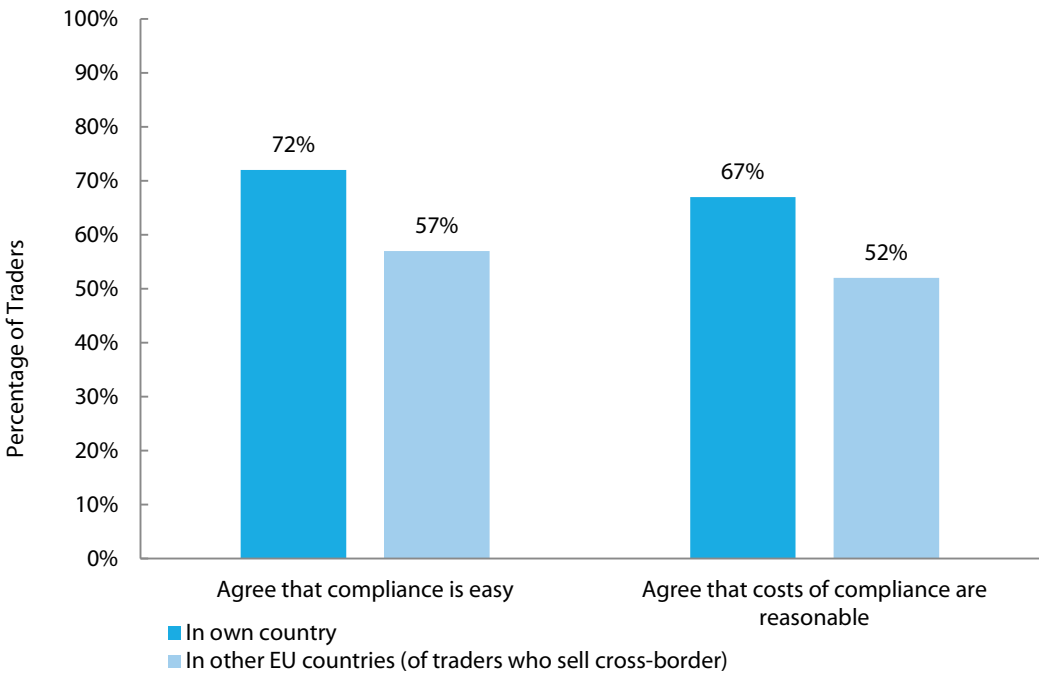
[466] For more details on the business interviews, refer to Part 4 of this report.

[467] Due to data limitations, costs could not be broken down further by size class, however results of the interviews are presented by size class in Part 4.

software, which reduces related costs. In spite of these data limitations – and with the caveat that the interviews regarding price indication only covered the especially affected food retail sector – it appears reasonable to conclude that the costs of (unit) price indication do not seem to imply disproportionate burdens on businesses.

The proportionate character of the costs of consumer protection legislation, of which the UCPD is an essential element, has also been recognised by businesses. In a 2014 survey (the only year that such a question was asked in the Eurobarometer) a large majority of traders agreed that in their own country compliance with consumer legislation is easy (72%) and that the costs of compliance are reasonable (67%), although traders selling in other EU countries were less likely to agree that this applied when selling cross-border. Only a slight majority of traders operating cross-border agreed that compliance in other EU countries was easy (57%) and that the related costs were reasonable (52%).

Figure 6: Percentage of traders agreeing that compliance with consumer legislation is easy and the costs are reasonable, EU28 in 2014.



Source: Flash Eurobarometer 396. 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.

These results illustrate that compliance with the rules in other EU countries is considered to be more burdensome, which is consistent with the above described estimate of considerable one-off costs for entering a new market, which are in addition to the regular compliance checks.

- Benefits for traders due to the relevant directives (UCPD, PID, MCAD)

The segmentation between traders active in cross-border trade and those focused on their domestic market is very relevant also for the benefits from the EU legislative framework in the area of commercial practices and marketing. Not only the costs they face in terms of compliance and adjustment will be impacted differently by

harmonising EU rules, but also the advantages they may obtain from the directives are different in nature and dimension. This is not only to be expected in theoretical terms, but is also supported by the results from the business interviews: across all potential benefits that were listed in a respective question, between 63% and 46% of the businesses that sell their products/services in other EU countries indicated that they benefited at least slightly from the EU legislative framework subject to the Fitness Check. 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 level playing field that was created across the EU for businesses regarding contracts with consumers by safeguarding that standard contract terms are fair. In contrast, the benefits of having harmonised rules in the EU in view of selling cross-border were ranked last among the sample of businesses that only operates domestically. Only between 51% and 29% of the businesses that do not sell their products/services in other EU countries indicated that they benefited at least slightly from the legal framework, a significantly lower proportion than in the sample of businesses that sell their products/services in other EU countries.[468]

Traders operating cross-border are clearly the ones reaping the most tangible benefits, since their costs caused by legal diversity between Member States are likely to decrease as a result of the EU legislative framework reducing the level of legal fragmentation. Those who do not engage in business with counterparties in other Member States are substantially less affected by legal diversity across Europe, and thus their costs will be affected less. The benefits they may experience may arise from a more stable and consistent legal framework as a result of it being Europeanised, something that was referred to in the previous sub-section.

As to the MCAD, slightly more than half of the interviewed businesses indicated that they benefitted at least slightly from the legal framework in this respect. According to the evidence collected in the Commission's public consultation in 2011 as to misleading marketing practices affecting businesses, a substantial portion of existing problems seem to be linked to scam operations (such as misleading payment forms, e.g. fake invoices for unsolicited goods or services) against which the current EU legislative framework is less effective (see section effectiveness of the MCAD, above). Resulting benefits in this respect are therefore likely to be limited. It is true, however, that online review platforms, identified in the 2014 Flash Eurobarometer as a growing source of concern among traders,[469] have the potential to affect commercial practices among traders in a more intense way, and therefore to potentially bring new benefits of an EU legal framework against misleading B2B practices.

6.2.1.3. *Costs and benefits for consumers*

- Costs for consumers stemming from both the minimum harmonised and the fully harmonised consumer rules (UCPD, PID, MCAD)

From an economic viewpoint, two different kinds of consumers' costs can potentially arise from the legislative framework for unfair commercial practices and marketing. First, costs may accrue due to the insufficient functioning of the framework, i.e. through the unfair commercial practices of traders which are not prevented by the legal framework. Second, traders may pass on their costs of compliance with the legal framework to consumers in the form of higher prices.

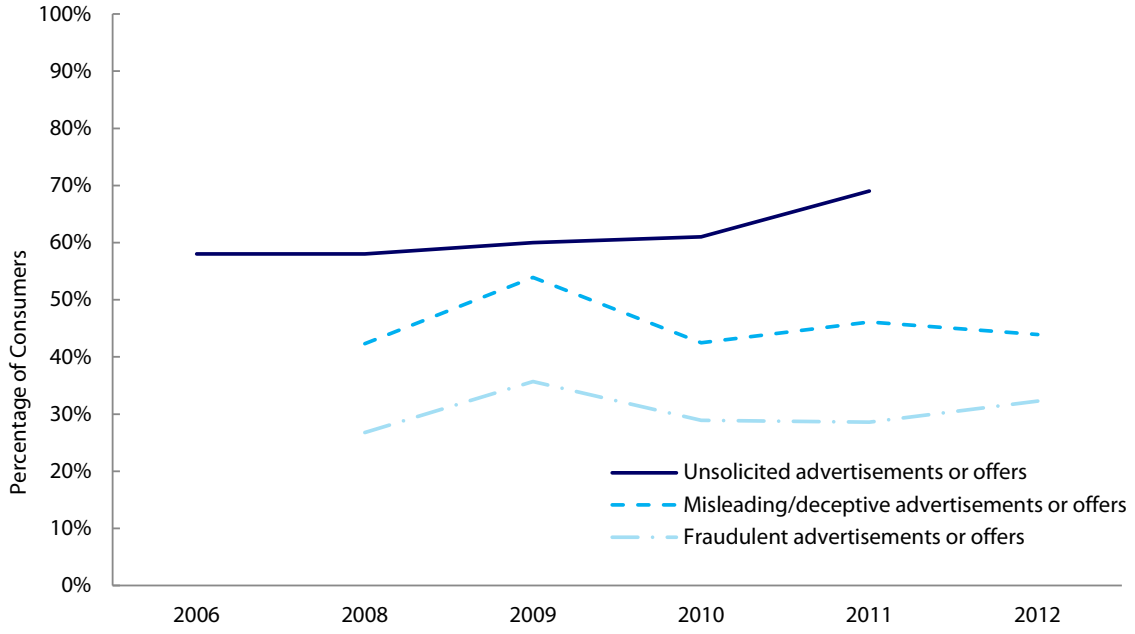
[468] See detailed results in Part 4 of this report.

[469] Flash Eurobarometer 396, see analysis of levels of awareness and key trends since the adoption of key directives in Annex VIII.

The first type of costs refers to the welfare losses that consumers may have experienced as a result of economic transactions over goods and services that they would not have entered into, or would have agreed to only at different prices and/or terms, if their economic behaviour had not been distorted by the (unfair) practice. That is, the costs for consumers arising from the failure of the legislative framework regarding unfair commercial practices and marketing to avoid certain practices or actions by traders that are actually harmful and detrimental to consumers. In this context, it is notable that unfair commercial practices continue to exist on EU markets to a significant degree.

The figure below shows the development over time of common types of unfair commercial practices that consumers have reported experiencing.

Figure 7: Percentage of consumers reporting that they experienced common types of unfair commercial practices within the last 12 months, EU%.



Source: Special Eurobarometers 252 and 298, Flash Eurobarometers 282, 299, 332, 358 and 397. Question 2008 – 2012: Have any of the following happened to you in the past 12 months? 'You came across misleading or deceptive advertisements, statements or offers' / 'You came across fraudulent advertisements, statements or offers.' Only in 2006 – 2011: 'You came across unsolicited commercial advertisements, statements or offers (cold calls, spam emails, commercial SMS, etc.)'. Note: EU% comprises the EU25 in 2006 and the EU27 thereafter.

Referring to the figure above, unsolicited advertisements were the most prevalent practice, with 69% of consumers reporting an experience with unsolicited advertising within the last 12 months before the option was dropped from the Eurobarometer survey in 2011. The levels of reported misleading and fraudulent advertising both show slight increases from 2008 to 2012, in the order of 2 percentage points for misleading advertising and 5 percentage points for fraudulent advertising.

The continuing relevance of unfair commercial practices in consumer markets was also confirmed by the consumer market study conducted for the Fitness Check in 2016. When asked about their experience with types of problems in the last 12 months, 33% of consumers responded that they had experienced misleading or aggressive practices at least "sometimes" within the last 12 months, including 15% who had responded that they experienced misleading or aggressive commercial practices "often" or "very

often".[470] These problems were most likely to relate to telecom services (36%), financial/insurance services (23%) or utilities (18%).

It is very likely that these reported unfair commercial practices lead to consumer detriment, although there are no estimates available in this respect (see also the discussion of enforcement, below).

The second category of costs for consumers refers to the possible negative impact on consumers of increased compliance costs for the trader brought about by the legislative framework. In turn, traders may pass on their increased business costs to the counterparty in the transaction (i.e. their customers), so that consumers end up paying more for the goods and services they buy. The passing-on of the costs created or raised by consumer protection legislation, including rules concerning unfair commercial practices and marketing to consumers, would depend on the impact of these legal measures on price elasticities and on supply and demand functions. The degree to which costs are actually passed on will also depend on other factors such as the pricing policy of traders and competitive pressure they face, which will likely differ by sector and Member State. It is therefore not possible to assess the extent to which the mentioned costs of the legislative framework concerning unfair commercial practices and marketing in B2C transactions are passed on to consumers. Even if they would be fully passed on, the effect on prices would likely be minor, considering that regular costs in this respect were estimated at approximately 0.011 percent of turnover for the five sectors in which business interviews were conducted (best estimate for combined effect of national and EU legal framework regarding unfair commercial practices and marketing to consumers, see above).[471] It also is important to note that passing-on in itself (if it occurs) is not necessarily undesirable, and the efficiency judgement on the legal measure raising traders' costs depends ultimately on it being socially efficient:[472] in this context socially efficient means that the costs to consumers caused by the passing-on of traders' compliance costs, together with the compliance costs that were absorbed by the traders themselves, are lower than the welfare losses due to unfair commercial practices that were prevented by the legislative framework.

The argument above also applies to potential savings by traders and their effect on consumer prices. The interviewed businesses that operate cross-border in Europe indicated that about two thirds of the one-off costs of entering another EU country's market (both in terms of checking and verifying requirements, and in terms of adjustment and change) are related to advertising and marketing to consumers or to other traders, which suggests that savings in these compliance costs are likely to be relevant. Since the UCPD and MCAD have very likely produced some reduction in the dispersion of the content of legal requirements across Member States, it is to be expected that there will be costs savings for traders, and indirectly, also savings in consumers' costs as well, to the extent that these savings are passed on.

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[470] 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? 'Misleading or aggressive commercial practices.'

[471] If costs of the legislative framework were considerably higher than the estimates calculated in the framework of this study, additional effects on the market would need to be considered: In this case the higher prices and (consequently due to the elasticity of demand) lower quantities of good produced would drive some consumers out of the market, and possibly some traders out of business given the higher costs of undertaking the activity. However, in light of the business interviews and the results of the extrapolation on business costs this seems not to be a major concern, see also the previously quoted assessment of 67% of surveyed business that costs for complying with consumer legislation are 'reasonable' (Flash Eurobarometer 396).

[472] See, Craswell, 1991, Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships.

- Benefits for consumers stemming from both the minimum harmonised and the fully harmonised consumer rules in terms of benefits for consumers from the protection against unfair commercial practices (UCPD, PID, MCAD)

The EU legislative framework in the area of commercial practices and marketing is a key element of EU consumer policy. It intends to ensure a high level of consumer protection (in line with Art. 169 TFEU) regarding their economic interests. The aim of the UCPD is to provide a (fully harmonised) set of rules concerning the commercial practices of traders that can affect the economic welfare of consumers. These rules provide that a given action, campaign or conduct of a trader, if found to be "unfair", will trigger certain negative consequences for the trader engaged in the practice (Arts. 11 and ff. UCPD). The UCPD, though, requires relevance or impact of the practice in order for the practice to be deemed unfair, that is, commercial practices that do matter for the actual response and behaviour of consumers (the transactional decision test, see effectiveness section). It therefore restricts and deters commercial practices vis-à-vis consumers only when these practices are harmful to them. If there is no harm, or only negligible harm, to engage the machinery of legal intervention would be a waste of scarce resources. Thus, the UCPD tries to reduce the level of harm to consumers, implying an increase of economic welfare for those consumers who had been, or could have been, harmed by the unfair practice.

In different ways, the same is true for the MCAD and PID. Although the MCAD aims at the protection of traders (Art. 1, Art. 5 MCAD), it seems clear that in an indirect way the reduction in misleading advertising between traders would also reduce its level *vis-à-vis* consumers (think of non-targeted advertising campaigns, or a possible spill-overs of findings under the MCAD for assessing unfair commercial practices in a B2C context).

As to PID, the price transparency that it promotes allows consumers to increase awareness as to the unit price (and by implication the true economic consequences of purchases) and thus to be better placed to shop around and find better alternatives in terms of price/quantity ratios. Again, the aim is that of improving decision-making of consumers, eliminating or reducing actions and factors that would distort these processes.

In other words, the benefits for consumers from the protection against unfair commercial practices mainly derive from an improved functioning of the market in terms of outcomes for consumers, by deterring harmful practices and increasing transparency and reducing influences that potentially distort economic decision making, thereby increasing consumer welfare.

It is notable that consumers may in addition benefit from a reduction of traders' costs due to reductions in compliance costs linked to legal disparity between Member States (see above).

6.2.2. Contract conclusion and performance

6.2.2.1. *The economic rationale of providing an EU legal framework regarding standard contract terms*

Transaction costs are real costs in the economy. Thus, reducing the costs of preparing, negotiating and drafting the terms of contracts between the parties with help of standard contract terms is, ceteris paribus, a worthwhile and socially desirable endeavour. <u>These cost savings are not only privately beneficial for the trader, but are also true reductions in social costs, and consumers, depending on the market structure, are likely to benefit from such reductions</u> in the form of lower contract prices as traders will be facing lower costs of doing business.

It is obvious that there are powerful market forces (cost reduction pressures) that lead to the use of standard terms in contracts, that is, terms of the agreement that are not subject to individual negotiation and drafting, but are written in advance by one of the parties, and then "inserted" into each and every single contract that is signed by the drafter. In many contracts, the bulk of the terms governing the transaction will be "boilerplate", that is, repeated *ad infinitum* in all contracts.[473] Indeed, the use of standard terms dominates contracting between traders and consumers, but it is also rampant in contracts between traders.

Of course, contracting standardisation through standard terms does not only have the upside of decreasing transaction costs. It creates – or exacerbates – costs of its own. It is also prone to acute informational problems and asymmetries. If there is no individual negotiation of terms, the drafter will possess an informational advantage over that content that may add onto a previously existing advantage as a trader. From an economic perspective, thus, the uses and abuses of standard terms in contracts with consumers involve asymmetries of information between contracting parties, though this observation does not mean that the only sensible solutions in the setting of standard form contracts are duties to reveal information. In any event, it is clear that the content of the contract is not the product of the joint preferences of both parties, since by definition the standard terms are not subject to negotiation, and in practice, they are rarely, if ever, read by the consumer.

An additional problem is that in most circumstances searching for information about quality of the substance of standard terms does not actually work. If the consumer would be informed about the quality of standard terms simply by reading them, rules mandating disclosure and clarity in order for the standard terms to be incorporated to the individual contract may be sufficient. However, economic literature has challenged the added value of incorporation rules and mandates of disclosure and intelligibility, at least when understood as formal requirements. With these types of requirements it is intended that the drafter adopts measures to increase knowledge of the conditions by the consumer (i.e., that the cost of the consumer of becoming informed about the substantive terms be reduced). However, it is rational for the consumer to remain ignorant of the clauses as they anyhow cannot be changed, a strategy that can be easily anticipated by the drafter, who can then select the level of quality most beneficial to themselves, and not to the joint welfare of the parties. Competition among traders will not decrease this problem, given the rational ignorance by consumers, who would concentrate on the more obvious dimensions of the transaction (e.g. price, brand, etc).

This is not only a theoretical observation. There is various evidence available that in electronic transactions and in other forms of contracting which rely on standard terms governing the transaction, consumers do not commonly read the contract terms before entering into the contract; they do not have the capacity, or the willingness, to read and understand the implications of standard contract terms; they do not value the opportunity to read the terms prior to contract; nor do they typically value the more advantageous contract terms that they may hypothetically be able to find if they read standard contract terms in advance and shop around for more favourable ones.[474] This does not imply that increased transparency and shorter terms and conditions are irrelevant in practice: A recent consumer market study commissioned by the European Commission concluded that shortening and simplifying terms and

[473] See Ben-Shahar, 2006, Foreword to Boilerplate: Foundations of Market Contracts Symposium.

[474] See, Hillman and Rachlinski, 2002, Standard Form Contracting in the Electronic Age; Hillman, 2007, Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?", in Omri Ben-Shahar (ed.), *Boilerplate. The Foundation of Market Contracts*; Marotta-Wurgler, 2009, Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements; Ben-Shahar, 2009, The Myth of 'Opportunity to Read.

conditions has positive effects, including improvements in the proportion of consumers who read the terms and conditions.[475] In addition, the results of the behavioural experiments conducted in the Consumer market study to support the Fitness Check of EU consumer law also found that standard (long) T&Cs were read less thoroughly by participants than summarised T&Cs, that participants read a higher proportion of the text of the summarised T&Cs, and that participants were better able to distinguish between fair and unfair T&Cs in their comprehension of the legal fairness of terms, in fairness perceptions and in intentions to buy from the seller, when presented with summarised T&Cs.[476] It can also be argued that if certain "key terms" important for the overall welfare that the consumer expects to get from the transaction were to be presented separately and clearly (e.g. in a short summary of a structure that is similar for all contracts of this product category), this targeted transparency could be expected to improve consumer welfare. The reason is that if consumers were aware of the low quality of the key terms offered by a trader, and they could easily compare them with the terms offered by other traders, this will have a negative impact on the first trader's revenue, if consumers as a consequence prefer traders with higher quality terms.[477]

In other words, while transparency and presentation of standard contract terms can be improved and this would be beneficial for consumer welfare, the available empirical evidence does not indicate that imposing duties to disclose standard contract terms, to provide consumers with opportunities to read, and to draft the terms in a clear manner alone will sufficiently address the mentioned problem of asymmetries of information between the contracting parties. Even with substantial improvements in this respect a large majority of consumers are likely to continue to be ignorant about the quality of the standard contract terms offered.

The contracting process involving standard terms therefore does not by itself result in the level of quality in the bundle of rights and obligations of the parties that will be desirable in a societal perspective, i.e. there is a market failure as to the content of standard terms. It is clear that the potential detriment to consumers can be very large through unfair standard contract terms. This is certainly the case when the transaction is of great importance to the welfare of the consumer (e.g. a mortgage, or of a personal loan that may lead the consumer to bankruptcy in case of default). But also in transactions of smaller size, the consequences may be significant if the unfair terms also imply the raising of switching costs, and thus the likelihood of being trapped in a long-term contract that reduces the welfare of the consumer. This market failure can be addressed by mandating certain minimum levels of quality (in terms of consumer rights) in non-negotiated terms, or the banning of certain terms that are deemed unfair given their impact on the situation of the consumer, an approach many countries have taken. Legislators in EU Member States and third countries have introduced minimum levels of quality in standard terms, through several means: black lists of prohibited terms that are always considered being below the minimum acceptable level of consumer rights, grey lists of presumptively prohibited terms, general notions and tests of unfairness.

[475] For example, in the online experiments conducted in the framework of the study, when terms and conditions were extremely short and simple 26.5% of consumers report to have read the full terms and conditions compared to only 10.5% when the T&Cs were long and complex (the study was conducted in 12 Member States with 1000 respondents in each Member State). See European Commission 2016, Study on consumers' attitudes towards Terms and Conditions (T&Cs), Final report.

[476] Behavioural experiments on consumers' responses towards unfair contract terms, 2016 consumer market study to support the Fitness Check of EU consumer law.

[477] See Artigot, Ganuza, Gomez and Penalva, 2015, Product liability should reward firm transparency. See also recommendations.

At the EU level, the UCTD provides minimum harmonisation in this area. The UCTD has as a goal, in economic terms, of regulating the substantive quality of non-negotiated terms in contracts, with a broad horizontal scope of application, so that virtually all types of contract and all economic sectors are affected (see effectiveness, above). The UCTD can therefore be expected to have significant impacts for traders, as well as for consumers. The specific costs and benefits for both sides are discussed in more detail in the following sub-sections.

6.2.2.2. *Costs and benefits for traders*

- Costs and burdens for traders due to the need to respect the requirements under the UCTD

While the UCTD applies to almost all business-to-consumer transactions, this does not imply that the costs are uniform in nature and magnitude across economic sectors or size classes (in line with what has been indicated before regarding the UCPD). This has been empirically supported through the business interviews conducted in the framework of this study (see results presented above). One reason for these differences is the extent to which standard terms are used in specific sectors: While in the interviews conducted for this study the large majority of businesses (87% of the overall sample) do use standard written terms, in some sectors their use is less common. The majority of businesses that do not use standard terms were in the goods sector, mostly the pre-packaged food and detergent sector (where close to two thirds of interviewed businesses reported not using standard terms). Other reasons for differences in costs include the degree of complexity and variation of terms necessary for different product categories, which may vary between sectors.

In addition, as indicated before, costs also depend on whether traders sell their products and/or services in other EU Member States, or restrict their sales to their domestic market. In the following discussion, therefore, both situations are again considered separately, focusing in each case on assessing costs for checking compliance with and adjusting business practices to the national legislation regarding standard contract terms.[478]

One-off costs when entering another EU country's market for the first time

If a trader decides to enter another EU country's market for the first time, it is likely that standard contract terms will have to be adapted, e.g. due to specific national legislation going beyond the UCTD (such as a national black list of unfair terms), national guidance in this respect, or case law. In our business interviews, the costs for checking compliance with and adapting standard contract terms to the national legislation and adjusting business practices as a result (e.g. using different standard contract terms) were again estimated in terms of working days of professional staff time), working days of administrative or sales staff time, and Euro amounts for other costs (e.g. related to legal advice).[479] After monetising labour costs, total one-off costs per business were calculated. Table 12 above presents one-off costs when entering another EU country's market for the first time per business by sector. On average, as

[478] Additional costs for traders may also be caused by the reduced variety of contract terms that can be used due to the limitations provided the legislation against unfair terms. However, the size and nature of these costs are very hard to establish on a general basis. It is also likely that related costs of traders would be at least offset by corresponding welfare gains of consumers, to the extent that the reduction of variety of standard terms is mainly related to terms that are considered to be unfair under all circumstances. This issue is therefore discussed in the sub-section regarding the costs for consumers below.

[479] Costs for translation were not included in the estimate.

reported by interviewed businesses, of these costs, up to one third is related to standard contract terms (for those sectors for which estimates were available). In absolute terms, this corresponds to median costs of between EUR 570 and EUR 3 970 per business for the five sectors covered.[480] These estimates refer to the one-off compliance costs for businesses related to the national legal framework regarding unfair contract terms when entering *one* other EU country's market for the first time. As minimum harmonisation applies for the UCTD, Member States legislation may add additional requirements, and because of the combined effect of EU and Member States' sectoral and horizontal legislation, the estimated costs cannot directly be attributed to the UCTD alone.

However, it is likely that EU harmonising rules have a direct impact upon those costs. The UCTD has brought down the level of legal disparity between Member States to some extent, as has the case law of the CJEU. The impact on such compliance costs must have been positive in view of entering another EU national market (compared to a situation where rules concerning unfair contract terms were only based on national law). As indicated before, this is recognised by the interviewed businesses, of which nearly two thirds assessed that they benefitted at least slightly from the harmonised legislation that facilitates selling cross-border to consumers in other EU countries, implying recognition of this cost reduction effect.

Costs incurred by businesses on a regular basis

Traders typically incur costs to verify compliance with legislation and engage in necessary adjustments on a regular basis, including concerning their practices and terms in the area of standard contracts, even for traders operating in a purely domestic context.[481] Table 13 above presents annual costs for compliance checks and adjusting business practices incurred by businesses, by sector and by size class. On average, of these costs, 39% are related to standard contract terms. In total, the annual costs incurred by businesses in the EU28 for checking that standard contract terms still comply with legislation and for adjusting business practices are estimated at EUR 108 million in the five sectors reviewed, equivalent to 0.009 percent of annual turnover (best estimate). As indicated before, these costs are caused by the combined effects of EU and Member States legislation in this area, which are difficult to disentangle, as businesses do not categorise their costs according to the EU or national origin of specific rules.

The following considerations, however, give insight into the relative importance of EU and Member States legislation in causing these (regularly incurring) costs: It is likely that when the UCTD was transposed into national legislation after its adoption in 1993, this had an impact on the regular costs incurred by businesses even in a domestic context, since the existing rules, at least to some extent, had to be revised and changed to comply with the new EU requirements concerning standard contract terms. After this phase, however, the UCTD and other sector-specific legislation with relevance for standard contract terms would only increase such regular costs in case of legislative changes at EU level or changes in national legislation induced by relevant CJEU case law.

The relevance of the costs of EU legislation in the area of standard contract terms for businesses has also to be considered in comparison to a hypothetical situation in which no such EU level legislation would exist. It is reasonable to assume that Member

[480] Based on an estimated share of one third of the one-off costs. Not for all sectors an estimate was available.

[481] As indicated above, roughly three quarters of the interviewed businesses (both purely domestic and cross-border traders) reported checking that advertising/marketing and standard contract terms still comply with national legislation at least once per year.

States would in this case have national rules concerning standard contract terms in place, because the above mentioned market failure requires regulatory measures of some kind. These national rules would also likely be updated regularly to adjust them to changing business practices etc., so that the fact that regular checks would have to be conducted by businesses that intend to be compliant with legislation would remain unchanged under this scenario. The additional costs caused by the EU legislation in comparison to this (counterfactual) scenario are therefore likely to be limited. It could even be argued that the existence of an EU legislative framework increases the stability and the consistency of the benchmark against which to assess the practices and terms used by traders, both in their domestic markets and in the other EU markets they serve, so that regular costs are reduced. This effect, however, is difficult to prove.

- Benefits for traders due to the UCTD

As indicated before, standardised contracts (whether regulated by national or EU legislation) reduce transaction costs for traders. When a trader faces a multitude of contract negotiation and drafting processes with different contracting parties, there are substantial economies of scale to be achieved if the contracting process becomes standardised and not tailor-made. The average transaction cost of an agreement goes down, even dramatically, if substantial portions of the cost are incurred only once (i.e. only when drafting the standard terms) for all contracts of a given kind that the trader is likely to enter into. Additionally, standardisation and centralisation of contract drafting and writing is likely to lead also to some degree of reduction in agency costs that traders have to face in their operations, since contracting is typically delegated to decisions and actions by employees, managers, and in general, agents of the trader as an entity.[482]

Traders that are active in cross-border transactions may benefit from the EU legislative framework in the area of standard contracts in two additional ways. First, the UCTD allows additional economies of scale in the investments made by traders on contract drafting and communication, and on compliance with legal requirements, by making the set of legal requirements more homogeneous (although not entirely so) across European markets. This makes such investments more productive, and thus improves the return traders obtain from them. This would suggest (to some extent) higher levels of investment in ensuring adequate drafting and communication, and improving consistency with legal requirements in the content of standard terms under the UCTD compared to a situation of unrestricted legal diversity across Member States.

Second, competition among traders in the EU may be improved. The UCTD creates a level playing field independently of the country of origin. Moreover, the UCTD may help to restrict contract terms which impose high switching costs on consumers (i.e., clauses and terms that reduce the ability of new entrants to lure existing consumers from an established trader) by a finding of unfairness with respect to those terms. With this, entry and competition may become more vigorous. This effect may be particularly attractive both for new traders and for traders entering new markets in other EU Member States.

[482] The term agency costs refers in economics to all the costs arising from possible deviations by agents from the goals of the organisations for which they work (the principal), and include costs not just from the deviations themselves, but also of monitoring and assessing compliance to goals. Gibbons and Roberts, 2013, Economic Theories of Incentives in Organizations, in Robert Gibbons and John Roberts (eds.), Handbook of Organizational Economics, Princeton University Press.

6.2.2.3. *Costs and benefits for consumers*

- Costs for consumers stemming from both the minimum harmonised and the fully harmonised consumer rules (UCTD)

The sources of potential costs for consumers arising from the EU framework on standard terms in consumer contracts are mainly two: The reduced variety of terms in standard contracts as result of the unfairness test and the possibility that traders pass on their costs for compliance with the legal framework to consumers through higher prices.

The first source of potential costs to consumers is that the outcome of the unfairness test under the UCTD and the national implementation legislation may result in excluding certain contractual content from the terms that are not individually negotiated. Consumers do not have the same preferences, and certain groups or types among them may prefer a given term (say, A), whereas other types may prefer an alternative term (say, B). If traders offer two types of contracts, one with standard term A, the other with standard term B, and one of them (B, for instance) is deemed unfair with respect to some consumers, it may be dropped altogether, forcing those consumers who prefer term B (and for whom the term may not be unfair) to contract under term A, potentially reducing their surplus from the transaction. A practical example for differing consumer preferences for specific contract terms are mortgage contracts. Different terms – such as fixed rate vs. adjustable rate, large down payment vs. low or zero down payment,[483] sizable termination fees vs. no termination fees, easy acceleration of loan in case of non-payment vs. hard acceleration conditions – may be preferred by different types of borrowers depending on age, income level and profile, risk aversion, etc.[484] Thus, elimination of alternatives due to an unfair term assessment made with respect to one type of borrower may inefficiently reduce term variety for other borrowers. Such a reduction of the variety of standard contract terms is not necessarily welfare-enhancing for all groups of consumers. However, the reduction in variety is likely to be socially beneficial in many other cases, especially regarding those terms that can be considered as unfair under all possible circumstances.

The second type of potential costs for consumers results from the increase in transaction costs concerning consumer contracts that the rules on disclosure and drafting of non-negotiated terms in the UCTD (mainly art. 5 UCTD) and the implementing national provisions (that often are more detailed and exacting in these matters) may impose on traders. It is clear that standard terms constitute a transaction-costs saving "technology", and interferences with their use, clearly in terms of drafting and communication, may increase contracting costs for traders. If traders are able to pass on all or part of these additional costs, consumers may end up paying up more for the goods and services they buy using standard term contracts. As has been discussed above, the regular costs for traders for checking compliance with the legal framework with respect to standard contract terms are estimated to be equivalent to 0.009 percent of annual turnover (in the five sectors for which data was collected). While these costs could be expected to only lead to minor effects on consumer prices, even if they would be fully passed on,[485] this does not imply that the

[483] Some of these issues have been addressed by the Court of Justice of the European Union interpreting UCTD: *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa*, 14.3.2013 (C-415/11); *Banco Primus v. Gutiérrez García*, 26.1.2017 (C-421/14).

[484] See, Ehrmann and Ziegelmeyer (2014, Household Risk Management and Actual Mortgage Choice in the Euro Area, ECB Working Paper 1631) showing how those variables influence the choice of different terms of the mortgage contract using a large database of European mortgages in several Member States.

[485] See discussion in the section of price effects from the legislative framework regarding unfair commercial practices and marketing above.

UCTD and its national implementation legislation cannot have very significant economic repercussions, for traders, and for consumers. This is illustrated in the next sub-section.

- Benefits for consumers stemming from both the minimum harmonised and the fully harmonised consumer rules in terms of benefits for consumers from the protection against unfair contract terms (UCTD)

The UCTD is a horizontal measure that covers virtually all economic sectors and all possible standard terms in consumer contracts. The benefits that consumers may derive from a legal instrument that allows them to get rid of contract terms that are detrimental and unbalanced are very large, covering a wide range of circumstances and economic transactions. This includes fundamental transactions in the economic life of a consumer, such as a mortgage contract, or a sizable personal loan. Here, the terms of the contract determine the impact of the transaction on the surplus that the consumer will derive, and may determine the sign (positive or negative) and the size of that surplus. Very few consumer policy measures have the potential to influence the economic welfare of consumers to such an extent and with such a wide scope of application as the UCTD. An illustration of this large potential impact for consumer welfare of the EU legislative framework on unfair contract terms can be found in the Spanish experience from mortgage contracts. Foreclosure proceedings, penalty interest, and floor clauses in adjustable interest rate mortgages have been strongly affected by the UCTD and its interpretation by the CJEU and Spanish courts. The UCTD therefore plays an essential role in the economic welfare of Spanish borrowing consumers, as has been illustrated again through a recent judgement by the CJEU which will lead to large pay-backs of Spanish banks to consumers due to an unfair term in their mortgage loan agreements.[486] Obviously, this very significant impact of the UCTD is the product of a specific set of circumstances (the Spanish housing boom, the banking crisis, the pre-existing Spanish legal and regulatory environment, etc.), rather than a general manifestation of the benefits of the UCTD for consumers. It is, however, a meaningful example that illustrates the magnitude of the economic impact that the UCTD and its implementing legislation may have on consumer markets in Europe in specific situations.

It can be concluded that the benefits of the UCTD for consumers mainly derive from preventing and stopping abuses of standard terms in contracts, which involve asymmetries of information between contracting parties leading to market failure. The obligations of the UCTD for traders concerning transparency and fairness of standard contract terms and the possibility to declare the nullity of an unfair contract term address this market failure and thereby increase consumer welfare.

Again, consumers may also benefit from a reduction of traders' costs due to a reduction in compliance costs linked to legal disparity between Member States, as the harmonising effect of the UCTD (and the related CJEU case law) is significant in spite of its minimum harmonisation character. In addition, it can be argued that the potential benefits for consumers from the reduction in transaction costs for traders due the use of standard contract terms can partly be attributed to the UCTD framework, as the willingness of consumers to accept standard contract terms is likely

[486] Judgement 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 judgement, the CJEU "overruled" national case law that limited the temporal effects of the declaration of nullity of an unfair term (in this case 'floor clauses' in mortgage loan agreements establishing a minimum rate below which the variable rate of interest cannot fall). According to an estimate published by *El País*, banks will have to pay back an estimated amount of EUR 3 to 5 billion, see: http://economia.elpais.com/economia/2016/12/21/actualidad/1482306332_458117.html.

dependent to some degree on their trust in minimum levels of quality regarding the protection of their rights.

6.2.3. Injunctions

6.2.3.1. *The economic rationale of providing an EU legal framework regarding injunctions*

It is well-known from an economic perspective that decentralised, disperse, individual action for enforcing consumer protection legislation may result in significant under-deterrence of infringements. This is the outcome of a combination of factors. First, infringement of a given rule may not be detected by the affected consumers, due to a wide variety of circumstances: long-tail effects of the infringement make it detectable only after a long time; the negative effects of the trader decision may be only a low-probability event; the loss for the consumer may not be manifest to many consumers, e.g. consumers may not see the link between the misleading character of the advertising and how it manipulated their economic behaviour, or between the unfairness of the clause and its consequences. Moreover, consumers may not be adequately informed about the legal consequences of the infringement and the remedies provided to them.

Second, even if the affected consumers are aware of the loss and are also informed about the remedies, consumers may rationally decide to forego legal actions and the ensuing remedies. The reason would lie in the negative balance of costs and benefits of such legal action, compared with remaining passive, and letting bygones be bygones. The individual loss incurred by the consumer considering legal action may be reduced in case of a successful outcome – but this is something that the individual consumer will rationally not include in the calculation prior to deciding to pursue legal action. The reason is that this private benefit of initiating legal proceedings against the potentially liable trader (i.e. the damages awarded by court) is not certain, but probabilistic. It needs to be discounted by the probability that the trader, in the end, is not found liable, due to factual or legal reasons. On the cost side, however, there are the fixed costs of litigation, both monetary and not (time and inconvenience) associated with the redress activity.

Third, the classical collective action problem identified by Olson 50 years ago will induce individual consumers to choose a level of legal action that is sub-optimal in a societal perspective.[487] The underlying reason relates to the public good nature of the enforcement effect that individual legal action brings about. Legal action does not only provide private benefits, in the form of a damage payment, or the interruption of an action or activity detrimental to the individual consumer who decides to pursue legal claims. Legal action serves also to produce two types of (at least initially) non-rival and non-excludable benefits: the action, if successful, creates a beneficial precedent favouring parties in similar circumstances, and also serves to enforce the substantive rules of consumer law, thus imposing costs on infringing traders and benefiting all similarly situated consumers. These collective benefits in precedent and enforcement, which constitute a 'public good' in the economic sense of the term, will be subject to the well-known collective action failures: suboptimal incentives to contribute through legal action to the provision of the collective good, and coordination failures to collectively organise provision.

In view of the above, legal actions initiated by suitable organisations (typically, consumers' associations) or other representative bodies may help alleviate the enforcement shortcomings from decentralised consumer redress. These collective

[487] Mancur Olson, 1965, The Logic of Collective Action: Public Goods and the Theory of Groups.

actions allow for the exploitation of the significant economies of scale in the process of preparing and litigating cases, and provide a mechanism, at least in theory, to reduce the coordination and transaction costs of bringing together different affected consumers.

This explains the presence of collective enforcement in the area of consumer law, as well as in other settings similarly prone to the disadvantages of individual enforcement.

Efficiency aspects of collective enforcement can be illustrated with the following example: The country reports for the present study include an estimation of the costs borne by consumers for obtaining redress when invoking the unfairness of terms that inappropriately exclude/limit consumers' rights to compensation in a contract that they concluded, based on a hypothetical example.[488] Taking into account lawyer's fees, court fees and other costs associated with the first instance court procedure for this hypothetical example, the costs for a lower court procedure borne by an individual consumer are estimated at EUR 1 095 on average across Member States, within a range between EUR 0 and EUR 7 569.[489] In the case of injunction actions, efficiency largely relates to the fact that one action can be brought instead of a number of individual actions for each consumer concerned by the same problem. In the hypothetical case introduced above, if 100 affected consumers would go to court, the sum of the costs for their individual actions would be EUR 109 500. The overall costs of an injunction action, which depend on the cost rules in the Member State in which the action is brought, could be expected to be significantly lower than the sum of costs for individual actions, in particular in Member States where special cost rules apply to limit costs (e.g. in Germany, see Section 6.1.3.3), but also in other Member States due to economies of scale (e.g. with respect to lawyers' fees). This simplified calculation does not take into account the amount of time saved or the reduced levels of stress for consumers that would also likely ensue. In addition, importantly, another benefit of an injunction action that cannot be measured is the number of potential future cases prevented as a result of the injunction order. While injunctions therefore produce benefits for the future, they do not however cover the compensation of the victims of the infringement in their current form, which may reduce their attractiveness for consumers and their organisations (see section 6.1.3.3 on this).

At the EU level, the potential impact of consumer law infringements on cross-border trade, and more specifically, of the under-deterrence of those infringements associated with the failures of individual legal action on the Single Market provide grounds for an EU legislative framework for injunctions. The heightened importance of the exposure of cross-border trade to the effects of collective enforcement actions of consumer law is revealed in different ways.

[488] Hypothetical example: A consumer went on a package holiday with a friend to Kenya for which they paid EUR 2000 per person. The holiday was a disaster. The flight was delayed by 12 hours. The air conditioning in the hotel was not working at all. The safari trip took place but not in the park they had been promised; on top of that, they were transported there by bus instead of by plane. They complained to the tour operator and asked for compensation amounting to a total of EUR 5000 (EUR 4000 for the cost of the package and EUR 1000 for lost time and enjoyment). The tour operator agreed to compensate them EUR 1000 only, pointing to a provision in the contract limiting the organiser's liability to 25% of the total cost of the holiday. When the consumer asked, her local consumer association told her that terms which inappropriately limit the trader's liability in case of inadequate contractual performance are most probably unfair. The consumer decided to take the tour operator to court to enforce her rights (Example adapted from http://europa.eu/youreurope/citizens/consumers/unfair-treatment/unfaircontract-terms/index_en.htm).

[489] Conservative cost estimates based on data provided by legal country experts (not available for IE, SE, UK), including lawyer's fees, court fees and other costs, and not including potential costs of appeal or of losing, Estimates are based on lower bounds where ranges were provided and a value of EUR 0 was assigned to lawyer's fees in countries where a lawyer is not required.

First, cross-border B2C transactions are always more sensitive to the uncertainty concerning rights and remedies available to the consumer, and to the lack of adequate incentives to comply caused by the failure of private action. Consumers' trust in the reputation and behaviour of traders from their own Member State is typically higher than for traders from other Member States (although the emergence of successful cross-border traders in the EU indicates that this may change to some extent). Thus, the need to rely on specific mechanisms to safeguard trust in B2C transactions appears to be larger in the cross-border context than in the purely domestic context.

Second, the obstacles of collective enforcement are higher for cross-border infringements than for national infringements. This is supported by the results of the survey of qualified entities, in which qualified entities assessed the potential obstacles to the effective use of the injunctions procedure related to cross border infringements on average as being significantly more important than concerning national infringements.[490] It is also supported by the analysis of obstacles to the use of injunctions (see section on effectiveness of the ID, above).

Third, even if the collective enforcement actions actually being brought engage infringements of consumer law with no direct cross-border effects, there are spill-overs to other Member States' markets through two channels: Given the substantive harmonisation of the consumer laws of the Member States by means of EU legislative measures (*inter alia*, UCPD and UCTD), the outcomes of "national" injunction actions will have some bearing on future actions in different Member States, at least potentially; and infringing behaviour is rarely purely national in the sense of being disconnected or not reflected in similar patterns in other markets, especially in those Member States that are close in legal and economic terms.

The result of the survey of qualified entities also shows that injunctive actions have mostly focused on national infringements. For the reasons described, this does not mean that such proceedings and the ensuing outcomes are devoid of relevant implications for the situation in other EU markets, and thus for cross-border trade.

As in previous sub-sections, we will first consider costs and benefits of the legal framework regarding injunctions for traders, before assessing them in a consumer perspective.[491]

6.2.3.2. *Costs and benefits for traders*

- Costs and burdens for traders due to ID

For traders that comply with the substantive requirements of consumer law,[492] the Injunctions Directive and its national implementation legislation do not lead to any costs, except those of checking on a regular basis that business practices are indeed compliant. The costs for these regular checks have been analysed and presented in the previous sub-sections.

[490] See results of the survey of qualified entities in Part 4 of this report.

[491] It is notable that the rationale described above is not limited to the actions for injunction envisaged in the Injunctions Directive, such as orders implying cessation and prohibition of an infringement in the sense of the Injunctions Directive (Art. 2). The same reasoning applies to actions for damages, for fines or other sanctions, for corrective measures, etc.

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

The only possible additional costs caused by the ID for compliant traders are the possibility of being subject to unmeritorious claims. It could be argued that the lower cost of bringing claims under a collective mechanism (per affected consumer) makes it more likely that unmeritorious claims will be filed in the expectation of obtaining a positive settlement amount from the (by hypothesis, law-abiding) defendant. Probably this effect is lower in a pure injunctive action than when the collective action also concerns damages to the affected consumers etc. While evidence for unmeritorious claims in the context of class action suits exists in the US,[493] this evaluation has not identified any evidence for unmeritorious claims brought in the EU by qualified entities under the ID. An illustrative example is Germany, where the highest number of injunction actions is reported (4 579 injunction actions initiated in the five year period since June 2011, about four times the number of reported actions in all other Member States combined).[494] In this country, frivolous claims for injunctions are inadmissible. Thus, even if there is an infringement, the court will not grant the injunction if the claim is frivolous.[495] It is also notable that consumer organisations have to be accepted as a qualified entity, and they would risk their status if they bring unmeritorious claims, therefore reducing any incentive that might exist in this respect. Therefore, the costs of unmeritorious claims under the Injunctions Directive for traders in the evaluation period appear to have been insignificant or non-existant.

- Benefits for traders due to the ID

A source of potential benefits from concentrated litigation under injunctive action proceedings within the scope of ID is the avoidance of possibly contradictory outcomes under individual enforcement actions,[496] and thus, enhanced legal certainty for traders. In effect, if the cost of individual action is not prohibitive compared to the expected private benefit, a trader may encounter a very large number of individual claims by separate consumers, in many different places and at very different times. Those different individual actions by consumers may receive diverse, even contradictory, responses from the courts who adjudicate the individual disputes. Delay and uncertainty concerning the legal treatment and the legal consequences of a past business decision impose significant costs on the trader who took it, especially if similar choices have to be made in the future. Thus, ceteris paribus, a trader may prefer the unified and consistent resolution of all possible individual cases in one single proceeding, even if they are spread across several European markets.

It could also be argued that the per-case litigation cost for the trader under a collective action for injunction would be lower than having to face a multitude of individual cases. This in turn, however, depends on the number of consumers that would actually sue the trader on an individual basis. As the consistent and long-

[493] See an analysis by Johnston (2016, High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes), who looks into a sample of all consumer class actions filed in the Northern District of Illinois over the period 2010-2012 (totalling 510), under four federal consumer protection statutes (the Electronic Funds Transfer Act (EFTA), the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), and the Telephone Consumer Protection Act (TCPA)), and finds that for most case types, only 15 percent or less of the class receive compensation, and the aggregate compensation paid to the class is far less than the stated or nominal class settlement fund amount.

[494] See effectiveness section, above, and the results of the survey of qualified entities, Part 4 of this report.

[495] See also footnote 972 below.

[496] Assuming that the collective action and individual actions are linked, as is the case in some but not all Member States and as is not yet (expressly) required by the Injunctions Directive.

standing opposition against collective redress mechanisms by business associations illustrates,[497] businesses themselves do not seem to consider these theoretical benefits as being relevant in practice.

6.2.3.3. *Costs and benefits for consumers*

- Costs for consumers stemming from both the minimum harmonised and the fully harmonised consumer rules (ID)

The most relevant costs for consumers stemming from the ID would result from the lack of effective realisation of the goals of the EU legislative framework in this area. In other words, these are the costs caused by the lack of effectiveness of injunction actions, which results from the identified obstacles to the use of the procedure in the national context, and even more clearly in the cross-border context (see effectiveness section, above). Given that enforcement by consumers through individual litigation results in inefficiently low levels of deterrence of infringing behaviour, and public enforcement has inherent limitations, such insufficient levels of enforcement will lead to welfare losses for consumers due to continuing violations of consumer protection legislation as well as high enforcement costs for society, as the potential for economies of scale in enforcement through collective actions is not used (see also next sub-section).

- Benefits for consumers stemming from both the minimum harmonised and the fully harmonised consumer rules (ID)

The actual benefits for consumers from the EU consumer and marketing law framework would depend on the combination of the adequacy of the substantive rules in the framework with the level of enforcement of the rules. It is obvious that however adequate the substantive provisions may be, if the level of enforcement is insufficient, the harmful behaviour for consumers would not be adequately deterred, and thus consumers' economic welfare would be lower than it should be. Lack of sufficient enforcement would substantially deprive consumers of the expected benefit of the substantive rules, since under-deterrence would mean that unfair – and likely consumer welfare-decreasing – commercial practices and unfair contract terms will not be prevented, as the traders engaging in them would not actually face sufficiently serious consequences for the infringement of the substantive rules.

Enforcement may come through different means. The affected consumer may privately and individually initiate legal action against the responsible trader. Public authorities entrusted with consumer protection in this field may initiate proceedings to assess unfairness and eventually sanction unfair practices. Or entities and organisations having legitimate interest in combatting unfair commercial practices may take legal action against the responsible trader under the ID (see Art. 1 and 3 ID).

The effectiveness of those enforcement channels depends on a variety of factors, which, in addition, may differ widely across Member States, since a meaningful number of them have not been approximated through EU rules. For instance, for individual consumer action, the amount of individual detriment and the cost of access to the civil justice system are decisive factors which differ greatly among Member States. As to public enforcement, national variation will be very large due to institutional diversity, distribution of powers between central, regional and local authorities, funding, staffing and powers of consumer protection authorities and the

[497] See also the results of the open public consultation in Part 2 of this report.

like. It is important to recall that the issue of tight funding for consumer protection agencies has often been raised in the country interviews for this study, which casts doubt on how effective public enforcement may be under scarce funding scenarios. Despite this, consumer confidence in public authorities protecting consumer rights remains reasonably high and has even slightly increased during recent years.[498]

Finally, consumer and marketing law can be enforced through mechanisms to protect the collective interest of consumers, such as injunctions. The most obvious and relevant benefit for consumers as a group refers to the enhanced enforcement of the underlying substantive rule in consumer law: if individual action by dispersed consumers in cases where the infringing trader's behaviour has widespread effects leads to insufficient levels of (and in the extreme case, to zero) deterrence of the harmful behaviour, then collective actions, including injunctions that stop the behaviour and prohibit it for the future, are very likely to improve this situation. These efficiency gains result from enhanced enforcement of the substantive rules, and the ensuing increased levels of deterrence of undesirable traders' behaviour.

The above are gains brought about by the improved enforcement levels, but do not refer to the enforcement process itself. With respect to the latter, there is a second set of benefits: collective injunctive actions are a more economical way to achieve a given level of enforcement. There are high fixed costs associated with enforcing consumer law rules, both for the parties and for the public, given the important level of public subsidy in litigation. This implies the presence of significant economies of scale that can be exploited if the high fixed costs can be spread out over a large number of individual cases arising from the same, or very similar, sets of factual circumstances, even if these affect different individual consumers. The sharing of legal services by lawyers and other legal professionals, the sharing of judicial and experts' time, and the reduction in time taken by litigation from both claimants and defendants bring down the costs per case, and thereby the costs per unit of increased deterrence of the undesirable behaviour, as well as the costs of achieving a certain level of law enforcement.

Thus, the collective actions for injunctions according to the ID allow society (and therefore consumers) to attain a given degree of enforcement at lower costs, both to the parties involved and to the public, or, equivalently, to attain higher levels of enforcement for the same total cost. However, the deficiencies of the ID, which limit its effectiveness especially in a cross-border context (see effectiveness section above), reduce these potential benefits to a significant degree.

As indicated before, a considerable proportion of consumers in the EU continue to experience unfair commercial practices, both well-known forms (unsolicited ads, deceptive practices, scams) as well as some recent problems in the area of commercial practices (comparison tools). The same is true regarding unfair contract terms.[499] However, the principle-based approach of the EU directives regarding unfair commercial practices (the UCPD) and unfair contract terms (the UCTD) provides by and large an effective framework for achieving a high level of consumer protection, as concluded by this evaluation (although the effectiveness of both directives can be increased, see recommendations). The continued existence of unfair commercial practices and unfair contract terms on the market therefore points at persisting

[498] In a series of Eurobarometers, the proportion of respondents expressing trust in public authorities rose slightly from 2006 to 2014, from 57% to 61%. This trend is largely driven by changes in the EU15, which showed a larger increase in trust of public authorities compared to the EU12/13 (8 percentage point increase from 2008 to 2014 compared to 6 percentage point increase). Source: Special Eurobarometers 252 and 298, Flash Eurobarometers 282, 299, 332, 358 and 397.

[499] See above and the analysis of levels of awareness and key trends since the adoption of key directives in Annex VIII.

shortcomings in the level of enforcement,[500] as has been recognised by both business associations and consumer organisations responding to the open public consultation in the framework of the Fitness Check, as well as during the discussions at the EU Consumer Summit in October 2016, with a call for more effective and consistent enforcement of the directives.[501] The persistence of problems with unfair commercial practices and contract terms does therefore not question the benefits to consumers achieved by the legal framework in this area of EU consumer policy, but rather indicates that the resulting welfare effects can be further increased through improved enforcement, including by reducing the obstacles to collective actions.

6.3. Coherence

6.3.1. Unfair commercial practices and marketing

6.3.1.1. *Interplay between UCPD information requirements according to Article 7(4) and the information requirements in the horizontal consumer law instruments (in the advertising stage)*

- The level of awareness of traders as regards information requirements at different stages of the transaction, in particular as demonstrated by their practical application; [*Note: The focus is here on the advertising stage. Key aspects to consider are: How are these rules applied in practice? To what extent do traders implement these rules? Are these information requirements under the UCPD useful in view of the more comprehensive pre-contractual information requirements of the CRD?*]

For “invitations to purchase”, Article 7(4) UCPD regards certain pieces of information as “material”. This means that traders will need to provide consumers with this information.[502] Failing to provide consumers with information required by Article 7(4) in the case of an invitation to purchase is a misleading omission, if this failure is likely to cause the average consumer to take a transactional decision he or she would not have taken otherwise.[503] Hence, Article 7(4) UCPD establishes an indirect duty to disclose information in the specific context of “invitations to purchase”, subject to the well-known transactional decision test.

In the 2016 UCPD Guidance, the European Commission stressed that, in order not to place unnecessary or disproportionate information burdens on traders, the requirements of Article 7(4) are not static and require different pieces of information depending on the situation. This follows, in particular, from the clarifications made both in Articles 7(1), 7(3) and 7(4) that the factual context and limits of the communication medium used should be taken into account.[504] In addition, under the

[500] Another factor are continuing innovations by traders, which include new practices that are considered to be unfair by authorities or courts (but where a certain time lag between introduction of the practice on the market and the official categorisation as being an 'unfair practice' may exist).

[501] See Part 2 of this report and outcomes of the 2016 European Consumer Summit available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34204.

[502] UCPD Guidance document, 52.

[503] UCPD Guidance document, 74.

[504] UCPD Guidance document, 75.

introductory part of Article 7(4), traders do not need to provide information in invitations to purchase that is already apparent from the context.[505]

According to Article 2(i) UCPD, "invitation to purchase" means "a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase". In the *Ving Sverige* case, the CJEU held "that, for a commercial communication to be capable of being categorised as an invitation to purchase, it is not necessary for it to include an actual opportunity to purchase or for it to appear in proximity to and at the same time as such an opportunity."[506] It follows that the concept is narrower than "advertising", "marketing" or "commercial communication". As soon as the information given in a "commercial communication" is sufficient to enable the consumer to take a decision as to whether to purchase the advertised product for the advertised price, the pieces of information mentioned in Article 7(4) must be provided (if it not otherwise apparent from the context).[507] An "invitation to purchase" does not necessarily imply that the next step for the consumer is to enter into a contract with a trader.[508] It follows that the concept does not simply refer to the precontractual stage in the strict sense (i.e. the very moment before the contract is signed).

In the 2016 UCPD Guidance, the European Commission explained that this distinction between the stage of "invitation to purchase" and the "precontractual stage" is particularly important in relation to the interplay between the Article 7(4) UCPD and Article 5 CRD concerning on-premises contracts and Article 6 CRD concerning off-premises and distance contracts. Article 5/6 CRD imposes a positive obligation on traders to provide the consumer, before he or she enters into a contract (i.e. at the precontractual stage), with certain pieces of information, in a clear and comprehensible manner, unless if already apparent from the context. The amount of information that must be provided at the precontractual stage (under Article 5/6 CRD) is clearly more comprehensive than that required in the context of an invitation to purchase (under Article 7(4) UCPD). Moreover, Article 5/6 CRD takes a minimum harmonisation approach, which means that Member States can maintain or introduce additional precontractual information requirements; this is not possible under the full harmonisation approach of Article 7(4) UCPD.[509] Finally, Article 5/6 CRD does not contain the requirement that the failure to provide the required information be likely to cause the average consumer to take a different transactional decision. As pointed out by the European Commission, complying with the more comprehensive information requirements of Article 5/6 CRD should normally also ensure compliance with Article 7(4) UCPD, as far as the content of the information is concerned.[510]

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[505] UCPD Guidance document, 73.

[506] Case C-122/10 Konsumentombudsmannen v Ving Sverige AB, Judgement of 12 May 2011, paragraph 32.

[507] UCPD Guidance document, 52.

[508] UCPD Guidance document, 52.

[509] UCPD Guidance document, 19-20, where the Commission clarified that, for commercial practices falling under the fully harmonised UCPD, the minimum harmonisation clause of Article 5(4) CRD means that Member States may adopt or retain additional precontractual information requirements for on-premises contracts that go beyond the UCPD, as long as these national requirements only apply to on-premises contracts and at the pre-contractual stage (i.e. before the contract is signed).

[510] UCPD Guidance document, 20; CRD Guidance document, 17. The UCPD will still be applicable when assessing any misleading or aggressive commercial practices by a trader on the form and presentation of this information to the consumer. See UCPD Guidance document, 74-80, for the pieces of information to be provided in the context of an invitation to purchase.

On the basis of the country research and other evidence collected, the following conclusions can be drawn as to the level of traders' awareness of Article 7(4) UCPD and Article 5/6 CRD:

In a large number of Member States the level of awareness of traders as regards Article 7(4) UCPD is generally considered to be fairly high.[511] Yet, bigger traders are more likely to be aware of the information requirements and to implement them.[512] The same holds for members of trade associations.[513] They also have a reputation which is at stake if they contravene the legal standards.[514] By contrast, the level of awareness amongst SMEs appears to be lower.[515] The same holds for online-traders, who reportedly often fail to meet the exact requirements and especially the indication of the final price often causes considerable problems in practice.[516] The country research confirms the Commission's experience that in practice the requirement to state the total price in an invitation to purchase is not always complied with.[517]

In a small number of Member States, the general level of awareness of traders as regards Article 7(4) UCPD is considered to be relatively low,[518] and because of this reason there has been little practical application of these rules.[519] In another small group of Member States, the extent to which traders are aware of these information requirements and the extent to which these requirements are met in practice are not clear.[520]

In comparison, the level of awareness of traders as regards the more recent Article 5/6 CRD seems to be equally high if not higher than the level of awareness of Article 7(4) UCPD, and it was also noted by stakeholders that nowadays the focus is very much on compliance with Article 5/6 CRD.[521] One of the reasons might be that positive information duties are much more effective than a prohibition of misleading omissions, indirectly establishing a general duty to provide essential information, subject to a transactional decision test.[522] Under Article 7(4) UCPD, the failure to provide the required information must be likely to cause the average consumer to take a transactional decision he would not have taken otherwise, whereas the breach of the

[511] E.g. country reports Austria, Belgium, Bulgaria (but one consumer organisation disagreed), France, Germany, Croatia, Lithuania, Poland (view of trade associations), Romania, Sweden.

[512] E.g. country reports Croatia, Czech Republic, Estonia, Malta, Lithuania, Slovakia.

[513] E.g. country reports France, Lithuania, the Netherlands.

[514] Country report the Netherlands.

[515] E.g. country reports Estonia, Malta.

[516] Country report Austria. See also e.g. country report Czech Republic.

[517] E.g. country reports Austria, Croatia (view of consumer assocations and ECC), Latvia. See also Commission Guidance, 77.

[518] E.g. country reports Cyprus (view of the Regulator), Latvia.

[519] Country report Malta (with the exception of high levels of awareness in specific sectors, according to sector-specific authorities).

[520] E.g. country reports Spain, United Kingdom.

[521] Country reports Estonia, Poland (view of consumer associations).

[522] Country report Slovenia (view of stakeholders).

positive information duties of Article 5/6 CRD is much easier to prove (because there is no transactional decision test).[523]

As regards the interplay between Article 7(4) UCPD and Article 5/6 CRD, the results of the country research can be summarised as follows:

- In a small group of Member States the prevailing opinion seems to be that Article 7(4) UCPD is useful and not redundant in the light of the more comprehensive precontractual information requirements of Article 5/6 CRD.[524] It was mentioned that Article 7(4) UCPD targets a specific situation at the B2C advertising stage ("invitation to purchase") whereas Article 5/6 CRD imposes more detailed precontractual information requirements (before the contract is signed).[525] In this perspective, Article 7(4) UCPD should remain in force despite all the information requirements of the CRD, as the information requirements under the UCPD play a role in the earlier stages of the relationship.[526] Parallel information requirements do not create confusion for consumers and are rather informative.[527,528] Any overlap and friction between the UCPD and the CRD should not be removed, since the goals of these directives are different (preventing misleading practices versus having clarity on what the contract concluded actually entails).[529] It was said to be unlikely that the current overlap of information requirements would constitute a burden for traders or consumers, considering that traders knowing what information to provide will provide it just once and fulfil both requirements at once. Moreover, it may be easier for courts and enforcement authorities to have separate lists of information requirements, to better know what to enforce, in which situation and under which law. The overlap between information requirements in the UCPD and CRD is therefore not considered problematic, and need to change the law is not seen.[530]
- In another group of Member States, <u>the information requirements laid down by Article 7(4) UCPD are considered not useful and redundant</u> in view of the more comprehensive precontractual information requirements laid down in Article 5/6 CRD.[531,532] In this perspective, it would seem reasonable to have all

[523] Country report France.

[524] E.g. country reports Bulgaria, Cyprus, Croatia (view of consumer assocations and ECC), Lithuania (view of enforcement authority), Malta, Romania.

[525] Country reports Bulgaria, Cyprus.

[526] Country report the Netherlands (view of consumer organisations).

[527] Country report Estonia (view of consumer association).

[528] This view was also supported by the results of the behavioural experiments that were conducted as a part of the 2016 consumer market study for the Fitness Check. The results of the behavioural experiments showed that respondents did not feel overwhelmed by the information required by the UCPD. "Arrangements for complaint handling" and "geographical address of the seller" were the only items that respondents indicated they would not need to see in an advertisement.

[529] Country report the Netherlands (view of the enforcement authority).

[530] Country report Poland (view of trade associations).

[531] E.g. country report Hungary (view of the relevant ministry).

[532] This was also the view suggested by the participants of Workshop 1 on Simplifying consumer information requirements at the 2016 Consumer Summit. The participants also suggested that information should be improved through simplified language and clear requirements for printed text (size, font, etc.).

information to be provided to the consumers regulated in one act, which would be beneficial for both businesses and consumers.[533]

- In a third group of Member States, the view seems to be that the information requirements imposed by Article 7(4) UCPD need a more precise coordination with the more comprehensive pre-contractual information requirements of Article 5/6 CRD.[534] It is noted that there is some uncertainty in relation to the precise meaning of the concept of "invitation to purchase".[535] In this perspective, the overlap between Article 7(4) UCPD and Article 5/6 CRD may create confusion not only among consumers and businesses, but also among courts and enforcement authorities.[536] It is not always clear what type of information with what kind of specificity should be given at what stage of the marketing and contracting process.[537]

Both the second and the third perspective on the interplay between Article 7(4) UCPD and Article 5/6 CRD would imply that a change to current rules would be recommended to increase coherence. This appears to the most prevalent view, as the results of the open public consultation confirm: the majority of all respondent categories either strongly agree or tend to agree that the marketing/pre-contractual information requirements currently included in the Unfair Commercial Practices Directive, Price Indication Directive and Consumer Rights Directive 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.[538] Especially business stakeholders were strongly in favour of streamlining, simplifying and consolidating the current consumer acquis, as long as this was accomplished in a balanced and proportionate way that did not place additional burdens or regulations on EU businesses (as illustrated by 16 submitted position papers). Two of the three consumer organisations that provided position papers in the framework of the open public consultation agreed with the business stakeholders that there was room to streamline and consolidate consumer legislation where possible, as long as this did not lead to an overall lower level of protection for consumers. Both consumer organisations mentioned the pre-contractual information requirements in particular as an area that could be further consolidated.

In this context it was also emphasised by stakeholders in the country research that the amount of information that must be provided to consumers under Article 7(4) UCPD and/or Article 5/6 CRD is pushing the "information-model" to its limits, creating "information overload" and confusion amongst consumers and also creating costs for businesses.[539] Taking into account the insights of behavioural economics, there should be a critical analysis of what type of information with what kind of specificity should be given at what stage of the marketing and contracting process. For example, it was suggested that all information does not necessarily have to be included in an "invitation to purchase"; it should be enough that information is provided before the actual purchase.[540] It is not the role of advertising to provide such detailed information

[533] E.g. country report Slovenia (view of the relevant ministry).

[534] E.g. country reports Germany (view of the stakeholders), Italy, the Netherlands, Sweden.

[535] Country reports Denmark, the Netherlands.

[536] Country report Italy.

[537] Country report the Netherlands (view of the enforcement authority).

[538] See Part 2 of this report.

[539] E.g. country reports Austria, Denmark, France, Germany, Slovakia, Portugal, Sweden.

[540] Country report Sweden.

such as right to withdrawal so early on, but rather its role is to attract the consumer.[541] Likewise, it was stated that, at the advertising stage, there is no direct dialogue with the consumer and that at this stage only the really essential information should be mandatory. By contrast, in the pre-contractual phase, when a one-on-one dialogue with the consumer starts, there should be a more extensive obligation to inform consumers.[542] This was also stressed in legal scholarship, coming to the conclusion that the best way forward would be to delete Article 7(4) UCPD.[543]

The results of the open public consultation emphasise the support for a gradual approach for information provision according to the different stages of the transaction, at least among business stakeholders: The majority of business associations (81%), business respondents (65%) and "other" respondents (69%) either strongly agree or tend to agree 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. However, only 45% of consumer associations and 28% of consumer respondents agree with this statement, with 50% of both consumer associations and consumers respondents either tending to disagree or strongly disagreeing in this respect.

- Any costs arising due this multiplicity of information obligations. [*Key aspects to consider are: Is there any overlap with the provisions of the Services Directive and the E-commerce Directive that apply to advertising? If so, are there any costs arising for public authorities and/or businesses due to this multiplicity of information obligations?]*

The information requirements set out in Article 7(4) UCPD are complemented not only by the information requirements of Article 5 CRD, but also by a number of information requirements laid down in the Services Directive and in the E-Commerce Directive.

The information requirements in Article 22 of the Services Directive apply in addition to the information required for invitations to purchase under Article 7(4) UCPD.[544] However, it should be noted that 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, whereas Article 7(4) UCPD is only applicable to B2C transactions and more specifically to "invitations to purchase".[545] Moreover, under Article 22 of the Services Directive, certain pieces of information must only be provided at the recipient's request.[546] The E-Commerce Directive applies to information society services, which can include the services provided by operators of websites and online platforms which allow consumers to buy a good or service. Article 5 lays down general information requirements for service providers, while Article 6 lays down information to be provided in commercial communications. The lists of items set out in these two

[541] Country report Greece (government authorities and business associations).

[542] Country report Belgium (views of businesses).

[543] See B. Keirsbilck, "Which way forward for the new European law of unfair commercial practices", *EJCL*, 2013, p. 233 et seq. (see p. 264). See also country report Belgium.

[544] UCPD Guidance document, 22.

[545] Country report Cyprus.

[546] Country report Bulgaria; CRD Guidance document, 18

Articles are minimum lists.[547] By contrast, the full harmonisation Article 7(4) UCPD applies to all types of B2C invitations to purchase, whether offline or online.

On the basis of the country research, the following conclusions can be drawn as regards the practical experiences with the above-mentioned multiplicity of information requirements and any costs arising therefrom:

In several Member States the view of stakeholders is that the scopes of the various information requirements in UCPD, Services Directive and E-Commerce Directive do not overlap (significantly) or at least that there have not been practical problems reported in this respect, and that, hence, no related costs are incurred by businesses or by public authorities.[548] In other countries, it is admitted that costs can arise for businesses, as the fragmentation in advertising law requires resort to and review of multiple laws and regulations.[549] Moreover, where different authorities are competent to enforce the various implementing provisions, there may be coordination issues that tend to increase costs.[550] It was also reported that the interplay between the UCPD and the E-Commerce Directive is considered particularly ineffective.[551] An example of overlap and conflict between the UCPD and E-Commerce Directive is mentioned in several country reports: Art. 5 E-Commerce Directive provides that information should be given on 'whether prices are inclusive of tax and delivery costs', whereas Art. 7(4) UCPD provides that prices in an invitation to purchase shall be inclusive of tax and costs.[552] Such discrepancies are considered not desirable and may also affect enforcement (and related costs), as the legal framework is said to be extremely complicated to operate for supervisory authorities (as stated by one of them).[553]

Even for the European Commission it was not particularly easy to give an overview of the various information requirements under the UCPD, the CRD, the Services Directive and the E-Commerce Directive in its CRD Guidance document.[554] Of particular concern in this context is also Article 6(8) CRD, according to which the information requirements in relation to distance contracts are in addition to the information requirements in the Services Directive and in the E-Commerce Directive and do not prevent Member States from imposing additional information requirements in accordance with those directives.[555] It is noted that the broad space left to the Member States can create relevant problems in the cross-border trade and is in evident contrast with the targeted full harmonisation approach.[556] Overall, it would

[547] UCPD Guidance document, 22-23.

[548] E.g. country reports Bulgaria, Croatia, Denmark, Estonia, France, Latvia, Portugal, Slovenia.

[549] E.g. country report Cyprus.

[550] E.g. country reports Cyprus, Malta.

[551] E.g. country report France (view of one stakeholder regarding platforms in particular).

[552] See e.g. country reports Netherlands and Lithuania. The full text of the required indication according to Article 7(4)(c) UCPD is: "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."

[553] Country report Netherlands.

[554] CRD Guidance document, pp.16-29 (Pre-contractual information), p.19 (Overlapping information requirements) and pp.73-80 (Annex II).

[555] See also CRD Guidance document, 19

[556] E.g. country report Italy.

seem that there is a clear need for information requirements under the different directives to be coordinated properly, to reduce the multiplicity of information obligations and resulting costs due to their complexity, both for businesses and enforcement authorities.

For an in-depth discussion of costs of businesses related to compliance with the legal framework in advertising and marketing, refer to the evaluation questions related to efficiency, Section 6.2 above.

6.3.1.2. *Interplay between PID information requirements and the information requirements in the horizontal consumer law instruments (in the advertising stage)*

- The burden for businesses arising from obligations under the Price Indication Directive at different stages of the transaction (i.e. advertising and pre-contractual stage);

There is incidental evidence from the country research that compliance with the obligations of the PID is less of a burden for large retailers, due to economies of scale. Existing exemptions for small retailers seem to alleviate the burden on those retailers. While the interviews with business associations and other stakeholders in all EU Member States and the literature reviewed did not provide further data on the burden for businesses arising from the obligations under the PID at the advertising and pre-contractual stages, the business interviews conducted for this study give some detailed insights.[557] On basis of the interview results it was concluded that the costs of (unit) price indication do not seem to imply disproportionate burdens on businesses (see above, efficiency, Section 6.2).

In this context reference can be made to the recent judgment of the CJEU in *Citroën Commerce.*[558] The CJEU confirmed that although Article 3(4) lays down no general obligation to mention the selling price, where an advertisement mentions both the characteristics of the product on offer and a price, this will be regarded by a reasonably well-informed and reasonably observant and circumspect consumer, to be the selling price of that product. In such a case, the price so indicated must satisfy the requirements of the PID.[559] In this particular case this amounted to the obligation to indicate the final price within the meaning of Article 2(a) of the PID, including costs to be paid by the consumer for the delivery of the good. With regard to the relationship between the UCPD and the PID the Court reminded that under Article 3(4) of the UCPD in the case of conflict between the provisions of the directive and the other rules of EU law regulating specific aspects of unfair commercial practices, the latter are to prevail and apply to those specific aspects. Hence the indication, in an advertisement, of the selling price a total price is governed by the PID and the UCPD cannot apply as regards that aspect. For that reason in that case Article 7(4)(c) of the UCPD (invitation to purchase) needed not be interpreted.[560]

That being said it is not clear to what extent the obligation to indicate the (final) price in advertisements adds an important burden to the obligations arising for businesses from other information duties.

[557] For more details on the business interviews, refer to Part 4 of this report.

[558] Judgment in Citroên Commerce, *C-476/14, EU:C:2016:527.*

[559] Paragraph 30 of the judgment.

[560] Paragraphs 42-46 of the judgment.

- The consumer benefits of receiving the information required under the Price Indication Directive at different stages of the transaction;

See answers to the evaluation questions regarding effectiveness (Section 6.1) and the discussion of benefits of the legal framework in advertising and marketing for consumers in the efficiency section (Section 6.2).

- The effect on cross-border trade of the divergences between national laws due to the minimum harmonisation character and the use of regulatory options under the Price Indication Directive.

The research conducted for this evaluation did not provide evidence that the divergences between national laws due to the minimum harmonisation character and the use of regulatory options under the Price Indication Directive have a significant effect on cross-border trade. However, some business stakeholders have argued in their written submissions to the open public consultation that the PID should in general be made more consistent across the EU with respect to derogations and units, as in their view different national rules have made it confusing and difficult to apply them in practice, especially for retailers that sell online cross-border.[561]

6.3.1.3. *Interplay with EU sector-specific consumer protection legislation*

- Analyse the awareness of the requirements of the horizontal EU consumer legislation regarding unfair commercial practices and information obligations regarding advertising by businesses, consumers and the specific public enforcement bodies in the relevant sectors, as in particular demonstrated by their practical application. [*Key question here is: Is the UCPD applied in practice by national authorities and courts as a legal basis to combat unfair commercial practices in the regulated sectors?*]

The UCPD is a framework directive that works as a "safety net" ensuring that a high common level of consumer protection against unfair commercial practices can be maintained in all sectors, including by complementing and filling gaps in other EU law.[562] Article 3(4) UCPD read in conjunction with Recital 10 implies that a provision of EU law will prevail over the UCPD if all of the following three conditions are fulfilled: it has the status of EU law, it regulates a specific aspect of commercial practices, and there is a conflict between the two provisions or the content of the other EU law provision overlaps with the content of the relevant UCPD provision, for instance by regulating the conduct at stake in a more detailed manner and/or by being applicable to a specific sector. Where all three conditions set out above are fulfilled, the UCPD will not apply to the specific aspect of the commercial practice regulated, for example, by a sector-specific rule.[563] The UCPD continues nonetheless to remain relevant to

[561] For example, EuroCommerce stated: “As with other minimum harmonisation Directives, EuroCommerce thinks that the numerous derogations, which allow member states to adopt different national rules have made it confusing and difficult to apply in practice, especially for retailers that sell online cross-border. In particular, Article 10 (minimum harmonisation) and Article 6 (exemptions for non-food products) created obstacles in cross-border trade.” The three consumer organisations that provided written submissions were also unanimous in the desire to see the PID be made more consistent with respect to accepted units and exemptions. This view was supported by two public authorities that in their written submissions suggested that the PID be implemented more consistently across the EU with respect to units and derogations.

[562] UCPD Guidance document, 14.

[563] UCPD Guidance document, 15.

assess other possible aspects of the commercial practice not covered by the sector-specific provisions, such as, for example, aggressive behaviour by a trader.[564]

As regards the awareness of the UCPD requirements by businesses, consumers and the specific public enforcement bodies in the relevant sectors (electronic communications, passenger transport, energy and consumer financial services), the following conclusions can be drawn on the basis of the country research:

First, it appears that consumers' awareness of the UCPD's applicability in the regulated sectors is generally considered insufficient, whereas the general awareness of the UCPD requirements seems to be higher. Consumers do not seem adequately informed that the UCPD complements other EU legislation that regulates specific aspects of unfair commercial practices and that the UCPD thus also applies in regulated sectors.

Second, it appears that businesses are generally considered to be quite well aware of the application of the UCPD in the regulated sectors. They are obliged to comply with the UCPD and, as a result, they would be well-informed of its requirements. However, awareness and compliance appear to be two different things. Violations of the UCPD requirements are common in the regulated sectors.[565] Nevertheless, it should be noted that a small number of stakeholders mentioned a lack of awareness by traders. According to a Dutch ministry, for instance, companies active in the regulated sectors tend to look at sector-specific legislation and may believe that horizontal EU consumer legislation such as the UCPD is not applicable to their sector. This issue was also reported by Sweden, particularly in the financial sector.[566]

Third, it appears that enforcement authorities are generally considered to have a fairly good knowledge of the interaction between the UCPD and sector-specific legislation. However, the enforcement system does not always work properly (see further below).

In sum, businesses and enforcement bodies are generally considered to be aware of the combined application of the two sets of rules in the regulated sectors. The awareness of consumers of the UCPD requirements in the regulated sectors, however, seems be insufficient.

- Specify whether in Member States it is the same authority which is responsible for the enforcement of the horizontal EU consumer law (UCPD) and the sector specific rules, or whether there are different authorities responsible for these two sets of rules; [*If different entities are responsible, key aspects are: Is there an institutionalised cooperation between them? Does the institutional arrangement for*

[564] UCPD Guidance document, 15.

[565] For instance, the Second consumer market study on the functioning of the retail electricity markets for consumers in the EU found that a third (34%) of consumers surveyed disagreed that advertising from electricity companies does not deceive, mislead or omit relevant information and 77% agreed that electricity companies made their tariffs appear more attractive than they really were to encourage customers to switch, and that many stakeholders considered unfair commercial practices by electricity companies to be, overall, "common". In the area of financial services, the 2016 Consumer Markets Scoreboard points to a lack of compliance by business, shown e.g. in the EU sweep conducted in March 2014 that found that relevant product information on consumer credit was not provided to consumers on more than 20% of the surveyed websites in 11 Member States. In the area of telecommunication services, the 2012 Consumer market study on the functioning of the market for internet access and provision from a consumer perspective also reported that 48% of the national regulatory authorities, consumer organisations, members of the Consumer Protection Cooperation Network, and ADR entities that responded to the study's stakeholder survey indicated that in their view unfair commercial practices in their country are common.

[566] Country reports Netherlands and Sweden.

enforcement affect the use of UCPD in the regulated sectors, as specified in the previous bullet?]

In the UCPD Guidance document, the Commission stressed that Article 3(4) UCPD bears an impact on the public enforcement of the UCPD. "Based on Article 11, in order to ensure the proper enforcement of EU consumer protection laws, Member States should ensure coordination in good faith between the different competent enforcement authorities. In those Member States where different authorities are responsible for enforcing the UCPD and sector-specific legislation, the authorities should closely cooperate to ensure that the findings of their respective investigations into the same trader and/or commercial practice are consistent."[567] On the basis of the country reports, the following conclusions can be drawn:

In the vast majority of the Member States, different authorities are responsible for the enforcement of the horizontal consumer law and the sector-specific rules.[568] In general, one centralised authority is competent to enforce the UCPD (regardless of the sector), while the sector-specific rules are enforced by another authority or other authorities.

In countries such as Bulgaria the cooperation between the various competent authorities is regulated by legal provisions in multiple legal acts.[569] Some countries have established a cooperation mechanism for the separate authorities. The Italian enforcement bodies, for instance, often cooperate via memoranda of understanding.[570] In Romania certain protocols exist in the energy and telecommunications sector; as from 2016 a specific legal framework on institutional cooperation is in place.[571] Such cooperation protocols also exist in the Netherlands[572] and the Czech Republic.[573]

In other countries like Latvia cooperation takes place informally via regular meetings and discussions.[574] In France the enforcement bodies work closely together and often exchange information or redirect consumers towards the competent body if necessary. In Cyprus, there is no institutional arrangement for cooperation, but the competent authorities cooperate unofficially. This mainly involves mutual consultation and each authority referring a case that falls within the competence of another authority to the competent authority.[575] Furthermore, Malta indicated not to have a formal cooperation mechanism.[576] The same holds for Poland[577] and Portugal.[578]

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[567] UCPD Guidance document, 17.

[568] See various country reports, with country report Spain as a remarkable exception (mentioned having only one (general) enforcement body).

[569] Country report Bulgaria.

[570] Country report Italy.

[571] Country report Romania.

[572] Country report the Netherlands.

[573] Country report Czech Republic.

[574] Country report Latvia.

[575] Country report Croatia.

[576] Country report Malta.

[577] Country report Poland.

It should be noted that certain Member States created a separate regime for the financial sector. In Slovakia there is one general authority (the Slovak Trade Inspection) that supervises the compliance with the UCPD. However, a separate body, namely the National Bank of Slovakia, is authorised to enforce the horizontal consumer protection legislation as well as the sector-specific rules in the financial sector.[579] Romania also established a different regime for the financial sector. The Romanian National Authority for Consumer Protection (NACP) has the power to enforce the UCTD in general and in the regulated sectors. Separate bodies enforce the sector-specific rules (but not the horizontal legislation) in the regulated sectors. However, the NACP is authorised to enforce both the horizontal consumer protection legislation and the sector-specific rules in the financial sector.[580]

In answer to the key question, the institutional arrangements for enforcement indeed sometimes affect the use of the UCPD in the regulated sectors. It appears from the country reports that the cooperation between the different bodies is not always efficient.[581] As indicated earlier, the powers of the enforcement bodies usually depend on whether horizontal or sector-specific legislation was infringed. Consequently, it is not always clear for consumers to which body they should address a complaint. Consumers tend to recognise that their rights were violated, but do not know which specific rule was breached.[582] Thus, if the respective powers of the enforcement bodies depend on which rule was breached, consumers may not know which body is responsible. It appears that a consumer that wants to exercise the rights under the UCPD in a regulated sector, but wrongly addresses the sector-specific enforcement body, is not always redirected to the competent body. Furthermore, it should be mentioned that the sector-specific legislation sometimes overlaps with the general principles set out by the UCPD. Because of the overlapping provisions, different bodies could consider themselves authorised. This way, businesses could be fined twice by different bodies on the basis of different regulation.

In conclusion, the country research established that the majority of the Member States has divided the responsibility to enforce the UCPD and sector-specific rules between different authorities. It appears that this indeed causes some problems regarding the application of the general consumer legislation in the regulated sectors.

- Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning unfair commercial practices and information obligations regarding advertising [*Key aspects to consider are: How do they work together with the sectoral legislation? Are there issues/overlaps/conflicts etc.?]*; What are the benefits of the complementary application of the UCPD in the regulated sectors? What are the costs due to its complementary application with the sectoral EU consumer protection legislation? Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law concerning unfair commercial practices and information obligations regarding advertising.

[578] Country report Portugal. Despite the lack of formal cooperation mechanisms, some authorities admit to using informal mechanisms, such as bilateral meetings or meetings within the Centre of Studies on Public Law and Regulation (CEDIPRE).

[579] Country report Slovakia.

[580] Country report Romania.

[581] See also e.g. country report Czech Republic.

[582] E.g. country report Austria.

On the basis of the available country reports, the following conclusions can be drawn:

In the majority of Member States the interplay between the horizontal UCPD and the sector-specific rules is generally considered to provide for a clear and coherent legal framework concerning unfair commercial practices and information obligations regarding advertising. Most stakeholders consider the legal framework rather clear and coherent.[583] General rules and sector-specific rules do not interfere and complement each other. Article 3(4) UCPD clearly provides that in case of conflict between the UCPD and sector-specific rules, the latter prevail. Conflicts between the general and the sector-specific rules are scarce anyhow.[584] The combination of the UCPD and the sector-specific rules therefore seems to work fairly well in practice.

The overall perception is that the complementary application of the UCPD and sector-specific rules in the regulated sectors generally benefits consumers. As intended by the legislator, the UCPD works as a "safety net" ensuring that a high common level of consumer protection against unfair commercial practices can be maintained in all sectors, including by complementing and filling gaps in other EU law. The specific legislation usually does not tackle every problem, particularly in dynamic sectors like financial regulation, energy and transport. As the UCPD is applicable in each situation, potential gaps in the sector-specific regulation are filled. Vice versa, the sole application of the UCPD in the regulated sectors would not always be sufficient. The value of sector-specific legislation is widely recognised. The sector-specific legislation thus tends to protect consumers in the regulated areas, in case the horizontal legislative framework is not sufficient.[585]

In the country research, stakeholders in most countries could not provide any assessment regarding possible costs for businesses due to the complementary application of the UCPD with the sectoral EU consumer protection legislation. The few stakeholders that had an opinion, often differed in their view: While in Portugal, a business association emphasised that the existence of horizontal rules and sectoral legislation results in costs for traders, in the Czech Republic stakeholders were not sure to what extent there are costs due to the complementary application, and in Romania no costs were mentioned by stakeholders, as there were no overlaps in their opinion.[586]

However, it is reported in a number of Member States that the application of numerous (overlapping) texts jeopardises the clarity of the legal framework.[587] A French respondent spoke of a *"mille-feuille"* (literally: thousand-leaf, a French pastry) of provisions in the field of unfair commercial practices.[588] The wide range of legislation in different texts and sectors could hinder the general understanding of problems in practice, thereby creating legal uncertainty for consumers and businesses.[589] In the UK, stakeholders argued in a more general note that "neither

[583] However, stakeholders referred to in the country reports Slovakia, Spain, Cyprus and UK mentioned that the overall clarity and coherence of the legal framework should be improved.

[584] Country report France.

[585] See also J. STUYCK, "*Consumer concepts in EU secondary law*", paper https://www.law.kuleuven.be/ccm/bochumfeb2014def.docx.

[586] Country reports Portugal, Czech Republic, Romania.

[587] See in particular country reports Slovakia, Spain, Cyprus and UK.

[588] Country report France.

[589] Country report Spain; See also B. J. DRIJBER in M. ROGGENKAMP and H. BJORNEBYE, "*European Energy & Law Report*", Volume X, Intersentia, 14.

domestically (CRA 2015) nor at EU level legislation (Consumer Rights Directive 2011) [has] gone far enough to consolidate the complexity of the law in consumer protection, [and] unsurprisingly, perhaps, consumers seem either reluctant or less than willing to engage with the full suite of remedies."

In many Member States, the perception is that there is in any event ample room for reducing overlaps in information requirements. There are many different information requirements that could need coordination and revision (see also above).[590] The country research shows that there may also be a need for some further clarification of the interplay between the UCPD and the sector-specific rules.[591] In this respect, it is found that the new UCPD guidance document provides helpful insight to understand the interplay.[592] Importantly, it is often stated that the main problem is not so much the overlaps or conflicts between the UCPD and sector-specific rules but rather the still existing competence gaps and conflicts between different enforcement authorities (see answer to the previous evaluation question).[593]

6.3.2. Contract conclusion and performance

6.3.2.1. *Interplay with EU sector-specific consumer protection legislation*

- Analyse the awareness of the requirements of the horizontal EU consumer legislation concerning unfair contract terms and contractual transparency requirements by businesses, consumers and the specific public enforcement bodies in the relevant sectors, in particular as demonstrated by their practical application; [*Key question here is: Is the UCTD applied in practice by national authorities and courts as a legal basis to combat the use of unfair contract terms in the regulated sectors?*]

On the basis of the country research, it appears the majority of the stakeholders believe that the awareness of consumers is insufficient.[594] Most consumers seem not to be adequately informed of the existence of the general unfair contract terms regime, let alone know that this general regime also applies to the regulated sectors.[595] This unawareness of consumers was also acknowledged by several legal scholars[596] and is recognised in the case law of the CJEU.[597] Some countries have

[590] Country reports Austria, Denmark, Italy.

[591] E.g. country report Cyprus.

[592] Country reports Cyprus, Denmark.

[593] Country reports Czech Republic, Italy, Malta, Romania.

[594] On the contrary, Cyprus, Bulgaria and Italy mentioned that, in the financial sector, the horizontal consumer legislation is often applied and consumers seem to be more aware of their rights.

[595] This is also supported by responses to the online public consultation. Respondents were asked about the interplay between horizontal EU consumer law and EU sector-specific rules in five different sectors (financial services, passenger transport, electronic communication, energy and environmental protection). There was no sector in which a majority of respondents agreed that consumers were aware of the complementary application of EU consumer and marketing laws in that sector.

[596] H-W. MICKLITZ and N. REICH, "The Court and sleeping beauty: the revival of the Unfair Contract Terms Directive (UCTD)" in *Common Market Law Review 51*, 2014, 777, 2014; A. VAN OEVELEN, S. RUTTEN and F. DUPON, "Ambtshalve inroepbaarheid van Europees consumentenrechtenrecht, materieelrechtelijk en procesrechtelijk beschouwd" in G. STRAETMANS and M. ROZIE (eds.), *Doorwerking van het Europese recht in de nationale rechterlijke praktijk*, Antwerpen, Intersentia, 2012, 96; E. SWAENEPOEL, "De onrechtmatige bedingen : evolutie naar het ambtshalve opwerpen van de relatieve nietigheid?, *DCCR* 2005, 79; J. STUYCK, "*Consumer concepts in EU secondary law*", 11, paper https://www.law.kuleuven.be/ccm/bochumfeb2014def.docx.

already tried to address this problem. France for instance has established a specific body responsible for informing consumers, regardless of the sector. Furthermore, Lithuania states the number of consumers showing interest in consumer protection legislation increased during the last year, due to active campaigns.[598] Such a campaign was also organised by the EU in 2014. This Consumer Rights Awareness Campaign aimed to increase the knowledge of consumer rights by both consumers and traders.[599]

In contrast, businesses in most countries are considered to be quite well aware of the application of the horizontal EU consumer legislation in the regulated sectors. They are obliged to comply with the (legislation implementing the) UCTD and as a result, they should be well-informed of its requirements. Although the knowledge of businesses is deemed sufficient by most stakeholders, violations of the legislation on unfair contract terms occur frequently.[600] The cases referred to the CJEU confirm this, often concerning the financial sector, the energy sector and the telecom sector. Also in the air transport sector, there are an important series of cases where the Member States condemn the use of unfair terms in air transport contracts. BEUC noted that a significant number of the terms scrutinised and deemed unfair by the national courts were based on the IATA Recommended Practice 1724 (hereinafter the IATA RP 1724).[601] It appears the IATA recommends the use of passenger contract terms which are legally unfair in many European countries. For instance, article 3.3 of the IATA RP 1724 obliges a passenger to strictly respect the order of the flight itinerary. If he misses or does not take one leg of a return flight, the company may automatically cancel the remaining leg and rescind the contract. This clause was determined unfair by several judgements in different Member States. To express its concern, BEUC sent a letter to the IATA in 2013 asking them to amend their recommendations.[602] Unfortunately, at a meeting later in 2013, the IATA did not signal any intention to revise the RP 1724.[603] Although the country reports did not mention this issue, the public consultation showed some concern as to the application of the UCTD in the transport sector in general. According to certain respondents, transport is one of the areas where the highest amount of consumer complaints appears. Consumers, but also traders seem not always aware of the application of the UCTD in this sector. In addition, they believe that cooperation between the various enforcement bodies in the area of passenger transport could be improved. However, the open public consultation, as well as the country reports explicitly pointed to the benefits of the application of the UCTD in the air transport sector.[604]

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[597] C-473/00 *Cofidis*, see also cases C-240/98 to C-244/98, *Océano Grupo*, consideration 26 referred to the ignorance of the law by consumers.

[598] Information campaigns were also organized by, amongst others, the Netherlands, Ireland and the United Kingdom. See COM(2000) 248 final, 10 on this issue.

[599] http://ec.europa.eu/justice/newsroom/consumer-marketing/events/140317_en.htm

[600] COM(2000) 248 final, 35.

[601] The International Air Transport Association (IATA) is the leading international representative body of the airline industry.

[602] BEUC, Unfair terms in air transport contracts, Letter sent to Mr. Tony Tyler, Chief Executive Officer/IATA (Ref. L2013_016/MGO/UPA/rs – 05/02/2013), p. 1-2.

[603] See BEUC presentation of 27 May 2013 on Unfair terms in air transport contracts, http://www.beuc.eu/publications/2013-00451-01-e.pdf.

[604] Part 2 of this report; Country report Slovakia; Country report Sweden.

Several countries reported that in some sectors standard contracts are subject to an ex ante control, which reduces the opportunities for traders to apply unfair terms (e.g. in the Romanian energy sector service providers cannot apply unfair terms in their contracts, since they have to submit those contracts to the authorities for approval before offering them to consumers). Nevertheless, it should be noted that a small number of stakeholders mentioned a lack of awareness by traders. According to the Dutch Ministry of Economic Affairs, for instance, companies active in the regulated sectors believe horizontal EU consumer legislation such as UCTD is not applicable to their sector and tend to only take into account the sector-specific legislation. This issue was also reported by Sweden, particularly in the financial sector.

As regards the enforcement bodies, most reports considered the knowledge of the interaction between the various rules sufficient. However, (mainly) due to issues in the organisational structure, the enforcement system does not always work properly. A lot of Member States empowered different authorities with the enforcement of the UCTD in general, and the enforcement of the sector-specific rules. Due to a lack of collaboration between those authorities, a few of them are experiencing difficulties in enforcing the horizontal rules in the regulated sectors. This topic will be discussed below.

In summary, the stakeholders believed that businesses and enforcement bodies are generally aware of the combined application of the two sets of rules in the regulated sectors. It is the awareness (or rather lack of awareness) of consumers of the requirements of the UCTD-both in the regulated sectors and also in general-that turns out to be an important concern.

- Specify whether in Member States it is the same authority which is responsible for the enforcement of the horizontal EU consumer law (UCTD) and the sector-specific rules, or whether there are different authorities responsible for these two sets of rules; [*If different entities are responsible, key aspects are: Is there an institutionalised cooperation between them? Does the institutional arrangement for enforcement affect the use of UCTD in the regulated sectors, as specified in the previous bullet?*]

As has been pointed out before (in the context of the discussion of the enforcement of the UCPD), in the vast majority of the Member States, different bodies are responsible for the enforcement of the horizontal consumer law and the sector-specific rules.[605] In general, one centralised body is authorised to enforce the UCTD (regardless of the sector), while the sector-specific rules are enforced by another body or other bodies. In other words, the latter have no power to deal with violations of the provisions of the UCTD in the regulated sectors if those provisions are not as such included in the sector-specific rules.

Some countries have established a cooperation mechanism for the separate authorities. The Italian enforcement bodies, for instance, often cooperate via memoranda of understanding. In Romania certain protocols exist in the energy and telecommunications sector. Such cooperation protocols also exist in the Netherlands. In Bulgaria the collaboration between the authorities is even regulated by multiple legal acts. By way of example, the Bulgarian Energy and Water Regulatory Commission is obliged to send drafts of terms and conditions on the delivery of central

[605] See different country reports. However, the Spanish country report mentioned having only one (general) enforcement body.

heating and electricity to the Commission for Consumer Protection for review, before approving them.[606]

In other countries like Latvia cooperation takes place informally via regular meetings and discussions. In France the enforcement bodies work closely together and often exchange information or redirect consumers towards the competent body if necessary. A Cypriot stakeholder mentioned Cyprus has no institutional arrangement for cooperation, but highlighted that the competent authorities cooperate unofficially. This mainly involves mutual consultation and each authority referring a case that falls within the competence of another authority to the competent authority. Furthermore, Malta indicated not to have a formal cooperation mechanism. However, the Maltese stakeholders pointed out that some of the specific regulators in the sector of electronic telecommunications, e-commerce and postal services, also referred to as 'qualified entities', can request other authorities to issue injunction orders if there is a breach of the UCTD in the sector they supervise.

It should be noted that certain Member States created a separate regime for the financial sector. In Slovakia there is one general authority (the Slovak Trade Inspection) that supervises compliance with the UCTD. However, a separate body, namely the National Bank of Slovakia, is authorised to enforce the horizontal consumer protection legislation as well as the sector-specific rules in the financial sector. Romania also established a different regime for the financial sector. The Romanian National Authority for Consumer Protection (NACP) has the power to enforce the UCTD in general and in the regulated sectors. Separate bodies enforce the sector-specific rules (but not the horizontal legislation) in the regulated sectors. However, the NACP is authorised to enforce both the horizontal consumer protection legislation and the sector-specific rules in the financial sector.

In answer to the key question, the institutional arrangements for enforcement indeed sometimes affect the use of the UCTD in the regulated sectors, as was already concluded for the UCPD. It appears from the country reports that the cooperation between the different bodies is not always efficient.[607] As indicated earlier, the powers of the enforcement bodies usually depend on whether horizontal or sector-specific legislation was infringed. Consequently, it is not always clear for consumers which body they should address. Consumers tend to recognise that their rights were violated, but do not know which specific rule was breached.[608] Thus, if the respective powers of the enforcement bodies depend on which rule was breached, consumers may not know which body is responsible. It appears that a consumer that wants to exercise the rights included in the UCTD in a regulated sector, but wrongly addresses the sector-specific enforcement body, is not always redirected to the competent body. Hence, a Greek consumer authority stated that the referral from authority to authority can be time-consuming and frustrating for consumers. Further, the Finnish consumer authorities pointed out that the more scattered the regulation and the supervision duties are, the higher the costs of supervision.[609]

A Maltese consumer organisation mentioned that "ideally there should be one national authority able to act in a comprehensive manner, applying where necessary the

[606] Article 148 (2) of the Bulgarian Consumer Protection Act

[607] Additionally, in the online public consultation, approximately one-third of respondents agreed that cooperation between the various public enforcement authorities in charge of consumer protection in each of the five sectors considered (financial services, passenger transport, electronic communication, energy and environmental protection) should be strengthened.

[608] Country report Austria.

[609] Country reports Greece, Finland.

national norms which transpose [...] the UCTD and sector-specific consumer protection norms."[610] Whether this is the best way forward is debatable. The workload for this one body could be too high. Certain countries, like Slovakia, mentioned that their 'general' body is already overloaded and does not have sufficient employees to cover its broad competencies in the field of consumer protection.

An alternative solution could be to give the sector-specific regulators the ability to enforce both the sector-specific and the general consumer legislation in the regulated sectors. This approach was suggested by the same Maltese consumer organisation. The direct application of the UCTD by the sector-specific regulators could avoid overlap in enforcement powers, could lead to better coordination and could reduce costs related to parallel investigations by different regulatory authorities. In addition, it would perhaps be easier for consumers to simply address the body that is responsible in the respective sector than to verify whether a horizontal or sector-specific rule was violated. Moreover, competent authorities would be able to handle every aspect of a case and would not need to transfer it to another body if a violation of, for example, the UCTD occurs. This would be more efficient.

Assess to what extent the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework concerning unfair contract terms and contractual transparency requirements; What are the benefits of the complementary application of the UCTD in the regulated sectors? What are the costs due to its complementary application with the sectoral EU consumer protection legislation? Assess any need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law concerning unfair contract terms and contractual transparency requirements.

The EU sector-specific consumer legislation often contains provisions relating to unfair contract terms or transparency requirements. Directive 2009/72/EC concerning electricity, for instance, stipulates Member States have to 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".[611] According to the Markets in Financial Instruments Directive, all information (and thus also a standard contract) addressed to clients or potential clients has to be fair, clear and not misleading.[612] And Directive 2009/73/EC concerning natural gas partly covers the same aspects as the UCTD, as it requires Member States to ensure a high level of consumer protection with respect to the transparency of contractual terms and conditions.[613] When assessing the transparency of a contract in a regulated sector, the CJEU thus often applies both the horizontal and sector-specific consumer legislation.[614] For example, in C-92/11 *RWE Vertrieb AG* the Court examined whether price increases of natural gas are compatible with, on the one hand, the transparency requirements of

[610] This is the case in Spain.

[611] Annex I Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

[612] Article 19 (2) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 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.

[613] Annex I of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 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.

[614] See also C-453/10 Perenicova where the ECJ applied the UCTD in a case on consumer credit.

Articles 4(2) and 5 of the UCTD and, on the other hand, the similar provisions of Directive 2003/55/EC.[615]

In our country research and interviews, stakeholders commented regarding the clarity and coherence of the two sets of rules.[616] Most stakeholders indeed consider the legal framework rather clear and coherent.[617] In a number of Member States however it was emphasised that the different sets of regulation overlap regularly.[618] In this respect in Cyprus it was noted that this is often due to the fact that the horizontal and sector-specific legislation is enforced or overseen by different authorities.[619] By way of an example the Cypriot Office of the Commissioner of Electronic Communications and Postal Regulation referred to the Cypriot Law 112(I)/2004, which empowers the Commissioner to regulate all consumer protection issues pertaining to electronic communications by issuing decrees or decisions. On this basis, the Commissioner issued a sector-specific decree (the Consumer Protection Decree 42/2013) with regard to the appropriate content of contracts in this area. Understandably, this matter is closely connected and even overlaps with the issues governed by the UCTD for which the Cypriot Regulator is responsible. Hence unfair contract terms in this area are governed by both general and specific legislation, enforced or overseen by different authorities. As noted above, such overlap does also occur at the EU-level.

Apart from the problems concerning overlapping legislation combined with the organisation of the enforcement bodies we mentioned earlier, we will focus on two practical issues due to combined application that also came forward in the country research.

Firstly, certain Member States reported that the application of numerous (overlapping) texts jeopardises the clarity of the legal framework.[620] The wide range of legislation in different texts and sectors could hinder the general understanding of problems in practice, thereby creating legal uncertainty for consumers and businesses.[621] Consumers do not always find their way in the tangled web of legislation. Further, according to stakeholders in the Netherlands the requirements of the UCTD do not always match well with the specific financial legislation, which is not developed with consumer protection as a primary objective. Consequently, the instruments in part overlap and are sometimes even contradictory.[622]

Secondly, issues could arise when the different sets of rules apply simultaneously. The hierarchy between the UCTD and the sector-specific legislation is not regulated by the

[615] C-92/11 *RWE Vertrieb AG*; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, O.J. 2003, L 176/57 (now Directive 2009/73/EC).

[616] It should be noted however that the majority of the stakeholders mainly focused on the correlation between the UCPD and the sector-specific rules and referred to the overlap of information requirements in particular. This aspect was dealt with above in Section 6.3.1.

[617] The stakeholders answering the questions in the Slovakian, Spanish, Cypriot and UK country reports mentioned that the overall clarity and coherence of the legal framework should be improved.

[618] See also B. J. DRIJBER in M. ROGGENKAMP and H. BJORNEBYE, "*European Energy & Law Report*", Volume X, Intersentia, 13.

[619] Country report Cyprus.

[620] See in particular country reports Slovakia, Spain, Cyprus and UK.

[621] Country report Spain; See also B. J. DRIJBER in M. ROGGENKAMP and H. BJORNEBYE, "*European Energy & Law Report*", Volume X, Intersentia, 14.

[622] Country report Netherlands.

UCTD itself. The sector-specific rules often state that their requirements apply "without prejudice" to the UCTD.[623] This formula makes clear that the UCTD is not as such excluded by the sector-specific legislation and should be applied simultaneously. Nonetheless, this formula does not indicate how conflicting provisions should be handled. The country report for Slovakia points out that the CJEU does not provide much clarification on this point. As mentioned earlier, in C-92/11 *RWE Vertrieb AG*, the Court applied both Directive 2003/55/EC and the UCTD to assess the transparency requirements of a particular gas supply contract. The Court analysed the text of Directive 2003/55/EC which states that its requirements apply "without prejudice" to the UCTD, but did not elaborate on how to handle any potential conflicts between the UCTD and the sector-specific legislation. In the same context Advocate General Trstenjak mentioned in her Opinion that "the transparency rule in Article 3(3) of Directive 2003/55 laid down for general terms and conditions is a specially regulated example in the sector of the internal market for energy of the transparency requirement already secured under Directive 93/13."[624] Neither the Court nor the Advocate General explained whether the horizontal or sector-specific legislation prevails if a conflict emerges.[625] This should not come as a surprise, since there was *in casu* no conflict and both directives complemented each other. There was thus no need to establish a hierarchy.

Since the UCTD consists of general norms and an indicative list of unfair terms, it is usually easily compatible with the sector-specific legislation. A "without prejudice" formula in the sector-specific legislation could therefore be sufficient. However, a conflict between the UCTD and the sector-specific legislation is not entirely unconceivable, for instance when a sector-specific provision establishes a sanction for an unfair term, different from the one provided for in the UCTD.[626] This issue could also appear in case of conflicting interpretation rules. Since neither the UCTD, nor the sector-specific rules regulate how conflicting provisions should be managed, such issue is to be handled by applying the general principles of legal interpretation on a case-by-case basis, from which the result will not always be clear and foreseeable to traders. Consequently, it could be useful for the European legislator to clarify the hierarchy between the horizontal and the sector-specific legislation.

It appears that some stakeholders would indeed like the European Union to set out guidelines regarding the interplay between the horizontal and sector-specific consumer legislation. In Dutch law, for instance, specific legislation normally takes precedence over generic (horizontal) legislation. A Dutch ministry stated that it is unclear whether such a rule also applies at the European level. Another Dutch stakeholder indicated that the interaction between both rules is not transparent at the moment. This could cause problems and may prevent the regulator from timeously intervening in the market. Furthermore, the Croatian regulatory authority stated that further clarification about this issue would be valuable, especially with respect to the natural gas sector. The Slovakian country report notes that the case law of the Court of Justice is not always that helpful in this context, criticising the approach of the Court, which was considered to have mixed the horizontal and sector-specific rules concerning unfair contracts. In particular, it referred to C-92/11 *RWE Vertrieb*, C-359/11 *Schulz &*

[623] Annex I of Directive 2009/72/EC for instance states its requirements apply to the respective contracts without prejudice of the Community rules on consumer protection (including the UCTD).

[624] C-92/11 RWE Vertrieb AG; Opinion Advocate General V. Trstenjak of 13 September 2012; H-W. MICKLITZ and N. REICH, "*The Court and sleeping beauty: the revival of the Unfair Contract Terms Directive (UCTD)"* in Common Market Law Review 51, 771-808, 2014.

[625] Country report Slovakia.

[626] See for instance article 5 and article 6.1 of the UCTD which could be incompatible with sector-specific legislation that provides for a moderation (instead of declaring the term non-binding).

Egbringhoff and C-400/11 *Egbringhoff.*[627] The Slovenian report argued that any future horizontal legislation should contain a list (e.g. in an annex) of all the EU sector-specific rules it affects.

A few Member States already tried to cope with the issues caused by overlapping or conflicting provisions. In Spain, the coordination of the general and sector-specific consumer legislation is regulated by a royal decree.[628] Article 59.2 of this decree stipulates that the general consumer protection rules are applicable anywhere and in any sector, unless the sectoral or special rules establish a higher level of consumer protection and those rules comply with EU law. Since the notion 'higher level of consumer protection' is rather subject to interpretation, this approach might not be the best way to proceed. A better solution may be to have the specific legislation take precedence over the general (horizontal) legislation in case of a conflict, as is the case in the Netherlands. The same approach was used in the Consumer Rights directive, which expressly states: "If any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors."[629] Further overlaps and contradictions could also be reduced by making different competent bodies work closely together. In Latvia for example, consumer legislation is drafted with the participation of all authorities involved, ensuring consistence and clarity of the rules.[630] Some country reports noted that the use of the same definition for 'consumer' in the horizontal and sector-specific legislation would improve the coherence between the different sets of rules.[631] Lastly, Finnish government officials requested more cooperation and communication between the DG working groups in charge of the different regulation in order to avoid cross-cutting or intersectional issues.[632]

This being said, it is important to point out that applying both the horizontal and sector-specific legislation in the regulated sectors has its advantages. The overall perception is that the combined application generally benefits consumers. The specific legislation usually does not tackle every problem, particularly in dynamic sectors like financial regulation, energy and transport. As the (principle based) UCTD is applicable in any sector, potential gaps in the sector-specific regulation are filled. Accordingly consumers benefit from a minimum level of protection in all circumstances, enhancing the legal certainty for those consumers. The UCTD acts as a 'safety net' with general clauses that are flexible and able to embrace new situations whereas sector-specific rules are usually more rigid. Vice versa, the sole application of the UCTD in the regulated sectors would not always be sufficient. By way of example, in C-359/11 and C-400/11 *Schulz-Egbringhoff*, the content of the contracts at issue was determined by mandatory German legislative provisions. Therefore, the contracts fell outside the scope of the UCTD, but the consumer concerned was nonetheless protected by the sector-specific legislation.[633] In the Dutch country report, a Dutch consumer organisation also recognised the value of the sector-specific legislation. "The existence

[627] See above.

[628] Royal Legislative Decree 1/2007.

[629] Article 3(2) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

[630] Country report Latvia.

[631] Country reports Luxembourg and Greece.

[632] Country report Finland.

[633] C-359/11 and C-400/11 Schulz-Egbringhoff, paragraphs 52 and 53.

of specific unfair terms, such as terms forbidding consumers to make use of a return ticket for their return flight if they have not also made use of the outbound flight – such terms are difficult to combat with the general ban on unfair terms", the organisation argued. The sector-specific legislation thus tends to protect consumers in the regulated areas, where the horizontal legislative framework is not sufficient.[634]

It can be concluded that mostly the legal framework for unfair contract terms and contractual transparency requirements is considered to be rather clear and coherent. Still, it appears that certain stakeholders would like the European Union to set out guidelines regarding the interplay between the horizontal and sector-specific consumer legislation. The current provisions do not determine how conflicts between the different sets of rules that apply simultaneously should be handled, nor does the case law of the ECJ provide legal certainty in this regard. Indeed, the UCTD is overall compatible with the sector-specific legislation and causes no severe issues at the moment. However, any future problems could be prevented by clear EU guidance – similar to Article 3(2) of Consumer Rights Directive – on the hierarchy between the horizontal and sector-specific legislation.

6.3.3. Injunctions

6.3.3.1. *Interplay between the Injunctions Directive and other enforcement instruments of consumer law*

- What is the legal and practical interplay between the Injunctions Directive and the CPC Regulation, in particular what has been the impact of the application of the CPC Regulation on the use of injunction procedure, as defined by the Directive and in particular on the number of injunction actions for infringements having a cross-border dimension brought by public bodies and organisations? Is there a need for any further steps in order to ensure the coherence between those two legislative acts, taking into account the works on the CPC Regulation review?

The Injunctions Directive and the CPC Regulation differ in their respective scopes of application in relation to those who can use them and to the types of consumer law infringements that they cover.

First, only public authorities can make use of the CPC Regulation, whereas consumer organisations can only take cross-border action by way of the Injunctions Directive or by using none of the two instruments, namely by suing the foreign trader in their domestic courts, or by way of informal co-operation with a befriended consumer organisation in the Member State where the trader is domiciled.

Second, from the legal instruments that are within the scope of application of the Injunctions Directive, only the Services Directive 2006/123/EC is missing in the CPC Regulation. In contrast, the CPC Regulation covers a number of instruments that are not listed in the Annex of the Injunctions Directive, namely the Price Indication Directive 98/6/EC, the Data Protection Directive 2002/58/EC, the Air Passengers Rights Regulation (EC) No. 261/2004, the Boat Passengers Rights Regulation (EC) No. 1177/2010, the Railways Passengers Rights Regulation (EC) No. 1177/2010, the Bus Passengers Rights Regulation (EU) No. 181/2011 and finally the Misleading and Comparative Advertising Directive 2006/114/EEC.

[634] See also J. STUYCK, "*Consumer concepts in EU secondary law*", paper https://www.law.kuleuven.be/ccm/bochumfeb2014def.docx.

Thus, there are a number of cases where the qualified entity that wants to take action does not have a choice in the first place, because the problem at hand is only covered by the one or the other enforcement system.

If they have a choice, consumer authorities prefer to use the CPC Network when it comes to cross-border infringements.[635] Consumer organisations who cannot use the CPC Network sometimes ask their national authorities to get in touch with other authorities through the CPC Network, or they ask consumer organisations from the trader's Member State for help.[636]

The potential need for any further steps in order to ensure the coherence between Injunctions Directive and the CPC Regulation is further discussed in subsequent section.

- What is the legal and practical interplay between the Injunctions Directive and the enforcement provisions provided by other EU Consumer Law Directives subject to Fitness Check and by the Consumer Rights Directive?

The legal and practical interplay between the Injunctions Directive and the enforcement provisions provided by other EU Consumer Law Directives subject to Fitness Check and by the Consumer Rights Directive is both relevant at the EU level, and at the domestic level. The following sub-sections focus on areas where incoherence between these provisions is observed, based on the results of the country research conducted for this evaluation.

Incoherence at EU level

Besides the Injunctions Directive, some of the EU consumer law directives contain provisions relating to injunction procedures in the respective areas. The start was made by the Misleading Advertising Directive 84/450/EEC that was replaced by the Unfair Commercial Practices Directive 2005/29/EC, which also provides for injunctions in Art. 11. The Unfair Contract Terms Directive 93/13/EEC deals with injunctions in Article 7(2), and so did the Distance Selling Directive 97/7/EC in Article 11. That latter Directive has, however, been replaced by the Consumer Rights Directive 2011/83/EC, Article 23 of which does not contain a specific provision on injunctions but a broader notion of collective enforcement by national authorities, consumer organisations or both.

Otherwise, all consumer law instruments require Member States to ensure effective, dissuasive and proportionate sanctions for infringements, and injunctions, thus the prohibition to stop an infringement in the future, appear to be the very least that this requirement implies.

The texts of the Injunctions Directive and the provisions relating to enforcement procedures foreseen by other EU law Directives differ. As to the *injunction procedure* as such, Article 2(1)(a) of the Injunctions Directive foresees an order requiring the cessation or prohibition of any infringement. That same type of measure is mentioned in Article 11(1) of the UCPD. Article 7 of the UCTD refers to the prevention of the continued use of unfair terms; which could be interpreted more broadly. Finally, Article 23 of the CRD is entirely open about the kind of collective enforcement measures that are to be taken to ensure the application of the related rules in the Member States.

[635] E.g. country reports Denmark, Finland, France, Lithuania.

[636] Country report Lithuania.

Under Article 2(1)(a) of the Injunctions Directive, injunction procedures are to be handled 'with all due expediency, where appropriate by way of *summary procedure*'. Article 11(1) of the UCPD requires Member States to make provision for measures to be taken 'under an accelerated procedure' either with interim effect or with definitive defect, to the choice of the Member State. The other directives do not deal explicitly with accelerated procedures.

In terms of publication, under Article 2(1)(b) of the Injunctions Directive, qualified entities can seek, where appropriate, measures such as the *publication of the decision*, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement. The corresponding provision of Article 11(1) of the UCPD reads: 'Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of unfair commercial practices the cessation of which has been ordered by a final decision: a) to require publication of that decision in full or in part and in such form as they deem adequate, b) to require in addition the publication of a corrective statement.' Article 7 UCTD does not mention publication, nor does Article 23 of the Consumer Rights Directive.

Article 2(1)(c) of the Injunctions Directive deals with *sanctions for the breach of an injunction order* in the following way: Sanctions are at the discretion of the Member States ('in so far as the legal system of the Member State concerned so permits'). They may foresee an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions. The UCTD and the CRD do not mention sanctions for the breach of an order. Article 7 of the UCTD requires Member States to ensure the availability of adequate and effective means 'to prevent the continued use of unfair terms', whereas Article 23 of the CRD merely refers to action under national law 'to ensure that the national provisions transposing this Directive are applied'; which may of course entail sanctions for the breach of an order, as this would seem to be a necessary element of an effective enforcement system.

Finally, there are certain differences as to the enforcement bodies. Article 3 of the Injunctions Directive mentions any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular one or more independent public bodies, specifically responsible for protecting the collective interests of consumers, and/or organisations whose purpose is to protect the collective interests of consumers; which is an open formula as the words 'in particular' demonstrate. Article 7(2) UCTD is also open by referring to 'persons or organisations, having a legitimate interest under national law in protecting consumers'. Article 11(2) mentions persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices but explicitly also refers to competitors. Article 23(1) refers to one or more of the following bodies, as determined by national law, may take action under national law and lists public bodies or their representatives, consumer organisations but also professional organisations. All the directives have in common that they leave the choice of enforcers to the Member States, and all of them only require Member States to have at least one category of enforcers in place while they also allow a combination of several enforcers, including business organisations. Competitors are only explicitly mentioned in the UCPD but it should be noted that breaches of other directives will often constitute unfair commercial practices at the same time.

Incoherence at the domestic level

Coherence in the implementation measures of Member States differs.[637] In some Member States, the different procedures envisaged by the Injunctions Directive and by specific legislation come under different legal provisions but follow by and large the same rules.[638]

Differences are sometimes (traditionally) made between unfair commercial practices law and the injunction procedure implementing the Injunctions Directive. For example, in Germany, injunction procedures under unfair commercial practices law can be filed by the trader's competitors, whereas they do not have legal standing under the Injunctions Act. Prescription periods differ between unfair commercial practices law and (other) injunctions in the collective interest of consumers. Both procedures can be used by consumer organisations though. Enforcers also differ from one area to the other in Spanish law.

In other Member States, the regimes of the national implementation of the Injunctions Directive and the national implementations of the UCPD, the UCTD and the CRD all differ. For example, in Cyprus, the prior consultation of the trader is required under the national implementation of the Injunctions Directive but not in the injunction procedures in the specific injunction procedures; which has been reported to create legal uncertainty.[639]

Where consumer law is entirely or mainly enforced by public authorities, they have often sector-specific competences.[640] The same applies, to some extent, to consumer organisations that are sometimes specialised, for example, in the area of energy or railways services.

- Is there a need for any further steps in order to ensure the coherence between the abovementioned legislative acts, also in the context of the possible codification/recast of EU Consumer law?

Experience in those Member States that have extended the scope of application of the Injunctions Directive shows that injunction procedures have been used in the past in a far broader range of consumer law infringements than those listed in the Annex of the Injunctions Directive or the CPC Network Regulation.

An example of a legislative act that is listed in the CPC Network Regulation but not in the Injunctions Directive and that has featured in domestic injunction procedures brought by consumer organisations is the Data Protection Directive.[641]

The country research did not identify any valid reason why some pieces of legislation should qualify as consumer law under the CPC Network Regulation but not under the

[637] See table in Annex V of this report for an overview.

[638] E.g. country reports Germany, Latvia.

[639] Country report Cyprus, 1.3.3. No other problems in other Member States were identified or reported in the context of this study.

[640] Country report Malta.

[641] See LG Dusseldorf, 9/3/2016, Verbraucher und Recht 2016, 230, on the Facebook ‚like button'.

Injunctions Directive. This was also emphasised by some stakeholders.[642] In the online public consultation, 50% or more of all respondent categories other than business associations agreed that there was a need to ensure coherence between the Injunctions Directive and other provisions on the enforcement of consumer rights, including 65% of consumer associations and 50% of public authorities. Regarding business associations, 28% agreed, 20% disagreed, and 52% had no opinion/did not answer to this item. Some consumer stakeholders that argued in favour of the extension of the scope of application of the Injunctions Directive also suggested that both Annexes could be turned into exemplary rather than exclusive lists so as to be sufficiently open for future development.[643]

Other than a streamlining of the Annexes of both the CPC Regulation and Injunctions Directive, this evaluation has not identified a need to change the current system that leaves the decision on the best strategy in the individual case in terms of choice between the two legal instruments as a basis for enforcement actions to the qualified entity. Regarding the interplay between the Injunctions Directive and the enforcement provisions of other Directives, the identified differences between the directives do not seem to be based on any clear rationale, and an alignment of enforcement provisions could therefore contribute to simplification and coherence of the EU consumer law framework.

See also Section 8, conclusions and recommendations.

6.4. Relevance

6.4.1. Unfair commercial practices and marketing

6.4.1.1. *Relevance for business-to-business transactions*

- Whether an extension of the Unfair Commercial Practices Directive to B2B transactions or a revision/extension of the Misleading and Comparative Advertising Directive would bring benefits for the cross-border trade; Whether it is appropriate to keep separate legal regimes for B2B and B2C transactions in the area of commercial practices and to what extent both regimes could be aligned;

As mentioned, the UCPD applies pursuant to Article 3(1) to business-to-consumer commercial practices before, during and after a commercial transaction. According to Recital 6 UCPD, "it neither covers nor affects the national laws on unfair commercial practices … which relate to a transaction between traders …". Hence, business-to-business commercial practices are not covered by the UCPD.

Such B2B commercial practices are partly regulated under the MCAD which, pursuant to Article 8(1), does not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for traders and competitors. Of course, Member States may extend, under their national laws, the protection granted under the UCPD to B2B commercial practices. A number of Member States currently apply the rules provided for in the

[642] E.g. in the position paper submitted to the online public consultation by BEUC: "There is no valid reason to restrict the [Injunctions] Directive to consumer protection measures which are currently listed in the annex. For instance, areas such as product liability, data protection, transport or financial services, should also be covered."

[643] See, for example, the position paper submitted to the online public consultation by the Federation of German Consumer Organisations (vzbv).

UCPD also to B2B relations.[644] First of all, Austria and Sweden have extended all UCPD provisions to B2B transactions. In Denmark, businesses are protected by provisions on both misleading and aggressive practices. France only extends the general prohibition of misleading actions and the blacklisted misleading practices to B2B transactions. In Germany, parts of the Directive also apply to business-to-business commercial practices. In Italy, the provisions implementing the UCPD apply not only to B2C commercial practices but also to commercial practices between businesses and so-called "micro-enterprises" (defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million). In Belgium, certain practices on the blacklist are also blacklisted in B2B transactions; in addition, an outright prohibition of the practices of misleading directory companies was introduced. This example was partly followed in the Netherlands, where an important statutory extension of the UCPD regime to B2B situations was introduced in 2016. Likewise, in Portugal, the legislation implementing the UCPD was amended in 2015 so as to broaden its scope to cover some misleading actions in B2B relations. In the Czech Republic, the UCPD is also extended to B2B transactions.[645]

The extension of the UCPD to B2B transactions and other measures to improve protection of businesses against unfair commercial practices have been discussed since many years. Already in Recital 8 UCPD, it is indicated that "the Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition." In its November 2012 Communication "Protecting businesses against misleading marketing practices and ensuring effective enforcement – Review of the MCAD" the Commission announced that it would come up in due time with a Proposal to amend the MCAD in order to address "the problem of unfair business-to-business practices". The Commission proposed the introduction of a black list of the most common and harmful B2B marketing practices (practices of misleading directory companies, misleading payment forms, offers to extend internet domain names or protection of trademarks, etc.) and provisions to improve cross-border enforcement. Eventually, the Commission did not adopt the announced Proposal for a Business Marketing Directive. Neither did the Commission eventually propose a cooperation mechanism among MS authorities in cross-border cases of misleading advertising.

This study explored stakeholder opinions, an analysis of compliance costs of businesses and other evidence concerning the questions whether an extension of the UCPD to B2B transactions or a revision/extension of the MCAD would bring benefits for the cross-border trade, and whether such a legislative change is needed with a view of ensuring more extensive protection for traders and competitors. On the basis of the country research, the following conclusions can be drawn:

From several countries it is reported that, from a theoretical perspective, an extension of the UCPD to B2B transactions or a revision/extension of the MCAD could bring benefits for the cross-border trade.[646] It would help to create a level playing field among Member States in B2B transactions and facilitate cross-border B2B marketing campaigns.[647] However, it was often added that relevant data as regards the

[644] See Annex III of this report for a summary of the extension of UCPD provisions to B2B relations, as well as additional protection going beyond the MCAD.

[645] See country reports of the mentioned countries.

[646] Country reports Austria, Bulgaria, Germany, Latvia.

[647] Country report Latvia (although it was immediately added that on the other hand it is not without problems); country report Malta (view of two business organisations)

(negative) impact of the current approach at the EU level on B2B cross-border trade are lacking.[648] In a number of Member States, no problems in cross-border B2B marketing were reported.[649] Moreover, it is difficult to predict and highly uncertain to what extent such a legislative change would facilitate cross-border trade in practice.[650] Hence, it was impossible to make an equivocal conclusion whether such an extension could bring those very benefits.[651]

It is notable in this context that current costs for businesses related to the MCAD are significantly lower than costs related to the UCPD, as the business interviews conducted for this study indicated.[652] In terms of one-off costs for checking compliance and adapting advertising/marketing and standard contract terms to the national legislation when entering another EU country's market (as well as adjusting business practices, where needed), average costs related to advertising and marketing targeted at businesses are in none of the selected sectors/company size classes higher than 30 percent of the total costs, typically being half or less of the cost share indicated by interviewed businesses for advertising and marketing targeted at consumers. A similar picture can be observed regarding regular checks of businesses that advertising/marketing and standard contract terms still comply with national legislation in those countries in which they operate (and adjusting business practices, if needed), with the share of average costs related to advertising and marketing targeted at businesses being never above 20% of the total costs in any of the sectors/size classes scrutinised. In other words, the potential benefits of creating a more level playing field and facilitate cross-border B2B marketing campaigns in terms of reducing costs for businesses seem to be limited. However, in case the number of B2B cross-border marketing campaigns would notably increase, even this relatively low share of costs could become more relevant. It is also conceivable that an extension of the UCPD to B2B relations (but not necessarily a revision/extension of the Misleading and Comparative Advertising Directive) could be expected to lead to reduced compliance costs for businesses that target both businesses and consumers in advertising/marketing, as in this case there would be no need (and no related costs) for checking compliance with a separate B2B legislative framework, both in a domestic and in a cross-border context. Only those companies that exclusively target businesses in their advertising/marketing could be expected to have increased compliance costs, as they would now have to comply with the more comprehensive rules of the UCPD.

The results of the country research indicate that the general perception among stakeholders is that there is no need for a fully-fledged 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.[653] The UCPD was designed with the goal of raising the level of consumer protection.[654] Its justification lies in the special needs of natural persons acting for non-professional purposes and their weaker

[648] Country report Austria.

[649] Country reports Cyprus, Denmark.

[650] Country reports Bulgaria, the Netherlands, Poland, Slovenia.

[651] Country report Latvia, Lithuania.

[652] See results of the business interviews in Part 4 of this report.

[653] Country reports Czech Republic (majority of stakeholders), Denmark (majority of stakeholders), Estonia (most respondents), Finland (business associations), France (most respondents), Germany (majority of stakeholders), Latvia, Poland (business associations), Romania (business associations), Slovakia (majority of stakeholders).

[654] Country report Austria (view of business organisations and ministries).

position vis-à-vis traders; this justification does not apply to traders.[655] The B2B-relationship as opposed to the B2C-relationship is not fundamentally unbalanced.[656,657] A higher degree of diligence is to be expected than in B2C transactions.[658] It is generally considered not appropriate that businesses and consumers should be equally protected across the board. The analysis of the written submissions to the open public consultation conducted in the framework of the Fitness Check show that many business stakeholders were opposed to the idea of extending consumer law to B2B relations.[659]

An additional and more pragmatic argument that is being made in a number of Member States is that the extension of the UCPD would require notable additional resources for enforcement authorities as currently they would not be equipped to handle the increased workload.[660] More fundamentally, the view is that public enforcement of unfair commercial practices in B2B transactions should be avoided and that preference should in any event be given to private enforcement.[661]

However, several stakeholders in a minority of countries are of the opinion that an extension of the UCPD is needed for systematic reasons. It is considered not appropriate to keep separate legal regimes for B2C and B2B transactions;[662] this would contribute to a clearer and more uniform regulatory framework of the law of unfair competition which would be beneficial per se;[663] and this would allow reaching a high level of harmonisation in the internal market.[664] In this regard, reference is made to the view of some legal scholars that the current division of B2C and B2B regimes at the national level is an artificial one. Commercial practices of a trader may target and reach different addressees.[665] Certain scholars have argued that the best way forward at the EU level would be to create a unified legal regime to fight unfair commercial practices (including illegitimate comparative advertising) applicable to B2C and B2B commercial practices. As a matter of principle, the criteria for determining the unfairness of a practice should be uniform, irrespective of whom is targeted, addressed or reached by it.[666]

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[655] Country report Poland (view of business organisations).

[656] Country reports France (view of business organisations and consumer associations), Belgium (view of business organisations).

[657] See e.g. the position argued in the paper submitted by EuroCommerce to the online public consultation regarding the difficulty in identifying the “stronger” and “weaker” party in B2B transactions.

[658] Country report United Kingdom (view of Department of Business, Energy and Industrial Strategy).

[659] 8 written submissions suggested this, see Part 2 of this report.

[660] Country reports Lithuania; Malta (view of consumer organisation).

[661] Country report Bulgaria (view of some stakeholders).

[662] E.g. country report Croatia (view of a business association); country report Malta (view of two business organisations).

[663] Country reports Slovenia, Belgium, Greece.

[664] Country report Spain.

[665] Country report Lithuania.

[666] See B. Keirsbilck, “Which way forward for the new European law of unfair commercial practices”, *EJCL*, 2013, p. 233 et seq. (see p. 240 and 254), adding that an extension of the UCPD would require much more research and some important amendments to the UCPD provisions, with to avoiding any undesirable impact on national laws of unfair competition, and on national contract laws.

Based on the research conducted for the study, several options for further aligning the legal regimes for B2B and B2C transactions in the area of commercial practices could be identified:

- The UCPD's general prohibition of unfair practices could be extended to B2B relations or a general prohibition of unfair B2B practices in the MCAD could be introduced. This could be combined with the extension of the UCPD's general prohibition of aggressive B2C practices to B2B relations or the introduction of a general prohibition of aggressive B2B practices in the MCAD. The main argument for these options would lie in the mentioned more unified approach and the expected lower compliance costs for businesses that advertise to both businesses and consumers (only for the first option, an extension of the UCPD to B2B, see above). Along these lines, these options could be complemented with an extension of the UCPD's general prohibitions of misleading B2C practices to B2B relations or the alignment of the general prohibition of misleading B2B practices in the MCAD with the UCPD. However, it is unclear to which extent these benefits would be relevant at a practical level, as no major problem with the current situation in terms of cross-border advertising/marketing targeted at businesses are reported. Also, as indicated above, most stakeholders do not see a need in this respect.
- A *B2B blacklist of unfair practices could be introduced*. It is acknowledged in at least some Member States that SMEs may need additional protection because they have a level of competence or bargaining power similar to those of consumers.[667] As mentioned, Italy extended the UCPD to relations between businesses and "micro-enterprises".[668] Also, previous studies and the country research demonstrate that businesses (especially SMEs) face a number of common and harmful misleading B2B marketing practices. The creation of a B2B blacklist combating such practices is therefore suggested in a number of Member States.[669] In some Member States, however, the need for such a B2B blacklist was not seen.[670] A split of opinions can also be noted in the results of the open public consultation, which show that the majority of business respondents from individual companies (60%) either strongly agree or tend to agree that business protection against unfair commercial practices should be strengthened by introducing a "black list" of B2B practices that are always prohibited. In contrast, less than one-third (27%) of responding business associations agree with this statement, while 47% either tend to disagree or strongly disagree.[671] While the creation of a B2B black list at EU level is therefore likely to be controversial,[672] it appears to be an option for aligning the legal regimes for B2B and B2C transactions in the area of commercial practices to some degree, in line with the identified needs.
- *B2C and B2B rules on misleading practices could be aligned*. Before the adoption of the UCPD in 2005, the MCAD's general prohibition of misleading advertising applied to any advertising, whether addressed to consumers or

[667] Country report Latvia.

[668] However, it is often noted in this regard that it is impossible to set objective and fair criteria allowing to separate those traders that are in need of additional protection from those that do not need additional protection ("slippery slope"). Country report Latvia, Poland

[669] Country report Slovakia.

[670] Country report Germany.

[671] See Part 2 of this report.

[672] See also country report United Kingdom.

businesses (integrated approach). It is only since 2005 that EU law takes a dualistic approach in the field of unfair practices, with the UCPD covering (unfair) B2C practices and the MCAD covering (misleading) B2B advertising. An alignment of B2C and B2B rules on misleading practices would reintroduce an integrated approach in this area, which could be expected to generate benefits from an enforcement point of view. Mass (misleading) advertising is often directed at both consumers and businesses. In private enforcement cases the dualistic approach can cause a problem in that the judge might be called to apply to different sets of rules to the same facts. This option would be a partial alignment only, if it were not to include the introduction of a general prohibition of unfair/aggressive practices in B2B transactions.

Options for aligning B2C and B2B rules are further discussed below in Section 8.

- The appropriate scope of the protection in B2B transactions – whether the protection should cover only the pre-contractual stage (i.e. misleading or aggressive marketing) or should it cover also unfair commercial practices during and after the transaction;

This issue was not considered in past studies on the reform of the MCAD.

The results of the open public consultation show that two-thirds of business respondents (63%) either strongly agree or tend to agree that business protection against unfair commercial practices should be extended to practices happening not just at the marketing stage but also after the signature of the contract (22% disagree). In contrast, only 28% of business associations agree with this statement, while a plurality (34%) disagrees.[673]

The country research also revealed widely differing views concerning whether or not there is a need for better protection of businesses against unfair commercial practices during and after the transaction. While stakeholders in some Member States see a need for such an extension,[674] stakeholders in other Member States do not consider a better protection of businesses against unfair commercial practices during and after the transaction to be necessary.[675] Other emphasise that there are no studies or that there is no sufficient experience to make recommendation.[676]

- Whether there is a need to have a black-list of practices in the business-to-business marketing area;

See answer to the first evaluation question of this section (above).

- What should be the enforcement cooperation mechanism in the business-to-business marketing area;

[673] See Part 2 of this report.

[674] Country reports Bulgaria, Croatia; Italy, Malta, Portugal, Romania, Slovenia, Spain; in Ireland a policymaker was welcoming such an extension.

[675] Country reports Cyprus, Czech Republic; Denmark, Estonia, France, Poland, Slovenia.

[676] Country reports Latvia, Lithuania, Netherlands, Slovakia, Sweden.

In the 2012 MCAD public consultation a majority of respondents was of the opinion that existing mechanisms in the Member States against misleading business-to-business advertising were not effective and that sanctions provided by national law should be strengthened.[677]

It can be observed that in some countries there are already alternative forms of enforcement available to businesses. In Austria, associations of traders that are sufficiently representative can bring actions for injunctions against unfair commercial practices.[678] According to other country reports judicial procedures are to be preferred.[679] In several countries stakeholders had no opinion[680] or emphasised that there is no specific experience in this respect.[681]

In some Member States stakeholders advocate an extension of Regulation 2006/2004 to business relationships (see previous evaluation question regarding cross-border enforcement, above). In other Member States this was not welcomed.[682] In Member States where the enforcement of rules to protect the interests of businesses is not a task for the state such extension might cause problems. Improved voluntary enforcement could therefore be an alternative option, e.g. by strengthening cross-border cooperation of existing self-regulation bodies in the advertising field. However B2B marketing practices that are borderline fraudulent would not be effectively covered by self-regulation, as the relevant companies are unlikely to voluntarily adhere to the decisions of self-regulation schemes.

- Whether there is a need to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive;

Stakeholders interviewed at the country level often did not perceive a need to develop contractual consequences linked to breaches of the MCAD. Some country reports refer to the existing remedies (under general contract law) that are believed to be sufficient.[683] The Czech legal system has developed contractual consequences of relevant breaches: “A person whose right has been jeopardised or violated by unfair competition may request the violator to refrain from competing unfairly or to remove a defective state.“ Not only can adequate satisfaction be requested, but also compensation for damage and restitution of unjustified enrichment.[684]

Several country reports indicate that they have no information or that there is no relevant experience in this respect.[685] One report states that this is a sensitive issue

[677] See more in detail: B. Keirsbilck, “Which way forward for the new European law of unfair commercial practices”, *EJCL*, 2013, p. 233 et seq. (see p. 271 and 273)

[678] Country report Austria.

[679] Country reports Bulgaria, Denmark.

[680] Country reports Belgium, Romania

[681] Country report Lithuania, Netherlands.

[682] Country report Hungary.

[683] Country reports Belgium, Cyprus, France, Malta, Poland, Portugal, Slovakia.

[684] Country report Czech Republic.

[685] Country reports Greece, Lithuania, Netherlands, Spain, Sweden.

and that the interplay with national law is highly complex.[686] Other country reports mention opposition from business representatives against such remedies,[687] from enforcement authorities concerning harmonisation in this respect at the European level,[688] or simply that there is no need for such remedies.[689] In the open public consultation conducted in the framework of the Fitness Check, a majority of individual businesses (45%), but only a minority of business associations (22%) either strongly agreed or tended to agree that business protection against unfair commercial practices should be strengthened by introducing a right to individual remedies (with 26% of businesses and 41% of business associations disagreeing).

- Whether there is a need to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive.

It has already been mentioned that in some Member States the existing conditions for the lawfulness of comparative advertising are felt to be too restrictive and are seen as an obstacle for comparative advertising. The case law of the Court of Justice rather favours comparative advertising, especially with regard to retail prices, in the interests of consumers. However this generous case law can obviously not avoid self-restraint on the side of businesses. Apart from traditional views on advertising (and indeed a former tradition of prohibiting comparative advertising) self-restraint may be dictated by business interests in avoiding aggressive competition. Comparative advertising in the EU is notably – but not solely – present in the retail sector where some actors have chosen for discount pricing (and at the same time suppliers are increasingly complaining about pressure by large retail groups to obtain lower prices).

Stakeholders interviewed during the country research often did not see the need to adapt the rules on comparative advertising of the MCAD. Some reports mention the need of small adaptations.[690] One report stresses that there is only a need to clarify the interplay with the misleading advertising rules of the MCAD and the rules of the UCPD.[691] In another Member State government officials opined that the law should incorporate the clarifications brought by the CJEU in several judgments.[692]

A point that possibly needs to be clarified is the relationship between the rules on comparative advertising in the MCAD and the limitations on comparative advertising resulting from the CJEU's case law on the protection of the reputation of trade marks (which has been reinforced by the recent Trademark Directive of 2015).

[686] Country report Austria.

[687] Country report Romania (adding that this should remain a matter of private law).

[688] Country report Italy.

[689] Country report Slovenia.

[690] Country report Austria: directory scams (but that does not seem to be a problem of comparative advertising) France already adopted rules on comparative websites.

[691] Country report Portugal. It is specifically reported that it is unclear whether certain practices (such as business directories) should be dealt with by the UCPD or by the MCAD.

[692] Country report Slovakia.

6.4.1.2. *Relevance for consumer-to-business transactions*

- The Study will analyse the need and potential for the application of the UCPD in consumer to-business (C2B) relations. This concerns situations where the consumer sells goods or provides services to a trader (e.g. where the consumer sells gold jewellery to a trader or supplies digital content to business against remuneration).

According to the definition of Article 2(d) UCPD, "commercial practices" are only those "directly connected with the promotion, sale or supply of a product to consumers". The reverse situation, where traders (for example, car dealers, antique dealers and retailers of second-hand goods) purchase products from consumers, does not fall within the scope of the UCPD.

However, in the UCPD Guidance document, the Commission notes that 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 and, hence, where the UCPD applies. The Commission gives two examples. First, a car dealer purchases a used car from the consumer who in turn buys a new or second-hand from the car dealer ("trade-in agreements"). Secondly, the Commission gives the example of the purchase and resale of gold where the trader offers consumers a professional evaluation for their gold before buying it.[693]

According to the country research for this study cases involving consumer to-business (C2B) relations are not frequent. The above-mentioned examples appear to be the ones that are most relevant in practice. It is reported that over the past years there has been a rise and fall of e.g. businesses inviting consumers to sell their jewellery (especially in the 2010-11 period).[694] It is also reported that businesses invite consumers to offer them their old electric appliance or car at a given price and buy a new one in the context of single transaction.[695] Another example that was mentioned relates to consumers providing digital content to businesses (e.g. YouTube) for remuneration.[696] A final example is where consumers owning solar panels or wind turbines sell energy to traders.[697]

The country research confirms that situations where traders purchase goods from consumers (C2B relation) are in principle not covered by the UCPD, unless where a link can be established with the promotion, sale or supply of a (different) good or service to the consumer. Hence, it is recognised that, under certain circumstances, the UCPD can apply to C2B relations.[698] In the UCPD Report, the Commission stated that Member States are indeed free to regulate the area concerned to address national specificities and needs.[699]

As regards the need to explicitly extend scope of the UCPD so as to cover consumer to-business (C2B) relations, views diverge considerably. On the one hand, some stakeholders take the view that the UCPD should not be extended to all C2B

[693] UCPD Guidance document.

[694] Country reports Cyprus, Greece, Lithuania, Portugal.

[695] Country reports Cyprus, the Netherlands, Portugal.

[696] Country report Lithuania.

[697] Country report Sweden.

[698] Country report Denmark.

[699] UCPD Report, 10-11.

situations. This would create confusion and raise unnecessary questions about the need of such protection.[700] Moreover, this is considered not to be necessary in light of the fact that C2B situations are less frequent and pose smaller risks to consumers (usually their main interest is to receive the agreed remuneration).[701] Finally, it is sometimes noted that this is not necessary because national provisions implementing the UCPD already apply to C2B transactions.[702]

On the other hand, it is sometimes argued that there is a clear need to extend the protection of the UCPD to C2B situations, because consumers selling products to traders are in the weaker position and in need of protection.[703] Without such an extension, the enforcement authorities are indeed forced to particularly extensive interpretations in order to cope with the lack of protection for consumers.[704] In cases involving C2B relations, only general provisions of the Civil Code are applicable, thus failing to afford any kind of special or additional protection to the weaker party (natural person acting for non-professional purposes).[705] Arguably, such an extension could be achieved by broadening the definition of "commercial practice" to all practices "directly connected with the promotion, sale or supply of a product to or from consumers". As a result, commercial practices by traders who purchase goods from consumers (C2B relations) would be covered by the UCPD.

See also recommendations in Section 8.

6.4.2. Contract conclusion and performance

6.4.2.1. *Relevance for business-to-business transactions*

- Whether there is a need to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms;

Earlier studies on unfair commercial practices (broadly defined as including the use of unfair contract terms) confirm the existence of a problem, also in B2B relationships. Thus, in a study carried out in 2012, 58 % of the more than 700 responding businesses declared to have been affected by unfair practices within the last two years. 66 % of the latter respondents declared to have had unfair terms imposed on them.[706] In the same study, 70% of all respondents took the view that the legal certainty and predictability of their business would be enhanced if contractual terms were provided solely in a written form. Another 2009 survey with almost 700 respondents reported that 96.4 % of the responding companies (suppliers) had been

[700] Country reports Croatia, Czech Republic, Poland (view of consumer associations)

[701] Country report Latvia.

[702] Country reports Estonia, Germany, Slovakia.

[703] Country report Austria (view of some stakeholders); France (most respondents), Lithuania, Portugal (enforcement authority), Romania (authorities and consumer associations)

[704] Country report Italy.

[705] See country reports Greece, the Netherlands (view of the Consumentenbond)

[706] Directorate-General for the internal market and services: Summary report of the responses received to the Commission's consultation on unfair business to business commercial practices, 15 februari 2012, http://ec.europa.eu/yourvoice/ebtp/consultations/2011/unfair_business/report_en.pdf, 14-15, nr. 30-32;

exposed to unfair practices.[707] 48 % of the responding companies confirmed to have been imposed clearly one-sided contractual provisions.

So far, the responses to the use of unfair commercial practices (including the use of unfair contract terms) in the Member States have been extremely diverse. Both competition law (through theories like 'abuse of economic dependence' or 'abuse of relative dominance')[708] and unfair competition law, and specific B2B legislation has been adopted. Also, contract law is used in some Member States, in addition to self-regulation. Contract law was found to be mainly used in relation to unfair practices relating to contract formation and execution and in particular in relation to payment terms and price related clauses, disclaimers, disproportionate penalty clauses.[709]

This study confirms the disparity of the current approaches towards a strengthened protection of businesses. Quite a number of Member States already have some form of protection in place to protect businesses against unfair contract terms,[710] often in their general contract law provisions. This may be a system similar to the system of the UCTD, that either predated the implementation of the UCTD, or in other countries, like e.g. Croatia, that finds its origin in an extension of the scope of application of the UCTD also to traders.

The scope of the control of B2B unfair contract terms differs.[711] The control of unfair contract terms may apply to all contracts;[712] to all B2B contracts; or in certain countries only to certain categories of traders – whether only to traders acting for a purpose that is outside their regular business,[713] or to all SMEs and micro-enterprises.[714]

In a number of countries, the protection against unfair terms in B2B contracts is ensured by mechanisms that differ from the system of the Directive. Thus e.g., in Lithuania, surprising conditions contained in a standard contract, i.e. such conditions

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[707] DEDICATED RESEARCH, "AIM-CIAA Survey - Unfair commercial practices in Europe", maart 2011, http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/docs/contributions/registered-org/federacion-espanola-de-industrias-de-alimentacion-y-bebidas-fiab-2-annex_es.pdf.

[708] See e.g. Bulgaria, 37a the Protection of Competition Act that prohibits the abuse of stronger position in negotiations (since 2015).

[709] A. RENDA, F. CAFAGGI, J. PELKMANS, P. IAMICELI, A. CORREIA DE BRITO, F. MUSTILI, L. BEBBER, S. CLAVEL, J. IGNACIO RUIZ PERIS en C. ESTEVAN, "Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain", http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdfu.

[710] I.a. Austria, Czech republic (situational protection), France, Lithuania (some protection in general contract law), Portugal, Germany, Denmark, Slovenia, the Netherlands, Sweden, Poland (to a limited extent).

[711] See Annex IV of this report for a summary of extensions of the UCTD to B2B relations in the Member States.

[712] E.g. in France where the recently introduced Art. 1171 Code civil (law of obligations) entails a fairness-test applicable to all not individually negotiated standard agreement forms (excluded are terms pertaining to the subject-matter of the contract and the adequacy of the price). (Ordonnance du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations) ; and in Portugal.

[713] Article 1 of the Latvian Consumer Rights Protection Law; also in France the rules on UCT laid down in the Code de la consommation apply to the "non-professionnel", a legal entity acting for purposes which are outside his commercial activity (cf. Art. L. 212-2 C.conso.). Note however that there are additional provisions protecting other traders.

[714] E.g. in the Netherlands.

that the other party could not reasonably expect to be included in the contract, are not effective.[715] In addition, the Lithuanian Civil Code provides that a party may withdraw from the contract or the specific surprising condition if at the time of the conclusion of the contract, the contract or its condition unjustifiably gave the other party an excessive advantage.[716] An example of an alternative system is provided by the new Czech Civil Code that enshrines the protection of the weaker party as a general principle.[717] The protection of the weaker party[718] is strengthened in all B2B relationships, not just SMEs, but it only ensures a situational protection, i.e. protection of a party *not* dealing in the course of their own business in cases where the other party *is* dealing in the course of their own business.[719]

The protection in B2B relationships is furthermore often not limited to mere control by way of general contract law provision but supplemented by additional provisions that are often sector specific. Thus, as one illustration of such a complementary and specific approach, France can be mentioned. Specific provisions in the French Commercial Code aim at securing well-balanced and fair trade relationships, irrespective of the size of the business.[720] The provisions tackle power asymmetries, which often result from the structure of the market (e.g. suppliers to mass market retail chains are generally in a position of weakness, regardless of their size). More specifically, Art. L. 442-6(I)(2°) Code de commerce entails a control on unfair terms in B2B-contracts (including terms defining the contract's object and the balance between price and performance). A court can hold a term unfair (and void) that causes a significance imbalance in the rights and obligations of the parties provided that one party has subjected (or at least attempted to subject) the other party to this term.[721]

Especially in the food sector, sector specific legislation has been enacted or is being considered in a number of Member States. Thus e.g. a special law in Slovakia regulates the relations between suppliers and purchasers of food enacted as the reaction to the frequent unfair practices in this branch of trade.[722] The act covers only trade relations concerning foodstuffs. It does not contain a general clause. However, it identifies 44 specific types of unreasonable terms, and any contracting party who benefits from these terms may be sanctioned. In the Czech Republic, Act. 395/2009 Sb. addresses the significant market power in the sale of agricultural and food products, and includes not just a general prohibition of abuse of significant market power, but also a black list of unfair contract terms and unfair commercial practices. In Croatia, in 2016, the Ministry of Agriculture in cooperation with the Competition Agency and the relevant stakeholders has initiated intensive activity in delivering an

[715] Article 6.186 of the Civil Code of the Republic of Lithuania.

[716] Article 6.228 of the Civil Code of the Republic of Lithuania.

[717] § 433 Czech Civil Code Act 89/2012 Sb., Havel in Melzer/Tégl a kol. Občanský zákoník, Velký komentář, 2014-2017, Leges, § 433.

[718] Josef Bejček: Smluvní Svoboda a ochrana slabšího obchodníka, Acta Universitatis Brunensis, iuridica edition Scientia vol. 557, masarikova univerzita, Brno 2016, p 43 ff. 52

[719] § 433 Czech Civil Code "(1) A person who acts as an entrepreneur with respect to other persons in economic transactions may not abuse his expertise or economic position to create or take advantage of the dependence of the weaker party and to achieve a clear and unjustified imbalance in the mutual rights and duties of the parties. (2) It is presumed that the person who, in economic transactions, acts with respect to the entrepreneur in a manner unrelated to his own business activities is always the weaker party."

[720] Book IV title IV Code of Commerce.

[721] Country report France.

[722] Act no. 362/2012 Coll. on unreasonable terms in trade relations objects of which are foodstuffs entered into force on January 1, 2013.

Act against unfair business terms in the food supply chain in order to establish protection against unfair business terms between all participants in the food chain.[723]

- Whether the system of protection established by the Directive, based on the concept of good faith and the significant imbalance in the parties' rights and obligations, would be appropriate for B2B transactions;

On the basis of the country research, it can be concluded that the system of the Unfair Contract Terms Directive is generally considered appropriate for an extension to (at least certain) B2B contracts. The increased need to take into account individual circumstances in a B2B case was stressed in several country reports, as the existence of a weaker position of one of the parties cannot be presumed.[724] The creation of several different standards to judge the unfairness of contract terms in certain Member States has attracted criticism[725] and should be avoided at EU level. The open norm seems sufficiently flexible to take into account the specificities of a B2B context. However, there are differences of opinion as to the exact formulation an open norm should take in a B2B context[726] and it should be noted that in prior proposals and attempts to introduce judicial control for B2B contracts, such as the DCFR and the CESL, slightly different open norms have been proposed (relying on the test of Article 3 of the Late Payment Directive, recast 2011),[727] a key goal being to place some restraints on the scope for judicial intervention.[728]

The question of appropriateness of the UCTD's test for use in B2B contracts if EU wide controls were to be applied to such contracts, is of course a different question from whether there is a *need* for such extension in the first place. In the countries that already have a system of control of unfair B2B contract clauses in place, it is logical that a need to extend the scope of the UCTD at European level was not considered strictly necessary by national stakeholders.[729] In contrast, in a large majority of countries that do not have such system in place, a possible extension was seen as beneficial, especially for SMEs.[730] Thus, e.g. the Estonian Chamber of Commerce

[723] See country reports of the mentioned countries.

[724] This point was also argued by some business associations in the position papers that they submitted to the online public consultation. For example, from EuroCommerce: "There will always be a stronger and a weaker party. We challenge the assumption that larger businesses are *ipso facto* the stronger in any relationship and that small sellers are automatically in a weaker position. There is no evidence that this is inevitably the case and there are examples of smaller suppliers providing 'must have' local brands who exert seller power on larger retailers."

[725] Country report France.

[726] See e.g. T. Pfeiffer, "Unfaire Vertragsbestimmungen", *European Review of Private Law* 2011 in favour of a slightly different norm in an B2B context.

[727] Directive 2011/7/EU.

[728] See article 86 CESL and Article II.-9:405 DCFR.

[729] E.g. Austria, Germany, France, Slovenia.

[730] Some support for an extension of the protection against unfair contract terms to SME's was expressed in the following country reports: Belgium, Croatia, Estonia, Greece, Hungary, Italy, Malta, Spain, UK (see also the 2005 Law Commission Recommendation to extend the scope of application to small businesses). In Romania, companies have repeatedly brought the issue of the lack of protection to the Constitutional Court. The mentioned countries represent a majority of countries in which no protection currently exists for B2B unfair contract terms. In some countries, mixed views were reported (Bulgaria; Slovakia), and in a minority of countries in which no B2B protection exist, no need for or opposition to an extension of the protection was reported (Ireland, Latvia, Luxemburg).

answered that certain measures could definitely help benefit SMEs which sometimes have no other options than to succumb to the rules foreseen by the other contracting party; similarly Italian stakeholders were reported to be particularly in favour for the extension of the provisions of the UCTD at least to the Business-to-Microenterprises sector.[731]

The position papers that were submitted in the open public consultation represent a different view. Of the papers submitted by business stakeholders that mentioned the UCTD (14),[732] eight mentioned that the UCTD should not be extended to cover B2B relations. The principle of freedom of contract between businesses was often invoked as a justification. It should be noted, however, that the majority of position papers representing the business perspective were submitted by business associations. The quantitative results from the full survey in the online public consultation show that opinions on this issue are strongly divided between business associations and individual businesses: while only 24% of business associations agreed that business protection should be strengthened by extending the UCTD to cover B2B contracts, a majority (53%) of individual business respondents (companies) indicated that they would be in favour of such an extension.

Various rationales have been invoked to justify judicial intervention in contracts. The approach adopted has an influence of the scope of application of judicial control of contract terms. The following possible reasons have been set out:[733]

1. Protection of an individual contract party ('the other party'):
   (a) Protection of the weaker party
   (b) Protection of the other party due to informational asymmetry upon conclusion of the contract.
2. Protection of market functioning:
   (a) Judicial correction of market failure.
   (b) Enabling acceptance of (certain) contract terms without reading and negotiating.

These reasons are not necessarily mutually exclusive. Some authors see the protection of the weaker party as the main reason for judicial intervention, other authors focus on the protection of the market. Most authors see both the protection of the individual contract parties and of the market in general as a reason for judicial intervention.[734] Control of unfair contract terms certainly enables necessary corrections: in B2B contracts, just like in B2C contracts, standard clauses may not be efficient because they are not really based on the choices of both parties. In addition standard clauses may be inefficient in that they can have unwanted redistribution effects. So, in a contractual chain, for example, where B2C protections prevent the retailer excluding or restricting responsibility to the consumer for defective goods, the retailer may be prevented from passing liability back up the chain to the party from

[731] In the same sense, ia also country report Malta.

[732] See report on the public consultation, Part 2 of this report.

[733] H. Schulte Nölke, "No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts", European Review of Private Law 2-2015 [195–216].

[734] KÖTZ, *European Contract Law*, vol. I (1997), p 137 ff.; BEALE, 'Unfair Contracts in Britain and Europe', 42. *Current Legal Problems* 1989, p (199) 204; English and Scottish Law Commissions, *Unfair Terms in Contracts: A Joint Discussion Paper*, 3 Jul. 2002 (The Law Commission Consultation Paper No. 166; The Scottish Law Commission Discussion Paper No. 119, available at <http://www.lawcom.gov.uk/unfair_terms.htm>), p 2.1 ff.

whom the goods were purchased, if this party is free to exclude or restrict liability (because such terms are not subject to fairness controls).[735]

Extension to non-negotiated terms in B2B contracts can in any event be justified on the basis of several of the above mentioned reasons. Protection of the market would allow an extension to all non-negotiated terms in all B2B contracts (there being no negotiation, there may not be an efficient allocation of risks); while if the rationale is the protection of the weaker party, there would be a justification for protecting at least those businesses that are most vulnerable to unfair terms.

The case to apply control of unfair contract terms is therefore the least controversial for SMEs and micro-enterprises. This is even justified if one accepts that there is only a need for judicial intervention because of the weaker (bargaining) position of one of the parties. The similarity and negligible difference between small business (especially micro-enterprises) and consumers in terms of knowledge, experience and negotiating power has in any event been stressed in several country reports[736] and studies. Also, certain consumer organisations report that micro-enterprises have turned to consumer associations in search of help and guidance.[737]

To limit the scope of control to certain categories of businesses such as SMEs, of course entails the difficult task of providing a good and practicable criterion to distinguish SMEs from other businesses. An example of this approach is the Netherlands, where the equivalent of Art. 3 (1) UCTD[738] is also applied to business-to-consumer and business-to-SME (hereafter B2SME) contracts alike. The unfairness test does not apply to businesses that make use of the same set of standard terms, or that have 50 employees or more, or that are required to publish their annual financial statements including their balance sheet and the income statement and explanatory memorandum (large and medium-sized enterprises under European company law).[739] Such a distinction between different sizes of businesses is also not novel to EU law.[740]

In the legal literature, an extension to all pre-formulated terms in all B2B contracts and not merely B2SME contracts has however also been pleaded for.[741] It has been argued that the least controversial reason for intervention is that an efficient legal system should allow all parties, including businesses, to accept certain parts of pre-formulated contracts presented to them without being required to check their content for fairness.[742] Such reasoning pleads for an extension of judicial control to non-negotiated terms for all B2B contracts, possibly with the exclusion of transactions

[735] T. Pfeiffer (2011), 842-843.

[736] E.g. country report Slovakia; country report Croatia; Petrić (2013), p. 34; this was also the recommendation of the UK Law Commission in 2005 - Law Commission, *Unfair Terms in Contracts,* (Law Com. No 292 (2005)).

[737] Country report Croatia.

[738] Art. 6:233 sub (a) Dutch Civil Code.

[739] See Art. 6:235 (1) and (3) DCC.

[740] See Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; OJ L 124, 20.5.2003, p. 36; and the Proposal for a Regulation on a Common European Sales Law.

[741] H. Schulte Nölke, "No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts", European Review of Private Law 2-2015, (195), 207; T. Pfeiffer (2011) 843.

[742] H. Schulte Nölke, "No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts", European Review of Private Law 2-2015, (195), 207.

above a certain (important) value.[743] The idea behind excluding transactions of a large value, is that in these cases the contractual parties can be expected to seek legal advice and to carefully examine contract terms.[744]

- The appropriate scope of B2B protection against unfair contract terms – should the protection, if at all needed, extend to individually negotiated terms, the main subject-matter of the contract and the adequacy of the price; Whether there are specific contractual terms often used in B2B transactions which could be regarded as unfair in all circumstances or presumed to be unfair;

Based on the country research for this evaluation it can be concluded that the current limitations of the scope of application of the UCTD (exclusion of individually negotiated terms and core terms) appear to be appropriate for B2B contracts. Regulating these excluded terms is generally considered to be contrary to freedom of contract, especially in a B2B context, and an inappropriate intervention in the freedom to trade and conduct business. [745]

With regard to *individually negotiated terms*, it was argued that in a B2B context, it is much more difficult to justify intervention. A thorough justification is all the more necessary in a B2B context as an extension to negotiated terms play a much greater role in a B2B context than in a B2C context: whereas the number of B2C contracts in which there is genuine negotiation of the terms can be considered to be limited, this is not the case in a B2B context.

Such justification is however lacking. In a B2B context, the transaction cost justification cannot be invoked for individually negotiated terms (there has, after all, been negotiation, so the resulting terms can be assumed to be efficient), and the weaker party justification does in any event not justify an extension to all negotiated B2B contracts either, as there is not necessarily a weaker party in every B2B contract.

Some stakeholders in several Member States have however mentioned that, as in B2C contracts (albeit to a more limited extent), it may sometimes be that it is claimed that there has been negotiation when this is not really the case.[746] In general, however, extension of controls to negotiated terms in B2B contracts is not pleaded for nor recommended by the stakeholders interviewed in the Member States.[747]

The arguments raised against *control of core contract terms* in a B2C context are reiterated and generally considered even more relevant in a B2B context.[748] Such an intervention would go contrary to freedom of contract[749] or is considered an

[743] H. Schulte Nölke, "No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts", European Review of Private Law 2-2015, (195), 213; the English and Scottish Law Commission - Unfair Terms in Contracts: Joint Report, February 2005 (http://www.lawcom.gov.uk/docs/lc292.pdf), p 5.24 and 5.54 - proposed a threshold of 500.000 GBP.

[744] H. Schulte Nölke, "No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts", European Review of Private Law 2-2015, (195), 213.

[745] Country reports Bulgaria; Cyprus; Germany; Estonia; Croatia.

[746] Country reports the Netherlands, France.

[747] See also 2005 Law Commission Recommendation, *Unfair Terms in Contracts,* (Law Com. No 292 (2005)) at 5.68.

[748] E.g. country report Czech Republic.

[749] In this sense, e.g. country report Bulgaria.

inappropriate intervention in the freedom to trade.[750] The argument was also raised that potential unfair consequences with regard to core terms could be averted by using "classical" contract rules such as those, e.g., on usurious contract.[751] Also, it was argued that clear definitions are needed to distinguish core terms in order to avoid uncertainty and diverging court decisions. [752]

- Whether there is a need for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive;

Support for a similar rule on transparency in B2B transactions as the one that applies in B2C contracts was reported from several countries.[753] Such a rule was considered to have potential benefits in B2B transactions, as especially in certain specific sectors, very technical terminology is often used.[754]

In general, there seems to be no convincing argument why the contractual transparency requirements should not equally apply to B2B transactions.[755] Businesses can equally be in need of protection from non-transparent terms.[756] Such duty can also be justified as it enables a contractual party to assess the obligations and rights that arise from the contract without having to invoke legal or other assistance.[757]

Some scholars reject this approach and argue that businesses can be expected to put more effort into understanding contract terms.[758] The imposition of contractual transparency was also seen as a restriction upon private autonomy, it was argued that B2B transactions are usually much more complicated than consumer contracts and parties have freedom to choose the wording of their contract.[759] It was also mentioned that much would depend on the standard to be applied in assessing those concepts and the consequences of non-compliance.[760] It is clear that the question whether a

[750] In this sense, e.g. country report Cyprus.

[751] E.g. country report Slovenia.

[752] *Langer* "§ 879 para. 3 KSchG", rec. 7 seq. in: Kosesnik-Wehrle (2015).

[753] Country reports Czech Republic, Spain.

[754] Country report Bulgaria.

[755] Loos (2015), "Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law", 191; T. Pfeiffer, "Unfaire Vertragsbestimmungen", *European Review of Private Law* 2011, 848. See also art. II.-9:402 DCFR.

[756] *Leitner* (2005), p. 130 seq.

[757] See C. Von Bar, E. Clive (eds.), Principles, definitions and model rules of European private law. Draft Common Frame of Reference, Full edition, Munchen, Sellier, 2009 (comment to Article II.-9:402 DCFR), p. 629.

[758] *Kath* (2007), p. 226 seqq; against an analogous application of Sec. 6 para. 3 also *Schurr* "§ 6 para. 3 KSchG", rec. 8 in: Fenyves/Kerschner/Vonkilch (2006).

[759] Country report Latvia.

[760] Country report UK.

term is transparent may be answered differently in a contract between businesses than in a consumer contract.[761]

- Whether an extension of the Unfair Contract Terms Directive to B2B transactions can bring benefits for cross-border trade; Whether the consequences of such an extension would have an effect on innovation by or market opportunities for SME providers/suppliers; Whether the benefits of extending the scope to business-to-business transactions would exceed the negative consequences of such an extension.

In the country research, no compelling evidence was provided that the extension of the scope of the UCTD would create a hindrance to trade. On the contrary, in those countries which have already such protection in place, no specific barriers to trade stemming from such specific protective provisions were reported.[762] In addition, such an extension would remedy the existing lack of uniformity as between national approaches to fairness in B2B contracts, and this was considered by a number of stakeholders to entail potential benefit to cross-border trade and to have the potential of strengthening the position of SMEs.[763] It was however also mentioned that such effects are is difficult to quantify and might be limited.[764] In general, the potential positive effects are considered to outweigh in the potential negative consequences.

This evaluation therefore concludes that a majority of Member States already have some system of protection in place for unfair contract terms in B2B contracts. There is especially a case for control of such terms in contracts with SMEs. The system of the UCTD, based on the concept of good faith and significant imbalance between the rights and obligations of the parties, is generally considered appropriate for an extension to such contracts. This open norm leaves sufficient leeway to take into account the specificities of a business context. It is also considered appropriate in a B2B context to limit controls to clauses that are not individually negotiated and not to apply controls to the core contract terms. In case of an extension of the protection to B2B contracts, it appears logical to also extend the transparency requirement, as this can also benefit traders.

6.4.2.2. *Relevance for consumer-to-business transactions*

- The Study will also analyse the need and potential for the application of the UCTD in consumer to-business (C2B) relations. This concerns situations where the consumer sells goods or provides services to a trader (e.g. where the consumer sells gold jewellery to a trader or supplies digital content to business against remuneration).

The current unclear formulation of the scope of application of the UCTD leads to a discussion concerning its application to C2B contracts and to legal uncertainty in some Member States. According to Art. 1(1) the UCTD approximates unfair terms in contracts concluded ‘between a seller or supplier’ and a ‘consumer’ (in the English version; as a different terminology is used in other language versions). The formulation has posed problems i.e. concerning suretyship contracts (see above). It is

[761] Loos (2015), “Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law”, 191.

[762] Country reports Austria, Germany.

[763] Country reports Bulgaria, Italy, Malta.

[764] Country report Latvia, UK.

also problematic in C2B contracts. Where the consumer sells the goods or supplies the service to a trader, the trader is not the 'seller' or 'supplier' and on a literal reading, the UCTD does not apply. Member States are of course allowed to extend the scope of application of the UCTD or to give a broad interpretation to that scope of application (given the minimum harmonisation character). It appears from the country research that different interpretations are indeed given to the scope of application. Whereas in some Member States, the UCTD is considered to cover these contracts, in other it is mentioned that this requires an extensive interpretation or an application by analogy, and in a third group of Member States, the UCTD is considered not to be applicable to C2B contracts.

It is generally accepted that there can be problems with these contracts. The position of a consumer is, in terms of negotiating power, quite similar vis-à-vis both professional sellers and professional buyers.

As has been discussed in the context of C2B unfair commercial practices (see above), the problems most often reported concern the sale of gold and jewellery by consumers to businesses.[765] But problems and the absence of negotiating power were also reported in cases where a consumer provides digital content to a professional (e.g. YouTube) for remuneration;[766] or where consumers occasionally sell their cars or motorcycles online to traders.[767] The inequality may even be more significant than generally exists, because in these particular cases the consumers (especially in the gold selling cases) may be in need of 'quick cash' and may therefore take rash decisions.[768] Traders can use this inferior position to the detriment of the consumers. Problems were furthermore reported in the energy market (e.g. when consumers sell solar or wind energy to traders).[769] The Romanian National Consumer Protection Authority (NCPA), received complaints from consumers regarding the fairness of C2B-lease contracts concerning land and buildings. In other countries however, the lack of protection in C2B contracts is considered to be less problematic or only seldom problematic.

The problems with C2B contract are also (partially) linked to the rise of the collaborative economy. Transactions involving the use of collaborative platforms may not only lead to C2C contracts, but also to C2B contracts.[770] However, the need to solve the lack of protection in C2C contracts in the sharing economy was perceived to be more urgent.[771]

Different positions are taken in the Member States with regard to the need to apply control of unfair contract terms to C2B contracts/the need to extend the scope of

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[765] E.g. in Greece, France, Portugal and Sweden. In the UK, the OFT e.g. launched an investigation into the gold buying industry, and found unfair contract terms contracts for the purchase of gold by post, this eventually leading to revisions of the terms. See https://www.gov.uk/cma-cases/purchase-of-gold-by-post-unfair-contract-terms; http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/goldpost/Goldpost-qandas

[766] Country report Lithuania.

[767] Country report the Netherlands.

[768] Country reports Lithuania; the Netherlands.

[769] Country report Sweden.

[770] Commission Communication, A European agenda for the collaborative economy, COM(2016) 356 final, p.8.

[771] C2C relations are subject to a complementary study and are therefore not discussed here.

application on the UCTD. In some Member States it is either recognised that C2B contracts require the protection of the UCTD or it turns out that such contracts are already protected through specific or general national legislation. In contrast, in other Member States, some stakeholders do not find the extension of the UCTD to C2B-relations necessary.

Some countries have already established legislation protecting consumers in specific types of C2B transactions. For instance, the French legislator has recently adopted some specific legal provisions regarding the sale of precious metal and gold by a consumer.[772] However, most French interviewees would prefer a general application of the UCTD to C2B-contracts. Other countries, like Italy, do not have regulation with regard to C2B-relations. Due to the lack of specific protection for consumers, the only possibility to provide protection to consumers in those relations is by interpreting existing legislation extensively.[773] It was therefore claimed that it would be more efficient to extend the scope of application of the consumer law directives (at least UCPD and UCTD) to C2B-relations. A similar view was reported from the Irish enforcement agency and from Greece, where the extension of the scope of application to protect consumers in C2B relations received positive reactions.[774] A gap currently exists, that can only be solved by an application of consumer law by analogy.

A third category of Member States already applies their provisions on unfair contract terms to C2B contracts.[775] Portugal, for instance, with its Decree-Law 446/85, has established some provisions that protect consumers against standard contract terms in C2B transactions. Indeed, a good number of countries have a broader control of standard contract terms that is not limited to contracts where the trader 'supplies' or 'sells'. Even within this third category of Member States, opinions differ on the need to extend the application of the UCTD itself to C2B-relations. The Dutch respondents, for instance, are in favor of the extension. Their legislation implementing the UCTD already applies to C2B-transactions, but only where the professional buyer introduces standard terms into the contract. The Dutch grey and black lists primarily assume that the consumer is the buyer or client instead of the seller or the service provider, and can therefore not protect consumers in the context of C2B-relations. Nevertheless, those C2B-contracts often contain terms that are 'mirror versions' of the ones mentioned on the lists. A consumer in such circumstances can only fall back on general contract law, from which the parties may derogate. In other countries, like Croatia or Cyprus, the abovementioned C2B problems would only seldom occur and as a result the need or potential for the application of the UCTD is not seen.

Lastly, some stakeholders in certain countries had reservations concerning an extension of the UCTD to C2B-relations. An extension in the sense that *traders* would be protected in C2B relations is in any event not considered necessary or desirable.[776]

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[772] Art. L. 224-96 ff, L. 242-34 ff and R. 224-4 C.conso http://www.economie.gouv.fr/files/files/directions_services/dgccrf/documentation/fiches_pratiques/fiches/rachat-d-or-metaux-precieux.pdf

[773] Example given by Italy: "The classic example regards a non-professional who sells gold to a jewelry or a dedicated shop. In this concern, the actual provisions on consumer protection would not find application to such a case. Therefore the Autorità Garante della Concorrenza e del Mercato has configured this contractual scheme as that of a service contract, in whose framework the consumer pays for a service consisting in the assessment of the value of the goods proposed to the jewelry or the dedicated shop."

[774] Country reports Ireland, Greece.

[775] I.a. Austria, Croatia, Estonia, Germany, Slovakia, also in the UK, the provisions on unfair contract terms were applied to consumers selling gold to traders.

[776] Country reports Luxembourg, Hungary, Greece.

Thus e.g., in Estonia or Poland, no need to extend the scope of the directives to C2B transactions was perceived. The Polish stakeholders representing traders consider the general contract rules that apply in such situation to provide sufficient protection. The point was furthermore raised that extension of the UCTD could complicate the understanding of traditional legal definitions as 'consumer'. This problem is arguably however not caused as such by the application of consumer protection rules to C2B transactions. More generally, the changing roles of consumers and traders, especially in the collaborative economy, require a clearer delineation and clearer thresholds to establish who is a consumer.[777]

In conclusion, there is no consensus on the need to extend the scope of application the UCTD to C2B transactions in the European Union as the scope of the problem is limited and an important number of countries already apply the UCTD to protect consumers in C2B contract either directly or by analogy.

However, it is generally recognised that the position of the consumer in C2B contracts is similar to the position of the consumer in B2C contracts in which unfair standard terms are used and the application of unfair contract terms legislation in those countries where this already exists is not problematic. A clearer description of the scope of application of the UCTD to ensure its application to all consumer contracts would increase legal certainty and solve the problems that have been reported with C2B contracts, even if these problems may not be all that large in scope. It would also make specific legislation as has been adopted in some Member States superfluous, thus simplifying consumer law.

6.4.3. Contractual consequences of unfair commercial practices

In this Section, we analyse links between commercial practices used by traders and individual remedies of the consumer under the contract, in particular whether there is a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

- Any national law provisions providing contractual consequences in case of breaches to the Unfair Commercial Practices Directive or national provisions on the avoidance of the contract e.g. in cases of usury or other immoral behaviour;

Article 3(2) of the UCPD expressly provides that it "is without prejudice to contract law and, in particular, to the rules on the formation, validity, or effect of a contract". Recital 9 provides that it "… is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law…" In essence, Article 3(2) of the UCPD functions as a kind of negative cross-reference to national contract law remedies[778] that may be available for situations where an unfair, misleading or aggressive commercial practice has actually caused consumer detriment. Whether or not an unfair practice triggers effects relevant to the individual relationships and whether national courts are allowed to decide that the individual contract concluded as a result of that practice be invalid in its entirety and/or to award damages, is a matter of national contract law, and not of the UCPD, which is without prejudice to contract law and individual claims.

[777] Reflecting this point, 49% of respondents to the online public consultation, including 90% of consumer associations and 68% of public authorities, agreed that further criteria should be defined to allow for a clearer distinction between consumers and traders in the collaborative economy.

[778] That core of national contract law has never been harmonised by the EU legislator (except for the UCTD, based on minimum harmonisation).

Our country research shows a diverse patchwork of national arrangements as regards contractual consequences of unfair commercial practices before, during and after a commercial transaction.

In all Member States, it seems in principle possible to rely on general contract law provisions to seek contractual consequences of an unfair commercial practice. Any consumer may claim that a misleading commercial practice constitutes a "mistake" or "fraud" that vitiated his or her consent; likewise, any consumer may claim that an aggressive commercial practice constitutes "violence", "duress", "threat" or "undue influence" that should lead to avoidance of the contract.[779] In addition, doctrines of unlawfulness and unconscionability may be relevant in this regard.[780] Likewise, doctrines on pre-contractual liability (*culpa in contrahendo*) may be relevant to claim damages.[781] In relation to commercial practices after a commercial transaction, national contract law rules on performance (good faith) may be relevant to ask for performance or claim damages.

However, it should be noted that there is no general principle that an unfair commercial practice (irrespective of whether before, during or after a commercial transaction) either automatically triggers the avoidance or termination of the contract and/or damages or automatically constitutes a breach of contract. These general doctrines are subject to certain limitations which may function as a barrier for consumers who want to get out of their contracts, etc., because of unfair commercial practices.[782] It should be stressed that consumers often have no interest in the contract being labelled completely invalid as the consequence of a breach of the UCPD; consumers are often more interested in performance and damages.[783]

In practice, in some Member States where national provisions on avoidance of contracts or damages could be used, a breach of the law transposing the UCPD is nonetheless generally not associated with any contractual consequences.[784] In some of these Member States, the legislation implementing the UCPD even explicitly provides for a negative cross-reference to relevant national contract law doctrines. For example, Estonian law states that an unfair commercial practice does not result, in itself, in the nullity of the transaction.[785]

Unfair commercial practices can also be taken into account in the interpretation of the contract.[786] Unfair commercial practices connected with the conclusion of a contract are to be qualified as "circumstances existing at the time of the conclusion of the contract" which, according to Article 4 of the UCTD, are relevant for the assessment of

[779] Country reports Austria, Cyprus, Germany, Estonia, France, Greece, Italy, Lithuania, Luxembourg, Slovakia, Spain.

[780] Country reports Austria, Germany, France, the Netherlands, Slovakia, and Luxembourg.

[781] Country reports Austria, Germany.

[782] Country report Austria, Germany.

[783] Country report Austria. See, for example, judgment of the Landgericht Hildesheim of 17 January 2017, imposing mutual restitution obligations on the consumer and the Volkswagen group (sale of a Skoda car with "Dieselgate" engine from the Volkswagen group), on the basis of Section 826 of the BGB, according to which a person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.

[784] Country report Cyprus.

[785] Country report Estonia.

[786] Country reports Denmark, Italy.

the unfair nature of the contractual terms and of the transparency of such terms, as required by Article 5 UCTD.[787] Unfair commercial practices can also trigger rights against the seller regarding lack of conformity under the legislation implementing the Consumer Sales Directive.[788] However, these rights only concern goods during the 2-year guarantee period (some Member States however have longer liability periods for sellers).

Taking the example of a consumer buying a car following false statements by the manufacturer and/or car dealer, during the 2-year guarantee period, the consumer could rely on the legal guarantee of the Consumer Sales Directive against the seller, "taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling" (Article 2(2), sub (d) CSD). After that period, the consumer can rely on national contract law doctrines as touched upon above. As mentioned, these doctrines are subject to certain limitations which may function as a barrier for consumers who want to get out of their contracts, etc., because of unfair commercial practices. These rights and remedies are not harmonised, so the legal situation of the consumer in a specific case will depend very much on the applicable national law.

As indicated above, Article 3(2) UCPD does not prevent the introduction of specific national provisions providing contractual consequences in case of breaches of the UCPD. In a number of Member States, the legislation implementing the UCPD contains a positive cross-reference to relevant national contract law doctrines. For example,

- In Bulgaria, the implementing legislation states that the consumer has the right to terminate the contract with the trader concluded as a result of an unfair commercial practice (through an out-of-court unilateral notice) and to claim damages under the general procedure;[789]
- In France, the legislation states that, if an aggressive commercial practice leads to the conclusion of a contract, this contract is deemed null and void;[790]
- In Luxemburg, Article L.122-8 of the Code de la consommation has a specific legal provision providing the nullity of a clause or a combination of clauses of a contract concluded in violation of the legal national legal provisions on unfair commercial practices. It is a relative cancellation, i.e. the consumer is the only admissible party to the contract to invoke its nullity. It is important to emphasise that cancellation involves retroactive destruction of the contract, or at least of the clause or the combination of clauses of the contract which is based on the unfair commercial practice;
- In the Netherlands, the legislation implementing the UCPD offers the possibility to avoid any transaction concluded under the influence of an unfair practice (through an out-of-court unilateral notice);[791]
- In Portugal, contracts concluded under the influence of an unfair commercial practice are voidable on the consumer's initiative, in accordance with the rule

[787] Country reports Denmark, Italy.

[788] Country reports Austria, Germany.

[789] Country report Bulgaria.

[790] Country report France.

[791] Country report the Netherlands.

of the Civil Code. The consumer has one year to act and the decision that annuls the contract has retroactive effects;[792]

- In Slovakia, a link is made with the category of good morals.[793]

In a number of Member States, national law provisions provide for special contractual consequences in case of breaches of the UCPD:

- In Belgium, Article VI.38 of the Code of Economic Law provides for a special type of invalidity of contracts concluded as a result of an unfair commercial practice: the court must (practices listed in para. 1) or may (practices listed in para. 2) order the reimbursement to the consumer of the amounts paid, without any obligation for them to return the product delivered. If the matter concerns an unfair commercial practice listed in para. 2, a judge has more discretion and can adapt the remedy, taking the concrete circumstances of the case into account, e.g. the gravity of the infringement, the degree to which the behaviour of the consumer was influenced, the financial implications and the proportionality of the remedy. For example, the judge could order a partial reimbursement of the sums paid. For practices listed in para. 1, the court has no margin of appreciation and must order the complete reimbursement;[794]
- In Poland, consumers may claim avoidance of the contract concluded as a result of an unfair commercial practice, with an obligation of mutual restitution and the trader's obligation to pay back consumer's costs related to the purchase of the product, not quite compatible with other forms of avoiding the contract from the Polish Civil Code and comparable to putting consumers in the same position as if they were withdrawing from a contract.[795]
- In the United Kingdom, consumers have specific private rights of redress in relation to the CPUTR 2008: the remedies are the unwinding of a contract, a discount and damages.[796] These remedies can be invoked where the "prohibited practice" (for these purposes, a misleading action or aggressive practice) was a "significant factor" in the consumer entering the contract or making the relevant payment ("transaction"). Generally, and subject to rules on double recovery, these remedies operate in addition to existing possibilities for private redress under the general law.[797]

[792] Country report Portugal.

[793] Country report Slovakia.

[794] Country report Belgium. One much-debated question concerns the causality requirement: to what extent must the consumer prove that the unfair practices caused them to conclude the contract? According to some authors, a decisive defect of consent (vice du consentement) is required, since the purpose of the legislator was to create a kind of extrajudicial nullity. In this regard, a contract is only null and void (with the consequence that reimbursement must be ordered) if the consumer would not have concluded the contract as such in the absence of the unfair commercial practice. Other authors state that no causal link needs to be established and that the only requirement is that the consumer took a transactional decision that they would not have taken otherwise, and therefore under other conditions. Legal certainty, equality of consumers and the consistent application of the remedy would benefit from a clarification of the causality requirement by the Belgian legislator.

[795] Country report Poland.

[796] Initially, the CPUTR 2008 did not give consumers specific rights of private redress; a position buttressed by the original version of Regulation 28 which provided that "[a]n agreement shall not be void or unenforceable by reason only of a breach of these Regulations." Instead a consumer wanting private redress from an unfair commercial practice had to fashion a remedy from pre-existing doctrines. Yet such an exercise was not always straightforward.

[797] Country report United Kingdom.

Finally, in some Member States, enforcement authorities can obtain a commitment from the trader responsible for the infringement, or order that trader, to compensate consumers that have suffered harm as a consequence of the infringement including, among others, monetary compensation, offering consumers the option to terminate the contract or other measures ensuring redress to consumers who have been harmed as a result of the infringement.[798]

- Any case law (enforcement decisions, court rulings) providing for such consequences;

According to the country research there is not much case law on the application of traditional contract law doctrines in relation to unfair commercial practices. As mentioned, these general doctrines are subject to certain limitations which may function as a barrier for consumers who want to get out of their contracts, etc. It also seems that the above mentioned positive cross-references to relevant national contract law doctrines in the legislation implementing the UCPD in Member States such as Bulgaria, France, Portugal and the Netherlands do not have a very significant practical impact. These provisions are not applied very often.[799] The Dutch provision, however, has been applied several times.[800] A first case in which the special sanction of Article VI.38 of the Belgian Code of Economic Law was applied, was published recently.[801]

- The relationship with Article 6 (1) of the Unfair Contract Terms Directive.

In contrast to the UCPD, breaches of the UCTD have contractual consequences: under Article 6(1), unfair terms used in a contract with a consumer must "not be binding on the consumer". In relation to the UCPD, Article 3(2) of the UCPD seeks to ensure that undesirable overlapping of the UCPD and UCTD does not occur at the level of legal consequences. In the *Pereničová and Perenič* case,[802] which concerned a credit agreement where the annual percentage rate of charge indicated was lower than the actual rate, the CJEU concluded that such erroneous information provided in the contract terms is 'misleading' within the meaning of the UCPD if it causes, or is likely to cause, the average consumer to take a transactional decision that he would not have taken otherwise. Finding that such a commercial practice is unfair is one factor that can be cited when assessing the unfairness of contractual terms under the UCTD. Such a finding, however, has no direct effect on whether the contract is valid under Article 6(1) of that Directive.[803]

[798] Country reports Latvia, Poland, Romania.

[799] Country reports Bulgaria, France.

[800] Country report the Netherlands.

[801] Antwerp Court of Appeal, 17 November 2014, *Rechtskundig Weekblad* 2016-17, nr. 23, 4 February 2017, 912.

[802] Case C-453/10 *Pereničová and Perenič*, 15 March 2012

[803] Case C-453/10 *Pereničová and Perenič,* paragraph 46.

- Whether there is a need and potential to develop contractual consequences linked to the use of unfair commercial practices.

The country research indicates that the question whether or not there is a need to develop contractual consequences linked to the use of unfair practices is highly controversial. Especially consumer organisations as well as certain enforcement authorities advocate the introduction of specific contractual remedies for breaches of the UCPD at the EU level (or at the least at the national level). It is submitted that the law should provide a specific clause giving the consumer a direct possibility to avoid any transaction concluded under the influence of unfair commercial practices.[804] Examples given for relevant problems include e.g. subscription traps and misleading car evaluation services.[805]

Most other stakeholders (especially business organisations) advocated against such contractual remedies.[806] Business organisations fear that the introduction of contractual sanctions could create a wave of claims against businesses that could often be unfounded.[807] A similar picture is provided by the results of the open public consultation conducted in the framework of the Fitness Check: 95% of consumer associations either strongly agree or tend to agree that consumer protection against unfair commercial practices should be strengthened by introducing a right to individual remedies. A significant number of consumer respondents and public authorities (both 75%) also agree with this statement. In contrast, only 10% of business associations agree, while 64% either tend to disagree or strongly disagree in this respect.[808] Interestingly, responding business respondents (individual companies) are split in this respect, with 45% agreeing, and 37% disagreeing.

Based on the country research the following options at the EU level with respect to contractual consequences linked to the use of unfair commercial practices could be identified:

- A first option would be to *continue the legislative status quo*. It can be expected that the case law of the CJEU on the interaction between the UCPD and UCTD will develop in the years to come. As mentioned above, the CJEU already ruled that the finding that the use of (not individually negotiated) contract terms constitutes an (unfair) commercial practice is one factor that can be cited when assessing the unfairness of contractual terms under the UCTD.[809] Of course the case law on the interaction between the UCPD and the (individual contractual remedies set out in the) UCTD does not provide for

[804] Country reports Austria, Croatia, Cyprus (almost all interviewed stakeholders), Denmark, Latvia (all stakeholders), Lithuania, the Netherlands, Poland.

[805] Country report Sweden.

[806] Country reports Cyprus (business association, regulatory authority, relevant ministry), Denmark (other stakeholders than the Danish Consumer Council), Estonia (government officials and consumer associations), Poland (stakeholders representing traders), Slovenia, Spain (ministry of justice).

[807] Country report Greece.

[808] See Part 2 of this report.

[809] See also Case C-388/13 Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft, Judgement of 16 April 2015, where the CJEU ruled that the UCPD must be interpreted as meaning that the communication, by a professional to a consumer, of (erroneous) information, must be classified as a (misleading) commercial practice, even though that information concerned only one single consumer. In light of this judgment, it would seem that any isolated act or omission on the part of a professional during individual negotiations on contract terms with one single consumer would also constitute a commercial practice within the meaning of the UCPD.

contractual consequences in case of unfair commercial practices other than the use of contract terms.

- A second option could be to replace the current negative cross-reference in Article 3(2) and Recital 9 UCPD with a positive cross-reference to national "contract law" and "individual actions"; for example through the introduction of a provision according to which "Member States shall ensure that national laws provide for adequate and effective contract law remedies for consumers who have been harmed by an unfair commercial practice". Under this option, the UCPD would oblige the Member States to establish contract law remedies, but Member States would be free to shape these remedies taking into account national legal cultures. This could be combined with further clarifications and examples in an updated UCPD Guidance document, drawing on best practices in Member States.
- A third option would be for the UCPD to provide for *a harmonised set of remedies that are available to consumers who have been harmed by an unfair commercial practice*. The primary aim would have to be to restore the victims to the position they were in before the unfair practice and the resulting harmful transactional decision took place. However, drafting a sound set of UCPD remedies might be quite a challenge and this option has a number of potential drawbacks, as it would entail a full harmonisation of core parts of national contract law. Moreover, there may be a risk that contractual consequences could create a wave of claims made against businesses that could often be unfounded.[810]

For a detailed discussion of the options, please refer to Section 8, conclusions and recommendations.

6.4.4. Injunctions

- Relevance of the injunction procedure across the EU under the Injunctions Directive and other directives.

The Injunctions Directive does not create consumer rights or traders' obligations but is merely an enforcement instrument. More precisely, in the absence of binding rules on collective redress, it is the classic enforcement instrument of EU consumer law. As has been emphasised in many documents of the European Commission and also at the Consumer Summit 2016, enforcement is essential for the practical effect of EU consumer law in the Member States, and it is in the interest of the EU to ensure its functioning if Member States do not safeguard the effectiveness of injunction procedures sufficiently; which this evaluation confirms, as well as the previous reports by the Commission have demonstrated.

The Injunctions Directive is complemented by singular and partly overlapping provisions in other directives that require Member States to introduce injunction procedures at the domestic level. Relevant EU legislation currently in force includes the UCTD (Directive 93/13/EEC on unfair terms in consumer contracts, Art. 7(2) and (3)), the UCPD (Directive 2005/29/EC on business-to-consumer unfair commercial practices, Art. 11 (1) and (2)) and the CRD (Directive 2011/83/EU on consumer rights, Art. 23 (1) and (2)).

The Injunctions Directive applies both to domestic and cross-border infringements. These two dimensions need to be considered separately with regard to the relevance of the injunction procedure.

[810] Country report Greece (views of business associations).

In this context, is must be noted that B2C cross-border transactions within the EU have increased considerably since the adoption of the Injunctions Directive in 1998. 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%.[811] The analysis of key trends provided in Annex VIII of this report also shows growth in cross-border shopping over the internet, which has also more than doubled since 2006, due in part to technological progress and the mainstreaming of internet shopping in general. In 2014, 16% of all Eurobarometer respondents reported that they made an online purchase from another EU country, compared to only 6% in 2006.

This by itself implies an increase in the numbers of cross-border infringements of consumer law, which is indeed evidenced by an increase of complaints related to cross-border purchases,[812] and a need to provide for instruments to address them.

Moreover, a further increase of cross-border B2C e-commerce can be expected, and is also considered desirable in an EU perspective, to increase competition between traders and also the quality of goods and services offered to consumers in the internal market. This requires consumers to feel confident purchasing online from another EU country, which again implies relevant substantive rights and an enforcement system that also covers cross-border infringements of consumer law. It is notable that the available data in this respect indicates that while there was a dramatic increase in confidence between 2003 and 2006, after 2008 confidence appears to have stagnated at a relatively high level. The following figure provides more details in this respect: in 2003, only 10% of consumers felt that they had a high level of protection buying something on the internet from another Member State. By 2006, however, nearly one third reported that they felt at least “as confident” shopping online in another Member State compared to their own. Between 2008 and 2014, the proportion of consumers indicating that they feel confident shopping online in other Member States has fluctuated around an EU average of 38%.

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

[812] Evidence for this increase is mostly available through the statistics of the networks of European Consumer Centres (ECC-Net). In 2014, ECCs addressed 37 609 complaints, an increase by 67% compared to 2005 (22 549 complaints). Note that complaint statistics have to be interpreted with caution, because other factors may contribute to increased complaint numbers (e.g. a better visibility of the network etc). Figures quoted from European Commission, The European Consumer Centres Network, Anniversary Report 2005-2015.

Figure 8: Percentage of consumers feeling confident purchasing online from another EU country, EU%.

Source: Special Eurobarometers 193, 252 and 298, Flash Eurobarometers 299, 332, 358 and 397. 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']. 2012-2014: 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, EU25 in 2006, EU27 from 2008 to 2012 and EU28 thereafter.

Note, however, that the survey questions in the Eurobarometer which address consumer confidence making cross-border purchases online has significantly changed twice, between 2003-2006 and between 2011-2012 (see figure caption). As question wording has an influence on consumer response, this trend should therefore be interpreted with care.

These figures indicate a continued need for cross-border enforcement of consumer rights. At the same time, the responses of stakeholders and the number of injunction procedures in those Member States where the injunction procedure is the primary enforcement instrument demonstrate the continuous need of that instrument also at the domestic level.[813]

As far as the domestic level is concerned, stakeholders have confirmed the relevance of EU legislation in this regard in the Member States, where injunction procedures have been introduced for the first time or where they have been improved by way of implementation of or as a reaction to the adoption of the Injunctions Directive and the specific provisions as mentioned above. Even though a few Member States, including Austria, France and Germany, had already established injunction procedures in sector-specific legislation such as unfair commercial practices law or unfair contract terms law, that legislation did not extend to all the areas of consumer law that are listed in Annex I of the Injunctions Directive or even to consumer law in general (as the scope

[813] See Section 6.1.3.2 above.

of application has been extended in a number of Member States). The country reports on Denmark, Finland and Sweden suggest that the Injunctions Directive has not added anything to the pre-existing system.

The survey of qualified entities and the country research conducted for this evaluation has, however, also shown that the injunction procedure is not used at all, or rarely used, in Member States where qualified entities have public law mechanisms such as injunction orders available that are faster, cheaper or more effective to use. In fact, there has been a recent development towards increasing the public law powers of consumer protection authorities and public regulators, for example, in the Netherlands, Poland, the United Kingdom and Sweden. Still, that development does not cast doubts on the relevance of the injunction procedure as a tool that is available EU wide, as firstly, there are Member States where public law barely plays a role at all in the enforcement of consumer law, such as Austria and Germany, and secondly, there are Member States where consumer protection authorities and regulators have to use the injunction procedure so as to enforce consumer law. Finally, even where public law instruments exist, and public consumer protection authorities are the main actors in the enforcement of consumer law, there is still a need for complementary rights of private actors, in particular consumer organisations, in cases where the public body decides, for whatever reasons, not to take action.

With regard to cross-border injunction procedures, the relevance of EU law is obvious from the problems that existed before its adoption, namely, that Member States denied legal standing to consumer organisations from other Member States, thereby rendering protection of consumers through collective action against cross-border infringements practically impossible. The low numbers of injunction actions taken in other Member States under the system of Article 4 of the Injunctions Directive (see Section 6.1.3 above) in spite of an increasing number of cross-border complaints indicate, however, that current needs are not sufficiently addressed by that system, and that existing obstacles to the use of the injunction procedure in a cross-border perspective diminish its relevance in practice.

At the same time, this study shows a significant number of domestic injunction procedures relating to cross-border infringements. For the last five years, 213 injunction procedures concerning cross-border infringements were reported, as compared to around 70 in the 2012 Commission report. Thus, through the cross-border enforcement of injunction orders of national courts, the national injunction procedure as called for by the Injunctions Directive produces effects for the internal market; which could, however, be improved if the cross-border enforcement of injunction orders and of sanctions for non-compliance with an injunction order was facilitated.

- Benefits of further harmonisation of the injunction procedure across the EU under the Injunctions Directive. In particular, the following issues from the perspective of the possible further harmonisation at EU level should be analysed: (i) scope of the Injunctions Directive; (ii) provisions ensuring exemption of qualified entities from legal costs within injunction procedure; (iii) mandatory summary procedure; (iv) mandatory publication of the injunction decision; (v) common rules on the burden of proof; (vi) sanctions for the infringements defined by the Injunctions Directive, taking into account provisions of the Directives listed in the Annex I to the Injunctions Directive as transposed into internal legal orders of the Member States; (vii) more precise sanctions in case of the non-compliance with the injunction order; (viii) the cross-border effect of the injunction order within the EU;

This evaluation has identified several types of problems with injunction procedures that only EU law would seem to be able to resolve: obstacles to the effectiveness of injunction procedures, and the lack of legal certainty in general. Thus, in a forward looking perspective, significant benefits of further harmonisation of the injunction

procedure across the EU under the Injunctions Directive can be expected. For a detailed analysis of related problems, the underlying needs and the options for further harmonisation (and related benefits) regarding scope, legal costs, summary procedure, publication of the decision, rules on the burden of proof, sanctions and the cross-border effect of the injunction order within the EU, see Section 6.1 on effectiveness above and the recommendations below (Section 8).

It should be emphasised that this also applies to the fight against cross-border infringements since qualified entities can take action against foreign traders in the qualified entities' domestic courts. If the problem of cross-border enforcement of injunction orders and sanctions for non-compliance with injunction orders can be solved, this type of injunction procedures against foreign traders could be used to enhance consumer protection but also to create a level playing field between domestic traders and foreign traders, thereby fostering competition in the internal market.

- Benefits of any further non-legislative or legislative measures increasing the use of injunction procedures by consumer organisations and strengthening the cooperation between consumer organisations from different MS. Analysis of: (i) the need and practical usefulness of the awareness raising activities, for example on the "e-justice" portal; (ii) the need and practical usefulness of further measures such as CoJEF II addressed to the qualified entities which are consumer organisations, so that they coordinate their injunction actions regarding infringements, as defined by the Injunctions Directive, having cross-border dimension (the advantages and the disadvantages of simultaneous actions taken by consumer organisations in different MS regarding the same/similar infringement should be covered by the analysis); (iii) the potential of out-of-court settlements aiming at stopping infringements as defined by the Directive to improve the enforcement of EU legislation protecting the collective interests of consumers as well as whether there are possible measures to encourage such settlements.

According to the country research for this evaluation, qualified entities, in particular from smaller Member States,[814] have limited financial and human resources. It can therefore be expected that such qualified entities, in particular, could benefit from the know-how and experience as well as from information on current activities of qualified entities in other Member States.

Co-operation and exchange of information between qualified entities have proven to be a useful 'third way' in addressing cross-border infringements, although only in a very limited number of cases. The majority of responding qualified entities have not cooperated on specific injunction actions with qualified entities from other EU countries. Specifically, 81% of responding qualified entities have not cooperated with consumer organisations in other EU countries on injunction actions, while 82% of participants have not cooperated with independent public bodies in other EU countries on such actions. Additionally, the majority (64%) of responding qualified entities have not informed qualified entities from other countries if an infringement affected consumers from their country since June 2011. Of the 27% of entities who have done so, one consumer organisation stated that they do so frequently within the framework of the CLEF and COJEF I and II projects.

Non-legislative measures by the EU Commission, in particular the financing of education measures, have been helpful but have not reached all qualified entities yet. Under half of all respondents to the survey of qualified entities (40%) have

[814] This was reported in the country reports for Cyprus, Czech Republic, Estonia, Greece, Lithuania, Malta and Slovakia.

participated in forums like the Consumer Justice Enforcement Forum and the Consumer Law Enforcement Forum. In terms of the effectiveness of these measures (which can be seen as a proxy for their practical usefulness), 36% of responding qualified entities viewed them to be 'very effective', stating, for example, that these forums facilitate the exchange of best practices and relevant information, which is particularly helpful for smaller consumer organisations.

6.5. EU added value

- What is the additional value resulting from the EU intervention, compared to what could be achieved by Member States at national and/or regional levels?

The four consumer protection directives subject to this study aim at contributing to a high level of consumer protection, and to remove obstacles to the Internal Market (the MCAD is the only directive scrutinised containing provisions that that relate to B2B relations, and aims at protecting businesses against misleading advertising and creating a harmonised basis for comparative advertising).

In principle, a high level of consumer protection can be ensured by a purely national legal framework, as is illustrated by the small number of Member States in which a comprehensive legislative framework against unfair commercial practices and unfair contract terms was already in place before implementation of the UCPD and the UCTD. This being said, it is clear that these two key consumer directives have significantly increased the level of consumer protection in the large majority of Member States in which a less comprehensive or even no such framework existed prior to their transposition. 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 the situation was more complex: The UCTD did not make much difference in countries such as Denmark, Germany or the Netherlands, which already had fairly advanced control regimes. In the case of the civil law countries, there was usually already a general clause of some kind that could, in theory, be used against unfair terms in consumer contracts. However, the UCTD has also brought the indicative list of terms which may be regarded as unfair, which provide a clearer focus as to the targeted terms, and also specific enforcement tools designed for unfair terms in consumer contracts which may not have existed before (e.g. Bulgaria, Cyprus, France, Malta, Romania, Slovakia). Also, the codification of the transparency rule was considered to be an improvement in terms of consumer protection (e.g. in Austria, the Netherlands). In common law countries such as the UK and Ireland, the systems have been improved not only in these ways, but also by the coverage of terms imposing unfair obligations and liabilities on consumers, as in these countries, controls tended to be limited to terms excluding or restricting the liabilities of the trader. Finally, in a number of countries like Croatia, Estonia, and Italy, comparable legislation to control unfair contract terms was absent prior to the implementation of the UCTD, and the UCTD therefore definitely contributed to the protection of consumers. In Italy, it was even reported to have influenced the adoption of legislation to control unfair terms outside the B2C context.

In conclusion, <u>the increase in the level of consumer protection resulting from the EU intervention depended very much on the pre-existing situation, and in most Member States the directives provided a clear added value</u>. This is also, but less so, the case regarding the MCAD, which seems to have improved the protection of businesses in some countries, but not in others.

For the Injunctions Directive, the main added value seems to have resulted for those countries that make significantly use of the injunctions procedure, and mainly in a

national context, as cross-border injunction procedures are very rare. The Injunctions Directive is an important enforcement instrument, and it has contributed much to the enforcement of EU consumer law at the national level, even though this evaluation confirms that more needs to be done to ensure that consumer law is enforced effectively in the Member States. The level of consumer protection would be lower in a number of Member States if the EU had not imposed the duty on Member States to implement effective remedies and sanctions and to provide for the collective enforcement of consumer law by qualified entities.

Effective enforcement of consumer law is by itself an essential ingredient of the consumers' trust in the legal system. This includes trust in the fact that consumers are also protected when it comes to transactions with foreign traders. In that respect, the Injunctions Directive is not the only instrument, but it forms a necessary part of a bundle of instruments that improve the consumer's position vis-à-vis foreign traders, including also the CPC Network, the Rome I Regulation and the Brussels I Regulation. At the same time, the Injunctions Directive does not negatively affect honest traders as it merely applies to infringements of consumer laws established by other directives and regulations. Thus, whilst it is not creating obstacles to honest traders, it has increased their potential to act on the markets of other Member States as consumers feel more confident to enter into transactions with them.

The second objective of the EU consumer and marketing law framework, removing obstacles to the Internal Market, cannot be reached by national legal frameworks alone. All Directives subject to this study are considered to have contributed to reaching this objective. While obstacles to the Internal Market remain, there is no doubt that both the maximum harmonised rules and the minimum harmonised rules, in conjunction with the harmonising effect of CJEU case law, have reduced these obstacles (at least to some extent), while also reducing the resulting costs for businesses to adjust to legislative diversity when offering their products and services cross-border.

In the interviews conducted for this study with key stakeholder organisations in all Member States, they often considered that these directives have had a positive impact on cross-border trade. The general view was that it has become easier for consumers to directly purchase cross-border from traders located in other EU countries over the past years, which is also confirmed by the increasing number of consumers purchasing online from traders in other Member States. The last decade saw a significant increase in business-to-consumer (B2C) cross-border shopping in the EU. Cross-border shopping over the internet has more than doubled since 2006, due in part to technological progress and the mainstreaming of internet shopping in general. In 2014, 16% of all Eurobarometer respondents reported that they made an online purchase from another EU country, compared to only 6% in 2006. However, it is also reported from some Member States that the percentage of cross-border purchases and the level of consumer confidence remains low (especially taking into account "geo-blocking").[815] As regards businesses, it is often reported that is has become easier for them to directly trade cross-border to consumers located in other EU countries over the past years. It is also frequently noted that the decision by both businesses and consumers regarding whether they will engage in cross-border transactions is also influenced by factors outside the legal environment.[816]

This view was confirmed by the panel data analysis conducted in the framework of the study, which analysed the impact of the UCPD on consumer trust and online cross-border shopping. While one of the regression models applied found significant effects

[815] Country reports Croatia, Estonia, Malta.

[816] Country reports France, Germany.

of the UCPD being in place on consumer trust and on cross-border online purchases, in other regression models the UCPD was not determined to have any significant causal effects in this respect.[817] These results therefore have to be interpreted with care, and are not unequivocal proof of a causal effect from the UCPD being transposed in the Member States. In contrast, the percentage of households with internet access at home in Member States was found to have a positive and highly statistically significant effect on consumer trust and online cross-border purchases. The robustness of this effect is striking in comparison with all other variables that were used in the analysis. The increasing access to information online which can contribute to better and more informed choices of products and services seems to be a major factor for increasing levels of consumer trust and market integration in the EU, in addition to any effects that could be attributed to the legal framework.

- To what extent do the issues addressed by the intervention continue to require action at EU level?

Consumer research through market studies and Eurobarometers, complaints data, and the responses of qualified entities to the survey conducted for this study consistently show that consumer law infringements are a continuing problem, including unfair commercial practices, unfair contract terms and intransparent/misleading pricing (see problem analysis, Section 7). While in theory national interventions could address these problems, there is a significant added value of a common and effective EU legal framework for safeguarding a high level of consumer protection, especially as retail strategies and product and service sales more and more cross EU (and international) borders. As indicated above, removing obstacles to the Internal Market is only possible through action at EU level. Continued EU intervention has the potential to increase effectiveness of measures (as e.g. new unfair commercial practices can be more quickly detected and cross-border violations better addressed), as well as their efficiency, as further harmonisation (e.g. through an updated black list of unfair commercial practices and a possible new black list of unfair contract terms) is expected to simplify enforcement and to create a more transparent framework for consumers and traders.

Regarding collective enforcement (e.g. through injunctions), the requirement of action at EU level has increased since the adoption of the Injunctions Directive and the specific provisions on injunctions in specific legislation. As indicated before, B2C cross-border trade, in particular via e-commerce, has increased significantly, and so have consumer complaints regarding cross-border transactions to the ECC network.[818] The responses of qualified entities to our survey suggest that more needs to be done at EU level to strengthen the position of qualified entities and, indirectly, of consumers through more effective collective procedures for enforcement of consumer law.

[817] The fixed-effects logistical model applied found a significant effect of the UCPD being in place on consumer trust, both with the full data set covering all Member States and a restricted data set excluding the seven Member States that already had a comprehensive legislative framework concerning unfair commercial practices in place before the UCPD was transposed. It also found a significant effect of the UCPD being in place on cross-border online purchases (with the restricted data set only). However, in the other panel regression models considered – the fixed effects, LSDV, and random effects models – the UCPD was not determined to have any significant causal effect on the overall level of consumer trust or cross-border online purchases. For methodological details, see Part 4 of this report.

[818] See problem analysis, Section 7.

- What would be the most likely consequences of stopping or withdrawing the existing EU intervention?

Withdrawing the existing consumer and marketing law framework (of which the five directives scrutinised in this study are an important element) would very likely result in an increase of regulatory diversity that would raise barriers to the Internal Market. Whether the level of consumer protection would be affected depends, of course, on the actions of national legislators that one would assume under such a scenario. But it could be expected that at least in some countries the currently developed consumer law framework would not be maintained, therefore reducing the level of consumer protection in these countries.

Also, stopping or withdrawing the existing EU intervention regarding the availability of injunction procedures at the national level would most likely have a negative impact on consumer protection in some Member States. In particular, the frequent intervention of the CJEU in injunction procedures concerning unfair contract terms shows that there is a significant risk that enforcement of consumer protection law at the national level would be weakened.

With regard to cross-border injunctions, where the effect of the Injunctions Directive has been very modest in the past (if at all), stopping or withdrawing the existing EU intervention would still be likely to have a negative effect as the possibility of cross-border enforcement under the current framework possibly acts to some degree as a deterrent to traders. More importantly, a reform of the existing legislation in line with the recommendations made in this study (see below) could increase the effectiveness of injunctions significantly. Withdrawing EU intervention in this area would therefore be likely to increase consumer detriment in B2C cross-border trade, which could be considerable as the frequency of cross-border transactions is increasing.

7. Problem definition

In this section we provide a description of the problems identified regarding unfair commercial practices and marketing, contract conclusion and performance, and injunctions. The subsequent sub-sections discuss drivers of the problems identified, the EU dimensions of these problems, and expected future trends and baseline scenario.

7.1. Problems identified regarding unfair commercial practices and marketing

- What are the issues or problems that may require action? What is the size of the problem? Why are they a problem?

7.1.1. Information requirements

The existence of marketing/pre-contractual information requirements for B2C transactions currently included in the Unfair Commercial Practices Directive (UCPD), Price Indication Directive (PID) and Consumer Rights Directive (CRD) creates problems of application and enforcement due to overlaps and conflicting approaches (such as positive information duties vs. a prohibition of misleading omissions). Especially the overlap between Article 7(4) UCPD and the more comprehensive Article 5/6 CRD creates confusion. In addition, there are relevant rules and requirements not only in the UCPD, PID, and CRD, but also in the Services Directive and E-Commerce Directive as well as in sector-specific rules concerning unfair commercial practices and information obligations regarding advertising. All in all, this creates a complicated legal framework which is difficult to apply for businesses and enforcement authorities, likely leading to additional costs due to its complexity, both for businesses and enforcement authorities. At the same time the multitude of requirements contributes to the problem of “information overload” for consumers. Behavioural research indicates that for an informed and unbiased decision process consumers need the right information at the right point in time. However, these needs of consumers are currently not addressed, and there seems to be a lack of a clear logic about which type of information is required at which stage of the marketing and contracting process.

7.1.2. Price indication

While by and large consumers appear to be effectively informed and aware about the unit selling price and from most countries no major problems in this respect were reported, investigations at the national level (in the UK and Germany) indicate that a considerable level of infringements of price indication rules occurs in practice. The country research also identified a number of current problems related to price indication, which often are outside the scope of the PID and are mostly considered to fall within the UCPD framework. These include:

- Small letter size of unit price indication;
- Differences between the price indicated on the shelves of the shop and the price charged at checkout;
- Erroneous or misleading price indication on websites (e.g. hidden surcharges);
- Indication of a price that will only apply if a certain method of payment is used, or discount that is applied only when the consumer is paying by a particular payment method, e.g. by cash;
- Prices are indicated not clearly enough during sales or discounts. For example, a discount is only applicable to the holders of a loyalty card and for others a higher price will apply;

- Price obfuscation, price partitioning and other practices which may confuse consumers and which may interfere with their ability to assess the full price.

These practices are particularly difficult to address since they operate on the fringes of what is allowed under the UCPD. Practices which are not within the PID scope also concern dynamic pricing. Since the UCPD does not oblige traders to offer their products at identical prices to different customers, traders can offer different prices depending on variables such as the time of day of the purchase (depending on different elasticities of demand by consumers at different times, e.g. higher gasoline prices during the morning rush hour), which can lead to a lack of transparency for consumers and may contribute to what has been called '*confuseopoly*', i.e. marketing approaches where businesses evade competition with other market participants via intentional obfuscation. This is particularly the case for high frequency price changes, which are common in the online environment and can easily be applied in an offline environment where electronic price labels or billboards are used.

This evaluation concludes that the costs of (unit) price indication do not seem to imply disproportionate burdens on businesses. There is also no evidence that the divergences between national laws due to the minimum harmonisation character and the use of regulatory options under the Price Indication Directive have a significant effect on cross-border trade. However, it has been argued by some stakeholders that the PID should in general be made more consistent across the EU with respect to derogations and units, as in their view different national rules have made it confusing and difficult to apply them in practice, especially for retailers that sell online cross-border.

As indicated above, there is some overlap between several consumer law directives which concern information requirements, including the PID. The recent *Citroën Commerce* judgment of the CJEU has also shown that the borderline between the UCPD and the PID is unclear and that the scope of application of the PID is unclear as well.

7.1.3. Principle based approach of the UCPD

As indicated before, this evaluation confirms that the UCPD's principle-based rules (in combination with the black list) are widely considered to provide an effective framework for achieving a high level of consumer protection regarding unfair commercial practices. However, there are some concerns about legal uncertainty for consumers and businesses. To some extent, the principle-based approach is considered to have contributed to enforcement difficulties. The openness of the clauses is reported to encourage traders to enter time-consuming discussions on the fairness of a practice and the outcome of an action is considered to be uncertain, which may discourage enforcement bodies from taking action on the basis of the general clause. Consumer organisations also consider that the principle-based approach does not prevent certain practices that border on unfairness but fall just outside the scope of what constitutes an unfair commercial practice. Especially during the first years of implementation some enforcement authorities and courts had difficulties to “circumstantiate” the principle-based rules of the UCPD to the concrete case. In the meantime, however, they have gained more expertise and practical experience to handle the principle-based approach. Stakeholders have also noted during the country research that the European Commission’s Guidance document facilitates more effective application of the implementing national legislation.

7.1.4. UCPD black list

The UCPD black list is generally considered to generate practical and significant benefits. For practices on the list, there is no need to apply the transactional decision test in order to take action, which facilitates enforcement and may avoid costly and time-consuming litigation. This assessment is confirmed through the country research

for this evaluation. Stakeholders often assess the idea of a black list as positive, as it provides certainty and offers some clarity, predictability and examples and illustrations for what is prohibited behaviour of traders. However, there are certain limitations in the application of the blacklist due to the peculiar character or little practical relevance of some of the blacklisted practices, the vague/open-ended and/or too detailed/narrow conditions of the commercial practices included and the need of an assessment in concreto of the unfairness of the behaviour of the traders for some practices. The country research for the evaluation also identified several commercial practices currently not covered by the black list that are considered to be problematic by some stakeholders who proposed them as potential candidates for an extended black list, including:[819]

- Practices related to promotion, marketing, and contract conclusion;
- Practices related specifically to price transparency;
- Practices related to contract performance/extension;
- Other practices.

This indicates that there is a need to review the practices on the UCPD black list and/or include new practices. It is notable that the current Directive does not provide for a simple mechanism to adapt blacklisted practices in light of new market developments or to include new unfair commercial practices that are leading to significant consumer detriment.

7.1.5. Average consumer benchmark and protection of vulnerable consumers

This evaluation concludes that the use of the "average consumer" benchmark allows authorities and courts in Member States to render a flexible decision, specifying the content of this concept in a manner that is appropriate for the specific case. This is an obvious advantage given to the authorities and courts that are not bound by formalistic and overly rigorous rules, when evaluating the nature of the supposedly unfair practice, which can be clearly to the benefit of consumer. In practice, the assessment whether a commercial practice is unfair vis-à-vis the "average consumer", as defined in CJEU case law, is very often at the heart of the dispute. However, it appears that while in a number of countries the "average consumer" benchmark is considered to work in practice and no major problems are reported (at least in the perspective of consumer protection authorities), in other countries authorities and courts are unfamiliar with the concept, and overall stakeholders are divided in their general assessment of the appropriateness of the benchmark.[820]

In the interviews conducted as part of the country research, consumer organisations in several Member States elaborated their concerns. For example, it was noted that the average consumer in real life is not reasonably well informed and reasonably observant and circumspect – and is usually acting under time constraints. It was also argued that the many consumer protection rules primarily benefit "stronger" consumers and not more vulnerable consumers who really need the protection, suggesting that a lower standard for the average consumer should be applied. Position papers submitted by some consumer organisations in the framework of the open public consultation further elaborated: They put into question whether the "'average consumer-model' is adequate to serve as a standard of consumer protection", and

[819] For more details, see Section 6.1.1 above.

[820] While in the open public consultation conducted in the framework of the Fitness Check most business organisations (70%) either 'tended to disagree' or 'strongly disagreed' with the statement that "the notion of "average consumer" should be reviewed/updated", most public authorities (68%) and consumer associations (70%) either 'strongly agreed' or 'tended to agree' that there is need for a review.

proposed to "modernise the UCPD in line with the way that consumers behave in the real world".

The discussion concerning the appropriateness of the "average consumer" benchmark is also led 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 – to which some of the consumer organisations refer – have significantly put into question the model of consumers as rational decision-makers. Consumers' behavioural biases are widely documented in the academic literature and have been confirmed by a wide range of behavioural experiments, including those commissioned by the European Commission in its recent study on consumer vulnerability. They are also acknowledged in the UCPD guidance document, which refers to the relevance of behavioural biases such as consumer overconfidence when considering self-reported assessments of "well-informed", "observant" and "circumspect" as indicators for establishing the characteristics of the average consumer.

To further explore this issue, an online workshop with experts for behavioural economics and psychology was conducted in the framework of the evaluation to consider the evidence and assess whether these concepts continue to be valid and fit for the purpose in light of results of behavioural research. The workshop concluded that there is indeed a need to further develop the concepts of "average consumer" and "vulnerable consumer" in light of the results of behavioural research.

7.1.6. Unfair practices in consumer-to-business relations

According to the definition of Article 2(d) UCPD, “commercial practices” are only those “directly connected with the promotion, sale or supply of a product to consumers”. The reverse situation, where traders (for example, gold traders, car dealers, antique dealers and retailers of second-hand goods) purchase products from consumers, does not fall within the scope of the UCPD unless they are linked to a B2C practice. According to the country research for this study cases involving consumer-to-business (C2B) relations are not frequent. In spite of this limited relevance in terms of numbers of cases, it has been argued that there is a need to extend the protection of the UCPD to C2B situations, because consumers selling products to traders are in the weaker position and in need of protection. In cases involving C2B relations, typically only general provisions of the Civil Code are applicable, thus failing to afford any kind of special or additional protection to the weaker party (natural person acting for non-professional purposes).

7.1.7. Contractual consequences of unfair commercial practices

Whether or not an unfair practice triggers effects relevant to the individual relationships and whether national courts are allowed to decide that the individual contract concluded as a result of that practice be invalid in its entirety and/or to award damages, is a matter of national contract law, and not of the UCPD, which is without prejudice to contract law and individual claims. The country research for this evaluation shows a diverse patchwork of national arrangements as regards contractual consequences of unfair commercial practices before, during and after a commercial transaction. In all Member States, it seems in principle possible to rely on general contract law provisions to seek contractual consequences of an unfair commercial practice. Any consumer may claim that a misleading commercial practice constitutes a “mistake” or “fraud” that vitiated his or her consent; likewise, any consumer may claim that an aggressive commercial practice constitutes “violence”, “duress” or “undue influence” that should lead to avoidance of the contract. In addition, doctrines of unlawfulness and unconscionability may be relevant in this regard. Likewise, doctrines on pre-contractual liability may be relevant to claim damages. In relation to commercial practices after a commercial transaction, national contract law rules on performance (good faith) may be relevant to ask for performance or claim damages.

However, it should be noted that there is no general principle that an unfair commercial practice (irrespective of whether before, during or after a commercial transaction) either automatically triggers the avoidance or termination of the contract and/or damages or automatically constitutes a breach of contract. These general doctrines are subject to certain limitations which may function as a barrier for consumers who want to get out of their contracts, etc., because of unfair commercial practices.

In a number of Member States, the legislation implementing the UCPD contains a positive cross-reference to relevant national contract law doctrines. In other Member States, national law provisions provide for special contractual consequences in case of breaches of the UCPD. Finally, in some Member States, enforcement authorities can obtain a commitment from the trader responsible for the infringement, or order that trader, to compensate consumers that have suffered harm as a consequence of the infringement including, among others, monetary compensation, offering consumers the option to terminate the contract or other measures ensuring redress to consumers who have been harmed as a result of the infringement. In the absence of EU contract law sanctions in case of violations of the UCPD (and similarly with respect to B2B practices in the MCAD) it therefore depends on the Member State if and to which extent there are contractual consequences of unfair commercial practices. National law copes with this in different manners, commensurate with national law sensitivities. According to the country research there is not much national case law on the application of traditional contract law doctrines in relation to unfair commercial practices. It also seems that the above mentioned positive cross-references to relevant national contract law doctrines in the legislation implementing the UCPD in Member States such as Bulgaria, France, Portugal and the Netherlands do not have a very significant practical impact. These provisions are not applied very often.[821]

7.1.8. Misleading practices in B2B relations

As described in Section 6.1.1.4 above, the scope of the Misleading and Comparative Advertising Directive (MCAD) is limited to “advertising”, because this was the Union legislature’s approach in 1984 (the original Misleading Advertising Directive in which the comparative advertising provisions were inserted in 1997). Although the notion of “advertising” in Union law (including in the MCAD) is rather broad, it is nevertheless narrower than that of “commercial practices” in the UCPD. The MCAD prohibits misleading advertising in a generic way. No examples are given, only features to be taken into account to determine whether an advertisement is misleading (Article 3). Unfair practices between businesses that are regularly referred to include misleading payment forms, offers to extend internet domain names or protection of trademarks, or misleading directory companies, which often have a cross-border dimension. While this evaluation concludes that the MCAD provides a rather solid framework for a considerable part of the B2B advertising market, it also confirms that in particular small enterprises are affected by misleading advertisements, and need further protection, as is evidenced by legislative action in some Member States. The evaluation has also confirmed that there is no functioning cross-border enforcement framework concerning misleading practices in B2B relations.

[821] The Dutch provision, however, has been applied several times, see country report Netherlands.

7.2. Problems identified regarding contract conclusion and performance

7.2.1. Scope of the Directive

Subject to specific exclusions having no relevance to consumer protection,[822] the UCTD applies to all trade sectors. Art 1 (1) refers simply to 'contracts concluded between a seller or supplier and a consumer'. This catches sale and supply of goods and services; and the sale, lease and mortgaging of land. This brings significant benefits which can be seen by considering the huge range of sectors in which national regulatory bodies have been able to carry out work to remove unfair terms. Although the Directive is effective in that it is basically applicable to all types of contracts, there is some uncertainty as to the scope of application of the UCTD. So, the use of the terms "seller and supplier" and "goods and services" has led to confusion and differences of approach in national case law, e.g. raising the question as to whether the UCTD covers C2B contracts, where the ''consumer'' supplies goods or services, e.g. consumers selling gold to traders.

Further, there has been a degree of uncertainty as whether it is necessary for the application of the UCTD that the consumer pays a price in the form of money, although it has recently been stated in the *Tarcău* case that this is not necessary (a consumer acting as a guarantor for another's debt was held to be covered by the UTCD).[823] This question is particularly relevant in the case of online services, as there is often no monetary consideration, but 'only' personal data in return for a service. This is however irrelevant for the application of this directive.[824] This principle has already been applied in several national cases.[825] Nevertheless, the issue still causes disputes and uncertainty.

Finally, the UCTD refers to 'contract' terms, thus triggering the discussion of whether terms in unilateral acts and any other terms/notices that do not have contractual status are subject to review. In some countries, the scope of the review was widened to cover such unilateral acts and other non-contractual terms and notices,[826] in other countries, a broad interpretation in case law has ensured the same effect.[827]

Individually Negotiated Terms

The test of unfairness in Art. 3 of the UCTD does not apply to individually negotiated terms. However, in reliance on the minimum clause, several Member States do provide for control of individually negotiated terms. Essentially the overall conclusions

[822] Contracts relating to employment, succession rights, rights under family law and the incorporation and organisation of companies or partnership agreements Preamble, recital 10).

[823] CJEU 19 Nov. 2015, *Tarcău*, ECLI:EU:C:2015:772, http://curia.europa.eu/juris/documents.jsf?num=C-74/15; Recital 10 Unfair Contract Terms Directive.

[824] E. TERRYN, "'Consumers, by Definition, Include Us All' … But Not for Every Transaction", ERPL 2016, n 2, 271; M. LOOS & J. LUZAK, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts', Journal of Consumer Policy 2015.

[825] See e.g. several national courts already applied national provisions implementing the Unfair Contract Terms Directive to 'free' internet services (e.g., Landgericht Berlin 6 Mar. 2012, Az 16 O 551/10; Kammergericht Berlin 24 Jan. 2014, 5 U 42/12

[826] Thus, in the UK, the Consumer Rights Act extends the scope of the review to a notice 'to the extent that it (a) relates to rights or obligations as between a trader and a consumer, or (b) purports to exclude or restrict a trader's liability to a consumer.' (s. 61 (4) Consumer Rights Act).

[827] E.g. in Belgium.

here, based on the country research,[828] are that the exclusion causes problems of uncertainty and also compromises effective protection; and that there have been no significant problems in countries where the exclusion does not apply.

The exclusion of individually negotiated terms can be argued to be problematic for the following reasons:

- It causes a protection gap in the sense that even if there is negotiation consumers will still be in a weaker position in terms of bargaining skill and expertise, so that the resulting terms may still be unfair to consumers.
- There are uncertainties as to precisely when a term can be said to be individually negotiated. This may cause inefficiencies, but also one particularly problematic consequence is that these uncertainties may be exploited by traders to persuade consumers that there have been negotiations, when none have in reality occurred.

Price and Main Subject Matter Terms

The test of unfairness in Art. 3 of the UCTD does not apply to price and main subject matter terms.[829] In several Member States, these exclusions from the test of unfairness do not apply, so the test of unfairness applies or should be applied to price and main subject matter terms.[830] In relation to countries where it applies, the exclusion of price and main subject matter terms causes again uncertainties.

The CJEU has already begun to develop what is required to satisfy the plain and intelligible language requirement, in fact taking it beyond plain and intelligible language to a fuller version of transparency. In *Árpád Kásler*[831] and *Van Hove*,[832] the Court said that the terms and their real consequences should be economically understandable to the consumer, i.e. that the consumer should be put in a position as to be able to "evaluate, on the basis of clear [precise], intelligible criteria, the economic consequences for him which derive from [the term].''[833]

However, it is not necessarily sufficient simply for these criteria to be contained in the case law if it is to be clear to all stakeholders precisely what is required. There is also a degree of uncertainty as to whether price and main subject matter terms (and the fact that they are exempt from review) must sometimes be specially highlighted within the contract. Finally, there is also uncertainty as to exactly what, in substance, can count as the price and main subject matter. It seems clear, but there remains a degree of uncertainty, that the 'adequacy' of the price refers to whether the price is too high, given what is received in return; this not covering other types of fairness

[828] E.g. Austria, Croatia, France Malta, UK.

[829] Art 4 (2)

[830] E.g. in Denmark, Spain, Finland, Luxembourg, Malta and Portugal.

[831] Case C-26/13 Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt [2014].

[832] Case C-96/14 Jean-Claude Van Hove v CNP Assurances SA [2015].

[833] Citations from both cases identical in this respect, except for the one adjective: 'clear' (*Árpád Kásler*) or 'precise' (*Van Hove*).

assessment, e.g. as to time or mode of payment, the right to vary the price etc;[834] and that the 'price' does not include charges imposed for consumer default.[835]

7.2.2. Scope of the transparency requirement

In general, it can be said that the transparency requirement of the directive has contributed to achieving a high level of consumer protection. The exact role of the transparency requirement in achieving this goal, however, differs in the Member States. In several Member States, a large number of cases are reported to be based on this provision.[836] In addition unfair and intransparent agreements are reported to have disappeared from the market.[837] It is only in a minority of Member States that the principle is seldom applied by the courts.[838] Notwithstanding the fact that the transparency principle is in general considered to be effective, continuing problems with transparency are reported, especially in specific sectors, including digital products, energy, and telecommunications.

It also appears from the country reports that there is a degree of uncertainty as to the scope of the transparency concept, which may undermine consumer protection, and also lead to differences in national approaches. For example, there is uncertainty as to what elements exactly are required for terms to be transparent. While there is CJEU guidance on transparency, in particular from CJEU cases such as *RWE* and *Kasler* and also rather detailed guidance in national case law, uncertainty still remains, and the issue is important as empirical research has shown that simpler and shorter terms contribute to readership, comprehension of the terms and to consumer trust.[839]

7.2.3. Lack of clarity as to the legal consequences associated with the issue of transparency

The results of the country research indicate that there is significant uncertainty as to the legal consequences of a lack of transparency. This is in line with the conclusions that were reached in earlier studies. For example, the same conclusion was reached in the Consumer Law Compendium.[840] In particular, there is uncertainty as to whether a lack of transparency can, in itself, lead to a term being found to be unfair.

The lack of clarity on the sanction for terms that are not transparent also affects the collective means of enforcement. Article 7 requires adequate and effective means (including collective means) to combat 'unfair' terms. As it is not clear whether terms that are not transparent are automatically unfair, it is also not clear whether

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[834] Willett, 'General Clauses and the Competing Ethics of EU Consumer Law'; this reading is certainly accepted in at least some Member States (e.g. UK-Law Commissions (2012) *Unfair Terms in Consumer Contracts: Advice to the Dept of Business, Innovation and* Skills).

[835] Otherwise, there would be no point in para 1(e) on the indicative list, which treats as indicatively unfair a term '..requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.'

[836] E.g. Austria, France, Germany, Greece, Portugal.

[837] E.g. Czech Republic (hidden arbitration agreements, hidden fines); Denmark (subscription traps); Estonia (insurance contracts); Poland (sector regulators report improvements);

[838] E.g. Cyprus, Slovenia.

[839] M. Elshouts, M. Elsen, J. Leenheer, M. Loos, J. Luzak, Study on Consumers' Attitudes Towards Terms Conditions (T&Cs) Final Report, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847546.

[840] Consumer law compendium, p. 421.

enforcement bodies/consumer organisations should be able to start actions for injunctions against terms that are merely not transparent. This is possible in some Member States,[841] whereas it is excluded in other Member States.[842]

There is also uncertainty as to the implications when terms are actually transparent. The key issue here is whether the existence of transparency can legitimise a term that is very substantively unfair. It seems likely from the *Aziz* case that transparency does not necessarily have this effect, i.e. that if a term is sufficiently unfair in substance, then there is a violation of good faith (because it will not be one that, according to the Aziz 'agreement' test, the consumer would have agreed to in individual negotiations), irrespective of whether the term is transparent. However, the issue remains unclear. Further, some Member States have not included the good faith element in their implementing legislation,[843] and there is uncertainty as to what implications this may have in terms of the above questions as to whether a lack of transparency can lead to a term being found to be unfair, and whether the existence of transparency can legitimise a term that is very substantively unfair.

7.2.4. The general test of unfairness

The UCTD controls contract terms which were not individually negotiated. It establishes a general norm that considers a contract term unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to the requirement of good faith (Art. 3 (1)). In the analysis of effectiveness of the UCTD (see Section 6.1.2 above) it was concluded that <u>this open-ended fairness test, which enables a range of (EU and national) fairness criteria to be applied to any given term, is broadly effective in contributing to a high level of consumer protection</u>. Notwithstanding the benefits of the open-ended test of unfairness, it however also <u>causes some uncertainty, and differing interpretations in various Member States. In addition, it does not take into account changes in circumstances after the conclusion of the contract that could affect the fairness of terms</u>.

7.2.5. Indicative list of terms which may be regarded as unfair

In addition to the general test, the UCTD contains an indicative list of terms which may be regarded as unfair (Annex, Art. 3 (3)). Based on the country research it can be concluded that the current <u>indicative list is considered to have significant practical benefits</u> in terms of consumer protection and legal certainty; but that the grey and black lists used in a number of countries may provide even greater protection and certainty. The practical relevance of a list of unfair terms in concretising the principle-based approach, i.e. in 'fleshing out' the broad test of unfairness by providing examples for consumers, businesses, courts and regulators of many of the most important types of potentially unfair terms, has been stressed by stakeholders throughout the country research. Lists add legal certainty and several national enforcers have stressed that lists with concrete examples of open norms make it easier to enforce compliance than mere open norms. However, <u>the merely indicative list has often not been considered to be sufficient in terms of protection and certainty</u>. In France e.g., it was not considered very effective[844] as it leaves the burden of proof

[841] Thus e.g. in Italy, see e.g. Court of Appeal of Rome, 24 September 2002, in Foro italiano, 2003, I, 332 ff.

[842] Thus e.g. in Slovenia.

[843] E.g. Belgium.

[844] Piédelièvre, nr. 459 a).

on the consumer-compared, e.g. to a black list where terms are automatically unfair or a grey list where there is at least a presumption that the terms are unfair. In France, the indicative list, which was attached as an Annex to the Code de la consommation, was reported to have had only a limited impact on the application of the general clause in the period before the introduction of the domestic grey and black lists. These grey and black lists are to a large extent based on the European list.[845] The terms listed in the similarly indicative recommendations by the Commission des clauses abusives (CCA) in France have had more impact in practical cases.[846] In other country reports, the lesser legal certainty and clarity of an indicative list was also emphasised.[847] In Sweden, for example, few traders were reported to look at the indicative list. In the Netherlands, both business associations and consumer organisations saw limited added value in the indicative list. The largest Dutch organisation blamed this on the abstract formulation of the terms in the indicative list. This formulation leads to the need for interpretation, which requires legal-technical knowledge that ordinary consumers do not possess. According to the country research it was also concluded that black lists (of terms considered unfair in all circumstances) and grey lists (of terms which may be presumed unfair) are considered more effective than indicative lists. However, in order to be effective, such lists – whether indicative, grey or black – need to be updated regularly, as was stressed several times in the country reports.

7.2.6. Role of the national courts

National courts must take up an active role in order to ensure the effectiveness of the UCTD. This is clear from the case law of the CJEU. Such an active role is however not taken up by courts in all Member States and uncertainty as to the exact role of national courts further impairs the full effectiveness of the UCTD. In particular, there is uncertainty as to precisely how to interpret the CJEU case law that requires *ex officio* assessments whether a contract term is actually unfair, just what changes this requires on national procedural law: these are particularly important questions to deal with, in view of the deeply rooted rules in some jurisdictions that judges are bound by the arguments that are invoked by the parties.

7.2.7. Uncertainty as to the precise effects of terms being found to be unfair

The Directive requires that the contract must remain binding upon the parties insofar as the contract is capable of continuing in existence without the unfair term (Art. 6 (1)). While certain issues surrounding this are now clearer than they were before, there are remaining uncertainties. The CJEU has made clear that national courts may not revise an unfair term.[848] Such a power might eliminate the dissuasive effect on sellers, who would remain tempted to use those terms in the knowledge that, even if they were declared invalid, they could nevertheless be modified by the national court in such a way as to safeguard the interest of those sellers or suppliers.[849] The

[845] 10 of those terms on the French black list, and 8 on the French grey list also figure on the European indicative list.

[846] Piédelièvre, nr. 463.

[847] Country report Latvia.

[848] CJEU 14 June 2012, C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino* ; CJEU 30 May 2013, C-488/11, *Asbeek Brusse*, para. 29.

[849] CJEU 14 June 2012, C-618/10, Banco Español de Crédito SA v Joaquín Calderón Camino, para. 69.

rejection of such a possibility to revise has generally been welcomed.[850] The exact scope of the prohibition to revise a clause is however subject to discussion and the issue is interpreted differently in different Member States, in legal literature and by different national courts. The above line of case law excludes the possibility to reduce the unfair contract term to its legally permitted core. Nevertheless, it still seems possible to only declare parts of clauses unfair and non-binding, when such parts can be eliminated without changing the content of the remaining part (the so-called blue pencil test).[851] This is however disputed in the literature and the need for a clarification by the CJEU has been expressed.[852] Even more controversial is the interpretation of the contract by a court according to the hypothetical will of the parties, more specifically in cases where the nullity of an unfair clause would lead to unacceptable economic consequences. This CJEU case law seems to exclude the application of this theory[853] but the views on this issue differ.[854] Also, different opinions have been expressed as to whether supplementary provisions could be invoked where the deletion of the terms does not lead to the annulment of the contract. This indicates a need for further clarification and guidance at EU level.

7.3. Problems identified regarding injunctions

The findings of the evaluation differ, at least gradually, between cross-border cases and domestic cases. These types of cases are distinguished in the following.

7.3.1. Problems concerning domestic cases

In domestic cases, the injunction procedure has proved to be an important tool for the enforcement of consumer protection rules, and in particular in those Member States where no other tools are available or where injunctions are the most used tool, in particular in Austria, France, Germany and Greece. The study has, however, revealed a number of problems that limit the effectiveness of this tool and which could be reduced with a reform of the Injunctions Directive. This is also the view of consumer organisations and consumer authorities, as expressed in the open public consultation for this Fitness Check.[855]

Insufficient coverage of the Injunctions Directive

Qualified entities have criticised the limited scope of application of the Injunctions Directive and suggested to adjust it to the scope of application of the CPC Regulation or to extend it to consumer law in general.[856] In particular, it was recommended to

[850] E. Hondius, "Unfair contract terms and the consumer: ECJ case law, Foreign Literature, and Their Impact on Dutch Law", *ERPL* (2016), 3 & 4, 467.

[851] MüKoBGB/Basedow BGB § 306 Rn. 17-19.

[852] MüKoBGB/Basedow BGB § 306 Rn. 4-6c.

[853] R. Steennot, 601; H. Micklitz, N. Reich, " The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)", *CMLRev* 2014, 795-796.

[854] See MüKoBGB/Basedow BGB § 306 Rn. 4-6c. The BGH is of the opinion that this theory is in conformity with the UCTD - BGH NJW 2013, 991 Rn. 24 ff.

[855] See Part 2 of this report.

[856] See country report Slovenia; position paper BEUC, at p. 12; position paper vzbv, at p. 23. Naturally, in those Member States where the injunction procedure has not been used by now, there is no perceived need for an extension of its coverage. The same is true where Member States have already extended the scope of application to consumer law in general.

include data protection law,[857] the latest EU legislation in the area of financial services[858] and consumer protection in regulated services such as telecommunications services and energy supply.[859] Experience from Member States that have autonomously extended the scope of application of the injunction procedure demonstrates that there is a need for this extension.

Incoherence between injunction procedures

The Injunctions Directive is complemented by singular provisions in other directives that require Member States to introduce injunction procedures at the domestic level. Relevant EU legislation currently in force includes the UCTD (Art. 7(2) and (3)), the UCPD (Art. 11 (1) and (2)) and the CRD (Art. 23 (1) and (2)).The various injunction procedures required under EU law do not follow identical rules. Of course, this only poses a problem in Member States where the injunction procedure is actually used, or where it would be used if it was easier to handle. Member States such as Germany have resolved the problem autonomously by adopting the same rules for all injunction procedures. In those Member States where this is not the case, for example Cyprus, stakeholders have reported confusion, which impacts on legal certainty and on the use of the procedure by qualified entities in general, given the litigation risk that is normally involved in an injunction procedure.

Legal uncertainty

Legal uncertainty always has a chilling effect on consumers, and it has a chilling effect on consumer organisations as well, in particular if they bear the litigation risk. Numerous comments in this study relate to uncertainty about the correct interpretation of national legislation and to the discretion of courts or authority that reduce the predictability of the outcome of litigation.

The problem of legal uncertainty also relates to undertakings that the current Injunctions Directive does not regulate at all. Some Member States have introduced specific rules on undertakings in which traders promise to discontinue an infringement in order to avoid litigation.[860] In other Member States, courts have developed case law on the requirements that such undertakings must meet so as to defeat an injunction claim.[861] Where no clear rules exist, this may lead to legal uncertainty.[862]

Litigation costs

Litigation costs, or rather the risk of having to pay litigation costs under the loser pays principle, was reported to be the most important obstacle, in particular, to qualified entities that are not funded through the state budget. Consumer associations from a number of Member States have indicated that they would be more inclined to use the injunction procedure if they were relieved from court fees and did not have to bear the risk of having to pay the defendant's expenses.[863]

[857] See country report France; position paper vzbv, at p. 23.

[858] See country reports Greece, Malta, Slovakia; position paper vzbv, at p. 23.

[859] See country report Malta; position paper vzbv, at p. 23.

[860] UK.

[861] Germany.

[862] See country report Austria.

[863] E.g. country reports Czech Republic, Slovenia.

In some Member States, legislators have resorted to damage claims of consumer organisations that they can use to finance their activities. Thus, in France, the consumer organisation can claim damages but these damages are not proportionate to the harm caused to consumers, and they have no deterrent effect. Likewise, in Greece, the consumer organisation can obtain moral damages. Part of such damages is, however, awarded to the state for the education and protection of the consumer.

Limitation to effect inter partes

The primary effect of an injunction order is that the trader is prohibited to continue the infringement. In most Member States, that decision has only effect *inter partes* (between the parties). Thus, it does not have direct impact on other traders that use the same term. This poses problems for the effectiveness and efficiency of the procedure in two ways.

First, the *inter partes* nature of the injunction requires individual consumers who bring claims based on the same infringement of consumer law by the same trader to substantiate and prove those claims anew, which increases their litigation risk and also causes costs to the court system as such. Accordingly, the consumer organisation stakeholders and one of the consumer authorities who have responded to the public consultation have noted that the *inter partes* nature of injunction decisions in most countries made it difficult for a consumer to rely on a decision to receive compensation.[864]

The prohibition to rely, vis-à-vis a consumer, on a term that was declared unfair in collective proceedings would already seem to be required under EU law, according to the decision of the CJEU in *Invitel*.[865] Some Member States, including Austria, Germany and Slovenia, provide accordingly in their national laws but most do not. The problem of course extends to infringements of consumer law other than by way of unfair contract terms.

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. Evidence for the necessity to soften that strict *inter partes* effect can be seen, for example, in Germany where traders of the same industry often continue to use and to defend their standard terms after identical terms have been declared unfair in injunction proceedings against their competitors.[866] Some Member States, including Greeceand Spain, have therefore introduced an *erga omnes* effect by law or have given that competence to the courts.

Insufficiently effective and deterrent remedy

A frequent critique by qualified entities of the remedy of injunction is that it is not sufficiently effective and deterrent as it only produces effects for the future but does not cover the compensation of the victims of the infringement; which leads to a situation where dishonest traders can often keep their unlawfully gained profits, to the

[864] See Part 2 of this report.

[865] CJEU, judgment of 26 April 2012, Case C-472/10 Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, ECLI:EU:C:2012:242. See also H.-W. Micklitz, in: N. Reich, H.-W. Micklitz, P. Rott and K. Tonner, European Consumer Law, 2nd ed. 2014, at para 3.22b; position paper vzbv, at p. 21.

[866] See the position paper submitted to the online public consultation by vzbv: "[I]t often happens that competitors do not abide by injunctions either. Especially in the case of financial services, it is problematic that banks often do not allow judgments against other banks to be enforced against themselves. Similar problems also arise in other sectors."

detriment of consumers.[867] In the survey of qualified entities, this issue of additional remedies ranked highest on the list of future harmonisation measures that would be most beneficial.[868]

There is abundant evidence in academic research on the fact that in many cases individual consumers will, for a variety of reasons, not bring a claim even if there is a remedy available in principle. The reasons include the lack of financial resources, the litigation risk and the unattractiveness of litigation in a cost/benefit perspective.[869]

The necessity of additional remedies has led to recent developments in Member States some of which have introduced such additional remedies with the express intention to cure the hitherto insufficient effectiveness of the injunction procedure. For example, in Austrian and Polish unfair commercial practices law, there is a rule, according to which the injunction claim includes the claim to remove the consequences of the breach. A similar rule exists in Slovakia. In Germany, that claim has long existed in unfair commercial practices law, although it was only codified in that area in 2004, and it was extended in 2016 to the Injunctions Act, with an exception for unfair contract terms. In Poland, the trader can be ordered to inform consumers about the unfairness of a standard term. In France, the trader is obliged to inform consumers by all appropriate means about the unfairness of contract terms. This has also been ordered, at the request of consumer organisations, in recent decisions of German instance courts. In Bulgaria, Spain and the UK, the trader can be ordered to make a corrective statement publicly. These measures aim at making the individual victim of a consumer law infringement aware of that infringement so that he or she can take follow-up action.

In Spain, it is possible to bring injunctions together with claims for absolute and relative nullity, termination, restitution of profits and damages. These secondary actions will be solved by judges responsible for the injunction claim. In Germany and Slovakia, there is an on-going academic debate about whether the obligation to remove the consequences of the breach could also cover the reimbursement of unlawfully obtained money.[870] Whilst this possibility was rejected by a Slovakian court, the German district court of Leipzig has awarded the claim in a case where a bank had unlawfully charged consumers 30 Euros each against long established case law of the Federal Supreme Court, arguing, amongst others, that the individual consumers concerned would be highly unlikely to bring individual claims against the bank.[871]

The most advanced add-on to the injunction procedure is reported from the UK, where the legislator has introduced, with the Consumer Rights Act 2015, the so-called “Enhanced Consumer Measures”. Their aim is to provide greater flexibility for public enforcers and the civil courts in relation to the contents of enforcement orders and undertakings made under the injunction procedure. If they are deemed suitable for a particular case, public enforcers and the civil courts will be able to attach (where they consider it just and reasonable) enhanced consumer measures to enforcement orders and undertakings. The enhanced consumer measures will need to fall into at least one of three specified categories (referred to as the redress, compliance and choice

[867] See also Part 2 of this report.

[868] See Part 4 of this report.

[869] See, for example, Wagner, in: Casper u. a. (eds), Auf dem Weg zu einer europäischen Sammelklage?, 41, at 51 ff. See also Civic Consulting, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, 2008.

[870] Country report Slovakia.

[871] See Landgericht Leipzig.

categories). Measures in the redress category will offer compensation or other redress to consumers who have suffered loss as a result of the breach of consumer law. Compliance measures are intended to increase business compliance with the law and to reduce the likelihood of further breaches. Measures in the choice category will help consumers obtain relevant market information to enable them to make better purchasing decisions.

Other obstacles

It has sometimes been argued that the application of "normal" civil procedural law does not reflect the fact that consumer organisations or consumer authorities that bring injunction claims act in the collective interest of consumers, or in the public interest;[872] a claim that has also been made in academic writing.[873] Problems may, in particular, relate to the burden of proof that is often on the qualified entity bringing the claim.[874]

In this context, it is worth noting that the problem of the burden of proof also extends to compensation orders if the qualified entity has to provide for a precise calculation of the loss suffered by consumers.[875] In the UK, the problem is alleviated in that way that the court or the FCA can award compensation that it deems 'just and fair'. In Belgian anti-discrimination law, the claimant may opt for a flat-rate compensation (fixed in the legislation), which may not be exact, but relatively speedy.

Insufficient awareness of courts of consumer law, due to lack of specialisation, has also been mentioned as an obstacle to the enforcement of consumer law by way of injunction procedures.

7.3.2. Problems concerning cross-border cases

In cross-border cases, qualified entities face such severe obstacles that they generally do not use the system of the Injunctions Directive but resort to other mechanisms (if any), in particular the CPC Network (if they have access to that instrument) or law-suits in their domestic courts against foreign traders.[876]

Litigation in the foreign court is the type of action envisaged by the current Injunctions Directive. It has advantages at the enforcement stage because the qualified entity would obtain a judgment from a court of the Member State where the trader is domiciled but is very difficult to handle for most qualified entities, due to the staff and financial resources needed for legal research into the foreign procedural law, translation, travel, etc.

Cross-border litigation in domestic courts is the currently preferred strategy of consumer organisations since they are more familiar with their domestic procedural law. They may, however, still have to argue foreign substantive law even in their domestic courts, as the determination of the applicable law is governed by the Rome I and Rome II Regulations. Problems also arise with the enforcement of the decision,

[872] See, for example, the position paper of Which? (on costs).

[873] See H.-W. Micklitz, in: Münchener Kommentar zur Zivilprozeßordnung, § 5 UKlaG margin note.

[874] See, e.g. country reports Austria and Hungary concerning the burden to prove an infringement of the "collective interest" of consumers.

[875] See the country reports Bulgaria and Hungary concerning the burden to prove the damage suffered by consumers in compensatory actions.

[876] See supra.

and in particular, of sanctions imposed on the trader, in a foreign country. The reason is that the Brussels I 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.

7.3.3. Protection of collective business interests

Collective business interests are protected in the unfair commercial practices legislation of some Member States. Where the national law only allows for action in the collective interest of consumers, there is, of course, still the indirect effect of protection of honest traders. The question is, however, whether or not business organisations need to have legal standing to protect the collective interests of businesses. In the country research, some business associations have proposed to introduce protection of the collective interests of small businesses or to businesses in general. Most country reports,[877] however, show no need to extend the scope of application of the Injunctions Directive to the protection of collective business interests.[878]

7.4. Drivers of the problems identified

- What are the main drivers? Who is affected by the problem (s), in what ways, and to what extent?

In this study, the term 'drivers' is understood as denoting the main underlying causes of the problems identified, in line with the definition set out in the Better Regulation Toolbox.[879] Drivers for the problems identified in the previous sub-sections can be divided into two broad categories: drivers related to *trends in markets and society* and drivers related to *the legal framework for EU consumer and marketing law itself*.

Drivers related to markets and society include the following:

- Increasing levels of e-commerce and online B2C cross-border shopping;
- Innovation in technology, commercial practices and contract terms;
- Increasing potential to target vulnerable groups of consumers;
- Stagnant levels of awareness of EU consumer and marketing legislation.

Drivers related to the legal framework include the following:

- Incremental development of EU consumer and marketing law;
- Different implementation of EU consumer and marketing law across Member States;
- Legal uncertainty resulting from the open-textured nature of the general clauses in the absence of up-to-date black lists;
- Lack of incentive for individual enforcement.

[877] For a possible exception, see Country report UK.

[878] Furthermore, in the online public consultation, just one-quarter of respondents agreed that the scope of the Injunctions Directive should be enlarged to cover the protection of collective interests of businesses. However, a difference of opinion could be observed between business associations (20% in favour) and individual businesses (33% in favour).

[879] European Commission 2015, Better Regulation Toolbox.

The following sub-sections describe these drivers in detail.

7.4.1. Drivers related to markets and society

Increasing levels of e-commerce and online B2C cross-border shopping

An increasing proportion of consumers shop online: between 2004 and 2016, the proportion of individuals in the EU reporting at least one purchase of a good or service over the internet within the last 12 months more than doubled, from 20% to 55%. The proportion of households with home internet access also doubled over the same period, from 41% to 85%.[880] While this increase in e-commerce creates new opportunities for consumers to benefit from cheaper prices and increased choice, it also drives problems in consumer protection, e.g. through innovative (online) unfair practices (see also next driver).

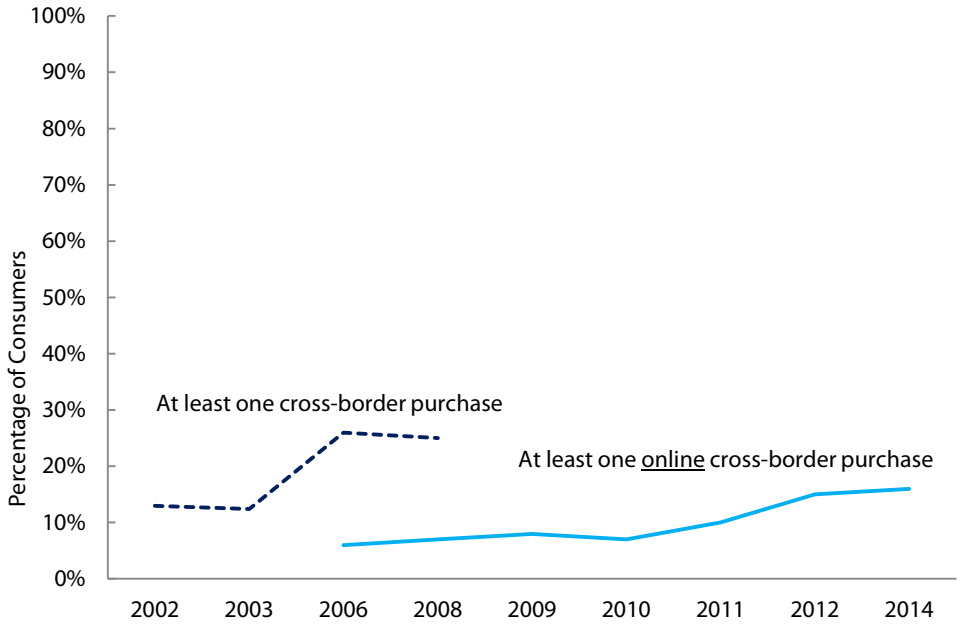
In parallel to the general increase in B2C e-commerce, and driven by increasing internet access at home,[881] more and more consumers purchase cross border within the EU, and more and more traders offer products to consumers in other Member States. Already between 2003 and 2006, the average proportion of survey respondents in the EU reporting at least one cross-border purchase (including in person) in the previous year more than doubled, from 12% to 26%. Cross-border shopping over the internet has more than doubled since 2006, due in part to technological progress and the mainstreaming of internet shopping in general. In 2014, 16% of all Eurobarometer respondents reported that they made an online purchase from another EU country, compared to only 6% in 2006 (see figure below).[882]

[880] Eurostat data series tin00096 and Eurostat data series isoc_ci_in_h.

[881] See results of the panel data analysis in Part 4 of this report.

[882] See Annex VIII on the analysis of awareness and trends for more detail.

Figure 9: Percentage of consumers who made at least one (online) cross-border purchase in the EU within the last 12 months, EU%.



Source: Standard Eurobarometer 57.2, Special Eurobarometers 128, 252 and 298, Flash Eurobarometers 299, 332, 358 and 397. Questions for general cross-border purchase: 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 purchase: 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] 2012-2014: 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]. Note: EU% comprises the EU15 up to 2004, the EU25 from 2004 to 2007, EU27 from 2007 to 2013, and EU28 thereafter.

An increase in cross-border commerce could be expected to also lead to an increase in cross-border infringements, which indeed is notable in the complaint statistics of the network of European Consumer Centres (ECC-Net). In 2014, ECCs addressed 37 609 complaints, an increase by 67% compared to 2005 (22 549 complaints).[883] This trend is expected to continue (see below, baseline scenario).

Innovation in technology, commercial practices and contract terms

The online environment along with its new business models, contract terms and marketing practices (including new unfair practices) leads to new challenges for consumers that have to be addressed by consumer organisations, enforcement bodies and courts. Examples include fake product reviews or possibly misleading practices of price comparison websites. Also new pricing practices, such as dynamic pricing and high frequency price changes, are concerns which are common in the online environment and can easily be applied in an offline environment using technology such as electronic price labels or billboards. The online environment has also seen

[883] Note that complaint statistics have to be interpreted with caution, because other factors than an increased number of problems may contribute to increased complaint numbers (e.g. a better visibility of the network etc). Figures quoted from European Commission, The European Consumer Centres Network, Anniversary Report 2005-2015.

innovation in standard contract terms. For example, there has been a degree of uncertainty as to whether it is necessary for the application of the UCTD that the consumer pays a price in the form of money, which is particularly relevant in the case of online services, as there is often no monetary consideration, but 'only' personal data in return for a service.[884]

Increasing potential to target vulnerable groups of consumers

The workshop with experts in behavioural economics and psychology conducted for this study on the implications of behavioural research for key aspects of the consumer protection legislative framework emphasised the rapid advances made in the understanding of behavioural biases in consumer decision making. While these research results may help enforcement bodies, courts and legislators to better protect consumers, relevant consumer biases are also exploited (and may be exploited with increasing sophistication) by new marketing techniques and products.

In particular, advances in behavioural research combined with innovation in technology and marketing practices (for example, in online behavioural advertising)[885] create opportunities to target certain groups of consumers, and vulnerable consumer groups may be particularly at risk to be targeted by unfair practices. An example is the targeting of children with hidden advertisements in online games, which was also the subject of a recent study by the European Commission.[886] The increasing potential both to target particular groups at a very granular level and to exploit the cognitive biases of consumers through technological innovation and behavioural insights therefore may exacerbate the problems associated with consumer vulnerability.

Stagnant levels of awareness of EU consumer and marketing law

Consumer awareness of EU consumer and marketing law as measured by the Eurobarometer has generally remained stable since 2010. As an example, the following figure shows the proportion of consumers who were able to correctly answer a knowledge question from the Eurobarometer about an unfair commercial practice between 2010 and 2014:[887]

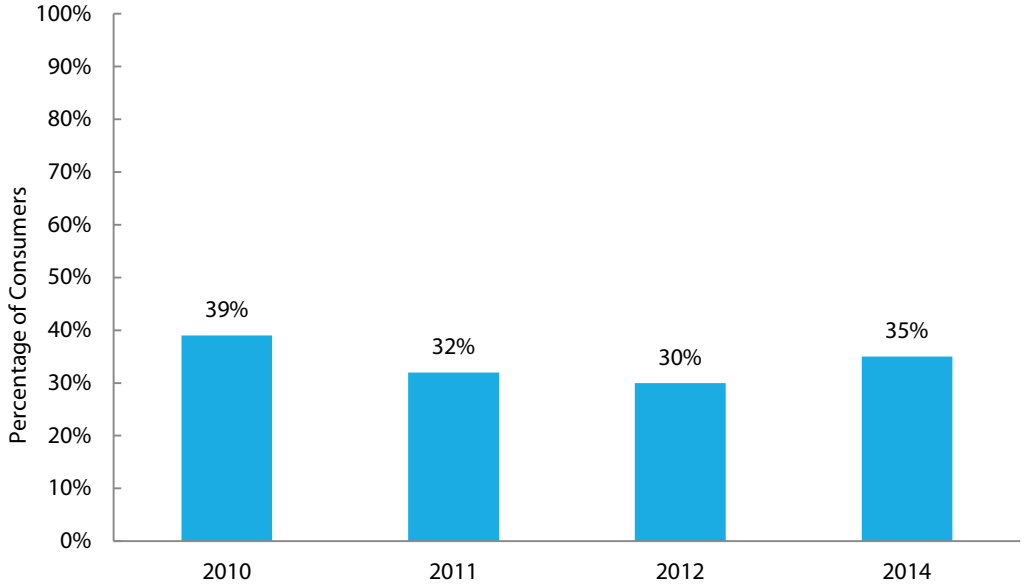
[884] Although CJEU case law stated in the Tarcău case that this is not necessary, the issue still causes disputes and uncertainty. See section 7.2.1.

[885] Behavioural advertising uses data collected on an individual's web-browsing behaviour, such as the pages they have visited or the searches they have made, to select which advertisements to display to that individual.

[886] 2016 Study on the impact of marketing through social media, online games and mobile applications on children's behaviour

[887] See the analysis of awareness and trends in Annex VIII for additional examples and information on consumer and trader awareness of EU consumer and marketing law.

Figure 10: Percentage of consumers who correctly answered a knowledge question about an unfair commercial practice (receiving unsolicited goods), EU%.



Source: Special Eurobarometer 342, Flash Eurobarometers 332, 358 and 397. Question: Imagine you receive two educational DVDs by post that you have not ordered, together with a EUR 20 [in 2010: EUR 50] invoice for the goods. Are you obliged to pay the invoice? [Correct answer: No, and you are not obliged to return the DVDs]. Note: EU% comprises the EU27 until 2012, and the EU28 in 2014.

Although these levels of awareness are not themselves trending in a particular direction, they remain an important driver of the identified problems in connection with the drivers discussed above. Unchanging levels of awareness have the potential to put consumers at risk as consumers' experiences become increasingly more complex in the face of the rapid innovation in technology, practices and contract terms as discussed above.

In contrast, traders' awareness of the unfairness of certain misleading advertising practices (i.e. describing a product as "free" when it actually entails substantial costs and including a fake invoice or other document seeking payment in marketing material) has slightly increased between 2009 and 2014, from 62% to 66% (for falsely describing a product as "free") and from 48% to 55% (for fake invoices).[888] It is unclear to which extent this trend will continue and lead to a reduction of related problems. However, the link between trader awareness and the number of problems consumers experience is not always direct, as consumer problems may be gravest with rogue traders, for which legality is not a major concern.

Another key driver in this regard is the reported deficits in awareness of the specifics of EU consumer and marketing law within national court systems. For example, interviewed stakeholders in several countries have noted a lack of education and training of judges with respect to EU consumer law.[889] If consumers and businesses are not aware of their rights and obligations and courts are uncertain as to the specific legal basis, this causes inefficiencies in rule application and dispute resolution.

[888] See analysis of awareness and trends in Annex VIII.

[889] See section 6.1.2 above.

7.4.2. Drivers related to the legislative framework

Incremental development of EU consumer and marketing law

The incremental approach in creating the current legislative framework at the EU level has been a driver for the problems with coherence discussed. Gaps and overlaps have emerged in the framework as new legislation is introduced and as new best practices evolve. For example, the abundance of marketing/pre-contractual information requirements currently included in various directives (UCPD, CRD, PID) is largely a result of this incremental approach, with many of the interviewed stakeholders noting that the resulting "information overload" is challenging for both consumers and traders to navigate.[890] Also in the context of injunctions, the various injunction procedures required under EU law do not follow identical rules, leading to confusion in some Member States with impacts on legal certainty and the use of the procedure by qualified entities.

Different implementation of EU consumer and marketing law across Member States

Differences in the implementation of EU consumer and marketing law across Member States through the use of minimum harmonisation clauses, extensions, regulatory derogations and different national interpretations of open-textured clauses may contribute to additional costs and legal uncertainty for traders in cross-border commerce, and may also contribute to differences in the level of enforcement. On the other hand, harmonisation may generate some sacrifices in terms of appropriate matching of the level of the legal standard in consumer law with the local preferences of consumers in a given country. Thus, when consumers may have different preferences concerning their willingness to pay for their rights as consumers, some flexibility and variety may improve welfare. An efficient implementation of EU consumer and marketing law across Member States therefore requires striking a balance between the gains from flexibility and the costs arising from the failure to realise the full potential gains from trade across the borders of Member States.

In this context it is notable that the case law of the CJEU has had a harmonising influence, and tends to align the interpretation of the legal framework in Member States over time. However, this harmonising effect is slow, as the CJEU provides clarification only on specific issues, once a related case is brought before the court. It may also take considerable time to be reflected at a Member State level, as can be seen, for example, in the case of the requirement for national courts to conduct *ex officio* assessments regarding the unfairness of a contract term. In this sense, while CJEU jurisprudence has contributed to clarify a number of specific issues and improve consistency in the implementation of EU consumer law, many of the problems associated with differences in implementation across Member States remain.

Legal uncertainty resulting from the open-textured nature of the general clauses in the absence of up-to-date black lists

Although this evaluation has confirmed that the principle-based approaches of the UCPD, UCTD and MCAD are widely considered to provide an effective framework for a high level of protection of consumers (and protection of businesses in the case of the MCAD), a degree of legal uncertainty resulting from the open-textured nature of the general clauses continues to drive problems for consumers, traders and enforcement bodies. With the UCPD black list (which is easier to enforce) not being up-to-date and the absence of such a list in the MCAD and the UCTD (where only an indicative list of terms is annexed to the Directive), the openness of the general clauses is reported to encourage traders to enter time-consuming discussions on the fairness of a practice or

[890] See section 6.3.1.

contract term, and the outcome of an action is often considered to be uncertain, which may discourage enforcement bodies from taking action on the basis of the general clauses. Consumer organisations also consider that the principle-based approach does not prevent certain practices or contract terms that border on unfairness but fall just outside the scope of what constitutes an unfair commercial practice or unfair contract term.

Lack of incentive for individual enforcement

In case of infringements of consumer law, consumers may rationally decide to forego legal actions and the ensuing remedies, as has been analysed above (see Efficiency, Section 6.2). The reason would lie in the expected negative balance of costs and benefits of such legal action, compared with remaining passive, and letting bygones be bygones. The individual loss incurred by the consumer considering legal action may be reduced in case of a successful outcome – but this is something that the individual consumer will rationally not include in the calculation prior to deciding to pursue legal action. The reason is that this private benefit of initiating legal proceedings against the potentially liable trader (i.e. the damages awarded by court) is not certain, but probabilistic. It needs to be discounted by the probability that the trader, in the end, is not found liable, due to factual or legal reasons. On the cost side, however, there are the fixed costs of litigation, both monetary and not (time and inconvenience) associated with the redress activity. Individual consumers therefore have an incentive not to pursue enforcement. This is problematic, as legal action does not only provide private benefits, in the form of a damage payment, or the interruption of an action or activity detrimental to the individual consumer who decides to pursue legal claims. Legal action also serves to produce two types of benefits for society: the action, if successful, creates a beneficial precedent favouring parties in similar circumstances, and also serves to enforce the substantive rules of consumer law. Legal actions initiated by suitable organisations or other representative bodies may therefore help alleviate the enforcement shortcomings from decentralised consumer redress. These collective actions allow for the exploitation of the significant economies of scale in the process of preparing and litigating cases, and provide a mechanism, at least in theory, to reduce the coordination and transaction costs of bringing together different affected consumers. However, so far no effective mechanism for collective action to compensate for the lack of incentive for individual enforcement is available at EU level, as certain obstacles (discussed above) limit the effectiveness of the ID, especially in cross-border situations.

7.5. EU dimension of the problems identified

- What is the EU dimension of the problem(s)?

Most of the problems described above have an EU dimension as they directly relate to shortcomings in the EU legal framework, such as inconsistencies, gaps and overlaps, which e.g. contribute to legal uncertainty and information overload, as well as increased compliance and enforcement costs. Regarding injunctions, the EU dimension is that EU consumer law is not sufficiently enforced if this instrument does not work in practice, affecting both domestic and cross-border cases.

Some of the described problems also relate to shortcomings or use of policy options in the implementation and application of these EU instruments at the Member State level. So, there may sometimes be a lack of resources, competence or will for enforcement. Equally, there may be deep-rooted national traditions that make it difficult to achieve what is provided for in the EU legislation, such as national procedural traditions that are resistant to courts exercising *ex officio* control over contract terms (the national tradition being that courts can only proceed on the basis of arguments raised by lawyers). Nevertheless, in many of these cases there is an EU dimension to the solution, i.e. to spell out ever more clearly what is required and to

provide guidance and training that is nuanced to the particularities of Member State legal frameworks.

The problems identified often affect Member States to a different degree, especially where minimum harmonisation has given them leeway to provide additional clarification or protection. Therefore, further harmonisation of relevant consumer protection rules based on best practices identified in the country research for this study would likely be beneficial for consumers and businesses and at the same time contribute to reducing obstacles to the internal market. This is especially obvious regarding injunctions. As far as the domestic level is concerned, there is a significant risk that consumer law is currently enforced unequally in the Member States, with the result of *de facto* different levels of consumer protection, which is likely to distort competition for businesses located in different Member States. In cross-border situations, lack of enforcement of consumer law may impact consumer confidence in purchasing goods or services from a trader in another Member State, limiting the potential of the internal market for consumers.

7.6. Expected future trends and baseline scenario

- How would the problem(s) evolve, all things being equal (i.e. no change to the existing rules)?

Predictions with respect to the evolution of the identified problems are difficult and will also depend on the future progress with EU integration. Nevertheless, considering the trends in the problem drivers allows for the construction of a plausible baseline scenario in which there is no change to the existing rules. The rest of this section discusses a likely baseline scenario for each of the eight identified drivers in turn.

Levels of e-commerce and online B2C cross-border shopping have been steadily increasing since the early 2000s and this trend can be expected to continue, particularly in conjunction with the European Commission's Digital Single Market strategy, which foresees 100% of European households having access to a broadband connection of 30Mbps or greater by 2020.[891] Additionally, the results of the panel data analysis conducted for this study show that an increase in internet penetration is also likely to lead to a rise in the level of cross-border online shopping.[892] As the number of cross-border online transactions is expected to increase, so too is the number of cross-border infringements, a trend which can be already identified in the above quoted complaints data of the European Consumer Centres. In the absence of intervention, these trends would be expected to put consumers at greater risk of online cross-border infringements.

Innovation in technology, commercial practices and contract terms can be expected to continue as new technologies (e.g. electronic price labelling) are adopted by traders, as more transactions take place online, and as new business models such as online platforms continue to evolve. Further innovation can be expected to also lead to new challenges for consumer protection; see, for example, the emerging problems and concerns expressed by consumers and consumer organisations regarding consumer

[891] See Pillar IV of the Europe 2020 strategy. More information available from: https://ec.europa.eu/digital-single-market/en/our-goals

[892] See the results of the panel data analysis in Part 4 of this report.

rights in response to the online public consultation for the European Commission's 2016 Study on online platforms.[893]

It can also be expected that new behavioural psychology insights will continue to inform methods for protecting consumers, but also methods for exploiting consumers' cognitive biases and vulnerabilities through more sophisticated marketing techniques and products. The increasing importance of online transactions and the availability of large databases with data on preferences and past purchasing behaviour of individual consumers will allow increasingly sophisticated targeting of specific consumer groups and individuals, to address their specific needs, demands and biases.[894] These practices are likely to specifically affect vulnerable consumer groups but also consumers that could be considered to be a closer match to the concept of an "average consumer".

Levels of awareness of EU consumer and marketing legislation have generally remained stagnant among consumers since 2010. In the absence of intervention, these levels of awareness are not likely to increase of their own accord. Stagnant levels of awareness among consumers faced with growing complexity and innovation in transactions with traders, particularly as an increasing number of these transactions take place online or across borders, can be expected to exacerbate consumer problems and drive further difficulties in enforcement where consumers are unaware of their rights and thus fail to exercise them.

By definition, with no change to the existing rules, the drivers related to the existing legislative framework will remain unaddressed. Although case law from the CJEU will continue to clarify many aspects of the existing rules and provide a harmonising influence with respect to the interpretation of EU consumer marketing law, the identified problems are likely to remain: For example, the overlaps and gaps that have emerged as a result of the incremental development of EU consumer and marketing law will likely persist. It is also likely that the relevance of the UCPD black list and the UCTD indicative list will decrease in absence of a mechanism for updating, as innovation in technology, commercial practices, and contract terms continues. This will increase reliance on the general clauses with the related greater legal uncertainty and thus a greater reluctance to enforce, as the outcome of enforcement actions will be more uncertain (and therefore carry a greater cost risk for individual consumers or enforcement bodies).

The lack of incentive for consumers to pursue individual enforcement actions will remain without changes to the possibilities for individual remedies or collective redress. Although individual Member States may introduce national legislation in this regard, consumers will still face problems with enforcement in the cross-border context. Consumer problems with individual enforcement in the cross-border context are in fact very likely to increase, given the increasing level of cross-border shopping and the extra cost and uncertainty involved in cross-border enforcement.

It is therefore considered likely that without changes to the existing rules, the consequences of the current shortcomings of the consumer and marketing law framework will become more pronounced in the future.

[893] 2016 Study on Online Platforms - Contrasting perceptions of European stakeholders: A qualitative analysis of the European Commission's Public Consultation on the Regulatory Environment for Platforms. See: https://ec.europa.eu/digital-single-market/en/online-platforms-digital-single-market

[894] See, for example, the European Commission's Impact Assessment carried out for the General Data Protection Regulation: http://ec.europa.eu/justice/data-protection/document/review2012/sec_2012_72_en.pdf

8. Conclusions and recommendations

In this section we first present overall findings of the evaluation, before elaborating on specific recommendations regarding unfair commercial practices and marketing, contract conclusion and performance, and injunctions. We then provide suggestions for improvements to the concepts of "average consumer" and "vulnerable consumer", as well as for codification of the current rules.

8.1. Overall findings of the evaluation

8.1.1. Overview

This evaluation study was conducted in the framework of the Fitness Check of EU consumer law and assesses the effectiveness, efficiency, coherence, relevance and EU added value of the following five EU consumer and marketing law directives in line with market and technology developments:

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

Also considered is the interplay with the most recent instrument of the EU horizontal consumer legislation, the Consumer Rights Directive 2011/83/EU, and existing sector-specific consumer protection rules in passenger transport, electronic communications, energy and consumer financial services, as well as with the relevant rules in the E-Commerce Directive 2000/31/EC and Services Directive 2006/123/EC.

The study was conducted by Civic Consulting in cooperation with KU Leuven CCM. It is based on country analyses by legal experts in all 28 Member States (including a review of academic literature and evaluation of case law); a broad scale interview process at EU and Member State level, consisting of a total of 255 interviews with key stakeholder organisations (mostly ministries, enforcement bodies, consumer organisations, business associations) and an additional 282 business interviews in all 28 Member States; an open public consultation with a total of 436 responses; a survey of qualified entities under the Injunctions Directive which received 29 answers from 21 Member States; and a comprehensive analysis of costs and benefits of the legislation covered. The fieldwork and the analysis for the study were concluded in February 2017. Detailed results are presented in the preceding sections of Part 1 of this report, as well as in Part 2 (results of the open public consultation), Part 3 (country reports) and Part 4 (additional evidence collected).

<u>The study concludes that the legislative framework subject to this evaluation is considered to be broadly fit for purpose</u>. The UCPD and the UCTD, most notably with the principle-based approach regarding unfair commercial practices and unfair contract terms (in combination with the black list of the UCPD and the indicative list of the UCTD), have been successful in creating a comprehensive EU legislative framework in their respective areas providing a well-working 'safety net' to address new commercial practices, contract terms and market developments in general. These

two key consumer directives have significantly increased the level of consumer protection in those Member States (the large majority) in which a less comprehensive or even no such framework existed before. For most Member States therefore the directives provided a clear added value. Stakeholders in a significant number of Member States confirm that overall the principle-based approach of the MCAD is also effective for protection of businesses, with only a limited number of B2B misleading practices reportedly being cause for concern. The PID is considered to be by and large effective and to provide added value in terms of better (unit) price information. Finally, the Injunctions Directive is an important enforcement instrument, and has contributed much to the enforcement of EU consumer law at the national level, even though this evaluation confirms that more needs to be done to ensure that consumer law is enforced effectively in the Member States. In light of technological innovations in the online environment, and the increase of EU cross-border B2C trade, the relevance and the added value of EU action in this area has even become more pronounced.

During the last decade, consumer trust has increased across the EU, in spite of the financial crisis. In Eurobarometer surveys between 2006 and 2014, the proportion of consumers who agree with the statement that in general, retailers and service providers respect the rules and regulations of consumer law increased by 9 percentage points from 62% to 71%. This overall rise in confidence was driven mostly by the EU12/13 (the accession countries), which saw an average increase of 15 percentage points (from 52% to 67%) compared to 7 percentage points in the EU15 (67% to 74%). The gap in consumer trust between the EU15 and the EU12/13 decreased in size by almost half between 2006 and 2014, from 15 to 7 percentage points. It is notable that this increase in trust correspondents to the significant benefits in terms of improved levels of consumer protection that the directives have brought to the EU12/13 (but not only to them), as perceived by stakeholders in our country interviews.

The last decade also saw a significant increase in business-to-consumer (B2C) cross-border shopping in the EU. Cross-border shopping over the internet has more than doubled since 2006, due in part to technological progress and the mainstreaming of internet shopping in general. In 2014, 16% of all Eurobarometer respondents reported that they made an online purchase from another EU country, compared to only 6% in 2006. In the interviews conducted for this study with key stakeholder organisations in all Member States, they often expressed the view that the directives have had a positive impact on cross-border trade. The general view was that it has become easier for consumers to directly purchase cross-border from traders located in other EU countries over the past years. However, it is also reported from some Member States that the percentage of cross-border purchases remains low (partly due to “geo-blocking”). As regards businesses, it is often reported that is has become easier for them to directly trade cross-border to consumers located in other EU countries over the past years. However, it is also frequently noted that the decision by both businesses and consumers as to whether they will engage in cross-border transactions is also influenced by factors outside the legal environment. This view was confirmed by the panel data analysis conducted in the framework of the study, which analysed the impact of the UCPD on consumer trust and online cross-border shopping.[895] While one of the regression models applied found significant effects of the UCPD being in place on consumer trust and on cross-border online purchases, in other regression models the UCPD was not determined to have any significant effects in this respect. These results have therefore to be interpreted with care, and are not unequivocal proof of a causal effect from the UCPD being transposed in the Member States. In contrast, the percentage of households with internet access at home in Member States was found to have a positive and highly statistically significant effect on consumer

[895] For details, see Added value, Section 6.5, and Part 4 of this report.

trust and online cross-border purchases. The robustness of this effect is striking in comparison with all other variables that were used in the analysis. The increasing access to information online which can contribute to better and more informed choices of products and services seems to be a major factor for increasing levels of consumer trust and market integration in the EU, in addition to any effects that could be attributed to the legal framework. These results also confirm the importance of effectively addressing unfair practices in the online environment which could materially distort economic behaviour of consumers, such as fake product reviews or possibly misleading practices of price comparison websites.

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

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

8.1.2. Effectiveness

8.1.2.1. *Unfair commercial practices and marketing*

Key evaluation questions regarding the **effectiveness of the Unfair Commercial Practices Directive** focus on the effectiveness of the principle-based approach under this Directive and of the black list of unfair commercial practices. They also address the practical benefits for consumers arising from: the minimum harmonisation clauses for financial services and immovable property; the "average consumer" as the reference point for assessing whether a commercial practice is likely to materially distort economic behaviour; and the specific protection of "vulnerable consumers" introduced by the directive. Finally, the related evaluation questions concern how self- and co-regulation actions in EU countries or at EU level have been effective in addressing unfair commercial practices. Findings include:

- The reasoning behind the Unfair Commercial Practices Directive's principle-based approach is focused on the inability of rigorous rules to regulate adequately each and every case. It allows for the combating of unfair practices that do not fall under any of the black listed items, and is ‘future-proof’ in that it allows national authorities and courts to adapt their assessments to the rapid evolution of new products, services and selling methods. In practice, decisions of enforcement authorities and courts often involve an application of the principle-based approach of the Directive. The Directive’s principle-based rules (in combination with the black list) are widely considered to provide an effective framework for achieving a high level of consumer protection regarding unfair commercial practices. 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. Only in a minority of Member States is it reported that the principle-based approach of the UCPD actually leads to divergent application of the same principles and that this divergent application actually has a negative impact on cross-border trade. From other Member States it is reported that the principle-based approach actually leads to divergent application of the same principles, but that no major problems due to a resulting negative impact on cross-border trade are reported or experienced. It would seem that so far CJEU jurisprudence, the recently updated UCPD Guidance document and the exchange of ideas amongst national enforcement authorities within the CPC Network contribute to a common understanding of the principle-based UCPD across the EU, limiting disparities in its application and related impacts.

- The black list of the UCPD is generally considered to generate practical and significant benefits. For practices on the list, there is no need to apply the transactional decision test[896] in order to take action, which facilitates enforcement and may avoid costly and time-consuming litigation. Country reports emphasise that the black list has important practical benefits for authorities, as well as for consumers and traders. There are however limitations in the application of the black list, namely, some of the blacklisted practices are considered to be irrelevant or incidental in practice; in several countries it is reported that many blacklisted practices are difficult to apply; and some of the provisions of the black list are formulated in a way which still requires an assessment *in concreto* of the unfairness of the behaviour of the traders. The country research also identified a call from various stakeholders to add a number of commercial practices that are considered to be problematic to an extended black list. From a theoretical perspective, the black list is more likely to remove barriers to the internal market, because the rule-based approach provides more legal certainty and uniformity than the principle-based approach. This assessment is confirmed through our country research. Stakeholders often assess the black list as positive in this respect. By reducing uncertainty and diversity in the application of the UCPD, the uniform black list is a helpful tool for fostering cross-border trade, complementing the Directive's general clauses.

- This study has not identified significant problems in countries that make use of the minimum harmonisation clause for financial services or immovable property (according to Article 3(9) of the UCPD) with respect to barriers to cross-border trade, although interviewed stakeholders in several countries could not report on practical experience on this issue.

- The benchmark of the average consumer is considered to allow in practice a significant degree of flexibility in its application. The use of the "average consumer" benchmark allows authorities and courts to render a flexible decision, specifying the content of this concept in a manner that is best suited for the specific case. This is an obvious advantage given to the authorities and courts that are not bound by formalistic and overly rigorous rules, when evaluating the nature of the supposedly unfair practice, which can be clearly to the benefit of consumers. In contrast, the vulnerable consumer benchmark is considered to be of limited relevance in practice, and there is no evidence that

[896] Under the general clause of the UCPD, 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.

this provision has benefitted consumers. National courts and enforcement authorities tend to apply the *modulated* average consumer benchmark,[897] instead of the "vulnerable consumer" benchmark of Article 5(3) UCPD. There is also little indication that new categories of vulnerable consumers not listed in the UCPD (such as poor/indebted) have been recognised by administrative practice or case law within the scope of the UCPD.

- In those Member States where there is long-standing tradition of self- and co-regulation, this approach seems to work fairly well in addressing unfair commercial practices. In contrast, in Member States where there is no such tradition, codes of conduct appear to be often of limited practical relevance – with notable exceptions such as the advertising self-regulatory organisations and self-regulatory organisations that promote the enforcement of unfair competition law by pursuing unfair commercial practices.

Key evaluation questions regarding the **effectiveness of the Price Indication Directive** mainly focus on the extent to which consumers are effectively informed about the unit selling price and related problems. Findings include:

- The available evidence indicates that by and large consumers appear to be effectively informed aware about the unit selling price or at least stakeholders consider that there are no major problems in this respect. While stakeholder mostly considered price indication rules to be effective and from most countries no major problems in this respect were reported, investigations by consumer organisations and authorities at the national level indicate that a considerable level of infringements of price indication rules occurs in practice.

- The research conducted for this evaluation did not provide evidence that the divergences between national laws due to the minimum harmonisation character and the use of regulatory options under the Price Indication Directive have a significant effect on cross-border trade.

Regarding the **effectiveness of the Misleading and Comparative Advertising Directive** evaluation questions focus on whether its scope limited to the notion of 'advertising' provides effective protection for businesses, the overall effectiveness of the principle-based approach of the Directive, but also concern the effectiveness of the comparative advertising rules, and of the current rules on enforcement. Findings include:

- The country research corroborates the finding that the Misleading and Comparative Advertising Directive provides a solid framework for a considerable part of the B2B advertising market. The limitation to "advertising", as it is broadly defined in the MCAD, does not seem to reduce significantly the MCAD's effectiveness as compared to a situation where its provisions would apply to e.g. "commercial practices" as in the UCPD. Stakeholders in a significant number of Member States confirm that overall the principle-based approach of the MCAD is effective. However, several country reports stress the absence of experience with the application of the MCAD, due to lack of administrative enforcement, or lack of case law or settlements, whilst others emphasise that in particular small enterprises are affected by misleading advertisements.

[897] Where commercial 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) UCPD).

- Apparently, and notwithstanding the full harmonisation character of EU provisions on comparative advertising, there are important differences between Member States in the occurrence of comparative advertising. The available evidence suggests that overall the existing comparative advertising rules are either not very relevant in countries where this practice is rare, or provide an effective legal framework to the extent that major problems have not been reported in those countries where comparative advertising is more often used.

- There appear to be only limited practical experiences in cross-border enforcement in B2B relations. Where experience exists, practical problems seem to be considerable; for example, an enforcement authority reported that they receive several complaints concerning cross-border infringements but that they are not able to react adequately, because of the lack of adequate instruments concerning cross-border cooperation.

- While in theory disparities in the application of the principle-based approach of the MCAD and the minimum harmonisation character of provisions on misleading advertising could have negative effects on cross-border trade, the country research for this study identified no significant problems in this respect. According to the country research the fully harmonised provisions on comparative advertising are considered to provide an appropriate legal framework, but it also has to be noted that relevant experience of stakeholders seems often to be limited, due to the limited use of comparative advertising in some Member States, and/or the limited experience with cross-border trade in this respect.

8.1.2.2. *Contract conclusion and performance*

Key evaluation questions regarding the **effectiveness of the Unfair Contract Terms Directive** focus on the effectiveness of the principle-based approach under this Directive and of the indicative list of unfair contract terms. They also address the benefits for consumers of the “black” or “grey” lists adopted in some Member States; the effects of limiting a court decision establishing the unfairness of a term to the individual relationship between the specific trader and consumer (the *inter partes* effect); the effectiveness of the contractual transparency requirements; and the benefits for consumers of the extensions in certain Member States to cover negotiated terms or terms on the adequacy of the price and main subject-matter. Finally, the evaluation questions concern the effectiveness of the sanction foreseen for unfair contract terms (i.e. that the term is not binding). Findings include:

- There is a principle-based approach of the UCTD in two broad senses (the range of sectors and terms covered and the open-ended fairness test), and in both these senses this principle-based approach is broadly effective in contributing to a high level of consumer protection. There is a principle-based approach in that the UCTD applies to all trade sectors and that all contracts not positively excluded are covered. This broad scope of application has certainly contributed to the effectiveness of the Directive. The test of unfairness is sufficiently open ended to enable a range of EU and national fairness criteria to be applied to any given term. It is arguable that the foundations are there for a general approach under which it can be taken that a term will often cause significant imbalance and violate the good faith requirement where it significantly deviates from any default position that would otherwise apply.

  The CJEU has unpacked the potential of the principle-based approach in developing new substantive fairness norms and thereby safeguarded the effectiveness of the principle-based approach in contributing to a high level of consumer protection. Furthermore, decisions of enforcement authorities and courts often involve an application of the UCTD illustrating the effectiveness of the Directive's principle-based approach in practice. In summary, the principle based approach appears to be working well.

- The indicative list of terms which may be regarded as unfair is considered to have significant practical benefits in terms of consumer protection and legal certainty. The indicative list of the Directive has been transposed in various ways in the different Member States, the Directive being a minimum harmonisation instrument. Most countries have some form of black (automatically unfair) or grey (presumed unfair) list, in some cases even both (e.g. Austria, Estonia, France, Germany, Italy, Netherlands, Portugal, UK). The black or grey lists were reported to provide more legal certainty than a mere indicative list. Specifically, they facilitate the judicial task, provide foreseeability as to the result of the procedure, and have thus helped to eradicate certain unfair terms considered particularly dangerous for consumers (e.g. arbitration clauses). It can be concluded that black and grey lists are considered more effective than indicative lists. However, in order to be effective, such lists (whether indicative, grey or black) need to be updated regularly.

- While the transparency principle of the UCTD is considered an important precondition for a high level of consumer protection, its full effectiveness is currently not reached due to a lack of clarity regarding the consequences of a breach of the principle.

- The extension of the application of Directive to individually negotiated terms in several Member States has been advantageous for consumers. It addresses existing problems as to complexity; and also as to sham negotiations, and the imbalance between businesses and consumers, which are likely to mean that there is a high risk of a significant imbalance even with 'negotiated' terms. At the same time, there is no evidence from the country reports, that extension of the Directive to individually negotiated terms, causes problems in application or leads to unintended effects. In the small number of countries where the Directive has been extended to price and main subject matter terms, the evidence suggests that this provides important consumer protection benefits, especially where these terms are not subjected to market discipline, and where other important policies of social cohesion are at stake. Further, there is no evidence that extension of the Directive to price and main subject matter terms, causes problems in application or leads to unintended effects.

- The sanction that a term is non-binding has contributed to achieving a high level of consumer protection. Especially the interpretation by the CJEU that the Directive requires this sanction to be invoked *ex officio* by the national courts has contributed to its effectiveness. The sanction has however not reached its full potential in all Member States, due to a lack of awareness of the effects of this sanction and a lack of compliance with this duty by national courts in some Member States. A need for increased awareness (in the form of legal training) and for guidance and codification of the exact scope of the obligations of the national courts was expressed by numerous stakeholders in the country research.

- Court or administrative decisions in the context of collective proceedings are in the vast majority of Member States only binding on the businesses who are party to the case. This limited effect of judgments and decisions declaring a term unfair limits the effectiveness of the Directive. Exceptions to this principle do however exist in some Member States. The absence of an *erga omnes* effect of individual and / or collective proceedings does however not mean that individual court decisions do not have influence, as decisions of especially the highest courts are followed even in countries in which there is no binding precedent.

8.1.2.3. *Injunctions*

Key evaluation questions regarding the **effectiveness of the Injunctions Directive** focus on the extent to which Member States have extended the scope of the injunction

procedure beyond the legislation listed in Annex I of the ID. They also address the use of the injunction procedure across the EU; the number of injunctions initiated in each Member States since June 2011 and trends in the use of the procedure; and the advantages of specific national measures taken by Member States; the obstacles to the effective use of the procedure. Finally, the questions concern the impact of the ID on consumers in terms of reduction in consumer law infringements and consumer detriment. Findings of the evaluation include:

- Based on the country research for this evaluation, four groups of Member States can be differentiated regarding the scope of application of the Injunctions Directive. The first group of Member States has implemented the scope of application for both national and cross-border infringements as in Annex I of the Injunctions Directive; the second group of Member States has added specific, enumerated pieces of legislation for both national and cross-border infringements; the third group has different approaches for national and for cross-border infringements; and the fourth group has extended the scope of both domestic and cross-border injunction procedures to consumer law in general.

- In the five year period since June 2011, qualified entities responding to our survey initiated a total of 5 763 injunction actions. While in most countries the number of reported injunction actions is a few hundred or less, the notable exceptions are qualified entities in Germany which reported the highest number of injunction actions (4 579) of all Member States, and Latvia (794).

- The number of injunction actions that concerned national infringements appears to have been relatively stable since 2008, while the number of cross-border injunction actions had been insignificant from the outset, and has remained low. The most affected sectors are the sectors that had also been mentioned in the 2012 report of the European Commission. The telecommunications sector still features on top of the ranking and other sectors such as banking and investments, tourism and package travel also continue to remain relevant. Misleading and aggressive practices and unfair contract terms have remained prominent types of infringements since the 2008 report of the European Commission.

- All available evidence confirms that while the injunction procedure is by and large considered being effective in several countries where their use is common (and stakeholders in the consultation agree that the procedure is beneficial for consumers), the impact of the Injunctions Directive in terms of its aim to facilitate cross-border injunction procedures can still be considered as being minimal. The complexity of cross-border injunction procedures mainly stems from the application of foreign law. This clearly has a limiting effect on cross-border injunction litigation.

- Court fees and lawyers' fees for injunction procedures brought by consumer organisations and even by public authorities have been named by stakeholders as key obstacles to the effectiveness of the injunction procedure generally, including domestically. The loser-pays-principle in particular has a significantly chilling effect on the consumer organisations' activities.

- The length of court procedures has been criticised by stakeholders. A lengthy procedure may reduce the effectiveness of an injunction order that only stops infringements from a later point in time onwards. Overall, however, while the availability of speedy procedures can be considered a necessary ingredient of effective injunction procedures, given the need to stop infringements of the collective interest of consumers as fast as possible, it seems clear that not all infringements of consumer law are clear-cut, and that in some instances complex legal issues need to be resolved.

- A system where individual claims are prescribed before a final decision in the collective action is made appears to be ineffective in protecting the consumers' interests. While injunctions as such can be considered an effective remedy to stop infringements for the future, as evidenced in the country research for this study, only some Member States have introduced broader effects of injunction orders. Additionally, from the country research it appears that publication of the decision and, where applicable, of a corrective statement is an effective remedy.

- Generally speaking, close to all Member States foresee sanctions for non-compliance. It has, however, sometimes been doubted that they are sufficiently deterrent to discourage continued infringements. Sanctions for the breach of an injunction order are however a necessary element under the principle of effectiveness as established by the CJEU. In some Member States, public authorities also use the prior consultation of the trader to negotiate a settlement that may even involve repayment of unduly collected fees.

8.1.3. Efficiency

The evaluation questions regarding efficiency concern both the costs and benefits of the minimum harmonised and the fully harmonised consumer rules for businesses and consumers, focusing on the rules regarding commercial practices, standard contract terms and injunction proceedings. To put these costs and benefits in perspective, we first outline the related benefits for society.

The **benefits for society** of having a consumer and marketing law framework in place are as follows:

- *Unfair commercial practices and marketing:* From an economic perspective, the behaviour of traders towards consumers with respect to communication, advertising, and marketing in general is likely to have a large impact on the functioning of consumer markets, since the influence on consumers' information and decision-making in such markets is very significant. Consumer policy has therefore the potential to positively interact with market forces in order to foster competition and improve both allocative and productive efficiency. This efficiency-enhancing function is partly performed at the EU level, for the following reasons: First, because within the EU, the size and intensity of cross-border trade are high enough (in fact, higher than in any other large trading area in the world) to make such economic activity in the Single Market vulnerable to inconsistent policy choices by Member States or even mere diversity between those choices. Second, traders' behaviour in communicating with consumers and in pre-contracting activity is not bound by Member States' borders; thus, it directly impacts cross-border trade. The trade dimension is fundamental, given that intra-EU28 trade in goods reached EUR 3 070 billion in 2015.[898] For businesses, cross-border trade can reduce input costs and increase the potential customer base. For consumers, access to goods cross-border can lower prices and increase choice.[899]

[898] Eurostat, Intra-EU28 trade (exports), by Member State, total product, Code: tet00047, http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tet00047&language=en, accessed on 20.1.2017

[899] This is especially obvious in the area of e-commerce. A 2011 study concluded that total welfare gains for EU consumers resulting from lower online prices and increased online choice under a hypothetical situation of a 15% share of internet retailing (then at 3.5%) and a Single EU consumer Market in the e-commerce of goods amount to 204.5 billion Euro per year (equivalent to 1.7% of EU GDP). This was estimated to be four times higher compared to a situation where, with a similar share of internet retailing, the (still rather) fragmented national consumer markets of the Member States would continue to exist. See: Civic Consulting

- *Contract conclusion and performance:* Transaction costs are real costs, and thus, reducing the costs of preparing the terms of contracts with the help of standard contract terms is, *ceteris paribus*, a socially desirable endeavour. These cost savings are not only privately beneficial for the trader, but are also true reductions in social costs, which are likely to benefit consumers. However, if there is no individual negotiation, the drafter will possess an informational advantage over the content that may add onto a previously existing advantage as a trader. The uses and abuses of standard terms in contracts with consumers thus involve asymmetries of information between contracting parties. Additionally, it is rational for the consumer to remain ignorant of standard clauses as they anyhow cannot be changed, a strategy that can be anticipated by the drafter, who can then select the level of quality most beneficial to themselves. The contracting process involving standard terms therefore does not by itself result in the level of quality in the bundle of rights and obligations of the parties that will be desirable in a societal perspective, i.e. there is a market failure as to the content of standard terms. This market failure can be addressed by mandating certain minimum levels of quality (in terms of consumer rights) in non-negotiated terms, or the ban of certain terms that are deemed unfair given their impact on the situation of the consumer, an approach many countries have taken. Legislators in the EU with the UCTD (as implemented in the Member States) and third countries with their national legislation have therefore introduced minimum standards of quality in standard terms, through several means: black lists of prohibited terms that are always considered being below the minimum acceptable level of consumer rights, grey lists of presumptively prohibited terms, general notions and tests of unfairness.

- *Injunctions:* It is well-known from an economic perspective that decentralised, disperse, individual action for enforcing consumer protection legislation often results in significant under-deterrence of infringements. First, infringement of a given rule may not be detected by the affected consumers; second, consumers may rationally decide to forego legal actions and the ensuing remedies, considering the potentially negative balance of costs and benefits of such legal action; third, the classical collective action problem will induce individual consumers to choose a level of legal action that is sub-optimal in a societal perspective. This is problematic, as legal action does not only provide private benefits, in the form of a damage payment, or the interruption of an action or activity detrimental to the individual consumer who decides to pursue legal claims. Legal action also serves to produce two types of benefits for society: the action, if successful, creates a beneficial precedent favouring parties in similar circumstances, and also serves to enforce the substantive rules of consumer law. Legal actions initiated by suitable organisations or other representative bodies may therefore help alleviate the enforcement shortcomings from decentralised consumer redress. These collective actions allow for the exploitation of the significant economies of scale in the process of preparing and litigating cases, and provide a mechanism, at least in theory, to reduce the coordination and transaction costs of bringing together different affected consumers.

In line with these societal benefits, **benefits for consumers** of having a consumer and marketing law framework in place are as follows:

- The benefits for consumers from the protection against unfair commercial practices through the UCPD mainly derive from an improved functioning of the market in terms of outcomes for consumers, by deterring harmful practices and

2011, Consumer market study on the functioning of e-commerce and internet marketing and selling techniques in the retail of goods.

increasing transparency and reducing influences that potentially distort economic decision making, thereby increasing consumer welfare. Consumers may also benefit from a passing on of the reduction of traders' costs due to reductions in compliance costs linked to legal disparity between Member States.

- The benefits that consumers may derive from the protection against unfair contract terms are very large, covering a wide range of circumstances and economic transactions. Very few consumer policy measures have the potential to influence the economic welfare of consumers to such an extent and with such a wide scope of application as the UCTD. An illustration of this large potential impact can be found in the Spanish experience from mortgage contracts. Foreclosure proceedings, penalty interest, and floor clauses in adjustable interest rate mortgages have been strongly affected by UCTD and its interpretation by the CJEU and Spanish courts. The UCTD therefore plays an essential role in the economic welfare of Spanish borrowing consumers, as has been illustrated again through a recent judgement by the CJEU which will lead to large paybacks of Spanish banks to consumers due to an unfair term in their mortgage loan agreements.[900] It can be concluded that the benefits of the UCTD for consumers mainly derive from preventing and stopping abuses of standard terms in contracts, which involve asymmetries of information between contracting parties leading to market failure. The obligations of the UCTD for traders concerning transparency and fairness of standard contract terms and the possibility to declare the nullity of an unfair contract term address this market failure and thereby increase consumer welfare.

- The actual benefits for consumers from the consumer and marketing law framework depend on the combination of the adequacy of the substantive rules with the level of enforcement. The most obvious and relevant benefit for consumers from the Injunction Directive refers to enhanced enforcement of consumer law: if individual action by dispersed consumers leads to insufficient levels of deterrence, then collective actions, including injunctions, are very likely to improve this situation. Collective actions for injunctions according to the ID also allow society (and therefore consumers) to attain a given degree of enforcement at lower costs, both to the parties involved and to the public. However, the deficiencies of the ID, which limit its effectiveness especially in a cross-border context, reduce these potential benefits to a significant degree.

Consumers may also incur costs related to the consumer and marketing law framework in place. Three different kinds of consumers' costs can arise:

- Traders may pass on their costs of compliance with the consumer and marketing law framework in the form of higher prices. The passing-on of the costs created or raised by this legislation would depend on their impact on price elasticities and on supply and demand functions. The degree to which costs are actually passed on will also depend on other factors such as the pricing policy of traders and competitive pressure they face, which will likely differ by sector and Member State. It is therefore not possible to assess the extent to which the mentioned costs of the legislative framework concerning unfair commercial practices and marketing in B2C transactions are passed on

[900] Judgement 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 judgement, the CJEU "overruled" national case law that limited the temporal effects of the declaration of nullity of an unfair term (in this case 'floor clauses' in mortgage loan agreements establishing a minimum rate below which the variable rate of interest cannot fall). According to an estimate published by *El País*, banks will have to pay back an estimated amount of EUR 3 to 5 billion, see: http://economia.elpais.com/economia/2016/12/21/actualidad/1482306332_458117.html.

to consumers. Even if they would be fully passed on, the effect on prices would likely be minor, considering that regular costs for businesses in this respect were estimated at approximately 0.024 percent of turnover for the five sectors in which business interviews were conducted (see below).

- In addition, costs accrue through unfair commercial practices or unfair contract terms of traders which are not prevented by the legal framework, e.g. because of insufficient enforcement of rules, or where consumers cannot obtain adequate redress regarding infringements of this legislation.

- Finally, the variety of terms in standard contracts may be reduced due to the legislative framework. Elimination of certain contract terms due to an unfair term assessment made with respect to one type of borrower may inefficiently reduce term variety for other borrowers, and such a reduction of the variety of standard contract terms is not necessarily welfare-enhancing for all groups of consumers. However, the reduction in variety is likely to be socially beneficial in many other cases, especially regarding terms that can be considered as unfair under all possible circumstances.

Regarding the **benefits for traders** related to the consumer and marketing law framework in place, the study concludes as follows:

- Traders operating cross-border reap the most tangible benefits related to a consumer and marketing law framework which is to a significant extent harmonised across Member States, since their costs are likely to decrease as a result of a reduction in the level of legal fragmentation across Member States. In our business interviews across all potential benefits that were listed in a respective question, between 63% and 46% of the businesses that sell their products/services in other EU countries indicated that they benefited at least slightly from the EU legislative framework subject to the Fitness Check. 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 level playing field that was created across the EU for businesses regarding contracts with consumers by safeguarding that standard contract terms are fair.

- However, even traders who do not operate cross-border may experience benefits from a more stable and consistent legal framework as a result of it being Europeanised, as this reduces the need for and cost of regular compliance checking and adjustment.

- Specific benefits for traders also arise from the legal framework regarding standard contract terms, because standardised contracts terms reduce transaction costs for traders. When a trader faces a multitude of contract negotiation and drafting processes with different contracting parties, there are substantial economies of scale to be achieved if the contracting process becomes standardised and not tailor-made. Traders active in cross-border transactions may benefit in two additional ways from the UCTD: First, it allows additional economies of scale in the investments made by traders on contract drafting and communication, and on compliance with legal requirements, by making the set of legal requirements more homogeneous (although not entirely so) across European markets. This makes such investments more productive, and thus improves the return traders obtain from them. Second, it may help to restrict contract terms which impose high switching costs on consumers (i.e., clauses and terms that reduce the ability of new entrants to lure existing consumers from an established trader) by a finding of unfairness with respect to those terms. With this, entry and competition may become more vigorous. This effect may be particularly attractive both for new traders and for traders entering new markets in other EU Member States.

- A source of potential benefits for traders from concentrated litigation under injunctive action proceedings is the avoidance of possibly contradictory outcomes under individual enforcement actions,[901] and thus, enhanced legal certainty for traders. It could also be argued that the per-case litigation cost for the trader under a collective action for injunction would be lower than having to face a multitude of individual cases. This in turn, however, depends on the number of consumers that would actually sue the trader on an individual basis. As the consistent and long-standing opposition against collective redress mechanisms by business associations illustrates,[902] businesses themselves do not seem to consider these theoretical benefits as being relevant in practice.

Finally, the **costs of traders** related to the consumer and marketing law framework in place are assessed as follows:

- To explore the costs for traders in detail, the above mentioned business interviews covering all Member States were conducted in five sectors.[903] On basis of the data collected, the annual costs incurred by businesses in the EU28 for checking that their advertising/marketing and standard contract terms still comply with national legislation and adjusting business practices if needed were estimated to amount to EUR 278 million in the five sectors reviewed (best estimate).[904] 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 and 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 when compared to the approximate annual turnover of EUR 1 180 billion in these five sectors, especially when taking into account the importance of these rules for the functioning of consumer markets. The estimated overall costs of regular compliance checks amount to approximately 0.024 percent of turnover. These estimates refer to the overall compliance costs for businesses related to the national legal framework on marketing and standard contract terms, and therefore are caused by the combined effects of EU and Member States legislation in this area, including relevant sector-specific legislation.

- Costs for (unit) price indication were separately assessed and are not included in the previous estimate. Median costs of interviewed businesses that indicate unit prices in the pre-packaged food and detergents sector[905] are EUR 2 178 per business per year (e.g. staff costs to prepare and change price labels and other costs such as electronic price labels), of which 30% are specifically related to unit price indication. Costs related to unit price indication therefore also do not seem to imply disproportionate burdens on businesses, although data limitations do not allow a final conclusion in this respect. In line with the

[901] Assuming that the collective action and individual actions are linked.

[902] See also the results of the open public consultation in Part 2 of this report.

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

[904] For an estimated number of 962 261 businesses in the five selected sectors. Note however that the total costs at the EU level are calculated based on costs per business by size class, which vary greatly as shown in the previous table, and on the number of businesses per sector and size class, which has a strong influence on the results; for more details see Part 4 of this report.

[905] In this sector unit pricing is most relevant.

size distribution of companies in the food retail sector, the business interviews focused mostly on SMEs. Large companies in the sector that were interviewed had difficulties providing estimates regarding the cost of price indication. Other possible reasons for the relatively low estimate include that price information is often provided automatically either on websites or in some cases on electronic labels, using special software, which reduces related costs.

- The proportionate character of the costs of consumer protection legislation, of which the scrutinised directives are essential elements, has been recognised by businesses. In a 2014 survey (the only year that such a question was asked in the Eurobarometer) a large majority of traders agreed that in their own country compliance with consumer legislation is easy (72%) and that the costs of compliance are reasonable (67%), although traders selling in other EU countries were less likely to agree that this applied when selling cross-border. Only a slight majority of traders operating cross-border agreed that compliance in other EU countries was easy (57%) and that the related costs were reasonable (52%). These results illustrate that compliance with the rules in other EU countries is considered to be more burdensome, which reflects the fact that in addition to costs for regular compliance checks, businesses incur one-off costs for entering a new market, as they need to assess whether their existing practices comply with the rules in the new market (see detailed analysis in Section 6.2, Efficiency).

8.1.4. Coherence

8.1.4.1. *Unfair commercial practices and marketing*

Key evaluation questions regarding the **coherence of the Unfair Commercial Practices Directive and Price Indication Directive with other horizontal legislation** focus on the level of awareness of traders regarding information requirements at different stages of the transaction and whether there were any costs arising from the multiplicity of information obligations. They also concern consumer benefits of receiving information under the PID; and the effect on cross-border trade of divergences between national laws arising from the minimum harmonisation character of the PID. Findings include:

- Article 7(4) UCPD establishes an indirect duty to disclose information in the specific context of “invitations to purchase”, subject to the well-known transactional decision test. Article 5/6 CRD imposes a positive obligation on traders to provide the consumer, before he or she enters into an on-premises contract (i.e. at the precontractual stage), with certain pieces of information, in a clear and comprehensible manner, unless if already apparent from the context. In a large number of Member States the level of awareness of traders as regards Article 7(4) UCPD is generally considered to be fairly high, while the level of awareness of traders as regards the more recent Article 5/6 CRD seems to be equally high if not higher. One of the reasons might be that positive information duties are much more effective than a prohibition of misleading omissions.

  Stakeholders in the country research and in the open public consultation emphasised that the amount of information that must be provided to consumers under Article 7(4) UCPD and/or Article 5/6 CRD is creating “information overload” and confusion amongst consumers and also creating (unnecessary) costs for businesses.

- The information requirements in Article 22 of the Services Directive apply in addition to the information required for invitations to purchase under Article 7(4) UCPD. The E-Commerce Directive applies to information society services, which can include the services provided by operators of websites and online platforms which allow consumers to buy a good or service. In several Member

States the view of stakeholders is that the scopes of the various information requirements in UCPD, Services Directive and E-Commerce Directive do not overlap (significantly) or at least that there have not been practical problems reported in this respect, and that, hence, no related costs are incurred by businesses or by public authorities. In other countries, it is admitted that costs can arise for businesses, as the fragmentation in advertising law requires resort to and review of multiple laws and regulations. Overall, it would seem that there is a clear need for information requirements under the different directives to be streamlined. Taking into account the insights of behavioural research, there is also a need for a critical analysis of what type of information with what kind of specificity should be given at what stage of the marketing and contracting process. For example, it was suggested that all information does not necessarily have to be included in an "invitation to purchase"; it should be enough that information is provided before the actual purchase.

Key evaluation questions regarding the **coherence of the Unfair Commercial Practices Directive with respect to EU sector-specific legislation** first address the awareness of UCPD requirements by businesses, consumers and enforcement bodies in the relevant sectors. They then consider the question which authorities are responsible for the enforcement of horizontal and sector-specific rules in the relevant sectors; the extent to which the combination of horizontal and sector-specific rules provide for a clear and coherent legal framework; the benefits of the complementary application of the UCPD in the relevant sectors; and finally the need for any clarification of the interplay between the horizontal and sector-specific rules. Findings of the evaluation include:

- As regards the interplay of the UCPD with sector-specific legislation (in electronic communications, passenger transport, energy and consumer financial services), the awareness of consumers that the rules of the UCPD are also applicable in the regulated sectors is generally considered insufficient, whereas the general awareness of the UCPD requirements seems to be higher. Businesses are considered to be quite well aware of the application of the UCPD in the regulated sectors. Enforcement authorities are also considered to have a fairly good knowledge of the interaction between the UCPD and sector-specific legislation.

- In the vast majority of the Member States, different authorities are responsible for the enforcement of the horizontal consumer law and the sector-specific rules. The institutional arrangements for enforcement sometimes affect the use of the UCPD in the regulated sectors.

- In the majority of Member States the interplay between the horizontal UCPD and the sector-specific rules is generally considered to provide for a clear and coherent legal framework concerning unfair commercial practices and information obligations regarding advertising. While the combination of the UCPD and the sector-specific rules seems to work fairly well in practice, the country research indicates that there is also room for reducing overlaps in information requirements in this respect, and that there may be a need for some further clarification of the interplay between the UCPD and the sector-specific rules.

8.1.4.2. *Contract conclusion and performance*

Key evaluation questions regarding the **coherence of the Unfair Contract Terms Directive** with respect to EU sector-specific legislation address the awareness of UCTD requirements by businesses, consumers and enforcement bodies in the relevant sectors. They also concern the extent to which the combination of horizontal and sector-specific rules provide for a clear and coherent legal framework; the benefits of the complementary application of the UCTD in the relevant sectors; and the need for

any clarification of the interplay between the horizontal and sector-specific rules. Findings include:

- Most stakeholders consider the legal framework as provided by the UCTD and sectoral EU legislation to be rather clear and coherent. In a number of Member States however it was emphasised that the different sets of regulation overlap regularly. Businesses and enforcement bodies are considered to be generally aware of the combined application of the two sets of rules in the regulated sectors, in contrast to the reported lack of awareness of consumers concerning the requirements of the UCTD, both in the regulated sectors and in general. The institutional arrangements for enforcement however sometimes affect the use of the UCTD in the regulated sectors.

8.1.4.3. *Injunctions*

Key evaluation questions regarding the **coherence of the Injunctions Directive** address the interplay with other enforcement instruments of EU consumer law, with a focus on the Consumer Protection Cooperation (CPC) Regulation 2006/2004. Findings include:

- The Injunctions Directive and the CPC Regulation differ in their respective scopes of application in relation to those who can use them and to the types of consumer law infringements that they cover. First, only public authorities can make use of the CPC Regulation, whereas consumer organisations can only take cross-border action by way of the Injunctions Directive or by using none of the two instruments, namely by suing the foreign trader in their domestic courts, or by way of informal co-operation with a befriended consumer organisation in the Member State where the trader is domiciled. Second, from the legal instruments that are within the scope of application of the Injunctions Directive, only the Services Directive 2006/123/EC is missing in the CPC Regulation. In contrast, the CPC Regulation covers a number of instruments that are not listed in the Annex of the Injunctions Directive, namely the Price Indication Directive 98/6/EC, the Data Protection Directive 2002/58/EC, the Air Passengers Rights Regulation (EC) No. 261/2004, the Boat Passengers Rights Regulation (EC) No. 1177/2010, the Railways Passengers Rights Regulation (EC) No. 1177/2010, the Bus Passengers Rights Regulation (EU) No. 181/2011 and finally the Misleading and Comparative Advertising Directive 2006/114/EEC. Thus, there are a number of cases where the qualified entity that wants to take action does not have a choice in the first place, because the problem at hand is only covered by the one or the other enforcement system. If they have a choice, consumer authorities prefer to use the CPC Network when it comes to cross-border infringements. Qualified entities have criticised the limited scope of application of the Injunctions Directive and suggested to adjust it to the scope of application of the CPC Regulation or to extend it to consumer law in general.

- The Injunctions Directive is complemented by singular provisions in other directives that require Member States to introduce injunction procedures at the domestic level. Relevant EU legislation currently in force includes the UCTD (Art. 7(2) and (3)), the UCPD (Art. 11 (1) and (2)) and the CRD (Art. 23 (1) and (2)).The various injunction procedures required under EU law do not follow identical rules, and the differences between the directives do not seem to be based on any clear rationale.

8.1.5. Relevance

8.1.5.1. *Unfair commercial practices and marketing*

Key evaluation questions regarding the **relevance of the Unfair Commercial Practices Directive and Misleading and Comparative Advertising Directive** address a possible extension of the UCPD for B2B transactions or revision/extension of the MCAD. They also consider whether it is appropriate to keep separate legal regimes for B2B and C2B in the area of commercial practices; and whether there is a need to develop contractual consequences linked to breaches of the MCAD or adapt the rules on comparative advertising. Finally, the evaluation questions address the need and potential for the application of the UCPD to consumer-to-business (C2B) relations. Findings of the evaluation include:

- A number of Member States currently apply the UCPD also to B2B relations. From several countries it is reported that, from a theoretical perspective, an extension of the UCPD to B2B transactions or a revision/extension of the MCAD could bring benefits for cross-border trade. However, the general perception among the interviewed stakeholders in Member States is that there is no need for a fully-fledged extension of the UCPD to B2B transactions whilst a revision/extension of the MCAD with a view to ensuring more extensive protection for traders and competitors could be considered. It is generally considered not appropriate that businesses and consumers should be equally protected across the board.

- Stakeholders interviewed in the Member States often did not see the need to adapt the rules on comparative advertising of the MCAD. Some government officials opined that the law should incorporate the clarifications brought by the CJEU in several judgments. A point that possibly needs to be clarified is the relationship between the rules on comparative advertising in the MCAD and the limitations on comparative advertising resulting from the CJEU's case law on the protection of the reputation of trade marks.

- According to the country research for this study cases involving consumer to-business (C2B) relations are not frequent. The country research confirms that situations where traders purchase goods from consumers (C2B relation) are in principle not covered by the UCPD, unless a link can be established with the promotion, sale or supply of a (different) good or service to the consumer. As regards the need to explicitly extend scope of the UCPD so as to cover consumer to-business (C2B) relations, views diverge considerably. Arguably, such an extension could be achieved by broadening the definition of "commercial practice" to all practices "directly connected with the promotion, sale or supply of a product to or from consumers".

8.1.5.2. *Contract conclusion and performance*

Key evaluation questions regarding the **relevance of the Unfair Contract Terms Directive** consider whether there is a need to strengthen the protection of businesses, particularly SMEs. They address the appropriateness of the UCTD's system of protection for B2B transactions; the appropriate scope of B2B protection against unfair contract terms; and the need and potential for the application of the UCTD to consumer-to-business (C2B) relations. Findings include:

- A number of Member States already have some form of protection in place to protect businesses against unfair contract terms, often in their general contract law provisions. Protection in B2B relationships is furthermore often not limited to mere control by way of general contract law provision but supplemented by additional provisions that are often sector specific. Various rationales have been invoked to justify judicial intervention in contracts, namely protection of an individual contract party and protection of market functioning.

- The case to apply control of unfair contract terms is the least controversial for SMEs and micro-enterprises. The similarity and negligible difference between small business (especially micro-enterprises) and consumers in terms of knowledge, experience and negotiating power has been stressed in several country reports and studies.

- There is no consensus on the need to extend the scope of application the UCTD to C2B transactions in the European Union as the scope of the problem is limited and an important number of countries already apply the UCTD to protect consumers in C2B contract either directly or by analogy. However, it is generally recognised that the position of the consumer in C2B contracts is similar to the position of the consumer in B2C contracts in which unfair standard terms are used and the application of unfair contract terms legislation in those countries where this already exists is not problematic.

8.1.5.3. *Contractual consequences of unfair commercial practices*

Key evaluation questions regarding **contractual consequences of unfair commercial practices** address national law provisions providing contractual consequences in case of breaches to the UCPD, and whether there is a need and potential to develop contractual consequences linked to the use of unfair commercial practices. Findings include:

- In all Member States, it seems in principle possible to rely on general contract law provisions to seek remedies in case of an unfair commercial practice. In practice, in Member States where national provisions on avoidance of contracts or damages could be used, a breach of the law transposing the UCPD is nonetheless generally not associated with any contractual consequences. In some of these Member States, the legislation implementing the UCPD even explicitly provides for a negative cross-reference to relevant national contract law doctrines. In other Member States, in contrast, the legislation implementing the UCPD contains a positive cross-reference to relevant national contract law doctrines. Furthermore, in some Member States, national law provisions do provide for special contractual consequences in case of breaches of the UCPD.

- The country research indicates that the question of whether or not there is a need to develop contractual consequences linked to the use of unfair practices is highly controversial, and stakeholders are divided in their opinion in this respect.

8.1.5.4. *Injunctions*

Key evaluation questions regarding the **relevance of the Injunctions Directive** focus on the benefits of further harmonisation of the injunction procedure across the EU and of any further non-legislative or legislative measures to increase the use of injunction procedures by consumer organisations and strengthen the cooperation between consumer organisations from different Member States. Findings include:

- The Injunctions Directive applies both to domestic and cross-border infringements. These two dimensions need to be considered separately with regard to the relevance of the injunction procedure.

- At the domestic level, stakeholders have confirmed the relevance of EU legislation in this regard in the Member States where injunction procedures have for the first time introduced or where they have been improved by way of implementation of or as a reaction to the adoption of the Injunctions Directive and the specific provisions as mentioned above. The survey of qualified entities and the country research conducted for this evaluation has, however, also shown that the injunction procedure is not used at all, or rarely used, in

Member States where qualified entities have public law mechanisms available that are faster, cheaper or more effective to use.

- With regard to cross-border injunction procedures, the relevance of EU law is obvious from the problems that existed before its adoption, namely, that Member States denied legal standing to consumer organisations from other Member States, thereby rendering protection of consumers through collective action against cross-border infringements practically impossible. The low numbers of cross-border injunctions in spite of an increasing number of cross-border complaints indicate, however, that current needs are not sufficiently addressed, and that existing obstacles to the use of the injunction procedure in a cross-border perspective diminish its relevance in practice. At the same time, this study shows a significant number of domestic injunction procedures relating to cross-border infringements.

- Co-operation and exchange of information between qualified entities have proven to be a useful 'third way' in addressing cross-border infringements, although only in a very limited number of cases. Non-legislative measures by the EU Commission, in particular the financing of education measures, have been helpful but have not reached all qualified entities yet.

8.1.6. EU added value

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

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

- Effective enforcement of consumer law is by itself an essential ingredient of the consumers' trust in the legal system. This includes trust in the fact that consumers are also protected when it comes to transactions with foreign traders. In that respect, the Injunctions Directive is not the only instrument but it forms a necessary part of a bundle of instruments that improve the consumer's position vis-à-vis foreign traders, including also the CPC Network, the Rome I Regulation and the Brussels I Regulation. At the same time, the Injunctions Directive does not negatively affect honest traders as it merely applies to infringements of consumer laws established by other directives and regulations. Thus, whilst it is not creating obstacles to honest traders, it has increased their potential to act on the markets of other Member States as consumers feel more confident to enter into transactions with them.

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

8.2. Recommendations

8.2.1. Unfair commercial practices and marketing

8.2.1.1. *Regroup and streamline information requirements*

Based on the results of this evaluation it is recommended to regroup and streamline the marketing/pre-contractual information requirements currently included in different directives. The number of requirements in Art. 7(4) UCPD could be reduced, in light of the overlap with Art. 5/6 CRD regulating the pre-contractual stage.

The information requirements under the UCPD, CRD, Services Directive and E-Commerce Directive should be coordinated and the interplay between the UCPD and the sector-specific rules concerning unfair commercial practices and information obligations regarding advertising be clarified. To tackle the problem of information overload for consumers it is suggested to draw on the results of behavioural research in determining the information required at each stage of the transaction, with a focus on essential information in advertising and the provision of more detailed information before the contract is concluded. Where possible, concise information on key product or service characteristics should be provided in a standardised manner, to facilitate an informed consumer choice.

8.2.1.2. *Integrate unit price indication requirements in other instrument*

The results of this evaluation indicate that the scope of the PID is somewhat unclear and that therefore a review of the Directive is recommended, preferably as part of a broader review of consumer information requirements. The integration of the PID into the CRD would lead to one instrument containing pre-contractual information duties; another option could be the integration of price integration requirements into both the CRD and the UCPD. Finally, a broader option for codification could be considered (see below).

As indicated before, special attention should be paid to information overload, while the principle of indication of the selling price and unit pricing should be maintained. It is notable that the country research indicated the existence of a number of current problems related to price indication, which often are outside the scope of the PID and are mostly considered to fall within the UCPD framework, reaching from small letter size of unit price indication to intransparent discount schemes, price obfuscation, and other practices. It is therefore recommended to monitor new pricing technologies and practices carefully. It will be essential to make price indication requirements 'future proof', i.e. to allow for effective and rapid measures should new pricing technologies impair an informed and unbiased consumer choice.

8.2.1.3. *Distribute UCPD guidance document and update in regular intervals*

While the UCPD's principle-based rules are an essential element of an effective framework for achieving a high level of consumer protection regarding unfair commercial practices, there are some concerns about the resulting legal uncertainty for consumers and businesses. Case law, but also the European Commission's Guidance document has facilitated more effective application of the implementing national legislation. It is therefore recommended to distribute the UCPD Guidance document widely to business associations and enforcement authorities, and to update it in regular intervals in light of new case law and market developments.

8.2.1.4. *Review practices on UCPD black list and introduce mechanism for updating*

The evaluation has also identified a call from some stakeholders to review the practices of the UCPD blacklist and/or to include new practices. The country research identified several commercial practices currently not covered by the black list that

some stakeholders considered to be problematic and proposed as potential candidates for an extended black list (see above and Section 6.1 on effectiveness). A key challenge for any revision or extension of the black list will be to avoid to the extent possible the use of terms which: need to be interpreted, or are otherwise vague and open-ended, while on the other hand not being too narrow or specific; or need an assessment of the unfairness of the behaviour of the specific trader in question.[906] In light of the consequences of inclusion of specific practices into a revised black list it is recommended to conduct an open, transparent and inclusive consultation process on possible additions. Finally, it is recommended to include a mechanism in a recast UCPD for updating the black list (e.g. delegated/implementing acts).[907] One black list for all Member States poses an inherent challenge, as there is a vast diversity in traditions and marketing cultures in various Member States (e.g. in relation to the regulation of sales). It is therefore recommended that a notification requirement be introduced whereby the Commission and other MS are duly notified of the emergence of any new unfair practices. This would have the benefit of alerting all MS of new practices considered as unfair which may possibly also impact other MS, and could feed into an updating of the UCPD black list in regular intervals.[908]

8.2.1.5. *Extend the protection of the UCPD to consumers selling products*

It could be considered to extend the protection of the UCPD to consumers selling products to traders, even if the number of cases in this respect seems to be limited, as consumers are typically in the weaker position in these transactions. This could be achieved by broadening the definition of "commercial practice" to all practices "directly connected with the promotion, sale or supply of a product to or from consumers". As a result, commercial practices by traders who purchase goods from consumers would be covered by the UCPD; yet, the "practices" by those consumers vis-à-vis these traders would not be subject to the UCPD control (even in C2B situations, traders remain the stronger party and are not in need of protection against any "practices" by consumers).

8.2.1.6. *Address needs regarding contractual consequences of unfair practices*

The country research for this evaluation indicates that the question of whether or not there is a need to develop contractual consequences linked to the use of unfair practices remains highly controversial, although a significant number of Member States have already introduced a specific contractual sanction (but case law seems to be limited in this respect). Consumer organisations in particular as well as certain enforcement authorities would prefer the introduction of specific contractual remedies for breaches of the UCPD at the EU level (or at the least at the national level). In contrast, business organisations in particular advocate against such contractual remedies. On the basis of the results of this evaluation the following options at the EU level with respect to contractual consequences linked to the use of unfair commercial practices could be identified:

- A first option would be to *continue the legislative status quo*. It can be expected that the case law of the CJEU on the interaction between the UCPD and Unfair Contract Terms Directive (UCTD) will develop in the years to come. As mentioned in Section 6.1, the CJEU already ruled that the finding that the

[906] See also the list of criteria proposed for the inclusion of terms in a possible black list of unfair contract terms.

[907] Similar to the use of delegated and implementing acts of the Commission in Article 9(3) Food Information Regulation (Regulation (EU) No 1169/2011).

[908] A similar mechanism could be envisaged for possible black lists that are recommend to be included in the recast UCTD and MCAD.

use of (not individually negotiated) contract terms constitutes an unfair commercial practice is one factor that can be cited when assessing the unfairness of contractual terms under the UCTD. Of course the case law on the interaction between the UCPD and the (individual contractual remedies set out in the) UCTD does not provide for contractual consequences in case of unfair commercial practices other than the use of contract terms. It should be noted that, as far as public enforcement is concerned, the Commission is now proposing to amend the CPC Regulation as to require new minimum enforcement powers for authorities, including the power to obtain a commitment from the trader responsible for the infringement, or to order that trader to compensate consumers that have suffered harm as a consequence of the infringement including, among others, monetary compensation, offering consumers the option to terminate the contract or other measures ensuring redress to consumers who have been harmed as a result of the infringement. But of course this is only relevant for those cases where the enforcement authority decides to take action.

- A second option could be to replace the current negative cross-reference in Article 3(2) and Recital 9 UCPD with a positive cross-reference to national "contract law" and "individual actions"; for example through the introduction of a provision according to which "Member States shall ensure that national laws provide for adequate and effective contract law remedies for consumers who have been harmed by an unfair commercial practice". Under this option, the UCPD would oblige the Member States to establish contract law remedies, but Member States would be free to shape these remedies taking into account national legal cultures. This could be combined with further clarifications and examples in an updated UCPD Guidance document, drawing on best practices in Member States.
- A third option would be for the UCPD to provide for *a harmonised set of remedies that are available to consumers who have been harmed by an unfair commercial practice*. Private law remedies are not a complete novelty to EU (consumer) law.[909] The primary aim of a UCPD set of remedies would have to be to restore the victims to the position they were in before the unfair practice and the resulting harmful transactional decision took place. However, drafting a sound set of UCPD remedies might be quite a challenge. Admittedly, one of these remedies might be designed through a cross-reference to the existing EU contractual sanction in Article 6(1) UCTD as interpreted by the CJEU, i.e. that the harmful contract or contract term is "not binding on the consumer"; other remedies could include a discount, damages, etc. Important choices would have to be made as regards to the criteria for determining whether the resulting contract is invalid in its entirety or only partially (one or more contract terms), the criteria for quantification of the discount or damages, the optional or automatic nature of these remedies, whether there should be a hierarchy between the remedies, the definition of the "causality" criterion (actual or potential (substantial) impact on the consumer decision making process), the applicable consumer benchmark (average consumer or the individual consumer at issue) etc. Even where these challenges may well be surmountable this option has a number of potential drawbacks. *First*, this option could entail full harmonisation of core parts of national contract law. In this respect, it should be noted that the UCTD and the CSD, that are properly regarded as the first EU

[909] See e.g. the (extension) of the right of withdrawal (CRD), the absence of liability for diminished value of goods in case of non-respect of certain information duties (CRD); the reimbursement of payment by the consumer in case of default options (CRD); the termination of the sales contract for non-delivery (CRD); the fact that a consumer is not bound by the contract or order in case the trader did not mention 'order with obligation to pay' or similar (CRD); the right to reimbursement in case of inertia selling (CRD); the non-binding character of unfair terms (UCTD); the right to claim repair or replacement of the product or a price reduction or the termination of the contract in case of non-conformity (CSD).

incursions into the heartland of national contract law, are based on minimum harmonisation only and that earlier attempts by the European Commission to shift to full harmonisation in this sensitive field have faced rocky reception. This could be avoided by a minimum harmonisation approach with regard to sanctions, or by explicitly determining that the UCPD remedies do not affect national private law remedies. *Second*, this option may create incoherencies at the national level. As the (fully) harmonised of set of remedies included in the UCPD would naturally apply *only* to *B2C* contracts that *result from an unfair commercial practice*, these new UCPD remedies would differ from the existing national contract remedies that would remain available for *other situations*.[910] Moreover, there may be a risk that contractual consequences could create a wave of claims made against businesses that could often be unfounded.[911]

It appears that replacing the current negative cross-reference to national contract law in Article 3(2) and Recital 9 UCPD with a positive cross-reference to national "contract law" and "individual actions" (i.e. the second option) could be one way to address current needs regarding contractual consequences linked to the use of unfair practices, while respecting the differences in national contract law. However, the evaluation could only identify limited data concerning the extent of the underlying problems and the effectiveness and practical relevance of the different approaches in the Member States. Also, the impact on national contract law of a harmonisation in this respect would need to be considered in detail. <u>It is therefore recommended to review all three options in the context of the subsequent impact assessment.</u>

8.2.1.7. *Improve protection against misleading practices in B2B relation*

Before the adoption of the UCPD in 2005, the MCAD's general prohibition of misleading advertising applied to any advertising, whether addressed to consumers or businesses (integrated approach). It is only since 2005 that EU law takes a dualistic approach in the field of unfair practices, with the UCPD covering (unfair) B2C practices and the MCAD covering (misleading) B2B advertising. However, mass (misleading) advertising is often directed at both consumers and businesses. In private enforcement cases the dualistic approach can cause a problem in that the judge might be called to apply to different sets of rules to the same facts. Based on the research conducted for the study, several options for further aligning the legal regimes for B2B and B2C transactions in the area of commercial practices and for increasing the protection for small businesses could be identified:

- The UCPD's general prohibition of unfair practices could be extended to B2B relations or a general prohibition of unfair B2B practices in the MCAD could be introduced. The main argument for both options would lie in the mentioned more unified approach and the expected lower compliance costs for businesses that advertise to both businesses and consumers (only for the first option, an extension of the UCPD to B2B, see above). Along these lines, these options could be complemented with an extension of the UCPD's general prohibitions of misleading B2C practices to B2B relations or the alignment of the general prohibition of misleading B2B practices in the MCAD with the UCPD. However, it

[910] See in this regard the work of Walter van Gerven, including "The Case-law of the European Court of Justice as a Contribution to the European Court of Justice and National Courts as a Contribution to the Europeanisation of Private Law', *ERPL* 1995, 367–377; "Comparative Law in a Texture of Communitarisation of National laws and Europeanization of Community law', in D. O'KEEFF and A. BAVASSO (eds.), *Judicial review in European Union Law. Liber Amicorum Lord Slynn of Hadley*, 1, The Hague, Kluwer Law International, 2000, 433–445. In this scenario, the only option to maintain coherence in national contract law as a whole would be to generalise the UCPD remedies so that they apply to *all contracts*. Yet, such "spontaneous harmonization" might take years; moreover, these UCPD remedies might not be fit for such "spill-over effect").

[911] Country report Greece (views of business associations).

is unclear to which extent these benefits would be relevant at a practical level, as no major problems with the current situation in terms of cross-border advertising/marketing targeted at businesses are reported. Also, most stakeholders do not see a need in this respect.

- A *B2B blacklist of unfair practices could be introduced*. It is acknowledged in at least some Member States that SMEs may need additional protection because they have a level of competence or bargaining power similar to that of consumers. As mentioned, Italy has extended the UCPD to relations between businesses and "micro-enterprises". Also, previous studies and the country research demonstrate that businesses (especially SMEs) face a number of common and harmful B2B marketing practices. The introduction of a black list of commercial practices would increase legal certainty and complement a principle-based approach with a list of practices prohibited under all circumstances, building on the positive experiences with the UCPD in this respect.
- *B2C and B2B rules on misleading practices could be aligned*. For this purpose, the MCAD's general prohibition of misleading B2B advertising could be aligned with the UCPD's general prohibitions of misleading B2C practices. This would be in line with the view that B2B relationships should be covered by their own set of rules (such as is now the case with the MCAD). For the sake of uniformity both regimes could use similar terminology and similar categories, but thresholds used within each category could differ for B2B transactions. In particular, the UCPD's general prohibition of misleading actions could be introduced into the MCAD. In addition, a general prohibition of misleading B2B omissions could be included in the MCAD, though it is likely much more difficult to prove a misleading omission in the B2B regime than in the B2C regime. An alignment of B2C and B2B rules on misleading practices would reintroduce an integrated approach in this area, which could be expected to generate benefits from an enforcement point of view. This option would be a partial alignment only, if it were not to include the introduction of a general prohibition of unfair practices in B2B transactions.

The results of this evaluation relating to the minimum character of the harmonisation and the limitation to advertising of the MCAD do not suggest that there is an urgent need for a fully-fledged extension of the UCPD to B2B relations or for a major revision of the MCAD. According to the majority of country reports stakeholders are not aware of many complaints, and the limitation of the scope of the MCAD to "advertising", i.e. not extending to commercial practices, is not reported to cause major problems. However, certain gaps in protection for small businesses remain, and it is therefore recommended to at least align <u>the MCAD's general prohibition of misleading advertising with the UCPD's general prohibitions of misleading practices, and to complement the recast MCAD with a short list of common and harmful misleading practices in B2B relations</u> (e.g. fake invoices, misleading directory companies), in line with the identified needs.

The results of the evaluation do not indicate an urgent need for a revision of the provisions on comparative advertising, which are subject to a developing case law of the CJEU. Relevant issues identified are that conditions for the legality of comparative advertising are felt to be too restrictive by certain stakeholders, and that the application of the Trade Mark Directive limits the possibilities of comparative advertising with goods bearing a trade mark and hence potentially jeopardises the attainment of the objective of consumer information of the provisions on comparative advertising. It could therefore be considered to clarify the relationship between the provisions on comparative advertising and the provisions of the Trade Mark Directive, and to describe the implications of the CJEU case law in a Commission Guidance document.

As regards the lack of effective enforcement framework in B2B relations, especially in the context of cross-border transactions, various solutions are possible, ranging from

creating a network of public enforcement authorities in the field of business protection to encouraging/strengthening voluntary enforcement mechanisms at the national and/or EU level.

8.2.2. Contract conclusion and performance

8.2.2.1. *Clarify the scope of application of the UCTD*

This evaluation concluded that there is uncertainty as to the scope of application of the UCTD. The use of the terms “seller and supplier” (in the English version) and “goods and services” has led to some confusion and diverging national case law. One particular aspect of this problem was shown to be the issue as to whether the Directive covers C2B contracts, e.g. consumers selling gold to traders.

It was already suggested in the Consumer Law Compendium that a more neutral and uniform wording would avoid these discussions as to the “seller and supplier” issue. Instead of the terms “seller/supplier”, a uniform term could be used for all consumer protection directives, to denote the contractual partner of the consumer, e.g. “business” or “professional” or “trader". So, following this approach, although the existing CJEU case law has largely clarified most of the interpretation issues regarding the UCTD identified in this study, textual amendment could avoid confusion and make it clear that the UCTD applies to all contracts between “traders” and “consumers”. The application of the UCTD to all contracts between consumers and traders would obviously imply its application to C2B contracts but this might also be stated expressly.

It was also concluded that there remains a degree of uncertainty as to whether the UCTD covers contracts where the consumer has not paid a price: an issue of particular significance in online services, as there is often no monetary consideration, but ‘only’ personal data in return for a service. Although it now follows from *Tarçau* that such contracts are covered, the issue still causes disputes and uncertainty. It is therefore recommended that it be clarified through textual amendment that the UCTD does cover contracts where the consumer has not paid a price.

Finally, because the UCTD refers to ‘contract’ terms it was also concluded above that there is uncertainty as to whether it covers terms in unilateral acts and any other terms/notices that do not have contractual status, but that affect the rights/ obligations of the consumer. It is therefore recommended that textual amendment or guidance could clarify that terms in unilateral acts and terms and notices affecting the rights/obligations of the consumer, are indeed subject to control by the Directive.

In relation to individually negotiated terms, there have been no express calls in country reports to remove the exclusion of these terms from the test of unfairness under UCTD. Nevertheless, the reports do suggest that the exclusion of individually negotiated terms can cause problems of uncertainty and also compromises effective protection; and there have been no significant problems in countries where the exclusion does not apply. Based on this it is recommended that the exclusion of individually negotiated term be removed: one important reason being the uncertainties surrounding its application, and related to this, how this may be exploited by traders to persuade consumers that there have been negotiations, when none have in reality occurred.

As with individually negotiated terms, there have been no express calls in country reports to remove the exclusion of price and main subject matter terms from the test of unfairness under UCTD. Nevertheless, it does appear from consideration of case law that there are various uncertainties in relation to the price and main subject matter

exclusions and specific stakeholders (mainly consumer organisations) have pleaded for the removal of the exclusion.[912] While it is in principle possible to remove the exclusion altogether, this would likely be considered to be a significant encroachment on freedom of contract. It is therefore recommended that guidance should be provided on the scope of the exclusion of price and main subject matter: developing the transparency condition, and both clarifying and placing substantive limits on what can count as 'price' and 'main subject matter'. The desirability of such approach was confirmed in the country research for this evaluation. Specifically the following is recommended:

- The CJEU has already begun to develop what is required to satisfy the plain and intelligible language requirement, in fact taking it beyond plain and intelligible language to a fuller version of transparency. In *Árpád Kásler*[913] and *Van Hove*,[914] the Court said that the terms and their real consequences should be economically understandable to the consumer, i.e. that the consumer should be put in a position as to be able to "evaluate, on the basis of clear [precise], intelligible criteria, the economic consequences for him which derive from [the term].''[915] These criteria should be spelt out in textual amendment of the Directive or guidance – the fundamental principle being that the term should be sufficiently transparent and explained, to enable the consumer to understand its real practical economic consequences.
- The redraft or guidance could improve the level of transparency further by specifying that price and main subject matter terms (and the fact that they are exempt from review) must be specially highlighted within the contract.[916] This might involve the explanation of these terms being separated out from the other terms, possibly in a separate document or communication; in a manner that very clearly indicates to the consumer both that these are the core and most important terms of the contract, and that special consideration should be given to them as they cannot be challenged under the unfairness test. It could further be provided that this separate part of the contract (or separate document) must be separately assented to by consumers.
- As for clarifying and placing substantive limits on what can count as the price and main subject matter, first it could be made clear that the 'adequacy' of the price refers to whether the price is too high, given what is received in return; this not covering other types of fairness assessment, e.g. as to time or mode of payment, the right to vary the price etc;[917] and that the 'price' does not include charges imposed for consumer default.[918] Further, it could be clarified whether,

[912] See e.g. position paper Which?.

[913] Case C-26/13 Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt [2014].

[914] Case C-96/14 Jean-Claude Van Hove v CNP Assurances SA [2015].

[915] Citations from both cases identical in this respect, except for the one adjective: 'clear' (*Árpád Kásler*) or 'precise' (*Van Hove*).

[916] Compare with the additional requirement of 'prominence' in the UK Consumer Rights Act to benefit from the core term exemption; see for a similar proposal in the US to only allow enforcement of unexpected, unfavourable terms if they have been discloses in a warning box: I. Ayres, A.Schwartz, "The No-Reading Problem in Consumer Contract Law", Stanford Law Review, vol. 66:545.

[917] Willett, 'General Clauses and the Competing Ethics of EU Consumer Law'; this reading is certainly accepted in at least some Member States (e.g. UK-Law Commissions (2012) *Unfair Terms in Consumer Contracts: Advice to the Dept of Business, Innovation and* Skills).

[918] Otherwise, there would be no point in para 1(e) on the indicative list, which treats as indicatively unfair a term '…requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.'

when goods or services are supplied in exchange for a charge, the CJEU intended to leave it open to national courts to include (as the price) *any* charge that is in exchange for goods or services, and (as the main subject matter) *any* trader obligation provided in exchange for a charge. In sum, it should be indicated whether any charge can be the price, so long as a service is provided in exchange for it, and any trader obligation can be the main subject matter, so long as it is provided in exchange for a charge; or whether charges and trader obligations can only be price and main subject matter terms if they can be considered to be main or essential provisions of the overall main contract.

- It could also be clarified, following the *Kasler* guidance, that 'main subject matter' in particular, is to be construed narrowly, and that if there are no goods or services supplied in exchange, then the charge in question cannot be the price, and any obligation of the trader cannot be the main subject matter.

The above recommendations focus on rather broad clarifications as to whether only essential elements of the contract can be the price and main subject matter, and generally how narrowly these exclusions should be construed. Another (slightly narrower) possibility, is to refuse to treat as main subject matter/price, any trader obligation/charge to the consumer, that does not arise as standard on entering the main contract, but rather is contingent on some later consumer action or omission-usually something that is inadvertent, and not a real choice by the consumer (the charges for exceeding overdraft limits or airline baggage limits, forgetting to check in on time etc.).[919]

8.2.2.2. *Extend the control of unfair terms to small businesses*

While respondents to the public online consultation were divided as to whether aspects of the consumer law framework should be extended to B2B relations, it appears from the evidence in the country reports that the application of the control of unfair contract terms also to SMEs, in particular micro-enterprises could be considered. The similarity and negligible difference between small businesses (especially micro-enterprises) and consumers in terms of knowledge, experience and negotiating power was stressed in several country reports and studies. Moreover, it has been argued that an efficient legal system should allow all parties, including businesses, to accept certain parts of pre-formulated contracts presented to them without being required to check their content for fairness.[920]

An extension to B2SME contracts would require a workable criterion to distinguish SMEs from other businesses. Such distinctions are however already in use both at national and at European level.[921] An alternative, which would be easier to apply, would be the exclusion of transactions of a large value from control.[922] In these cases

[919] With non-main/essential terms, and even more so with contingent charges, the argument for these not to be treated as main subject matter/price, is that, no matter how transparent these are, consumers may not be able to make market comparisons-there is a limit to how many terms consumers can consider, and it will be very hard to estimate the risk of the contingent events occurring. This means the terms will not be subjected to competitive discipline-sweeping away what is arguably the whole justification for them being exempt from the test: Willett, 'General Clauses and the Competing Ethics of EU Consumer Law'.

[920] H. Schulte Nölke, "No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts", European Review of Private Law 2-2015, (195), 207.

[921] See e.g. the Netherlands: Art. 6:233 sub (a) Dutch Civil Code and Art. 6:235 (1) and (3) DCC and for the EU: Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; OJ L 124, 20.5.2003, p. 36; and the Proposal for a Regulation on a Common European Sales Law.

[922] H. Schulte Nölke, "No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts", European Review of Private Law 2-2015, (195), 213; the English and Scottish Law Commission - Unfair Terms in Contracts: Joint Report, February 2005 (http://www.lawcom.gov.uk/docs/lc292.pdf), p 5.24 and 5.54 - proposed a threshold of 500.000 GBP.

the contractual parties can be expected to seek legal advice and to carefully examine contract terms.[923]

8.2.2.3. *Provide guidance on transparency*

It appears from the country research that there is a degree of uncertainty as to the transparency concept, which may undermine a high level of consumer protection, and also lead to differences in national approaches. To address these problems, guidance or textual amendment could set out CJEU case law on transparency, in particular from CJEU cases such as *RWE* and *Kasler.*[924] A textual amendment of the text of the directive could clarify that transparency includes the need for an actual opportunity for the consumer to examine all the terms (now only included in Recital 20). A definition of 'plain and intelligible language' could furthermore make the transparency requirement more concrete and could help to combat complex and long contract terms, a problem increasingly occurring in the online world. Empirical research has shown that simpler and shorter terms contribute to readership, comprehension of the terms and to consumer trust.[925] Such a definition can either be either numerical or formula based (length of sentences, paragraphs, words, font, etc.); elements based (structure, design, content, vocabulary) or outcome focused; or a combination of these approaches.[926]

In addition, this evaluation has established the need to clarify the legal consequences of a lack of transparency. This is in line with the conclusions that were reached in earlier studies, such as in the Consumer Law Compendium.[927] It should therefore be made clear in the UCTD that a lack of transparency can lead to the unfairness of a term. Guidance could therefore specify that transparency is always fundamental to good faith,[928] meaning that a lack of transparency can therefore lead to the unfairness of a term and make the term non-binding.

Lack of clarity as to the sanction for terms that are not transparent also affects the collective means of enforcement. Article 7 requires adequate and effective means (including collective means) to combat 'unfair' terms. As it is not clear whether terms that are not transparent are automatically unfair, it is also not clear whether enforcement bodies / consumer organisations should be able to start actions for injunction against terms that are merely not transparent. This is possible in some Member States.[929] A clarification that enforcement bodies can act against terms that

[923] H. Schulte Nölke, "No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts", European Review of Private Law 2-2015, (195), 213.

[924] This guidance could be possibly along the lines of the UK *First National Bank* case, and the UK Law Commission guidance, see above.

[925] M. Elshouts, M. Elsen, J. Leenheer, M. Loos, J. Luzak, Study on Consumers' Attitudes Towards Terms Conditions (T&Cs) Final Report, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847546.

[926] A useful outcome based definition is the following: "A communication is in plain language if it meets the needs of its audience – by using language, structure and design so clearly and effectively that the audience has the best possible chance of readily finding what they need, understanding it, and using it". A. Cheek, Defining plain language, Clarity, 2010, Journal of the international association promoting plain legal languagehttp://clarity-international.net/journals/64.pdf.

[927] Consumer law compendium, p. 421.

[928] In relation to those Member States that do not reproduce good faith in their implementing tests, see below.

[929] Thus e.g. in Italy, see e.g. Tribunale di Roma, 21 February 2000, in Foro italiano 2000, I, 2046 ff.; Court of Appeal of Rome, 24 September 2002, in Foro italiano, 2003, I, p. 332 ff.

are not transparent could improve the effectiveness of the Directive and its requirement of transparency.

We have seen that there is also still some doubt as to whether transparency can legitimise a term that is very substantively unfair. So, in the interests of guaranteeing a high level of consumer protection and improving consistency in national approaches, there is a case for indicating that if a term is sufficiently substantively unfair, it can still violate the good faith requirement even if it is transparent.[930] Some Member States have not included the good faith element in their implementing legislation.[931] This avoids any risk of transparency being taken to satisfy good faith, and therefore to legitimise substantive unfairness (see above). However, it would also mean that, even if the Directive were to be amended to clarify that transparency is a basic requirement to satisfy the good faith requirement, the sanction for a lack of transparency would remain unclear in the case of those countries with no good faith requirement. So, countries with no good faith requirement would either need to be required to introduce such a requirement, or they would need to be required to introduce a separate rule specifying that lack of transparency can make a term unfair.

8.2.2.4. *Clarify the general test of unfairness*

The country research for this evaluation concluded that the general test of unfairness (the 'open norm') generates a degree of uncertainty and is interpreted differently in different Member States. The following could increase legal certainty and consistency in application of the Directive:

- The *Aziz*[932] 'agreement' test determines compliance with good faith by reference to whether a consumer would have agreed to the term in individual negotiations. It could be clarified that this is not satisfied simply on the basis that consumers have agreed to the term in the past, and certainly not where in such past cases there have been no individual negotiations. It could also be clarified that for the purposes of this agreement test, the benchmark is a consumer who would only agree to a term if it would be possible to make a rigorous, evidence based case to the effect that the term in question is proportionate to protect the interests of the trader or other relevant interests.
- The *Aziz* approach, which defines potential unfairness in terms of deviation from national default rules, should be developed into guidance, giving further explanation and examples as to types of default rules and how terms might deviate from them to the detriment of the consumer. In addition to referring to deviation from default rules, there could be further guidance on forms of unfairness in substance that are likely to potentially cause significant imbalance contrary to good faith. So, guidance could provide that a term potentially causes a significant imbalance, contrary to good faith, where it allows for deviation from the 'reasonable or legitimate expectations' of the consumer.[933]
- This would cover terms that do not deviate as such from a national default rule, but give discretion to the trader in the way the trader performs his/her own

[930] An alternative would be to remove the good faith requirement, but this is probably not desirable because of how deeply rooted it is in the way of thinking about fairness generally in some countries, e.g. Germany

[931] E.g. Belgium.

[932] Case-415/11

[933] Early drafts of the UCTD provided that one way in which a term could be considered unfair would be if it 'causes the performance of the contract to be significantly different from what the consumer could legitimately expect': Re-examined proposal for a Council Directive on unfair terms in consumer contracts, COM (93) 11, at 6, alternative text of Art. 3.

obligations, or in the scope of the obligations that can be imposed on consumers. The link to reasonable or legitimate expectations is that the consumer has an impression (a reasonable or legitimate expectation) as to what will be received and how much it will cost, an impression generated by the basic agreement and the background marketing. However, the formal terms allow the trader the scope to vary things, i.e. to offer something substantially different from what was reasonably expected. Some such terms are contained in the UCTD Annex of indicatively unfair terms, e.g. paras (j), (k) and (l), dealing with discretionary rights to alter terms, product and service characteristics and price; and explicit reference to the reasonable/legitimate expectations concept would provide a solid theoretical basis for these Annex terms, for treating other discretion giving terms as potentially unfair, and for handling other types of (existing or emerging) terms that do not deviate from any particular default rule. It would also fit well within the CJEU's 'agreement' test, with consumers being unlikely to wish to agree to terms that do not reflect what they would reasonably expect.[934] Also, legitimate or reasonable expectations are already present in EU private law thinking: at a concrete level, forming the core of the 'defectiveness' concept, in the Product Liability Directive;[935] and at a more abstract (broader organising principle) level as suggested in academic literature.[936]

- Under Art. 4(1) the assessment of unfairness involves referring 'at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract'. So, no account can be taken of the fact that, although the term may have been a fair one to include at the time of conclusion of the contract, it has subsequently become unfair to rely on the term, due to changing circumstances. This is allowed in Nordic law, where the focus is on assessing the fairness of the consequences of applying a term: it not mattering whether the unfair consequences are related to the circumstances prevailing when the contract was made or to later changes in circumstances.[937] This may be especially important given the very many modern contracts that involve long term relationships (e.g. financial services, tenancy etc) and where the scope for detrimental changes is very significant.[938] A modern principle-based approach should be flexible enough to take such changes into account. So it is recommended that there be an extension of the test of unfairness, allowing consideration as to whether it has become unfair to rely on the term due to serious changes: either changes in the personal circumstances of the consumer, such as illness, unemployment etc., or in the socio-economic circumstances, e.g. significant changes in costs, or the advent of some other significant consumer detriment associated with the service (i.e. 'social force majeure').[939]

[934] In support of this connection, see T. Wilhelmsson (2016), 'Unfair Terms', in G. Howells and T. Wilhelmsson*, EU Consumer Law*, forthcoming.

[935] 85/347/EEC, art 6 (1), and also in support of this link, T. Wilhelmsson (2016), ibid.

[936] Hans-W. Micklitz, 'Principles of Justice in Private Law within the European Union' in Esa Paasivirta and Kirsti Rissanen (eds), *Principles of Justice and the Law of the European Union* (Helsinki University Institute of International Economic Law, 1995) 284, Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate 1997) 320, and Thomas Wilhelmsson (2016) ibid.

[937] See Nordic Contracts Act, s. 36.

[938] T. Wilhelmsson (2016), 'Unfair Terms', above.

[939] Willett (2007), Fairness in Consumer Contracts.

8.2.2.5. *Introduce a limited, non-exclusive black list of unfair terms*

According to the country research for this evaluation, the indicative list of terms which may be regarded as unfair (provided as Annex to the UCTD) has not had the same impact in all countries – potentially contributing to different levels of consumer protection across Member States. In some cases the problem is that (unlike a grey list) it leaves the burden of proof on the consumer; another problem is the open-ended nature of many of the paragraphs in the Annex, producing the need for interpretation, which requires legal-technical knowledge that ordinary consumers do not possess.

It is therefore recommended to provide at the EU level for a either a grey list, whereby the listed terms are presumed to be unfair, or preferably a black list of terms that are considered to be unfair under all circumstances, or for a combination of a black list and a grey list. Both lists obviously increasing the degree of certainty compared to the current situation where the terms are merely 'indicative' of unfairness. The country research provided numerous examples of terms that are blacklisted at the country level with a view to providing a high degree of certainty and effectiveness (see examples below from the Netherlands, Poland, Slovakia and the UK). It is recommended to have a limited list at EU level, to be complemented by national lists. Such a limited (black) list at EU level would both contribute to a high level of consumer protection across Member States, and increase predictability for traders. Some terms could be blacklisted on the basis of CJEU case law.

As indicated, the country research provided examples of blacklisted terms at national level. Further factors in determining whether terms should be blacklisted is to consider whether:

- The term is highly unbalanced (offering no benefit to consumers);
- The interest of the trader in using the term is manifestly and significantly lower than the interests of the consumer in it not being used (drawing on the 'abus de droit' principle); and
- The description of the term is sufficiently determinate that the assessment as to whether a term reflects this description, is appreciably simpler than would be the application of the full test there. Therefore a clear practical advantage in blacklisting must exist.

Based on these criteria, and drawing on the country reports of this evaluation, examples of terms which could be blacklisted at EU level are provided in the following box.

Examples of terms which could be blacklisted at EU level

Paragraph 1(a) of the UCTD Annex is concerned with terms excluding or limiting liability for death or personal injury.[940] Here, there is a case for general blacklisting, given the fundamental consumer interest in safety, the lack of any justification for escaping responsibility (traders can insure), and the determinate nature of the description (exclusions/restrictions cover death or injury, or they do not).

Paragraph 1 (b) describes terms having the object or effect of "inappropriately excluding or limiting the legal rights of the consumer … in the event of total or partial non-performance or inadequate performance." This covers a much broader range of exclusion/limitation clauses than para 1 (a), and it would not be justifiable to impose a blanket ban on all the many terms that could fall under para 1 (b). The key is to decide on specific types of exclusion clause that are always wholly unbalanced, and not justifiable in terms of legitimate trader interests. The case for blacklisting might be strongest in the case of: (i) terms *excluding/restricting very important rights and remedies* (e.g. in relation to quality etc. in digital contents contracts, and reasonable care in services contracts – it arguably being unacceptable to derogate in any way from such important rights and remedies – reflecting the approach of the Sales Directive, which allows no derogation from the key conformity standards and remedies in sales contacts);[941] (ii) most terms *wholly excluding all liabilities* flowing from any given breach (it is usually not justifiable to wipe out *all* responsibilities that would otherwise exist – unless a case can be made that there is such justification, in the case of specific terms).[942]

Paragraph 1 (c) and (d) describe respectively, terms "making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone", and "permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract". These are blacklisted in some countries,[943] as they are very one sided, with no consumer benefit. It is hard to see what legitimate interest a trader could have for using them, and there are no open textured elements (so the assessment as to whether a term reflects the description in the paras, is appreciably simpler than would be application of the full test-so there is a clear practical advantage in blacklisting).

Paragraph 1 (f) (part2) describes a term "permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract". There seems a case for blacklisting, as there is no obvious consumer benefit, or trader legitimate interest, and no open textured elements (so the assessment as to whether a term reflects the description in the para, is appreciably simpler than would be application of the full test).

Following the same general logic, paras 1 (m), (n), (o), (p) and (q) do not depend on open textured criteria, and it is hard to see a consumer benefit or a legitimate trader interest in ever using them, so blacklisting may be justifiable.

[940] Blacklisted e.g. in the UK (Consumer Rights Act 2015, s. 65 (1).

[941] Sales Directive, art 7 (1); and see UK, Consumer Rights Act 2015, ss. 47 & 57 banning certain exclusions in digital contract and services contracts.

[942] E.g. Netherlands.

[943] E.g. Slovakia

There are also some examples of terms which are blacklisted in some Member States, but which are not recommended to be included in a possible black list at EU level. The reason for this is that specific terms need to be interpreted in the specific case, so blacklisting does not make assessment easier in practice. Relevant examples are provided in the following box.

Examples of terms which are not recommended to be blacklisted at EU level

Paragraph 1 (e) describes a term "requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation". This is often blacklisted,[944] but there is no real practical point in blacklisting here, as the 'disproportionality' of the sum needs to be assessed (probably the main task to be performed under the general unfairness test as well).

Paragraph 1 (f) (part 1) describes a term "authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer". This is often blacklisted,[945] but it may not be wise to do so in the UCTD, as it may sometimes be justifiable to allow wholly discretionary cancellation, and perhaps a 'mirror image' consumer right may not always be useful.

Following the same general logic, there is no practical case for blacklisting in the case of paragraphs 1 (g) (open textured concepts 'serious grounds', 'reasonable notice'), 1 (h) ('unreasonably early'), 1 (i) ('no real opportunity'), 1 (j) & (k) ('valid reason'), 1 (l) ('final price is too high').

8.2.2.6. *Provide guidance with commentary and examples*

A recurring theme in the country research was that it would improve the effectiveness of the UCTD indicative list, if there was additional guidance containing commentary and examples in relation to each paragraph (at least for specific sectors). This would allow consumers and traders alike to better assess the potential unfairness of contractual terms. Such guidance could build, of course, on the CJEU jurisprudence, as well as national best practices.[946]

8.2.2.7. *Clarify the role of national courts*

National courts must take up an active role in order to ensure the effectiveness of the UCTD. This is clear from the case law of the CJEU. However, the country research for this evaluation has established that such an active role is not taken up by the courts in all Member States, and that uncertainty as to the exact role of national courts further impairs the effectiveness of the UCTD. Initiatives taken e.g. in the Netherlands and other countries lead to the following recommendations:

- There is a need for codification at EU level of the task of the national courts. Such codification could either be incorporated in the UCTD or in a horizontal EU

[944] E.g. Poland, Slovakia

[945] E.g. Slovakia

[946] See e.g. for the UK, OFT, 'Unfair Contract Terms Guidance' (OFT311 (2008)) at [18] later adopted by the CMA https://www.gov.uk/government/publications/unfair-contract-terms-guidance--2; see also country report Latvia. A useful resource providing generic descriptions of typical types of terms that might fall under each para is the work of the English and Scottish Law Commissions, *Unfair Terms in Contacts* (2005). See also the guidance on the application of the Belgian black list by the Belgian Commission on Unfair Contract Terms (Country report Belgium).

instrument.[947] Codification in a directive would make national implementation rules necessary and would in certain countries require an amendment of national procedural law. Clear legislation on the role of the courts will raise awareness and could increase effectiveness, especially in view of deeply rooted rules in some jurisdictions that judges are bound by the arguments that are invoked by the parties. In absence of a codification, it is recommended to provide at least guidance on the exact role of the national courts and the principles that can be inferred from the CJEU's case law, to avoid divergent or incorrect interpretations of CJEU case law.

- Further education and training of judges is necessary.[948] This has been confirmed and was stressed by stakeholders in several countries. Recent CJEU case law (*Milena Tomášová*)[949] underlines the need for such training. The Court confirmed in this case that not invoking the unfairness of a term *ex officio* can constitute a sufficiently qualified breach of EU law, leading to Member State liability. This is in any event the case since 4 June 2009, the date of the *Pannon* decision.[950]

8.2.2.8. *Clarify consequences for the contract term and for the contract as a whole*

The UCTD requires that the contract must remain binding upon the parties insofar the contract is capable of continuing in existence without the unfair term (Art. 6 (1)). A number of issues in this respect have been clarified by the case law of the CJEU. For example, it is now clear that the assessment whether the contract is capable of continuing in existence without the unfair terms is an objective assessment: the situation of one of the parties to the contract, in this case the consumer, can therefore not be regarded as the decisive criterion determining the fate of the contract. The court cannot base its decision solely on a possible advantage for the consumer of the annulment of the contract as a whole.[951] It is also clear that courts may not revise an unfair term to make it 'fair',[952] and that this also means that courts may not reduce the unfair contract term to its legally permitted core. In relation to these issues that are now clear, it is recommended that extra certainty be provided by these points of principle being reiterated in textual amendment or guidance.

In addition, a number of issues remain unclear. It is therefore recommended that guidance or textual amendment be provided in relation to the following:

- Whether it is possible to only declare parts of clauses unfair and non-binding, when such parts can be eliminated without changing the content of the remaining part (the so-called *blue pencil test*). As indicated above, this is disputed in the literature and the need for a clarification by the CJEU has been expressed.[953]

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[947] Country reports Cyprus, Romania (some stakeholders), see also Law Commission UK.

[948] C. Pavillon, "Het LOVCK-rapport ambtshalve toetsing II kritisch getoetst", TvC 2015-3, 128.

[949] C-168/15, http://eur-lex.europa.eu/legal-content/NL/TXT/HTML/?uri=CELEX:62015CJ0168&from=EN

[950] C-243/08, EU:C:2009:350.

[951] CJEU 15 March 2012, C_453/10, *Perenicova,* para. 32-33.

[952] CJEU 14 June 2012, C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino* ; CJEU 30 May 2013, C-488/11, *Asbeek Brusse*, para. 29.

[953] MüKoBGB/Basedow BGB § 306 Rn. 4-6c.

- Whether it is possible to apply the theory of *'ergänzende Vertragsauslegung'* as applied by the German Supreme Court (BGH, Bundesgerichtshof). This method interprets the contract according to the hypothetical will of the parties, more specifically in cases where the nullity of an unfair clause would lead to unacceptable economic consequences. As seen above, the CJEU case law seems to exclude the application of this theory[954] but the views on this issue differ.[955]
- Precisely when it is possible to invoke default rules of national law once an unfair contract term as been declared void. As we saw above, the Court has accepted this possibility, but only in very specific circumstances. In *Kásler*, the CJEU held it should be possible for a national court to replace an unfair term with a supplementary provision, if the court would otherwise have to annul the contract in its entirety, thus potentially exposing the consumer to particularly unfavourable consequences.[956] The difficulty is that, as we have seen above, different opinions have been expressed as to whether supplementary provisions could be invoked where the deletion of the terms does not lead to the annulment of the contract. Clarification and guidance on this issue therefore seems necessary.

8.2.2.9. *Include summary T&Cs in consumer contracts*

Evidence showing that in electronic transactions and in other forms of contracting which rely on standard terms governing the transaction, consumers do not commonly read the contract terms before entering into the contract because they do not have the capacity, or the willingness, to read and understand the implications of standard contract terms, they do not value the opportunity to read the terms prior to contract nor do they typically value the more advantageous contract terms that they may hypothetically be able to find if they read standard contract terms in advance and shop around for more favourable ones.[957] A recent consumer market study commissioned by the European Commission concluded that shortening and simplifying terms and conditions has positive effects, including improvements in the proportion of consumers who read the terms and conditions.[958] The results of the behavioural experiments on consumers' responses towards unfair contract terms conducted in the Consumer market study to support the Fitness Check also suggest that summarising the T&Cs is effective.[959] In the experiment, standard (long) T&Cs were read less thoroughly by participants than summarised T&Cs, and participants read a higher proportion of the text of the summarised T&Cs. In addition, results showed that participants were better able to distinguish between fair and unfair T&Cs in their

[954] R. Steennot, 601; H. Micklitz, N. Reich, " The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)", *CMLRev* 2014, 795-796.

[955] See MüKoBGB/Basedow BGB § 306 Rn. 4-6c. The BGH is of the opinion that this theory is in conformity with the UCTD - BGH NJW 2013, 991 Rn. 24 ff.

[956] CJEU 30 April 2014, C-26/13, *Árpád Kásler*, para. 83.

[957] See, Rachlinski (2002); Rachlinski (2007); Ben-Shahar (2008).

[958] For example, in the online experiments conducted in the framework of the study, when terms and conditions were extremely short and simple 26.5% of consumers report to have read the full terms and conditions compared to only 10.5% when the T&Cs were long and complex (the study was conducted in 12 Member States with 1000 respondents in each Member State). See European Commission 2016, Study on consumers' attitudes towards Terms and Conditions (T&Cs), Final report.

[959] The experiment aimed to answer the following research question: Can consumers distinguish unfair from fair T&Cs and can they do so more easily if the T&Cs are presented in a clearer (summarised) manner? It tested consumers' reactions to fair and unfair terms in two sectors: consumer credit and internet access provision, and their subsequent economic behaviour.

comprehension of the legal fairness of terms, in fairness perceptions and in intentions to buy from the seller, when presented with summarised T&Cs. In contrast, results showed that adding icons to the summary T&Cs seems to have no additional beneficial effects.

It is therefore recommended that "key terms" be required to be presented separately and clearly, e.g. in a short summary on the first page of the T&Cs following a structure that is similar for all contracts of this product or service category. As shown by the quoted study results, this would likely lead to increasing proportions of consumers reading the terms and conditions and it would make them better able to identify unfair terms as well as compare terms offered by different traders in a given market. As detailed in the section on efficiency, this targeted transparency could thus be expected to improve consumer welfare as well as the efficiency of the consumer law framework.

8.2.3. Injunctions

8.2.3.1. *Improve coherence of the various injunction procedures*

Injunctions are an important tool for consumer protection but this evaluation has identified a need to strengthen and refine procedural aspects, while at the same time safeguarding that the system is as clear and transparent as possible. Thus, it is recommended to create a coherent system for domestic and cross-border injunctions at the proposed higher level of protection. More concretely, the specific provisions of other consumer law directives should be abolished or integrated into the Injunctions Directive. This would be in line with the approach in several Member States to have the same system for all types of injunctions. Where cross-border injunctions require specific rules, they could be regulated in a separate chapter within the Injunctions Directive. The special rules concerning legal standing of business organisations of the UCPD could be maintained.

8.2.3.2. *Extend the scope of application of the Injunctions Directive*

Qualified entities have criticised the limited scope of application of the Injunctions Directive and suggested to adjust it to the scope of application of the CPC Regulation or to extend it to consumer law in general.[960] In particular, it was recommended to include data protection law,[961] the latest EU legislation in the area of financial services[962] and consumer protection in regulated services such as telecommunications services and energy supply.[963] Member States have also explicitly included passengers' rights legislation in their national legislation on injunctions.[964] In this context, it should be noted that the activities of airlines and other passengers transport sectors already come under the Injunctions Directive if they come in the form of standard terms or unfair commercial practices. The latter argument was also

[960] See the report on the open public consultation, at 6.6.2.; position paper BEUC, at p. 12; position paper vzbv, at p. 23. See also country report Slovenia.

[961] Country report France; position paper vzbv, at p. 23.

[962] Country reports Greece, Malta, Slovakia; position paper vzbv, at p. 23.

[963] Country report Malta; position paper vzbv, at p. 23.

[964] Croatia has included Regulation (EU) no. 181/2011 concerning the rights of passengers in bus and coach transport.

made in the context of data protection law when the German legislator included data protection law within the scope of the German Injunctions Act.[965]

Indeed, there seems to be no reason for a limitation of the scope of application of the Injunctions Directive to specific pieces of legislation. Experience in Member States with a broader scope of application, such as Austria, Germany or Lithuania, demonstrates a practical need for such extension. The preferable solution would seem to be a coherent scope of application of both the Injunctions Directive and the CPC Regulation. Both instruments should cover consumer law in general and could include a non-exclusive list of pieces of legislation that fall into that category.

8.2.3.3. *Remove obstacles that limit use and effectiveness of injunction procedures*

With regard to the substance of a possible reform of the Injunctions Directive, there seems to be four crucial topics that limit the use and the effectiveness of injunction procedures in general. In addition to that, in order to increase the effectiveness of cross-border injunctions, additional measures would need to be taken to overcome, or reduce, the specific obstacles to these procedures. The two areas are dealt with separately hereinafter. The four general obstacles are 1) litigation costs, 2) the limitation of the effect in the future rather than remedial effects, 3) the limitation of decisions and 4) lack of legal certainty.

Abolition or modification of the loser-pays principle

Clearly, the risk of having to bear the costs of a lost injunction claim has been the most crucial obstacle to many qualified entities, and in particular of underfunded consumer organisations. Hereby, relief from court fees is useful but insufficient, as in most Member States, court fees are low in comparison to the defendant lawyers' fees that a losing qualified entity would also have to refund. Qualified entities have therefore ranked exemption from legal costs second of the measures where they regard further harmonisation as beneficial.[966]

The loser-pays-principle does not reflect the public interest role that qualified entities (i.e. the designated public authorities and consumer organisations) play in defending the collective interest of consumers. Notably, the Court of Justice has qualified consumer law provisions as being part of the public order (*ordre public*) of the EU. Therefore, the most consequent measure would be to include a cost rule into the Injunctions Directive, according to which a) qualified entities do not have to pay court fees and b) qualified entities are not liable towards the defendant's lawyers' fees. Furthermore, it would be consequent if qualified entities did not have to pay for expert opinions etc that are necessary to decide on the merits of the claim.[967]

Another option that would also provide for predictable costs would be a system of limiting the litigation risk, as is in place in Germany; a system that has clearly worked in the area of injunction procedures.[968]

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[965] See the explanations of the German government in its bill, Printed Matters of the Parliament (Bundestags-Drucksache) 18/4631, 1 f.

[966] See survey of qualified entities, Part 4.

[967] An exception could of course be made for frivolous claims. However, this evaluation has not identified any evidence for frivolous claims brought by qualified entities. See also, for example the German experience where frivolous claims are excluded but that exclusion has never been applied to an action by a consumer organisation, see Münchener Kommentar zur Zivilprozessordnung – *Micklitz*, 4th ed. 2013, § 2 UKlaG margin note 53 f. Also note that consumer organisations have to be accepted as a qualified entity. Consumer organisations would risk their status if they bring frivolous claims.

[968] See above, Section 6.1.3.

Effects beyond the omission of future infringements

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 the only legal consequence is the prohibition to continue the infringement. If traders are not worried about their reputation, they can easily gain unlawful profits without fear of having to return them. Therefore, a recent trend in the Member States towards the introduction of further remedies that are meant to remove the consequences of the infringement could be taken up with a reform of the Injunctions Directive. This is supported by the survey of qualified entities conducted for this evaluation that have ranked the possibility to claim monetary compensation within the injunction procedure highest amongst possible measures that would be beneficial[969] or, conversely, have mentioned the unavailability of additional remedies, in particular, of monetary compensation as very negative.[970]

Two types of measures could be included, depending on whether the infringement already caused harm:

- Firstly, if the infringement consisted in, for example, an unfair term on the basis of which the trader has collected, or withheld money, the adequate effect would be the obligation to refund the money to the consumers concerned (compensation). This remedy would seem to be typical for infringements of consumer contract law.
- Secondly, where the risk has not materialised yet or where the victims of an infringement of consumer law cannot be identified, the adequate measure would seem to be an obligation to inform all consumers concerned about the unfairness of the term, or the misleading character of a statement, and also about the true contractual situation (excluding the unfair term).

Both measures are not disproportionate because the trader drafting the term that is later being declared unfair is often aware of the borderline character of the term. The same applies to advertisement. Therefore, there is no reason to protect the trader if the risk materialises. This is also the position of the Court of Justice when it comes to balancing consumer protection and legal certainty on part of the trader, as evidenced, for example, in the case of *Heininger*.[971]

Rather, the effect of having to refund the consumers concerned (and of having to identify the relevant consumers in the first place) may also serve as a deterrent against the use of potentially unfair terms. Protection of traders can be achieved by including a defence under which the trader has to demonstrate that he had no reason to suspect that he might commit an infringement.

As an additional measure, one would have to ensure that someone is able to monitor the fulfilment of the compensation or restitution duty. In principle, this could be the qualified entity that has obtained the compensation or restitution order. Alternatively, one could think of a collective claims settler to be appointed by the court, as it is foreseen in the new Belgian collective redress system.[972]

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[969] See Results of the survey of qualified entities, Part 4 of this report.

[970] See the Survey of qualified entities, Part 4 of this report. Business stakeholders, in contrast, generally regard the injunction procedure as sufficient and reject the idea of additional remedies, see Part 2 of this report.

[971] ECJ, case C-481/99, Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG, ECLI:EU:C:2001:684.

[972] For details, see S. Voet, Consumer Collective Redress in Belgium: Class Actions to the Rescue?, European Business Organization Law Review 2015, 121 ff.

The introduction of the restitution of unlawful profits, in particular, would trigger some additional need for regulation. In particular, one would need to clarify the beneficiary of the claim and its relationship with potential subsequent individual claims.

As to the beneficiary of the claim, the German legislator has determined, in the context of the restitution action under § 10 of the German Unfair Commercial Practices Act, that the unlawful profits have to be paid to the public purse; which has been criticised for its missing link to consumer protection. In Greece, in the context of the consumer organisations' action on "moral damages", one part of the "moral damages" is also to be paid to the State budget, where it is, however, used for the purposes of consumer protection. In the UK, if under the new "Enhanced Consumer Measures", compensation of the victims is not possible, the court can order "measures intended to be in the collective interests of consumers"; which would include payment of the unlawful profits into a fund dedicated to promote consumer protection.

As to the relationship between the payment of unlawful profit into the state budget or some consumer protection fund and compensation of individual consumers for the same infringement, double payment would need to be avoided. Thus, where individual consumers have been compensated already, the profit is reduced by the relevant amounts anyway. For subsequent compensation of individual consumers, German law concerning the action under § 10 of the German Unfair Commercial Practices Act provides for a claim of the trader against the State for reimbursement of amounts that were paid out to consumers after the restitution of the unlawful profits.

An opt-in or opt-out issue, which was and still is hotly debated with regard to collective redress mechanisms such as group actions, is not at stake, since individual consumers are not party to the injunction procedure, and they would not be party to the secondary compensation order either. The idea that consumers might be awarded compensation that they do not want appears to be illusionary. If they are awarded less than they would have expected in individual litigation, they would not be barred from suing for the difference in individual litigation; which is rather unlikely to happen.

An extension of the remedies of the injunction procedure towards restitution of unlawful profits would also be in line with equivalent powers that have recently been given to consumer protection authorities.[973] The most far-reaching powers have been given to the UK Financial Conduct Authority and some UK regulators. In Estonia, the Consumer Protection Board is entitled to order airlines to compensate passengers for cancelled or delayed flights, under the Air Passengers Rights Regulation (EC) 261/2004. In Spain, it is possible to bring injunctions together with claims for absolute and relative nullity, termination, restitution of profits and damages. These secondary actions will be solved by judges responsible for the injunction claim. In Hungary, the law provides for the possibility of combining the injunction order with a restitution order, that is an order to restore the situation as it was prior to the infringement. In Slovenia, draft legislation, according to which qualified entities shall obtain the right to claim compensation for consumers is currently in the legislative process. In Germany, there has been a judgment from a first instance court, according to which the reimbursement of unlawfully obtained money was owed as removal of the consequences of the breach.

Effects beyond the parties of the injunction procedure

The injunction procedure is a procedure in the collective interest of consumers. It should therefore have effects for the collective interest, which means that the effects

[973] See, for example, C. Hodges, Mass Collective Redress: Consumer ADR and Regulatory Techniques, European Review of Private Law 20ga15, 829; P. Rott, Behördliche Rechtsdurchsetzung in Großbritannien, den Niederlanden und der USA, in: H. Schulte-Nölke (ed.), *Neue Wege zur Durchsetzung des Verbraucherrechts*, 2016, forthcoming.

of the decision should go beyond the parties of the injunction procedure. Again, this is a trend in Member States that have acquired experience with injunction procedures, such as Spain. It has two aspects both of which are recommended to be addressed:

- *Effects for individual consumers in relation to the trader.* As the decision of the Court of Justice in *Invitel* indicates, the result of collective injunction procedures should be binding in a following individual law-suit, and in line with the established case law of the Court of Justice that considers the weakness of the consumer in his relations with the trader, the national courts should be obliged to consider the result of collective injunction procedures *ex officio*. Moreover, and this would be in line with the decision of the Court of Justice in the case of *Cofidis*[974] (according to which an unfair term cannot become fair due to prescription), the EU legislator could make sure that individual claims cannot be lost by way of prescription while collective procedures are pending that are relevant for those claims.
- *Effects on other traders engaging in the same infringement.* The reform of the Injunctions Directive could also take up the trend in Member States to extend the effects of a decision to other traders. This is particularly useful in the area of unfair contract terms that are often used identically by a whole industry (for example, because they have been recommended by a business association). In contrast, it would be highly ineffective and inefficient if a e.g. consumer organisation had to sue each trader that uses the same term individually. Therefore, the EU legislator could include a provision in the Injunctions Directive that determines, under which circumstance traders are bound by the decision in collective proceedings. Taking account of the decision of the Court of Justice in the case of *Partner*, such a rule would have to be accompanied by procedural rights of other traders to show that they have not engaged in the same infringement, so as to guarantee their right to be heard.

Both effects mentioned above would need to be supported by a register where the decided law-suits as well as the pending law-suits are made publicly accessible.

Legal certainty

Legal uncertainty always has a chilling effect on consumers, and it also has a chilling effect on consumer organisations (in particular if they bear the litigation risk). During the country research for this evaluation stakeholders provided numerous comments that relate to uncertainty about the correct interpretation of national legislation and also to the discretion of courts or authority that reduce the predictability of the outcome of litigation. These problems could be resolved by introducing clear mandatory rules at the level of the Injunctions Directive. Such rules should relate to the publication of the decision and of corrective statements as well as the way in which sanctions are imposed in the case of the continuation of an infringement after a related decision of a court or administrative body, amongst others:

- *Publication of the decision* has become much easier due to the internet. First of all, qualified entities could have the express right to publish a decision on their websites (as much as traders will have that right if they win the case). Secondly, the trader could also be obliged to publish the decision on the website and/or in the shop. The related reputational damage would act as a deterrent in the first place, thereby increasing the effectiveness of the sanction. Certainly, the obligation to publish the decision should not be in the discretion of the court, since such discretion creates legal uncertainty and acts as a deterrent, in particular, if a negative decision of the court triggers litigation costs.

[974] ECJ, case C-473/00, *Cofidis SA v. Jean-Louis Fredout*, ECLI:EU:C:2002:705.

- As mentioned above, *corrective statements* may already be one form of removal of the consequences of an infringement. This is, however, not always the case but only where statements were made to specific persons, for example, to all contracting partners. Qualified entities have ranked the publication of the decision and corrective statements highest as to the effectiveness of measures taken in the national implementation of the Injunctions Directive.[975] Therefore, the publication of the decision and of corrective statements, where applicable, could both complement the injunction.
- As all Member States foresee *sanctions for the breach of the judgment*, there is no additional burden involved in making this mandatory but this would increase legal certainty. Moreover, the Injunctions Directive could provide that sanctions should be provided for in the decision on the judgment so as to avoid a second procedure. It could be considered that sanctions are paid to the qualified entity; which would create an incentive to actually monitor the post-decision behaviour of the trader.
- *Prior consultation* appears to be a useful tool when it comes to dealings with a trader who is principally willing to comply with the law. It is an instrument that avoids litigation (or administrative procedures). Thus, it could be recommended that, normally, the qualified entity has to consult the trader prior to initiating formal proceedings but that there may be exceptions where the previous behaviour of the trader suggests that this is unlikely to lead to results. If prior consultation was made mandatory, qualified entities should be entitled to compensation for the prior consultation, which in itself causes costs.[976]
- The Injunctions Directive could also clarify the *role of undertakings* with which traders can avoid formal procedures. As a complement to the sanctions of the breach of a judgment, undertakings could have to include the promise of a penalty in case of continued infringement, and they could be published, as it is the case in some Member States, such as Latvia and the UK.
- *Summary procedures* should be available in all Member States but complex cases should not necessarily be decided in summary procedures. Negative consequences that may arise from the not-so-short duration of the procedure should be remedied through an extended remedial system, in particular through removal of the consequences of the infringement.

8.2.3.4. *Introduce modifications to "normal" civil procedural law*

Where injunction procedures are dealt with by civil courts, the procedural rules should reflect the public interest character of such proceedings. This could, in particular, relate to the burden of proof. For example, in Slovakia, the court may introduce evidence other than one proposed by the parties of the law-suit if the introduction is necessary for the decision.[977]

Some Member States have provided for a certain specialisation of courts in injunction procedures, aiming at the uniform application of the law and greater legal certainty. For example, in Poland only the District Court in Warsaw – Court Protecting Competition and Consumers is competent to hear appeals against injunction orders from the Polish consumer protection authority. In Slovakia, the three regional courts are the first instance courts in collective proceedings about abstract control in

[975] See Results of the survey of qualified entities, Part 4 of this report.

[976] For example, under German law, consumer organisations can claim around EUR 250 for a justified reminder to comply with the law.

[977] Country report Slovakia.

consumer affairs, and the Supreme Court is the appeal court. Best practices in this respect could be identified and provided in guidance to Member States.

8.2.3.5. *Improve the use of injunctions cross-border*

The original idea of the Injunctions Directive was that qualified entities should have legal standing in foreign courts. In the meantime, two alternative strategies have evolved: litigation against foreign traders in domestic courts, and co-operation with foreign qualified entities. All three strategies are valid, but all three strategies face obstacles that could be removed or reduced.

It should be noted at the outset that forum shopping concerning the applicable law is impossible since, in accordance with the decision of the Court of Justice in *VKI v. Amazon*, all relevant courts have to apply Article 6(2) of the Rome II Regulation and therefore have to apply the law of the Member State where the collective interest of consumers is harmed, or may be harmed.

At the same time, the Court has clarified that the law that is applicable to the alleged breach is to be determined separately. Thus, the Rome I Regulation applies where the breach of a contract is at stake, whereas the Rome II Regulation applies in the case of a non-contractual infringement. In that latter case, the country-of-origin principle may also play a role where the alleged non-contractual infringement is committed by an information service provider in the terms of the E-Commerce Directive.

Litigation in foreign courts

The only possible facilitation of litigation in foreign courts seems to be in a standardisation of the procedure, e.g. with standardised application forms, and possibly with designation of only one competent court or authority to deal with injunction claims that are brought by foreign qualified entities, similar to, for example, the system of the Order for Payment Regulation (EC) No. 1896/2006. Otherwise, qualified entities may always be expected to resort to cross-border litigation in domestic courts.

Cross-border litigation in domestic courts

Cross-border litigation in domestic courts is the currently preferred strategy of consumer organisations since they are more familiar with their domestic procedural law. Problems can arise with the enforcement of the decision, and in particular, of sanctions imposed on the trader, in a foreign country. The reason is that the Brussels I 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 Injunctions Directive.

Co-operation between qualified entities

Measures addressed to qualified entities, which are consumer organisations, so that they coordinate their injunction actions regarding infringements having a cross-border dimension, rank highest amongst “other measures” in the opinion of qualified entities. Co-operation between qualified entities requires, first of all, the readiness of qualified entities to take action in favour of foreign consumers; which may not be easily justifiable where e.g. consumer organisations are financed through membership fees. Even if they are ready to take action, however, one problem may be their legal standing, as they do not represent their own members, or consumers of their own Member State. A solution would be to clarify in the Injunctions Directive that qualified entities do have legal standing for the defence of the collective interest of consumers from other Member States.

Changes to private international law?

One problem is common to all three strategies: the problem of the applicable law. In the first strategy (litigation in the foreign court) the foreign court may have to apply the law of the Member State of the qualified entity if that is the Member State where the collective interest of consumers is harmed. This is likely to delay the injunction procedure significantly. Vice versa, if the trader uses a (valid) choice of law clause, the law of the trader's Member State, or even the law of a third country, may apply; which the qualified entity of the Member State where the collective interest of consumers is harmed is not familiar with. This was the result the Court of Justice found in the case of *VKI v. Amazon*. The result is clearly a chilling effect on the qualified entity's readiness to initiate an injunction procedure.

The solution to that problem would of course seem to be full harmonisation of relevant provisions. For example, with the General Data Protection Regulation (EU) 2016/679, the problem of different data protection laws that formed the background of the case of *VKI v. Amazon* should disappear. Under the current system of the Rome I Regulation, where 'passive' consumers are at least protected by the mandatory provisions of the law of the Member State in which they are domiciled, consumer organisations could at least litigate safely for the observance of those mandatory rules. Gaps arise where Article 6(2) Rome I Regulation does not apply, according to Article 6(4) Rome I Regulation. One such area is passenger transport, and indeed, some of the most challenging injunctions proceedings pursued by German consumer organisations were against airlines such as Air Baltic (Latvia)[978] and easyjet (UK),[979] where the consumer organisation had to demonstrate a breach of Latvian or English law. Here, one could consider introducing a special conflict rule for injunction proceedings.

8.2.3.6. *Continue non-legislative measures*

Co-operation and exchange of information between qualified entities have proven to be useful in addressing cross-border infringements. Non-legislative measures by the EU Commission, in particular the financing of education measures, have been helpful in this but have not reached all qualified entities yet. Thus, it is recommended to continue and expand the training measures to a larger number of qualified entities, especially in case the Injunctions Directive would be recast and the application of the rules for cross-border injunctions be streamlined, so that effective cross-border enforcement of infringements to EU consumer law becomes more feasible.

8.2.4. Concepts of "average consumers" and "vulnerable consumer"

8.2.4.1. *Clarify the "average consumer" concept*

There is a fairly general acceptance that the "average consumer" benchmark, as interpreted by the CJEU in some cases relating to misleading practices and food labelling does not reflect the behaviour of a real life consumer. It is regarded as a normative abstraction that does not correspond to actual consumer behaviour as understood by behavioural science. This was moreover demonstrated in behavioural experiments, e.g. with regard to the *Mars* case of the CJEU.[980] It has also been argued that such interpretation is problematic in terms of achieving the objectives of the

[978] BGH, 9/7/2009, NJW 2009, 3371.

[979] LG Berlin, 19/5/2015, VuR 2016, 311.

[980] For more information on CJEU case law and the results of behavioural research, see the Workshop Document, prepared for the workshop with behavioural experts, Part 4 of this report.

relevant directives and that a realistic interpretation of the consumer benchmark is all the more important as a number of consumer directives now provide for full harmonisation, leaving limited scope for further reaching protection at Member State level.

Yet, the current definition of the "average consumer", as a consumer that is "reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors" (Recital 18 UCPD) as such does not preclude the use of evidence from behavioural sciences. As a matter of fact, insights from behavioural sciences could more specifically be used to determine what is 'reasonably' circumspect and 'reasonably' observant. Some of the latest case law of the CJEU (*Teekanne, Canal Digital Denmark*) seems to move in that direction and – without however referring to insights from behavioural research – seems e.g. to accept that the effect of more prominent anchors (packaging, prominent price indication) will not always be undone by additional information (list of ingredients, less prominent price indication).

It is therefore not strictly necessary to define the average consumer differently[981] to take a more realistic view of the capacities of the average consumer and to concede that "reasonably observant and circumspect" does e.g. not imply reading a list of ingredients (cf. *Darbo)* nor that a consumer always realises that there no link between the size of publicity markings relating to an increase and the size of that increase (cf *Mars*).

Some amendments (in the recitals) seem nevertheless necessary in order to assure a more realistic interpretation of the capacities of the average consumer. It is therefore recommended that the reference to the average consumer in Recital 18 of the UCPD is amended to clarify that in the interpretation of the benchmark of the average consumer, insights from behavioural studies and available empirical data on the actual behaviour of an average consumer can be taken into account. It could also be emphasised that as insights from behavioural studies are quickly and constantly developing, the benchmark of the average consumer has to be a *dynamic* benchmark, reflecting new insights from behavioural sciences.

In order to make clear that insights from (available) empirical data and behavioural studies can be taken into account, the sentence in Recital 18 UCPD that "The average consumer test is not a statistical test" should be deleted. Although it can be made clear that there is no obligation to commission an expert's report or a consumer research poll, there should be *no prohibition* either if the "average" consumer is meant to reflect a real life consumer. Empirical insights (which are often derived from research results that are evaluated with the help of statistical methods) may thus feed into what ultimately remains a normative decision making process by courts and enforcement authorities.

It is also recommended that when reviewing and updating the UCPD black list (see Section 6.1.1 above) also practices are included that are known – on the basis of behavioural research – to cause material distortion of economic behaviour, in order to better protect consumers against such practices and to make it easier for traders to understand and apply the UCPD and thus increase predictability. Such amendments of the black list of the UCPD can also be used to prohibit specific practices that were shown by research to cause material distortion of economic behaviour of specific,

[981] See e.g. in Canada, where a different definition was used in recent Supreme Court case law, describing the average consumer as a consumer "who is credulous and inexperienced and takes no more than ordinary care to observe that which is staring him or her in the face upon first entering into contact with an entire advertisement" (Richard v. Time Inc. 2012 SCC 8 in ECCG 2013)

vulnerable groups of consumers (such as embedded advertising in games, that was shown to affect children's behaviour).[982]

As indicated before, the legislative process to amend the black list may however not be sufficiently flexible and swift to quickly respond to new unfair marketing practices and new evidence, and it is therefore recommended to use for this purpose delegated/implementing acts of the Commission, taking into account evidence of consumer behaviour, as has e.g. been done in Article 9(3) Food Information Regulation (see also Section 8.2.1 above).[983]

As for the UCTD there is currently no reference in the directive to the "average" consumer and no clear need to define the "average consumer" has become apparent. In the context of the UCTD, this concept has mainly played a role in the framework of the transparency requirement. In *Kasler,* the benchmark of the "average" consumer was also introduced in the interpretation of the UCTD and more specifically of the transparency criterion: in order to be transparent, terms should not merely be grammatically intelligible, but they should enable the (average) consumer to foresee, on the basis of clear, intelligible criteria, which economic consequences derive for him [or her] from the term.[984] This reference to the "average" consumer that is considered to be a stricter benchmark than referred to in other UCTD case law has been criticised in the academic literature as difficult to reconcile with the general idea of the UCTD, that the consumer is in a weak position vis-à-vis the trader, both in terms of bargaining position and level of knowledge.[985] This is also reflected in cases like *Océano, Pannon* on the duty of national courts to invoke unfairness *ex officio*, where no "reasonable circumspect" consumer seems to be required.[986] It was also recognised by the CJEU that the level of attention of the average consumer may vary according to the category of goods or services in question. The case of *Van Hove,* that concerned a loan with a linked insurance contract, illustrates this. The Court there found that the average consumer cannot be required […] to have the same vigilance concerning the insurance element of the transaction as he would if he had entered into it separately.[987]

Whether there is an actual conflict with the consumer benchmark in the various UCTD cases in any event depends on what is expected from a "reasonably circumspect" consumer. If insights from behavioural sciences are taken into account, also in the interpretation of the transparency requirement in the UCTD, the "average" consumer benchmark should not conflict with the general idea of the directive.

If the UCPD and the UCTD are kept in separate legislative instruments (see, however, recommendation in the next sub-section), <u>a reference in the recitals of both instruments to the possibility to take into account insights from behavioural sciences when assessing the capacities of the average consumer is recommended</u>.

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[982] Cf. European Commission's study on online marketing to children (Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices.

[983] Regulation (EU) No 1169/2011.

[984] CJEU 30 April 2014, C-26/16, Kásler, para. 73-74.

[985] M. Loos,"Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law", ERLPL 2-2015, 188.

[986] V. Mak, "Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive," (TISCO), Working Paper Series No.04/2010, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626115, p. 7.

[987] CJEU C-96/14, *Jean-Claude Van Hove,* para. 48.

8.2.4.2. *Streamline the "vulnerable consumer" concept*

As for the "vulnerable consumer" and the reference to this category of consumers in Article 5(3) UCPD, the evidence in the country reports illustrates that the specific article is seldom used. Courts and enforcement authorities rather apply the '*modulated'* average consumer benchmark, i.e. the average consumer of the target group. Moreover, the exact delineation between Art. 5(2) and 5(3) UCPD is not clear.

It is therefore recommended to delete Art. 5(3) UCPD and include it in article 5(2) UCPD in order to ensure adequate protection of vulnerable consumers. Certain practices may reach a larger group of consumers, but are actually directed to a specific group of consumers, that may be vulnerable consumers. Such practices should be assessed from the perspective of the average member of that group of consumers. As it may be difficult to prove that a practice is 'directed' to a specific group, it should be added as an alternative criterion that a practice is likely to affect a specific group of consumers. An alternative Art. 5(2), with an amended last sentence could therefore read:

Article 5(2) UCPD (amended)

A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence, and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, *'or of the average member of the group when a commercial practice is directed to a particular group of consumers or is likely to materially distort the economic behaviour only of a particular group of consumers, who may be particularly vulnerable'*.

The current 'foreseeability criterion' in Art. 5(3) is no longer included in the amended Article as it merely complicates the provision and seems included in the criterion that the practice should be 'likely' to materially distort the behaviour only of a particular group of consumers.

The current description of factors that can make consumers vulnerable and therefore more susceptible to certain marketing practices,[988] must furthermore be adapted as the discrepancy between the (seemingly) exhaustive enumeration in Article 5(3) UCPD and the non-exhaustive list in Recital 19 UCPD is confusing. It should be made clear in an amended recital that vulnerability can not only be caused by internal or endogenous factors (such as, but not limited to age, mental or physical infirmity, credulity) but also by external factors (such as but not limited to unemployment, overindebtedness, market environment) and that vulnerability may be temporary. It is not considered feasible or desirable to use a static definition of vulnerability or to work with a limited number of relevant factors, as this does not sufficiently take into account that vulnerability may be situational and insights on factors that determine consumer vulnerability are still developing.

As for the UCTD, there is currently no reference to the 'vulnerable' consumer. From the country reports, no clear need to define the concept in the framework of this directive has become apparent. The principle based approach of the directive and the open norm, that allows to take into account '*all the circumstances attending the conclusion of the contract'* in assessing the unfairness of a term, was mentioned to

[988] See European Commission, Study on consumer vulnerability in key markets across the European Union.

also allow protection of vulnerable consumers. The open norm allows to particularly protect those whose circumstances make them vulnerable to exploitation of pressure at the time they sign or otherwise agree to a contract.[989]

As is the case with the UCPD, the UCTD furthermore allows courts to have regard to a 'modulated' average consumer benchmark, taking the average consumer of the target group as a standard, thereby also taking into account specific characteristics or circumstances that may make targeted consumers vulnerable.[990] *Van Hove* in any event confirms that the level of attention required from consumers may differ depending on the type of contract or good or services involved.[991]

As mentioned, in the context of the UCTD, a reference to a consumer benchmark has mainly played a role in the framework of the transparency requirement. This transparency assessment is particularly important for core contract terms, as they are only excluded from control on condition that they are transparent. It is the *'average'* consumer that was referred to by the CJEU as a standard to assess the transparency of contract terms. As mentioned, such reference does however not exclude the use of the 'modulated' average consumer benchmark, that allows taking into account the capacities of vulnerable consumers where such consumers are targeted and ensures that core terms are only excluded from control when the economic consequences were clear for the average member of the group.

Though even the 'modulated' average consumer standard will not ensure that all (vulnerable) consumers will always fully understand all contract terms, no clear call for a stricter general standard in the UCTD in order to better protect vulnerable consumers was made. The general protection provided by the UCTD does however not exclude stricter protection in specific sectors where this may be justified for various reasons, including the complexity of the goods or services at stake or the interests involved.[992]

8.2.5. Codification

8.2.5.1. *Gaps, overlaps and inconsistencies in the current legal framework*

Although this evaluation did not include a detailed review of the Sales and Guarantees Directive and the Consumer Rights Directive, the analysis of the other directives nevertheless allows to draw some conclusions on the possible need for and added value of a single horizontal EU instrument. There are gaps in the current EU legal framework for consumer protection, there are overlaps and there are inconsistencies. They have been described in detail before, and include:

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[989] See CMA, "Unfair contract terms guidance. Guidance on the unfair terms provisions in the Consumer Rights Act 2015", 2.35, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf.

[990] See eg *OFT v Fair Trading v Ashbourne Management Services Ltd and others,* para. 155. The case concerned unfair terms in gym contracts. The average consumer was interpreted as 'a member of the public interested in using a gym which is not a high end facility and who may be attracted by the relatively low monthly subscriptions'.

[991] CJEU 23 April 2015, C-96/14, *Van Hove.*

[992] See e.g. the stricter standards for package leaflets for medicine, Directive 2011/83/EC on medicine for human consumption and the Guideline On The Readability Of The Labelling And Package Leaflet Of Medicinal Products For Human Use, ENTR/F/2/SF/jr (2009)D/869, http://ec.europa.eu/health/sites/health/files/files/eudralex/vol-2/c/2009_01_12_readability_guideline_final_en.pdf.

- There is an *abundance of marketing/pre-contractual information requirements* that is currently included in four different directives (UCPD, CRD, PID, MCAD). This was identified to create problems of implementation and application (overlap and conflicts).
- The recent *Citroën Commerce* judgment of the ECJ has shown that the *borderline between the UCPD and the PID is unclear* and that the scope of application of the PID is unclear as well. As a possible solution, the incorporation of the PID in the UCPD or CRD has been suggested.
- There is an *abundance of rules and requirements* not only in the UCPD, CRD, PID and MCAD, but also in the Services Directive and E-Commerce Directive as well as in sector-specific rules *concerning unfair commercial practices and information obligations regarding advertising*. As indicated above, this contributes to the problem of "information overload" and there seems to be a lack of a clear logic about which type of information is required at which stage of the marketing and contracting process.
- Despite this extensive information requirements, *gaps in the provision of information* were also identified, as the rules on the prior communication of contract terms and in the incorporation of contract terms were considered to be insufficiently clear and effective.
- Inconsistencies were furthermore identified in the *application and interpretation of key concepts*, such as the "average consumer" and the "vulnerable consumer" (see previous section).
- Furthermore, problems with a *lack of effective enforcement* were identified that are not limited to specific directives.

This evaluation therefore concludes that there is a need to address the identified gaps, overlaps and inconsistencies in the current legal framework.

8.2.5.2. *Options for codification*

A codification of several directives in a comprehensive single legal instrument is one possibility to solve the mentioned problems. The results of the open public consultation show that at least half of all respondent categories (with the exception of business associations) strongly agree or tend to agree that EU consumer and marketing rules should be simplified by bringing them into a single horizontal EU instrument. For example, 63% of businesses, 55% of consumer associations, and 53% of public authorities strongly agree or tend to agree that EU consumer and marketing rules should be simplified by bringing them into a single horizontal EU instrument.[993] Codification can take different forms, ranging from a codification *à droit constant* – regrouping but not substantially amending the existing directives – to a codification involving a substantive review of the existing instruments. Possible options and their advantages and disadvantages include:

- *Maintaining existing directives.* A first option would be to maintain the existing directives, to keep them separate and merely to delete overlapping provisions and to align definitions. This does imply that the directives continue to lead their separate lives; it also implies addressing similar changes in different legislative procedures. The simplifying effect of a horizontal instrument then remains absent. Assuring lasting consistency, also in the interpretation of different instruments and in the national implementation of aligned definitions and rules, is more difficult and complex than in a horizontal approach.

[993] While 32% of business associations agree, a plurality of 42% disagrees. See Part 2 of this report.

- *'Minimal' horizontal instrument.* A minimal codification exercise could be limited to extracting a number of common elements, mainly definitions from the separate directives in a common instrument. Although such an approach would provide guarantees for a common interpretation of fundamental notions as e.g. consumer and trader, the simplifying effect would remain limited. Cross-references to definitions used in the common instrument would remain necessary. Overlapping substantial rules (e.g. information requirements) would still need to be addressed in the separated legal instrument and thus through separate legal procedures.
- *Comprehensive horizontal B2C instrument.* A comprehensive horizontal B2C instrument has the potential to not only address inconsistencies and overlaps in the current consumer protection directives, but also to deal with identified gaps in consumer protection. A first attempt for such a codification exercise already exists in the form of the CRD. The scope of that directive has however remained limited and it is not well aligned with inter alia the information requirements from other directives, including the UCPD. Codifying different directives into a single instrument that deals with various stages of consumer transactions (both the marketing, pre-contractual, contractual and post-contractual stage) necessarily involves an exercise of simplification and harmonisation as not only different definitions but also substantive rules need to be aligned.

  Dealing both with marketing rules and contract rules in one instrument would allow for a clearer distinction to be made between the information that needs to be provided in marketing and information that needs to be provided prior to the conclusion of a contract, thus avoiding an information overload. This would also clarify the link between marketing (commercial practices) rules and contract rules at a European level and allow for determination as to whether unfair commercial practices have an effect on the validity on contracts concluded as a consequence of such practices (see discussion of related options above).

  A comprehensive horizontal instrument also allows for gaps in the current EU legal framework for consumer protection to be dealt with. EU consumer law currently does not cover all steps in a transactional process. Incorporation of standard terms is e.g. currently not clearly covered by the (transparency) rules of the UCTD. Also, as mentioned, the effect of unfair commercial practices on the validity of a contract is not clear. Neither, when assessing the fairness of contract terms, is there provision to take into account the effect of circumstances occurring after the conclusion of the contract. Gaps can of course also be dealt with in separate instruments, but incorporation in one horizontal instrument has at the very least as an advantage that it forces the legislator to pay attention to and address the interaction of the different instruments.

  Furthermore, any interpretation by the CJEU of common definitions in such a horizontal instrument will automatically have a further-reaching harmonising effect as there will be no doubt that it applies to all provisions in the horizontal instrument.

  Such a horizontal instrument would also make it easier to enhance the effectiveness of enforcement. A general section on sanctions could ensure that both private and public law sanctions are available for infringement of the rights guaranteed in the directive. Such a horizontal instrument would also allow to clearly define the tasks of the national courts in the application of EU consumer law. These principles are now necessarily developed by the court in the framework of one specific directive. That leaves it unclear whether these principles can be transposed to other (consumer protection) directives. That uncertainty can only be solved through new preliminary references, but that leads to a haphazard development of the law. Finally, a codification can further make legal provisions more easily accessible to traders and consumers and

may increase awareness. Of course, the latter benefit will mainly occur if the rules are then also implemented into one instrument at the national level. It must indeed be kept in mind that a codification (and simplification) in a broad horizontal EU instrument does not prevent national implementation in separate and scattered legislation; simpler EU legislation does not fully guarantee easily accessible national legislation. However, simple EU legislation is in any event a prerequisite for simple and accessible national legislation.

- *Comprehensive horizontal B2C and B2B instrument*. A fourth option would be to also include specific aspects of B2B protection into a horizontal instrument, both against unfair contract terms and against unfair commercial practices. As for unfair contract terms, there is especially a case for control of such terms in contracts with SMEs. The system of the UCTD, based on the concept of good faith and significant imbalance between the rights and obligations of the parties, is generally considered appropriate for an extension to B2B contracts. This open norm leaves sufficient leeway to take into account the specificities of a business context. Such a system already exists in a number of Member States where it is considered to provide an appropriate protection also for businesses. In the countries that do not have such systems in place, it appears from the country research that a possible extension would often be seen as beneficial by stakeholders, especially for SMEs. As for unfair commercial practices, this mostly makes sense in case of a maximum convergence of UCPD and MCAD, including an extension of the general prohibition of unfair practices to B2B relations. However, as mentioned above, on the basis of the country research, no urgent need for a fully-fledged extension could be established and a limited alignment of the B2C and B2B rules (outside a horizontal B2C instrument) was recommended: alignment of the MCAD's general prohibition of misleading advertising with the UCPD's general prohibitions of misleading practices, and the addition of a short list of common and harmful misleading practices in B2B relations (e.g. fake invoices, misleading directory companies).

The benefits in terms of substantive consumer protection of a codification exercise will of course depend on the scope, content and level of harmonisation of such an instrument.

8.2.5.3. *Scope and level of harmonisation*

The consumer protection directives within the scope of the Fitness Check are capable of inclusion in such a horizontal instrument. The incorporation of (parts of) other directives could be envisaged (e.g. the E-Commerce Directive or the future provisions on digital content). However, such a horizontal instrument will necessarily need to be complemented by a vertical approach as it cannot replace sector specific instruments. However, it is recommended to keep a revised Injunctions Directive as a separate instrument. The scope of the latter directive is indeed much broader and should be adjusted to the scope of application of the CPC Regulation or extended to consumer law in general, thus including sector specific legislation in the areas of data protection law and financial services as well as consumer protection in regulated services such as telecommunications services and energy supply. It is not considered feasible or desirable to include such sector specific instruments in the mentioned horizontal instrument.

An important choice to be made when adopting a comprehensive horizontal instrument will be the degree of harmonisation. Such a horizontal instrument does not necessarily imply that all provisions must use the same method of harmonisation. As in other instruments, a main form of harmonisation can be chosen, with exceptions for specific provisions. Both targeted full harmonisation or targeted minimum harmonisation could be envisaged.

It appears from the country research for this evaluation, and from earlier consultations and studies, that stakeholders continue to disagree on the desired level of harmonisation. Especially for the provisions on unfair contract terms, the link with national contract law underlines the need to maintain minimum harmonisation in this area.

Annex I List of references

Table 15: List of literature reviewed

Author	Year	Title of publication
P. Rott	Forthcoming	Behördliche Rechtsdurchsetzung in Großbritannien, den Niederlanden und der USA, in: H. Schulte-Nölke (ed.), Neue Wege zur Durchsetzung des Verbraucherrechts
A.I.S.E	2016	Roadmap feedback for Fitness check on consumer law A.I.S.E
BEUC	2016	Roadmap feedback for Fitness check on consumer law BEUC
Consumer Justice Enforcement Forum II	2016	Enforcement of consumer rights: strategies and recommendations
Cyprus Consumers' Association	2016	Roadmap feedback for Fitness check on consumer law Cyprus Consumers' Association
Ecommerce Europe	2016	Roadmap feedback for Fitness check on consumer law Organisation Ecommerce Europe
European Commission	2016	Roadmap and Consultation Strategy for the REFIT Fitness check of Consumer and Marketing law
European Commission	2016	Proposal to replace CPC Regulation 2006/2004
European Commission	2016	Study on consumers' attitudes towards Terms and Conditions – Presentation
European Commission	2016	Final report for the study on consumers' attitudes towards Terms and Conditions (T&Cs)
European Commission	2016	Public consultation for the Fitness Check of EU consumer and marketing law
European Commission	2016	Online Platforms and the Digital Single Market Opportunities and Challenges for Europe
European Commission	2016	Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content
European Commission	2016	Impact assessment on the review of the CPC Regulation
European Commission	2016	Report assessing the effectiveness of the CPC Regulation
European Commission	2016	Consumer Markets Scoreboard 12th edition - Making markets work for consumers
European Commission	2016	Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices
European Commission	2016	Commission proposes new e-commerce rules to help consumers and companies reap full benefit of Single Market
European Commission	2016	Study on the impact of marketing through social media , online games and mobile applications on children's behaviour Final report
European Commission	2016	Consumer vulnerability across key markets in the European Union Final Report

European Commission	2016	Notification from the Commission concerning Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, which codifies Directive 98/27/EC, concerning the entities qualified
European Commission	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
GfK	2016	Consumer Market Sudy to support the Fitness Check of consumer law (Lot 3) - Consumer survey results
GSMA	2016	Roadmap feedback for Fitness check on consumer law GSMA
Loos, Marco; Luzak, Joasia	2016	Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers
Multi-stakeholder Dialogue on Environmental Claims / European Commission	2016	Compliance Criteria on Environmental Claims: Multi-stakeholder advice to support the implementation/application of the Unfair Commercial Practices Directive 2005/29/EC
Multi-stakeholder Group on Comparison Tools / European Commission	2016	Key principles for comparison tools
The Federation of Finnish Enterprises	2016	Roadmap feedback for Fitness check on consumer law Organisation The Federation of Finnish Enterprises
Zander-hayat, Helga; Domurath, Irina; Groß, Christian	2016	Personalisierte Preise
Court of Justice of the European Union	2016	Case law C-476-14 judgment
K. Csach	2016	„A Pair of Wings: Air Passenger Rights in the Czech Republic and Slovakia“ Air Passenger Rights. Ten Years On, Hart Publishing, Oxford ,2016, pp. 131-144.
M. Krškova, N.Pániková	2016	Sexistické reklamy na Slovensku alebo čo má spoločné sťahovanie, prášková lakovňa a bankové služby , Slovenské národné stredisko pre ľudské práva, Bratislava, 2016.
J. Vozár	2016	´Niekoľko úvah k problematike ochrany finančného spotrebiteľa´ Právny obzor. Vol. 99, No. 2, 2016, pp. 61-70.
Ministry of Justice	2016	Predlog Zakona o kolektivnih tožbah (Class Action Act proposal)
Mónika Józon	2016	The Methodology of Judicial Cooperation in Unfair Contract Terms Law, in Fabrizio Cafaggi, Stephanie Law (eds.) Judical Cooperation in European Private Law, Edwards Elgar, 2016 (forthcoming).
Jorge Morais Carvalho	2016	Manual de Direito do Consumo (3rd ed., Almedina, Coimbra)
M. Namysłowska, A. Piszcz (eds.)	2016	Ustawa o zmianie ustawy o ochronie konkurencji i konsumentow z 5.8.2015 r. Komentarz. C.H. Beck
Elshout et al.	2016	M. Elshout, M. Elsen, J. Leenheer, M. Loos and J. Luzak, Study on consumers’ attitudes towards Terms and Conditions (T&Cs), Final report, 2016 (report on behalf of the European Commission, not made public yet)

Tillema	2016	I. Tillema, 'Commerciële motieven in privaatrechtelijke collectieve acties: olie op het vuur van de claimcultuur?', Ars Aequi 2016, p. 337-346.
Consumer Rights Protection Centre (Latvia)	2016	Decision in the case No. 18-pk
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EIM Business & Policy Research / European Commission	2004	Appraisal of Directive 98/6/EC on Consumer Protection in the Indications of Unit Prices of Products Offered to Consumers
Optem / European Commission	2004	Qualitative Eurobarometer Study on Cross Border Shopping in 28 European Countries
Luigi Varanelli	2004	Nepošteni pogodbeni pogoji po zakonu o varstvu potrošnikov (Unfair contract terms in Consumer Protection Act), Pravna praksa 27/2004, p. 23.
Damjan Možina	2004	Razvojne težnje v evropskem pravu nelojalne konkurence in varstva potrošnikov (Development trends in the Europan law of unfair competition and consumer protection), Podjetje in delo, 6-7/2004, p. 1139-1352
K. Kruszewska-Sobczyk & M. Sobczyk	2004	‘Niedozwolone klauzule w umowach zawieranych przez konsumenta’ in: Radca Prawny vol. 4.
Saeima (Parliament) of the Republic of Latvia	2004	Electronic Communication Law
Lettl	2004	“Der Schutz der Verbraucher nach der UWG-Reform”, GRUR (Zeitschrift der Gesellschaft für gewerblichen Rechtsschutz und Urheberrecht), p. 449.
Sack	2004	“Folgeverträge unlauteren Wettbewerbs“ GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 625.
Sack	2004	“Folgeverträge unlauteren Wettbewerbs“, GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 637.

Seidelberger	2004	“Vergleichende Werbung im Überblick” in: Schutzverband gegen den Unlauteren Wettbewerb (ed.): Aktuelle Herausforderungen des Lauterkeitsrechts, Vienna, p. 219.
J. Brucher, N. Thieltgen	2004	Le consommateur et sa banque – l’évolution depuis 1993 de la protection juridique du consommateur dans le domaine bancaire et financier
European Opinion Research Group / European Commission	2003	Special Eurobarometer 193 Consumer Protection in the EU
OPTEM / European Commission	2003	European consumers and services of general interest Qualitative study
Andrej Andrić	2003	The implementation of the Directive 93/13/EEC on unfair terms in consumer contracts in the law of the Republic of Slovenia, Pravna praksa 2/2003, p. 19.
Cláudio Petrini Belmonte	2003	A Redução do Negócio Jurídico e a Protecção dos Consumidores (Coimbra Editora, Coimbra)
Joaquim de Sousa Ribeiro	2003	O Problema do Contrato (Almedina, Coimbra)
Luís Silveira Rodrigues	2003	“Tendências Recentes sobre a Protecção do Consumidor na União Europeia” (Estudos de Direito do Consumidor, n.º 5)
A. Barenghi	2003	I contratti per adesione e le clausole vessatorie, in Lipari (ed.), Trattato di diritto privato europeo, Padua, III, p. 346
Köhler	2003	“UWG-Reform und Verbraucherschutz“, GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 265.
Weiler	2003	“Ein lauterkeitsrechtliches Vertragslösungsrecht des Verbrauchers?“ WRP 2003, 423, 426.
Augenhofer	2003	“Pippig versus Hartlauer: EuGH klärt offene Frage hinsichtlich vergleichender Werbung”, RdW (Recht der Wirtschaft), p. 682.
Fezer	2003	“Das wettbewerbsrechtliche Vertragsauflösungsrecht in der UWG-Reform“, WRP (Wettbewerb in Recht und Praxis), p. 138.
Köhler	2003	“UWG-Reform und Verbraucherschutz” GRUR (Gewerblicher Rechtsschutzund Urheberrecht), p. 271.
Schulte-Nölke	2003	“UWG und Europäisches Vertragsrecht – Neue große Schritte auf dem Weg nach Europa”, ZGS (Zeitschrift für das gesamte Schuldrecht), p. 41.
Schulze/Schulte-Nölke	2003	“Rechvergleichende Untersuchung des verbrauscherschützenden Lauterkeitsrecht der Mitgliedstaaten”, Osnabrück.
Kahneman, D.	2003	‘Maps of Bounded Rationality: Psychology for Behavioral Economics’, American Economic Review, 93
EOS Gallup Europe / European Commission	2002	Flash Eurobarometer 117 - Consumers Survey
EOS Gallup Europe / European Commission	2002	Standard Eurobarometer 57.2 & Flash Eurobarometer 128 - Public Opinion in Europe: Views on Business-to-Consumer Cross-Border Trade

European Opinion Research Group / European Commission	2002	Eurobarometer 58 - Consumers' Opinions about Services of General Interest
Ana Maria Guerra Martins	2002	"O Direito Comunitário do Consumo" (Estudos do Instituto de Direito do Consumo, vol. I)
Alexander	2002	"Vertrag und unlauterer Wettbewerb", Berlin.
Augenhofer	2002	"Gewährleistung und Werbung. Das neue Gewährleistungsrecht für Werbeaussagen", Vienna.
Völker	2002	"Preisangabenrecht, Recht der Preisangaben und der Preiswerbung", 2nd edition., Munich.
Alexander	2002	"Vertrag und unlauterer Wettbewerb", Berlin.
Augenhofer	2002	"Gewährleistung und Werbung", Vienna.
Micklitz/Keßler	2002	"Europäisches Lauterkeitsrecht Dogmatische und ökonomische Aspekte einer Harmonisierung des Wettbewerbsverhaltensrecht im europäischen Binnenmarkt", GRUR Int. (Gewerblicher Rechtsschutz und Urheberrecht International), p. 885.
Rummel (ed.)	2002	"Kommentar zum ABGB", 3rd edition, Vienna.
Robert Hillman and Jeffrey Rachlinski	2002	"Standard Form Contracting in the Electronic Age", 77 New York University Law Review
Europe, Eos Gallup	2001	Flash Eurobarometer 113 - Les emballages et les ménages
Almeno de Sá	2001	Cláusulas Contratuais Gerais e Directiva sobre Cláusulas Abusivas (Almedina, Coimbra)
Saeima (Parliament) of the Republic of Latvia	2001	Administrative Violation Code
Fleischer	2001	"Informationsasymmetrie im Vertragsrecht", Munich.
Sack	2001	"Vergleichende Werbung nach der UWG-Novelle" WRP (Wettbewerb in Recht und Praxis), p. 327.
Scherer	2001	"Partielle Verschlechterung der Verbrauchersituation durch die europäische Rechtsvereinheitlichung bei vergleichender Werbung", WRP (Wettbewerb in Recht und Praxis), p. 89.
Schwarze	2001	"Vorvertragliche Verständigungspflichten", Tübingen.
Enthofer-Stoisser/Karl	2001	"Das neue Preisauszeichnungsgesetz" in: Enthofer-Stoisser/Karl (eds.): „Sind die Preise ausgezeichnet?" – Das neue Preisauszeichnungsgesetz 2000 in Theorie und Praxis, Vienna, p. 35.
Faber	2001	"Handbuch zum neuen Gewährleistungsrecht", Vienna.
Welser/Jud	2001	"Die neue Gewährleistung", Vienna.
Haigh	2001	Contract Law in an E-Commerce Age
European Commission	2000	Report on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

INRA / European Commission	2000	Eurobarometre 53 Les Europeens et les services d'interet generaux
INRA / European Commission	2000	Eurobarometre 52.1 Les Europeens et l'acces a la justice
Aleš, Galič	2000	Procesni vidiki prava varstva potrošnikov (Procedural aspects of consumer protection law), Podjetje in delo.
José de Oliveira Ascensão	2000	“Cláusulas Contratuais Gerais, Cláusulas Abusivas e Boa Fé” (Revista da Ordem dos Advogados, ano 60)
M. Jagielska	2000	‘Niedozwolone klauzule umowne: nowelizacja kodeksu cywilnego’ in: Monitor Prawniczy vol. 11.
Canaris	2000	“Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner Materialisierung AcP (Archiv für die civilistische Praxis), p. 273.
Greger	2000	“Neue Regeln für die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht”, NJW (Neue Juristische Wochenschrift), p. 2457.
Plaß	2000	“Die gesetzliche Neuregelung der vergleichenden Werbung“, NJW (Neue Juristische Wochenschrift), p. 3161
Markov	2000	Development of the legal framework of contract under general terms, Metodi
Wamprechtshamer	2000	“Die Neuordnung der vergleichenden Werbung, ÖBl. (Österreichische Blätter zum Gewerblichen Rechtsschutz und Urheberrecht), p. 147.
S. Bright	2000	‘Winning the Battle against Unfair Contract Terms’ (2000) 20 Legal Studies 331.
C. Scott, J. Black	2000	Cranston’s Consumers and the Law (3rd edn., Butterworths, 2000)
Ine Demuynck	2000	De inhoudelijke controle van de onrechtmatige bedingen
Sunstein, C.	2000	Behavioral Law and Economics, Cambridge University Press
EOS Gallup Europe / European Commission	1999	Flash Eurobarometre 65 Consumer Information
INRA / European Commission	1999	Eurobarometer 51.1 - Europeans and Consumer Associations
Bojan Zabel	1999	Tržno pravo (Market law)
Mário Júlio de Almeida Costa	1999	Síntese do Regime Jurídico Vigente das Cláusulas Contratuais Gerais (Universidade Católica Editora, Lisboa)
Saeima (Parliament) of the Republic of Latvia	1999	Consumer Rights Protection Law
Saeima (Parliament) of the Republic of Latvia	1999	Advertising Law
Cabinet of Ministers (Latvia)	1999	Regulations on Procedures for Indication of Prices of Products and Services
E. Minervini	1999	Tutela del consumatore e clausole vessatorie, Naples

Soergl	1999	“Kommentar zum Bürgerlichen Gesetzbuch. Band 2: Allgemeiner Teil 2. §§ 104 - 240 BGB”, 13th edition, Stuttgart.
Saeima (Parliament) of the Republic of Latvia	1998	Civil Procedure Law
Wenke	1998	“Die vergleichende Werbung in Deutschland nach der Richtlinie 97/55/EG und der BGH-Entscheidung ‘Testpreis-Angebot’”, WRP (Wettbewerb in Recht und Preaxis), p. 811.
C.M. Bianca, F.D. Busnelli et alii (eds.)	1997	Commentario al capo XIV-bis del codice civile: dei contratti del consumatore, in Le nuove leggi civili commentate, p. 751 ff.
E. Navarretta	1997	Art. 1469-bis Codice civile, in C.M. Bianca, F.D. Busnelli et alii (eds.), Commentario al Capo XIV bis del codice civile: dei contratti del consumatore, in Le nuove leggi civili commentate, p. 864
Schwerdtfeger	1997	“Änderungen des AGB-Gesetzes durch Umsetzung der Verbraucher-vertragsrichtlinie”, DStR (Das deutsche Steuerrecht), p. 499.
Tilmann	1997	“Richtlinie vergleichende Werbung” GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 790.
Kiendl	1997	“Unfaire Klauseln in Verbraucherverträgen”, Vienna.
G. Cian	1996	Il nuovo capo XIV-bis (titolo II, libro IV) del codice civile, sulla disciplina dei contratti con i consumatori, in Studium Iuris, p. 411 ff.
M. Libertini	1996	Prime riflessioni sull’azione inibitoria dell’uso di clausole vessatorie, in Contratto e Impresa/Europa, p. 567 ff.
O’Keefe	1996	The Law of Weights and Measures (2nd. Edn., Butterworth, London, 1996)
D. Parry, R. Rowell, B.W. Harvey and C. Ervine	1996	Butterworths Trading and Consumer Law (Lexis, 1996)
H.G. Beale	1995	“Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts” in J Beatson & D Friedmann (eds), Good Faith and Fault in Contract Law, (1995, Clarendon, Oxford)
Judit Fazekas	1995	Judit A fogyasztói szerződések tisztességtelen szerződési feltételeit szabályozó új Európai Uniós irányelv és a magyar jog (Vol. 47 Issue 11 Magyar Jog).
Hans-W. Micklitz	1995	‘Principles of Justice in Private Law within the European Union’ in Esa Paasivirta and Kirsti Rissanen (eds), *Principles of Justice and the Law of the European Union*
H. Collins,	1994	‘Good Faith in European Contract Law’ (1994) OJLS 229
INRA / European Commission	1993	Eurobarometer 38 - European Opinion on the Safety of Consumers
F. Zoll	1993	‘Niedozwolone klauzule w umowach konsumenckich’ in: Kwartalnik Prawa Prywatnego vol. 2.
B. Jaworska-Dębska	1993	‘Wokol pojecia reklamy’ in: Przeglad Ustawodawstwa Gospodarczego vol. 12.

Koziol/Welser	1992	“Grundriß des bürgerlichen Rechts, Teil I”, 9th edition, Vienna.
European Commission	1991	Consumer Behaviour in the Internal Market An Interim Report from Eurobarometer 35
Richard Craswell	1991	"Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships" 43 Stanford Law Review
Parl. Gesch. Inv. Boek 6	1990	W.H.M. Reehuis, E.E. Slob (red.); C.J. van Zeben, J.W. du Pon (eindred.), Parlementaire geschiedenis van het nieuwe Burgerlijke Wetboek, Invoering Boeken 3, 5 en 6; Boek 6, Algemeen gedeelte van het verbintenissenrecht; Deventer: Kluwer, 1990.
António Pinto Monteiro	1986	“Contratos de Adesão” (Revista da Ordem dos Advogados, ano 46)
Koziol	1984	“Österreichisches Haftpflichtrecht. Band 2”, 2nd edition, Vienna.
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Henning-Bodewig	1981	“Die wettbewerbsrechtliche Haftung von Werbeagenturen“, GRUR (Gewerblicher Rechtsschutz und Urheberrecht), p. 164.
Lehmann	1981	“Vertragsanbahnung durch Werbung”, Munich.
Lehmann	1981	“Die bürgerlichrechtliche Haftung für Werbeangaben – Culpa in contrahendo als Haftungsgrundlage für vertragsanbahnende Erklärungen“, NJW (Neue Juristische Wochenschrift), p. 1233.
European Commission	1976	Eurobarometer 007 - European Consumers: their interests, aspirations and knowledge on consumer affairs
Welser	1973	“Das Verschulden bei Vertragsschluss im österreichischen bürgerlichen Recht”, ÖJZ (Österreichische Juristen-Zeitung), p. 282.
Mancur Olson	1965	*The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard University Press
F. Kessler	1943	‘Contracts of Adhesion: Some Thoughts about Freedom of Contract’ (1943) 43 Columbia L Rev 629.
Saeima (parliament) of the Republic of Latvia	1937	Civil Law
Applied Research and Communications Fund	Annually	The Study on Innovations of SME in Bulgaria

Source: Civic Consulting.

Annex II List of interviews conducted

Country	Organisation	Stakeholder type	Date
EU level	European eCommerce and Omni-Channel Trade Association (EMOTA)	Business association	03 May 2016
EU level	BusinessEurope	Business association	09 May 2016
EU level	Eurelectric	Business association	10 May 2016
EU level	EuroCommerce	Business association	10 May 2016
EU level	European Association of Craft, Small and Medium-Sized Enterprises (UEAPME)	Business association	11 May 2016
EU level	E-Commerce Europe	Business association	24 May 2016
EU level	European Direct Selling Association (Seldia)	Business association	25 May 2016
EU level	Independent Retail Europe	Business association	04 July 2016
EU level	Advertising Information Group	Business association	02 August 2016
EU level	European Advertising Standards Alliance	Business association	03 August 2016
EU level	Federation of European Direct and Interactive Marketing (FEDMA)	Business association	3 June 2016 and 6 September 2016
EU level	BEUC	Consumer organisation	04 May 2016
AT	Federal Ministry of Science, Research and Economy	Ministry	22 July 2016
AT	Federal Ministry of Justice	Ministry	25 July 2016
AT	Federal Ministry of Labour, Social Affairs and Consumer Protection	Ministry	26 July 2016
AT	Federal Labour Chamber	National authority	26 July 2016
AT	Austrian Regulatory Authority for Broadcasting and Telecommunications	National authority	22 July 2016
AT	Financial Market Authority	National authority	25 July 2016
BE	SPF Economie, P.M.E., Classes moyennes et Energie	National authority	4 August 2016
BE	Court	National authority	11 August 2016
BE	Court	National authority	17 August 2016
BE	Court	National authority	9 November 2016
BG	Ministry of Economy	Ministry	10 June 2016
BG	The Commission for Consumer Protection	National authority	20 June 2016 and 21 June 2016
BG	State Energy and Water Regulatory Commission	National authority	16 June 2016
BG	The Ministry of Transport, Information Technology and Communication, The Directorate General "Civil Aviation Administration"	National authority	21 June 2016
BG	Executive Agency "Car Administration"	National authority	29 June 2016
CY	Central Bank of Cyprus	National authority	29 July 2016

CY	Department of Civil Aviation of the Ministry of Transport, Communications and Works	Ministry	27 July 2016
CY	Department of Road Transport of the Ministry of Transport, Communications and Works	Ministry	26 August 2016
CY	The Energy Service of the Ministry of Energy, Commerce, Industry and Tourism	Ministry	26 August 2016
CY	Competition and Consumer Protection Service of the Ministry of Energy, Commerce, Industry and Tourism	Ministry/Regulator	23 June 2016
CY	Department of Merchant Shipping	National authority	12 June 2016
CY	Office of the Commissioner of Electronic Communications and Postal Regulation	National authority	22 June 2016
CY	The Financial Ombudsman of the Republic of Cyprus	National authority	18 July 2016
CZ	Ministry of Industry and Trade	Ministry	08 June 2016
CZ	Ministry of Finance	Ministry	10 June 2016
CZ	Czech Trade Inspection Authority	National authority	03 June 2016
CZ	Financial Arbitrator	National authority	14 June 2016
CZ	Czech Telecommunication Authority	National authority	07 June 2016
CZ	Czech National Bank	National authority	15 June 2016
DE	Federal Ministry for Economic Affairs and Energy (BMWi)	Ministry	06 July 2016
DE	Federal Ministry of Justice and Consumer Protection(BMJV)	Ministry	14 July 2016
DE	Federal Ministry of Justice and Consumer Protection (BMJV)	Ministry	28 July 2016
DE	Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur)	National authority	10 August 2016
DE	Federal Financial Supervisory Authority (BaFin)	National authority	10 August 2016
DK	Danish Competition and Consumer Authority	Ministry	23 June 2016
DK	Ministry of Justice	Ministry	01 July 2016
DK	Danish Consumer Ombudsman	National authority	17 June 2016
DK	Danish Energy Agency	National authority	16 June 2016
EE	Ministry of Justice	Ministry	16 June 2016
EE	Ministry of Economic Affairs and Communications	Ministry	20 June 2016
EE	Consumer Protection Board	National authority	16 June 2016
EE	Financial Supervision Authority	National authority	29 June 2016
EL	General Secretariat for Consumer Protection	Ministry	28 July 2016 and 29 July 2016
EL	RAE	National authority	26 July 2016

EL	ESR	National authority	29 August 2016
EL	EETT	National authority	30 August 2016
ES	Ministry of Justice	Ministry	29 July 2016
ES	AECOSAN (Spanish Agency for Consumer Affairs, Food Safety and Nutrition)	Ministry	02 September 2016
ES	Catalan Consumer Agency – Catalan Government	Ministry	14 October 2016
FI	Competition and Consumer Authority	National authority	06 September 2016
FI	Energy Authority	National authority	07 September 2016
FI	Financial Supervisory Authority	National authority	10 August 2016
FI	Consumer Ombudsman	National authority	05 September 2016
FI	Ministry of Justice	Ministry	05 September 2016
FI	Ministry of Economic Affairs and Employment	Ministry	23 October 2016
FR	Institut national de la Consommation (INC)/Commission des clauses abusives (CCA)	National authority	04 June 2016
FR	Autorité des Marchés financiers (AMF)	National authority	24 June 2016
FR	Autorité de Contrôle Prudentiel (ACP)	National authority	06 July 2016
FR	Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF) (1)	National authority	11 July 2016 and 19 July 2016
FR	Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF) (2)	National authority	11 July 2016 and 19 July 2016
FR	Autorité de régulation des communications électroniques et des postes (ARCEP)	National authority	12 July 2016
HR	Ministry of Economy	Ministry	22 July 2016
HR	Ministry of Justice	Ministry	01 July 2016
HR	Directorate for Economic Inspection (Market Inspectorate)	National authority	22 July 2016
HR	Croatian Regulatory Authority for Network Industries (Telecommunications regulatory authority)	National authority	08 July 2016
HR	Croatian Energy Regulatory Agency	National authority	06 July 2016
HU	Ministry of National Developement	National authority	17 August 2016
HU	Ministry of Justice	National authority	12 July 2016
HU	National Authority for Consumer Protection	National authority	13 July 2016
HU	National Authority for Media and Infocommunication	National authority	08 July 2016
HU	Hungarian Competition Authority	National authority	13 July 2016
IE	Department of Jobs, Enterprise and Innovation	Ministry	12 September and 10 October 2016

IE	Competition and Consumer Protection Commission	National authority	06 September and 19 October 2016
IE	Commission for Energy Regulation	National authority	14 September and 27 September 2016
IT	Ministry of Justice	Ministry	28 July 2016
IT	Ministry of Economic Development	Ministry	25 July 2016
IT	Authority for Competition and the Market (AGCM)	National authority	01 August 2016
IT	Communications Authority (AGCOM)	National authority	31 August 2016
IT	Banca d'Italia	National authority	01 August 2016
LT	State Consumer Rights Protection Authority	National authority	24 August 2016
LT	Competition Council of the Republic of Lithuania	National authority	23 August 2016
LT	Ministry of Justice of the Republic of Lithuania	Ministry	10 August 2016
LT	Ministry of Transport and Communications of the Republic of Lithuania	Ministry	26 August 2016
LT	Lithuanian Consumer Organisation Alliance	National authority	05 August 2016
LT	Bank of Lithuania	National authority	20 July 2016
LT	National Commission for Energy Control and Prices	National authority	17 August 2016
LU	Ministère de l'Economie et du Commerce extérieur – Direction du marché intérieur et de la consommation	Ministry	13 September 2016
LU	Ministère de l'Economie et du Commerce extérieur – Direction générale PME et Entrepreneuriat	Ministry	30 September 2016
LU	Commission de surveillance du secteur financier	National authority	26 September 2016
LV	Ministry of Economics	Ministry	21 July 2016
LV	Consumer Rights Protection Centre/ ECC Latvia	National authority	28 June 2016
LV	Competition Council	National authority	02 August 2016
MT	Malta Competition and Consumer Affairs Authority (MCCAA)	National authority	24 June 2016
MT	Regulator for Energy and Water Services ('REWS')	National authority	21 June 2016
MT	The Authority for Transport in Malta ('Transport Malta' or 'TM')	National authority	13 June 2016
MT	Malta Communications Authority ('MCA')	National authority	16 June 2016
NL	Ministry of Security and Justice	Ministry	11 July 2016
NL	Ministry of Economic Affairs	Ministry	23 June 2016
NL	Authority Consumer and Markets (ACM)	National authority	22 June 2016

NL	Netherlands Authority for the Financial Markets (AFM)	National authority	07 July 2016
NL	Complaints Board for the Advertising Industry (Reclame Code Commissie)	National authority	30 June 2016 and 11 July 2016
PL	Office of Competition and Consumer Protection (UOKiK)	National authority	27 July 2016
PL	Office of Electronic Communication (UKE)	National authority	27 July 2016
PL	Office of Energy Regulation (URE)	National authority	06 July 2016
PT	Directorate General for Consumers (DGC)	National authority	30 June 2016
PT	Authority for Economic and Food Safety (ASAE)	National authority	22 June 2016
PT	Directorate General for Consumers (DGC)	National authority	20 July 2016
PT	National Communications Authority (ANACOM)	National authority	01 July 2016
PT	Energy Services Regulatory Authority (ERSE)	National authority	28 June 2016
RO	National Consumer Protection Authority	National authority	29 June 2016
RO	National Authority for Management and Regulation in Communications	National authority	28 June 2016
RO	Regulatory Authority for Energy	National authority	30 June 2016
SE	Finansinspektionen	Ministry	08 June 2016
SE	The Swedish Consumer Agency (Konsumentverket)	National authority	21 June 2016
SE	Konkurrensverket	National authority	28 June 2016
SE	Energimarknads-inspektionen	National authority	13 June 2016
SE	Post och telestyrelsen	National authority	21 June 2016
SI	Ministry of Economic Development and Technology, Consumer and Competition Protection Division	Ministry, national regulatory authority	26 July 2016
SI	Market Inspectorate	National authority	19 July 2016
SK	Ministry of Economy of the Slovak Republic	Ministry	15 July 2016
SK	Ministry of Justice	Ministry	30 June 2016
SK	National Bank of Slovakia	National authority	29 June 2016
SK	The Regulatory Office for Network Industries	National authority	23 June 2016
UK	Business, Energy and Industrial Strategy (formerly BIS)	Ministry	11 August 2016
AT	Schutzverband gegen unlauteren Wettbewerb	Business association	15 July 2016
AT	Austrian Economic Chamber	Business association	09 August 2016
BE	VBO/FEB	Business association	29 July 2016
BG	Bulgarian Chamber of Commerce and Industry	Business association	13 June 2016

CY	Cyprus Association of Retail Trade Enterprises	Business association	17 June 2016
CY	Cyprus Advertising Regulation Organization	Business association	07 July 2016
CZ	Union of Trade and Tourism Czech Republic	Business association	14 June 2016
DE	German E-Commerce and Distance Selling Trade Association (BEVH)	Business association	29 July 2016
DE	Association of German Chambers of Commerce and Industry (DIHK)	Business association	09 July 2016
DE	Centre for Protection against Unfair Competition (Wettbewerbszentrale)	Self-regulatory institution for the enforcement of the Act against Unfair Competition	09 July 2016
DK	Danish Financial Supervisory Authority	Business association	16 June 2016
DK	The Confederation of Danish Enterprise	Business association	24 June 2016
DK	Creativity and Communication	Business association	29 June 2016
EE	Estonian Chamber of Commerce and Industry	Business association	17 June 2016
EL	SEV	Business association	27 July 2016
EL	ESEE	Business association	04 July 2016
FI	Finland Chamber of Commerce	Business association	07 September 2016
FI	Federation of Finnish Financial Services	Business association	05 September 2016
FR	Fédération du Commerce et de la Distribution (FCD)	Business association	27 June 2016 and 15 June 2016
FR	Fédération des industries électriques, électroniques et de communication (FIEEC)	Business association	18 July 2016
HR	Croatian Chamber of Economy	Business association	13 July 2016
HR	Croatian Chamber of Trade and Crafts	Business association	18 July 2016
HU	Hungarian Chamber of Trade and Industry	Business association	07 July 2016
HU	National Trade Association	Business association	06 July 2016
IE	RGDATA	Business Association	09 November 2016
IE	IBEC/Retail Ireland	Business Association	09 November 2016
IT	Assoelettrica	Business association	27 July 2016
IT	Confcommercio	Business association	15 July 2016
LU	Chambre des Métiers	Business association	06 September 2016
LU	Confédération luxembourgeoise du commerce	Business association	21 September 2016
MT	General Retailers & Traders Union ('GRTU') (represents SMEs in Malta)	Business association	14 June 2016
MT	Malta Employers Association (MEA)	Business association	23 June 2016
MT	Malta Chamber of Commerce, Enterprise and Industry (MCCEI)	Business association	23 June 2016
NL	Raad Nederlandse Detailhandel	Business association	20 June 2016

NL	Detailhandel Nederland	Business association	20 June 2016
PL	Conference of Polish Financial Businesses (KPF)	Business association	05 July 2016
PL	Polish Chamber of Commerce (KIG)	Business association	12 July 2016
PT	Portuguese Commerce and Services Confederation	Business association	07 July 2016
PT	Portuguese Association of Distribution Companies	Business association	08 July 2016
RO	Romanian Banking Association	Business association	30 June 2016
RO	Romanian Chamber of Commerce and Industry	Business association	28 June 2016
SE	Svensk handel	Business association	08 June 2016
SE	Energiföretagen	Business association	20 June 2016
SE	Stockholms lokaltrafik	Business association	15 June 2016
SI	Commercial Chamber of Slovenia	Business association	26 July 2016
SK	Union of Transport, Posts and Telecommunications	Business association	22 June 2016
SK	Association of Trade and Tourism of Slovak Republic	Business association	06 July 2016
SK	Slovak Banking Association	Business association	12 July 2016
UK	Federation of Small Business	Business association	30 August 2016
AT	Association for Consumer Information	Consumer organisation	26 July 2016
AT	European Consumer Centre Austria	Consumer organisation	26 July 2016
BE	Test Achats	Consumer organisation	17 January 2017
BG	Federation of Consumers in Bulgaria (FCB)	Consumer organisation	14 June 2016
BG	Bulgarian National Association Active Consumers – BNAAC	Consumer organisation	13 June 2016
BG	ECC Bulgaria	European Consumer Centre	14 June 2016
CY	Cyprus Consumer Organization	Consumer organisation	10 June 2016
CY	Cyprus Workers Confederation	Consumer organisation	01 June 2016
CY	Cyprus Consumer Union and Quality of Life	Consumer organisation	05 July 2016
CY	European Consumer Centre Cyprus	European Consumer Centre	28 June 2016
CZ	SOS Consumers Protection Association	Consumer organisation	03 June 2016
CZ	Czech Consumer Association DTEST	Consumer organisation	06 June 2016
CZ	Czech European Consumer Centre	European Consumer Centre	07 June 2016
DE	Federation of German Consumer Organisations (Vzbv)	Consumer organisation	11 July 2016
DE	German Conciliation Body for Public Transport (Söp)	Consumer organisation/ Arbitration agency	09 August 2016
DK	Danish Consumer Ombudsman	Consumer organisation	26 May 2016
DK	Danish Consumer Council	Consumer organisation	28 June 2016
DK	ECC Denmark	European Consumer Centre	16 June 2016
EE	Consumers Together	Consumer organisation	16 June 2016
EE	European Consumer Centre	European Consumer Centre	26 July 2016

EL	EKPOIZO	Consumer organisation	21 July 2016 and 28 July 2016
EL	KEPKA	Consumer organisation	22 July 2016
EL	INKA	Consumer organisation	29 July 2016
EL	Consumer Ombudsman	European Consumer Centre	25 July 2016
ES	CUS: Salut, Consum i Alimentació	Consumer association	16 November 2016
ES	Federació Unió Cívica de Consumidors i Mestresses de Casa de Catalunya (UNAE)	Consumer association	16 November 2016
FI	ECC Finland	European Consumer Centre	26 August 2016
FI	Finnish Consumer Association	Consumer organisation	06 September 2016
FR	Association Consommation, Logement, Cadre de Vie (CLCV)	Consumer organisation	22 June 2016
FR	Union Française des Consommateurs - Que Choisir (UFC)	Consumer organisation	29 June 2016
FR	EEC-France	European Consumer Centre	20 June 2016
HR	Croatian Union of Consumer Protection Organisations	Consumer organisation	04 July 2016
HR	Croatian Association for Consumer Protection	Consumer organisation	19 July 2016
HR	European Consumer Centre ECC – Croatia	European Consumer Centre	30 June 2016
HU	National Consumer Association	Consumer organisation	13 July 2016
HU	National Federation of Consumer Association	Consumer organisation	06 July 2016
HU	European Consumer Center	European Consumer Centre	13 October 2016
IE	ECC Ireland	European Consumer Centre	27 September 27 2016
IE	Bar Library Member	Consumer Rights Advocate	21 October 2016
IT	Consumer Association (Federconsumatori)	Consumer organisation	8 August 2016 and 11 August 2016
IT	Adiconsum	Consumer organisation	20 July 2016
IT	Altroconsumo	Consumer organisation	05 August 2016
IT	European Consumer Centre Italy	European Consumer Centre	20 July 2016
LT	Lithuanian bank customers association	Consumer organisation	05 August 2016
LU	Union Luxembourgeoise des Consommateurs	Consumer organisation	17 May 2016
LU	ECC Luxembourg	European Consumer Centre	05 September 2016
LV	Latvian Consumers' Association	Consumer organisation	01 July 2016
MT	Association for Consumer Rights	Consumer organisation	20 June 2016
MT	Ghaqda tal-Konsumaturi (Consumer Association – Malta)	Consumer organisation	15 June 2016
MT	European Consumer Centre – Malta	European Consumer Centre	17 June 2016
NL	Consumentenbond	Consumer organisation	2 June, 16 June and 28 June 2016
NL	Vereniging 'Consument en Geldzaken'	Consumer organisation	06 June 2016
NL	Europees Consumenten Centrum	European Consumer Centre	24 June 2016

PL	Consumer Federation	Consumer organisation	18 July 2016
PL	European Consumer Centre	European Consumer Centre	19 July 2016
PT	Arbitration Centre for Consumer Disputes of Lisbon	Consumer arbitration centre	12 July 2016
PT	Portuguese Association for Consumer Protection (DECO)	Consumer organisation	21 June 2016
PT	European Consumer Centre – Portugal	European Consumer Centre	20 June 2016
RO	Association Pro Consumer	Consumer organisation	29 June 2016
RO	Association of Romanian Users of Financial Services	Consumer organisation	29 June, 2016
RO	European Consumer Centre	European Consumer Centre	29 June 2016
SE	ECC Sweden	European Consumer Centre	03 June 2016
SI	Slovene Consumers' Association	Consumer organisation	25 July 2016
SI	Evropski potrošniški center	European Consumer Centre	27 July 2016
SK	Association for Protection of Consumer Rights (OMBUDSPOT)	Consumer organisation	20 July 2016
SK	Association of Slovak Consumer Entities	Consumer organisation	03 July 2016
SK	European Consumer Centre	European Consumer Centre	01 July 2016
UK	Which?	Consumer organisation	28 August 2016
UK	Consumer Council of Northern Ireland	Consumer organisation	31 August 2016
UK	European Consumer Centre	European Consumer Centre	26 August 2016

Source: Civic Consulting. Note: one additional interview is planned for January 2017 in Belgium.

Annex III Overview of rules in the national laws transposing the UCPD, MCAD and PID in the Member States

Table 16: Overview of Member States rules in the national laws transposing the UCPD regarding financial services or immovable property going beyond minimum harmonisation requirements

Country	Provisions going beyond minimum harmonisation requirements	
	Regarding financial services	Regarding immovable property
Austria	No	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 information available
Romania	No	No
Slovakia	No	No
Slovenia	No	No
Spain	Yes	Yes
Sweden	No	No
United Kingdom	Yes	Yes

Notes: According to country reports' fact sheets on transposition of directives in Member States' law - UCPD

Table 17: Overview of Member States provisions regarding specific regulatory choices/derogations PID

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, for small businesses with fewer than 9 full-time employees; businesses with fewer than 50 full-time employees where the product is not directly available to the consumer; a sales area smaller than 250m2, where that the shop is not part of a chain with more than 10 locations; at temporary markets or mobile sales facilities	Derogation for common price indications in Member States
Belgium	No	Yes, for sellers whose commercial premises are smaller than 150m2	Price per unit indication not mandatory for 6 types of food items: 1) pre-packaged food sold at a discount close to the best-before date; 2) food items offered for on-premises consumption in restaurant, cafés, hotels, hospitals, cafeterias and similar establishments; 3) wine conditioned in 75 cl bottles; 5) pre-packaged sweets and snacks and ice cream offered for immediate consumption of the whole unit; 6) packs of products in special gift packaging
Bulgaria	No	No	No
Croatia	No	No	No
Cyprus	No	No	No
Czech Republic	Act 526/1990 Sb. § 1 (3) Extension of the application to other sectors (general application for products, performances, works and services in every sector § 1 (1), and also for transfer of right and of immovable property § 1 (3))	Yes, if the product was sold in person; if the product was sold by self-service in a shop smaller than 400m2; if the product was sold in a vending machine	Derogation for antiquity, art, perishable goods etc.

Denmark	Yes: The requirement of price indications apply to electronic commerce to the extent it is possible to place an order. The rules apply to services as well.	No	Article 3(1) does not apply to sales by auction and sales of works of art and antiques (cf. Article 3(2). According to BEK 10002 it is possible to announce price reduction for a shorter period (2 weeks) by use of signage.
Estonia	No	No	No need to indicate the unit price for goods sold in auction and sales of works of art and antiques, products supplied in the course of the provision of a service; also in case of certain other product categories.
Finland	No	No	No
France	Extension to service providers.	No. However, breaches of the PID rules by non-self-service retail outlets with a sales area not exceeding 120 m2, have been considered with a certain degree of forbearance, in line with legislation prior to the PID.	Art. 5(2) allowing MS in the case of non-food products, to establish a list of the products or product categories to which the obligation to indicate the unit price shall remain applicable. Art. 4(1) allowing MS to provide that the maximum number of prices to be indicated be limited: identical products sold at the same price and displayed together can bear a single indication of the selling and unit prices
Germany	The German PAngV that transposes the PID is basically applicable to anyone that commercially sells goods to a person, that finally consumes the good. Therefore the scope is not limited to consumers (in the sense of EU law), but to everyone that is the eventual purchaser, e.g. the PAngV also applies, if a car is sold to a businessmen. In contrast it is not applicable to purchases from wholesalers to retailers. Different to the PID the PAngV does not address specific sectors.	Yes, the German legislature implemented the derogation for 'small direct salesmen' and 'small retailers'.	No specific information provided.

Greece	No	For traders with a sales floor not exceeding 50m2; for convenience stores, kiosks, and outdoor retail outlets.	The derogation of art.3.2 PID for products supplied in the course of the provision of a service and sales by auction and sales of works of art and antiques has been used.(See art.3.3 (a) and (b) KYA Z1-404). The waiver of art.5 PID has been used. Art.5 KYA Z1-404 includes table I and table II of non-food products and foodstuff respectively that are exempt from the obligation to indicate the unit price of products.
Hungary	Yes: The rules are applicable to products, i.e. movable property (except money, securities and other financial instruments), and natural energy usable as a product (Section 2 paragraph f) of Act CLV of 1997)	No	The rules on price indication are not applicable for products sold at auction, provided the starting bid is determined in the auction documents. The unit price shall not be indicated when the product is: a)under 50g, 50 ml or 5 cm, b)Sold from an automated machine, c)Sold in bulk, d)Is gift wrapped e)A foodstuff sold in a package for preparation of a particular meal.
Ireland	No	No	Products supplied under provision of a service and auctions sales and sales of works of art and antiques

Italy	No	No	The following products are excluded from the duty of indicating the unit price: a)Products which are sold without packaging; b)Products of different nature put in one single package; c)Products sold by means of vending machines; d)Products which are destined to be mixed with one another in order to create another product; e)Pre-packaged product which are exempted from the duty of indication of the net quantity; f)Pre-cooked products; pre-prepared products; products which contain elements which are separately packaged in one single package and that need an activity of the consumer in order to come to the final product; g)'Fantasy products'; h)Single-item ice creams; i)Non-food products which can be sold only per piece.
Latvia	Extension to service providers.	The price per certain unit of measurement does not have to be indicated at small sales points where it is not possible to ensure the indication of the price per certain unit of measurement in the manner easily identifiable and clearly legible for a consumer (Article 12)	The Regulations provided for the procedure of dual display of prices of products and services during the Latvia's accession to euro zone. The Regulations states that the price does not have to be indicated, *inter alia*, for a product which is utilised in providing a service and which is part of the service and in auctions and in marketing of works of art and antiques (Article 12).

Lithuania	No	Waived the obligation to indicate the unit price for products sold not in bulk in a market, kiosk, or other temporary sales facility, or by small businesses	Broadening the concepts of a consumer and a trader Waived the obligation to indicate the unit price if detergents are sold to the consumers and the price of one wash is indicated; Waived the obligation to indicate the unit price of some products; Additional measures indicating where the price is to be shown; Additional measures indicating how the price is to be shown (size etc); Article 4(2) of the PID was not transposed into Lithuanian law.
Luxembourg	Extension to services, except liberal professions, of the obligation to indicate unit price for every professional of all usual services proposed by the professional	For businesses whose sale area is less than 400 m2 and itinerant traders	Derogation for enumerated food products to indicate unit price; mandatory indication of the price unit for enumerated non-food products; derogation to indicate the unit price for products supplied in the course of the provision of a service
Malta	No	Yes: At the discretion of the Director	Reg. 6 of SL 378.09 lists the instances to which the said norms do not apply namely: goods supplied for the purpose of re-selling; goods sold in the course of the provision of a service; sales by auction or sales of works of art or antiques; advertisement for such goods unless the price is indicated in the advertisement. Furthermore the Director (Consumer Affairs) may exempt other goods if he considers that adherence would be 'excessively onerous' subject to any conditions that he may impose.

Netherlands	Yes	Yes: In Annex I use is also made of the option under Art. 6 PID to exclude certain small businesses. Annex I under E excludes 'products offered for sale on public markets by means of sales eloquence, where the sales price or unit price of the product are not settled in advance'	In Annex I of the 2003 Decree on Pricing of Products, the option under Art. 3 (2) PID to exclude works of art, services, auctions, and antiques is exercised.
Poland	No	No	The Act gave the authority to the Minister of Commerce to issue a regulation on publishing prices of products and services, which was published on December 9, 2015 and started applying as of January 1, 2016.
Portugal	Yes: National legislation sets out a few specific rules for the indication of prices in services contracts.	Decree-Law no. 138/90 contained a provision that exempted itinerant trading from the obligation to indicate the unit price. However, this provision was repealed in 2002.	PID is not applied to products supplied in the course of a provision of a service, to sales by auction or to sales of works of art and antiques, or where the unit price is not useful or may lead to confusion (e.g. products sold in quantities below certain limits or by the piece and different products sold in the same package).
Romania	No	No	No
Slovakia	No	No	No
Slovenia	No	Yes: For business with a sale area of less than 500m2	No

Spain	No	No	Use of this option with regard to products supplied in the course of the provision of a service; sales by auction; sales of works of art and antiques; stricter provisions on the display of the unit price; exclusions for products with a selling price identical to the unit price; products sold in quantities less than 50 g or ml, products of different nature sold in the same package; products sold by automatic vending machines; individual portions of ice cream; wines and alcoholic drinks with geographic nomination; fantasy food products; in Catalan Decree, jewellers and furriers are exempted for security reasons
Sweden	No	No	No
United Kingdom	No	Yes: For small businesses under 280m2.	Not applicable to products supplied in the course of a service (Regulation 3); not applicable to sales by auction and artwork/antiques (Regulation 3); not applicable to vending machines (Regulation 5(3)).

Country reports' fact sheets on transposition of directives in Member States' law - PID..

Table 18: Overview of MS extension of protection to B2B relations

Country	Extension of provisions of the UCPD to B2B relations		Other provisions going beyond the MCAD	
	Answer	Comments	Answer	Comments
Austria	Yes	*The UCPD's provisions generally also apply to B2B transactions.*	No	*N/A*
Belgium	Yes	*The following provisions of UCPD are extended to B2B practices: prohibition of three types of misleading advertisement; prohibition of one type of misleading omission; prohibition of three blacklisted practices: pyramid schemes, inertia selling, and the use of invoices or similar documents seeking payment*	Yes	*Additional specifics in the case of advertising for listing services in company guides in art. VI.107 CEL, addressing the illicit practices of the so-called advertising recruiters*
Bulgaria	No	*Since 2015 however there has been a new rule aiming at protecting the weaker party in B2B transactions from unfair acts or omissions of the party with the stronger bargaining position.* *Some courts also extend the application of the rules about unfair commercial practices between trader and consumers also to contracts between traders, when one of the parties is a 'one man company', acting outside their professional field*	No	*N/A*
Croatia	No	*N/A*	Yes	*A wide definition of the concept of "trader".* *In accordance with the provision of Art 5(2) of the MCAD, a system of collective protection of traders was introduced, meaning that certain organizations are ex officio entitled to initiate proceedings before the Commercial court against any suspicious advertising.*

Cyprus	No	*N/A*	Yes	*As for national rules going beyond the MCAD, the Trade Descriptions Law, Law 5/87 contains provisions (specifically, Section 5(2) and (3)), comparable to the ones on misleading omissions of the UCPD and to this extent, goes beyond the MCAD which does not touch upon misleading omissions. It should be noted however that the applicability of the Trade Descriptions Law, Law 5/87 to B2B relations is uncertain.* *Some of its provisions entail the term 'consumer' and are thus clearly not applicable to B2B relations. Other provisions however do not refer to the 'consumer' and it is in relation to those provisions that there is uncertainty with regards to their applicability to B2B*
Czech Republic	Yes	*The Czech norms extend the scope of the UCPD in many areas also to B2B transactions. According to § 2976-2990 CzCC, in the cases of a) misleading advertising, b) misleading identification of goods and services, c) creating a likelihood of confusion, d) free-riding on the reputation of an enterprise, product or services of another competitor, e) bribery, f) disparaging a competitor, g) comparative advertising, unless allowed as admissible, h) breach of business secrets, i) unsolicited advertising, and j) threat to health and the environment, competitors and consumers can request the violator according to § 2988 CzCC to refrain from competing unfairly or to return the injured party to the position they were in before the harm occurred. Not only can adequate satisfaction be requested but also compensation for damage and restitution of unjustified enrichment can be awarded.*	No	*N/A*
Denmark	No	*N/A*	Yes	*Generally speaking, the Danish marketing practices act provides a common framework for traders' marketing activities, including provisions on misleading and aggressive practices in order to protect the interests of consumers, businesses, and society. Hence, the regulation of B2B goes beyond the MCAD.*
Estonia	No	*N/A*	No	*N/A*

Finland	No	*N/A*	Yes	*The MCAD was implemented through the Unfair Commercial Practices Act, which operates primarily on its general clause that prohibits activity 'against good commercial practice'. Thus, redress is not limited to advertising or marketing, or the scope of the MCAD.*
France	Yes	*Only partially: art. L. 121-5 C.conso. The misleading practices of art. 6 UCPD and the black list of misleading practices from the UCPD (art. L. 121-2 and L. 121-4 C.conso.) are directly applicable to B2B transactions (see art. L. 121-5 C.conso.).*	Yes	*The scope of protection has been extended under French law to misleading practices. The misleading practices of art. 6 UCPD and the black list of misleading practices from the UCPD are directly applicable to B2B transactions.* *The misleading omission clause (art. 7 UCPD) does not apply to B2B relationships.*
Germany	Yes	*The UWG is generally applicable to B2B transactions, since there is no specific provision that limits the scope to B2C transactions. Exceptions are Sec. 3 para 3 UWG with the Annex (Black List), Sec. 5a para. 3 UWG.*	Yes	*Taking into account the minimum harmonisation approach of the MCAD, it is acknowledged that the transposing rule (Sec. 5 UWG) has to be interpreted differently regarding the advertisement's addressee. As regards consumers, the interpretation needs to align with Art. 5 UCPD, whereas for businesses Art. 2 lit. b, Art. 3 and Art. 8 para. 1 MCAD are decisive for the interpretation. In contrast to the UCPD itself, Sec. 5 para. 2 UWG, which transposes Art. 6 para. 2 lit. a UCPD, applies to B2B-relations as well under German law. As the requirements of Art. 6 para. 2 lit. a UCPD are stricter than those of the MCAD, this leads to a higher level of protection of companies in German law compared to the MCAD.*
Greece	No	*N/A*	Yes	*Misleading advertising is also covered by the law of unfair competition on art.1, 3 of N.146/1914. Furthermore, the code of advertisers as enforced by SEE also covers misleading advertising with detailed provisions that go beyond what is prescribed in the MCAD. As the code does not distinguish amongst addressees of the advertisement it can also be applied in B2B relations.*

Hungary	No	*N/A*	Yes	*The MCAD is implemented in a way to provide similar rules to the UCPD applicable for B2C transactions. It applies to 'business practice' that allows an investigation of a wider range of issues than advertising. There is reference to the 'average business' standard.* *However, there are no black listed practices available for B2B transactions and no reversal of burden of proof in front of the competent public authority.*
Ireland	No	*N/A*	No	*N/A*
Italy	Yes	*To microenterprises*	Yes	*Additional measures regarding the definition of "advertising" and permitted forms of advertising; additional conditions under which advertising is considered to be misleading*
Latvia	No	*N/A*	No	*N/A*
Lithuania	No	*N/A*	Yes	*Lithuania provided in the national law a broader definition of "advertising ", in comparison with one provided in Article 2(a) of the MCAD; Lithuania deviated in the national law from the definition of "misleading advertising", in comparison with one provided in Article 2(b) of the MCAD; Lithuania did not transpose Article 2(e) of the MCAD; Lithuania deviated from Article 3 of the MCAD; Lithuania deviated from Articles 4(e) and 4(f) of the MCAD*
Luxem-bourg	No	*N/A*	Yes	*In Luxembourg, effective protection in B2B relations is also and mainly reached by the concept of unfair commercial practice defined in article 14 of the 'Loi du 30 juillet 2002', which allow to take into consideration other acts - and not only advertising - which are against the fair competition.* *With regard to the forthcoming entry into force of the new law(law of the 23th Decembre 2016), B2B relations will no longer be regulated by this article 14 but only by the rules implementing the MCAD, i.e. articles 3 to 7 of the new law.*

Malta	No	*N/A*	Yes	*The remedies available are of a civil nature where the injured trader may seek redress against the offending trader before the competent civil court.* *A trader who acts in breach of prohibitions relating to comparative or misleading advertising may be sued by the injured party for damages or else be subject to a penalty.*
Nether-lands	Yes	*In 2016, an important statutory extension of the UCPD regime was introduced in Art. 6:194 (2) – (4) DCC. The new statutory regime opens up the possibility for businesses to claim on the basis of the tort of misleading omission of essential information and the tort of not properly and timely disclosing the commercial purpose of the information.*	Yes	*The original position of the Dutch legislature was to implement the MCAD in a broad sense; not only advertising but any commercially relevant public announcements fall within the scope. In the past, courts have therefore used the MCAD to evaluate not only advertising but also annual business reports, investment documentation, flyers, folders, public statements on business results outlook etcetera. Therefore, because of the initial choice to go beyond the minimum harmonisation character of the 1984 Directive, the Netherlands had already introduced a wider scope, which was continued with the MCAD.*
Poland	No	*Act on combating unfair competition (Ustawa o zwlaczaniu nieuczciwej konkurencji, 16 April 1993, Dz.U. 1993 Nr 47 poz. 211) applies a similar test for recognizing misleading and comparative advertising in B2B claims as for unfair commercial practices, though.*	Yes	*Penalisation of unfair competition acts, including misleading and comparative advertising*
Portugal	Yes	*Some misleading practices (e.g. concerning the trader's identity, the price or the object of the contract) are extended to B2B contracts.*	Yes	*Definition of misleading advertising going beyond minimum harmonisation (relies on UCPD definition), application of the regime on comparative advertising to consumers*
Romania	No	*N/A*	Yes	*Designated entities may also notify the enforcement authority; Legal facilities may be directed jointly against a number of traders; Legal facilities may be directed against code owners; Voluntary control by self-regulatory bodies*

Slovakia	No	*N/A*	Yes	*The definition of misleading advertising has been implemented almost verbatim from Art. 2 b) of MCAD, only in the Slovak regulation it has already included assets involved (the advertising of goods, services, real estates, a business name, trademark or designation of product origin and other rights and obligations).* *A more important feature of Slovak regulation is the alternative prerequisite that can indicate the misleading nature of advertisement, i.e. the advertisement is misleading also in the cases where it may injure consumers. In this regard the Slovak implementation provides a higher level of protection as the consumers are also entitled to claim legal protection against unfair competition under sec 53-55 of CommC.*
Slovenia	No	*N/A*	Yes	*The Consumer Protection Act contains some provisions, which also apply B2B and which go beyond the provisions of the MCAD on misleading advertising: a prohibition of indecent advertising, a demand that advertising messages must be written in a language easily understood by the consumers in Slovenia and a special rule that advertising may not contain any elements, which cause or may cause bodily, psychic or other harm to children, nor any elements exploiting or potentially exploiting their trustfulness or inexperience.*
Spain	No	*N/A*	No	*N/A*
Sweden	Yes	*Marketing Act, except 12 §*	Yes	*Provisions on misleading and comparative advertising are covered by the entire Marketing Act. It means that business operators enjoy the same legal protection as consumers.*
United Kingdom	No	*N/A*	Yes	*The public enforcement regime is supplemented by the availability of various (common law based) private law actions.*

Source: Country reports' fact sheets on transposition of directives in Member States' law and legal country expert clarifications.

Annex IV Overview of extensions of the application of the UCTD in the Member States

Table 19: Overview of MS extension of the application of the UCTD

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 The terms listed in Sec. 6 para. 1 KSchG are void, regardless whether they were individually negotiated or can be qualified as standard contract terms. Sec. 6 para. 2 KSchG only applies to standard contract terms.	No
Belgium	Yes: Belgium has extended the scope of the UCTD to individually negotiated terms.	No
Bulgaria	No	No
Croatia	No	No Namely, according to Article 52 of the CPA it is not permitted to assess whether the contractual terms relating to subject matter of the contract and adequacy of the price are fair, provided they are clear, easy understandable and noticeable.
Cyprus	No	No
Czech Republic	Yes The Civil Code has extended the application of the Directive regarding individually negotiated terms according to § 1813 CzCC	No
Denmark	Yes The General Clause applies to contracts in general, including B2C and B2B and all types of contract terms are within the scope.	Yes The General Clause applies to contracts in general, including B2C and B2B and all types of contract terms are within the scope.
Estonia	No	No
Finland	Yes National law has broadened the scope of the unfairness assessment to individually negotiated contractual terms	Yes National law has broadened the scope of the unfairness assessment to the adequacy of the price or remuneration.
France	Yes: France has extended the application of the Directive (art. L 212-1 C.conso.) to individually negotiated terms	No
Germany	No	No
Greece	No	No
Hungary	No	No

Ireland	No	No
Italy	No	No
Latvia	No	No
Lithuania	No	No
Luxembourg	Yes Luxembourg law provides the extension to individually negotiated terms.	No
Malta	Yes Article 44(1). Law provides that it is unlawful in consumer contracts to use unfair terms. The law does not include any exceptions or qualifications in relation to terms that are individually negotiated. Hence protection is provided to all terms.	No
Netherlands	No	No
Poland	No	No
Portugal	No	Yes UCT national legislation was not amended to exclude these aspects.
Romania	No	No
Slovakia	No	No
Slovenia	No	Yes Art. 4 (2) of the Directive - as regards the non-assessment of the adequacy of price – was not transposed. The possibility of the assessment therefore exists in Slovenian law. There is, however, no known case law of such assessment.
Spain	No Individually negotiated contract terms are excluded from the scope of application of both Act 7/1998 (Article 1 of this Act states that standard terms are pre-drafted clauses imposed in the agreement by one of the parties, without prejudice of their actual authority, their external appearance, their extension, and whatever other circumstances, having been drafted with the aim of being included within a plurality of agreements) and Royal Legislative Decree 1/2007 (Article 82 states that unfair terms shall be considered to be all clauses not individually negotiated and non-authorized practices against good faith principles, prejudicing consumers and users, by creating an imbalance between the rights and obligations of the parties under the agreement).	Yes Article 4.2 of the Directive was not explicitly transposed. This led to contradictory opinions and case law regarding the control of the main subject matter of the contract and the adequacy of price.
Sweden	No	No

United Kingdom	Yes The test of unfairness is not limited to, in effect, standard form contracts. The CMA, or other Regulator, is able to bring an application for an injunction (or interdict in Scotland) in relation to 'the use, proposing or recommending' of a relevant term or notice. This power also now extends to individually negotiated terms.	No

Source: Country reports' fact sheets on transposition of directives in Member States' law - UCTD.

Table 20: Overview of MS extension of UCTD provisions to B2B relations

Country	Extensions of provisions of the UCTD to B2B relations
Austria	Yes. The Austrian Supreme Court affirmed the use of § 6 KSchG [the B2C black and grey lists] as an indicative list for B2B contracts under certain circumstance ("Ungleichgewichtslage"). Under general civil law all standard contract terms are scrutinised under Sec. 879 para. 3 ABGB.
Belgium	No general rules on unfair terms for B2B transactions. There is however a specific provision in the Act on Late Payment in Commercial Transactions, namely art. 7, that provides that a contractual term which deviates from certain provisions of the Act can be reviewed by a judge if it is grossly unfair to the creditor.
Bulgaria	Since 2015 there has been a new rule aiming at protecting the weaker party in B2B transactions from unfair acts or omissions of the party with the stronger bargaining position – Article 37a the Protection of Competition Act. Following a number of cases in which big retail chains put pressure on their suppliers to accept contract conditions and clauses favourable mainly for the retailer, this new provision has been enforced. Some Bulgarian courts already justify the extended application of consumer protection legislation to terms in contracts between businesses. When checking the fairness of standard T&Cs of a certain trader this control may affect all contracts concluded between this trader and its customers, both consumers and legal entities (including, other traders). When a term in T&Cs used by the trader is proclaimed as unfair and void, as per some courts decisions, it is impossible to limit this legal effect only to contracts under the T&Cs which the trader concluded with consumers and to exclude the ones concluded with other traders under the same standard conditions.
Croatia	In Croatia, due to the fact that provisions of the Obligation Act have been harmonized with consumer protection Directives (including the UCTD) the concept of good faith and the significant imbalance in the parties' rights and obligations as well as the concept of the endangering of the purpose of the contract are applied in order to establish if the terms of the contract in B2B transactions are unfair.
Cyprus	No.
Czech Republic	The new Czech Civil Code Act 89/2012 Sb. enshrines the protection of the weaker party as a general principle according to § 433. The protection of the weaker party is automatically strengthened in all B2B relationships, not just SMEs, but it only ensures a situational protection. The decisive factor is whether the entrepreneur's act is unrelated to his business. Besides this general term, the new CzCC also covers special cases for protection of the weaker party against abuse, such as: - Usury (§ 1796); - Lesion, disproportionate shortening (§ 1793 et seq.); - Contracts of adhesion (§ 1798 et seq.); - Inability to negotiate a shorter or longer deadline to the detriment of weaker parties (§ 630 paragraph. 2); - Limitation or exclusion of rights to compensation under § 2898.
Denmark	The General Clause applies to contracts in general, including B2C and B2B and all types of contract terms are within the scope.
Estonia	Estonia has extended the applicability of the rules on unfairness control also to B2B relations.
Finland	No. B2B relations are governed by general contract law and a general clause.

France	The rules on unfair contract terms of the Code de la consommation do not apply to B2B transactions. However, Book IV title IV of the Code de commerce contains many provisions aiming at securing well-balanced and fair trade relationships. More specifically, art. L. 442-6(I)(2°) Code de commerce (which was introduced in 2008) entails a control on unfair terms in B2B-contracts (including terms defining the contract's object and the balance between price and performance). A court can hold a term unfair (and void) if it causes a significance imbalance in the rights and obligations of the parties, provided that one party has subjected (or at least attempted to subject) the other party to this term. What is more, the current revision of the Code civil (law of obligations) entails the introduction of a fairness-test applicable to all not individually negotiated standard agreement forms (excluded the terms pertaining to the subject-matter of the contract and the adequacy of the price). The newly drafted fairness-test of art. 1171 Code civil is based on the concept of the significant imbalance in the parties' rights and obligations. It does not refer to the principle of good faith.
Germany	Yes. Sec. 310 para. 1 BGB The law of unfair contract terms was initially developed to protect parties in B2B relations and that hence the regulation of this area of law in B2B contracts has a long history in Germany.
Greece	In Greek law, there is already a level of protection for SMEs from unfair contract terms. For unfair terms, the general definition of the consumer of art.1 par.4 (α) of N.2251/94 applies which includes legal persons and defines the consumer as the end user without requiring that they act outside their trade or profession.
Hungary	Key provisions of the UCTD are implemented without differentiating between B2B and B2C transactions. Although the key rules are extended to B2B contracts, the standard of protection is somewhat lower than in B2C contracts. The regulation of unfair terms in B2B contacts is limited to standard terms, and is not extended to individually not negotiated terms, the extension of which is only applicable for consumer contracts. While unfair terms in B2C contracts are null and void, unfair terms in B2B contracts are avoidable. The black and grey lists are only applicable to B2C contracts.
Ireland	No.
Italy	No.
Latvia	No.
Lithuania	No.
Luxembourg	All provisions of UCTD are extended to B2B.
Malta	No.
Netherlands	Under Dutch law, SMEs may invoke the open clause against unfair terms in standard terms used by their counterpart. The SME bears the burden of proof that a term is unfair. The conditions for the application of the unfairness test are the same as for B2C contracts. This implies that the protection against unfair terms is restricted to standard terms; core terms are excluded from the unfairness test unless they have not been drafted in plain and intelligible language. However, businesses that make use of the same set of standard terms, or that have 50 employees or more, or that are required to publish their annual financial statements including their balance sheet and the income statement and explanatory memorandum (large and medium-sized enterprises under European company law), are excluded from the protection of the unfairness test. Moreover, in cross-border B2B contracts the unfairness test does not apply, irrespective of a choice for Dutch law as the applicable law and irrespective whether the party relying on the standard terms is the Dutch or the foreign business. SMEs cannot invoke the protection of the black list or the grey list.
Poland	Polish law provides partially an extended protection against unfair contract terms, e.g. Article 805 of the Polish Civil Code in its paragraph 4 allows for such a control in case of insurance contracts concluded by any natural persons acting for purposes related to their trade or profession.

Portugal	Yes, the scope of application of the UCT national legislation does not draw a distinction between B2C and B2B contracts. The lists of unfair terms in articles 22 and 23 do not apply to B2B contracts.
Romania	No.
Slovakia	No.
Slovenia	In Slovenia, there are two different sources of unfair contractual terms law: the Consumer Protection Act, implementing the UCTD, and the Obligations Code (Art. 121-122) which is only applicable to B2B contracts. However, not so many B2B cases exist in practice. A possibility to invoke an unfair term in B2B contracts already exists in Slovenian law (Art. 121-122 Obligations Code). Under the existing regulation, a contractual term is unfair if it is 'contrary the purpose of the contract or good commercial practices', Art. 121 (1) Obligations Code. There is no mention of a significant imbalance in the parties' rights and obligations. However, a reference, although indirect, to significant imbalance may be deduced from Art. 121 (2) Obligations Code, which gives some examples of unfair clauses.
Spain	No.
Sweden	In Swedish law, there is already a law for combating unfair contract terms in B2B transactions, namely the law (1984:292) concerning contract terms between traders. The law is designed after the model of the law (1994:1512) on Consumer Contracts, which has been updated in order to fulfil the Unfair Contract Terms Directive.
United Kingdom	No.

Source: Country reports' fact sheets on transposition of directives in Member States' law and legal country expert clarifications.

Annex V Overview tables on injunction procedures in the Member States

Table 21: Overview of the Member States that have extended the scope of application of the injunction procedure

MS	Is the scope of application of injunctions extended to cover areas of consumer law that are not part of Annex I of the Directive, or consumer law in general?	
	Answer	Comment
AT	Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	Sec. 28a KSchG e.g. mentions also the general information duties of entrepreneurs and providers of services related to financial issues, and so-called "Heimverträge". For an extensive list, see the answer to the first question on the ID.
BE	Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	Belgian injunction procedure applies well beyond the scope of consumer law (e.g. competition and intellectual property, designation of experts and much more). Regarding consumer protection, the injunction procedure also applies to the protection of consumers of mobile telecommunication services.
BG	Yes, scope of application extended to cover consumer law in general	Any "other legislation that protect the interests of consumers"
HR	Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	According to Art 106 (1) of the CpA injunction procedure is also provided against persons who act against provisions of Act for the application of the Regulation (EU) no. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, so additionaly rights of consumers as bus or coach passengers (as weaker parties to the transport contract) are covered.
CY	No	
CZ	Yes, scope of application extended to cover consumer law in general	
DK	No	
EE	Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	The Consumer Protection Board may require termination of or refraining from activities harmful to the collective interests of consumers and for that purpose either issue a precept or file a claim at the court (§ 64 (1) of the Consumer Protection Act)
FI	Yes, scope of application extended to cover consumer law in general	
FR	Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	The national injunction procedure tied to civil actions carried out in the collective interest of consumers pertains to practices and clauses which are illicit under national law. It is not restricted to Annex I of the Directive. This type of civil action is however restricted to national organisations.

DE	Yes, scope of application extended to cover consumer law in general	
GR	Yes, scope of application extended to cover consumer law in general	
HU	Yes, scope of application extended to cover consumer law in general	The scope of application is very wide, including all disputes suitable for court procedure (based on Section 39 paragraph 1 of Act CLV of 1997).
IE	No	
IT	Yes, scope of application extended to cover consumer law in general	
LV	No	
LT	No, qualified entities of other EU Member States are entitled to apply for injunctions only in the areas of consumer law that are part of Annex I of the Directive. Yes, national entities may apply with a claim to a court for an injunction if a consumer public interest was infringed. The law does not limit the scope of "consumer public interest".	Please note that Annex I of the Directive was not fully transposed to the Lithuanian law, as the Lithuanian list does not contain the last addition to the list - Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR)
LU	Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	Code de la consommation, article L.320-1. Extension regarding price display
MT	Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	In the case of the Consumer Affairs Act – the injunctions procedure applies to Cap. 378 and any regulations made under that Act, and to any other laws relating to consumer protection as the Minister may designate (see art. 94(1)(c) of Cap. 378). Amongst the laws not relating to any of the Directives listed in the Annex in relation to which the injunctions procedure applies one can include the following: SL 379.10 'Home Loan Regulations' SL 378.14 'Denied Boarding (Compensation and Assistance to Air Passengers) Regulations
NL	Yes, scope of application extended to cover consumer law in general	For national cases the scope is broad: any claim for the benefit of the constituency of the organisation will be heard. For foreign qualified entities, the Annex I applies
PL	Yes, scope of application extended to cover consumer law in general	Pursuant to Article 21 para 1 and 2 of the above-mentioned Act, any practice harming collective consumer interests is prohibited and examples from Annex I are only listed as indication of possible infringements of such collective interests
PT	Yes, scope of application extended to cover consumer law in general	Article 2, no. 2 of Law 25/2004. The injunction procedure applies to any practice that violates consumers' rights.

RO	No	
SK	Yes, scope of application extended to cover consumer law in general	Under CPA as substantive statute (general procedural norms do not exist), special procedural norms exist only in cases of unfairness of contract terms and unfair commercial practice
SI	Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	Pursuant to Art. 74 (1) of the Consumer Protection Act the scope of application is extended, so that it covers all injunctions which are brought against companies which, in business with consumers, are using unfair contract terms, business practices or advertising activities contrary to the Consumer Protection Act and the act on the protection of consumers against unfair commercial practices, the act on consumer credit, the acts governing medicine and media, and, by doing so, are damaging the collective interests of consumers.
ES	Yes, scope of application extended to cover consumer law in general	General application of Royal Legislative Decree 1/2007 and Act 1/2000
SE	No	
UK	Yes, scope of application extended to cover areas of consumer law that are not part of Annex I of the Directive	See s.211 (‘domestic infringements’).

Source: Country reports' fact sheets on the Injunctions Directive.

Table 22: Overview table of whether the injunction procedure as foreseen by the Directive is regulated separately from the enforcement procedures foreseen by other EU Consumer Law Directives in the Member States

MS	Is the injunction procedure as foreseen by the Injunctions Directive regulated in your country separately (as a separate procedure or/and in a separate legal act) from the enforcement procedures foreseen by other EU Consumer Law Directives (the Unfair Contract Terms Directive or/and the Unfair Commercial Practices Directive or/and by the Consumer Rights Directive)?	
	Answer	Comments
Austria	Yes, separate procedures in separate legal acts	The UCTD'S procedural aspects are transposed in Sec. 28 seqq. KSchG, whereas the ID's transposition concerns both Sec. 28 seqq. KSchG and Sec. 14 UWG. Additionally, there has been an Act on Alternative Dispute Resolution, regulating aspects of Regulation (EU) 524/2013 and Directive 2013/11/EU.
Belgium	Yes, separate procedures in separate legal acts	Rules on injunctions can be found in the Judicial Code - not in the Code of Economic Law (CEL) where EU Consumer directives are transposed. Belgian rules go beyond the ID, in that urgency (a necessary condition to apply for an injunction under Belgian law) is irrefutably presumed in all matters falling within the scope of the ID.
Bulgaria	No, single procedure	Extended list of provisions to which injunction procedure is applicable – to "any other legislation that protects the interests of consumers"
Croatia	Yes, separate procedures in a single legal act	The injunction procedure is regulated in Art 106 CpA et seq. as procedure for the collective protection of consumers. The procedure does not exclude the possibility of initiating individual procedure for declaring the contract null and void, consumer's right to written complaints (Art 10 CpA), administrative procedure or traders misdemeanour responsibility(Art 138-140 CpA)
Cyprus	Yes, separate procedures in separate legal acts	The main difference is the prior consultation obligation that exists in the law transposing the ID but not in the laws transposing the individual Directives. Another is that the injunction procedure under the law transposing the UCTD allows for an injunction to be sought against trader associations while the law transposing the ID does not do so. There is no provision in any of the relevant laws that seeks to ensure coherence and this is problem identified in the report.
Czech Republic	No, single procedure	The procedure do not go beyond measures foreseen by the ID
Denmark	No, single procedure	

Estonia	No	There is a possibility of administrative procedure under § 64 of the Consumer Protection Act (issuing a precept and if the trader is not complying with it, then applying a penalty payment) as well as a court procedure. Both procedures go beyond the ID as they are available for all forms of violations of collective consumer interests. As court procedure has been used only once (in an unfair terms case) then practical problems concerning the coherence between the procedures have not yet emerged. There have been discussions within the Consumer Protection Board whether using an unfair term could constitute an unfair commercial practice entitling the Consumer Protection Board to issue a precept (and possibly penalty payment) but there is no case law yet.
Finland	Yes, separate procedures in separate legal acts	The ID did not change the law in Finland, since injunctions were already available under the CPA and sector-specific legislation
France	No, single procedure	Art. L. 621-7 in combination with art. L. 621-8 C.conso.
Germany	Yes, separate procedures in separate legal acts	The general procedural rules are set out in the Civil Procedure Act ("Zivilprozessordnung", ZPO). Additional provisions for the Injunction procedure are found in Sec. 5-12a UKlaG. As leges speciales they supersede the general rules of the ZPO. However, pursuant to Sec. 5 UKlaG, the ZPO is applied complementarily for everything that is not particularly regulated by the UKlaG. As far as injunctions against unfair commercial practices are concerned, Secs. 8-10 UWG contain the relevant provisions.
Greece	No, single procedure in a single legal act	The collective action of art.10 par 16 of N.2251/94 can request not only an injunction but also for pecuniary compensation for moral damages, temporary injunction as well as the acknowledgement of the right of consumers to restore the damages they incurred from the illegal behaviour of the trader. It should be noted that only injunction and pecuniary compensation for moral damages are exercised under the voluntary jurisdiction procedure.
Hungary	Yes, separate procedures in separate legal acts	Injunctions procedures are regulated in various acts separately from the acts implementing the UCPD and the CRD. Note that the enforcement procedure of unfair contract terms is regulated in the Civil Code together with other provisions implementing the UCTD.
Ireland	Yes, separate procedures in separate legal acts	Drafted in compliance with Directive 2009/22/EC. Application is made by qualified entities to the Circuit Court.

Italy	Yes, separate procedures in a single legal act	Art. 139 and 140 of the Consumer Code entitle the consumer associations listed in Art. 137 of the Consumer Code the power to ask a court to putting an end to abusive conducts which harm consumers' interests. In any case, relating to the implementing provisions of the mentioned directives, there is provided an additional protection system, which gives to the consumers' associations the power to ask the administrative authority for an injunction (in particular: Art. 27 Consumer Code concerning the violation of the implementing provisions of the UCPD; Art. 37 bis Consumer Code concerning the violation of the implementing provisions of the UCTD; Art. 66 Consumer Code concerning the violation of the implementing provisions of CRD).
Latvia	Yes, separate procedures in separate legal acts	Injunction procedure is foreseen in Article 15 of the Unfair Commercial Practices Prohibition Law, Article 25 of Consumer Rights protection Law, Article 213 of the Electronic Mass Media and Article 37 of the Cabinet of Ministers' Regulations No. 378 Procedures for Advertising Medicinal Products and Procedures by Which a Medicinal Product Manufacturer is Entitled to Give Free Samples of Medicinal Products to Physicians
Lithuania	Yes, separate procedures in separate legal acts	
Luxembourg	No, single procedure	
Malta	Yes, separate procedures in separate legal acts administered by different public authorities (see next column)	The majority of the Directives listed in the annex to the ID are dealt by the equivalent of the injunction powers (described as 'compliance orders' under Maltese law) of the Director General Consumer Affairs within the MCCAA. The DG can issue compliance orders with regard to the national laws implementing the following directives: UCPD UCTD Consumer Rights Directive Consumer Credit Directive Services Directive (2006/123/EC). The power to issue injunctions in relation to the other Directives listed in the annex of the ID is exercised by different sector specific authorities as described earlier. The procedures adopted in the applicable national legislation reflects to principal requirements of the ID and there is no substantial difference other than in the case of the injunction powers of the DG and of the MFSA are to some extent more feasible in so far as these authorities in the issue of injunction orders may also require any person to take any such measures as may be specified in the order in order to ensure effective compliance. The other point to note is that injunction order can be contested before diverse appellate fora which vary according to the authority which is issuing the order. Hence in the case of the Director General contestation of an injunction order may be lodged before the Consumer and Competition Appeals Tribunal, whereas contestation of an order by the MCA has to be lodged before the Administrative Review Tribunal.

Netherlands	Yes and no	The general procedure of Art. 3:305a – c DCC apply to all procedures, apart from the specific collective action procedure for unfair terms, which is regulated in Art. 6:240-243 DCC. The Supreme Court recently decided, however, that this specific procedure does not derogate from the general procedure, which implies that the general procedure is available to consumer organisations also in case of unfair terms (but only can serve to have the terms declared unfair without further consequences). Art. 3:305a – c DCC offers standing in court for any association or foundation incorporated with the aim to represent the interests of consumers in any consumer related case.
Poland	Yes, separate procedures in a single legal act	Act on protection of competition and consumers provides the President of the UOKiK with an authority to protect collective consumer interests. The President may thus start injunctions proceedings, negotiate with traders cessation of unfair practices etc. Article 99a (and further) of this Act regulate injunction proceedings against traders using unfair contract terms (see described in the text of the study). Art 100 (and further) of this Act regulate injunction proceedings when traders harm other collective consumer interests. One of the main differences in the procedures is that in case of injunctions related to the use of unfair contract terms only certain, specified categories of entities are entitled to notify the President of the UOKiK about this (Article 99a of the Act). In case of infringements of provisions on unfair commercial practices or implementing CRD – anyone may serve this notification (Article 100 of the Act). In case of procedure against infringement of UCPD- or CRD-based rules, the President of the UOKiK may also issue a temporary injunction for the trader to cease with such a practice, when continuation of this practice until a decision is issued could severely harm consumer interests (Article 101a of the Act).
Portugal	Yes, separate procedures in separate legal acts	Law no. 25/2004 (July 8) implemented into national law the ID. The injunction procedure is set out in separate legislation: a) Law no. 24/96 (Consumer Protection Act – CPA) applies to all cases not covered by specific legislation. b) Decree-Law no. 446/85 covers unfair commercial terms. Decree-Law no. 446/85 only applies when there is no specific provision on the CPA.

Romania	Injunction was introduced by a separate legal act in Romania: Government Decision no. 1553/2004 subsequently amended by Government Decision no 1822/2004; Government Decision no. 957/2008 on modification of the Annex of Decision no.1822/2004; Government Decision no. 404/2010, Government Decision no. 795/2011. However, no special procedure is provided for in the implementing act, thus the procedures under the laws enlisted in the annex to Government Decision 1553/2004 will apply in case of an injunction that only provides a single procedural rule, the 20 day timeframe within which the authority must solve the complaints.	The framework law does not go beyond the provisions of the ID. Injunction is not a separate procedure from the enforcement procedures of the implementing laws mentioned in the Annex of Government Decision no. 1553/2004 that enlists 13 legal acts for which an injunction is allowed. This annex does not go beyond the Annex of the ID.
Slovakia	Yes, separate procedures in separate legal acts	There are 4 procedures in cases of breach of collective interests of consumers: 1) Interim measure (summary proceeding) ordered by STI (under sec 21 CPA) 2) Interim measure ordered (summary proceeding) by The National Bank of Slovakia (in sector of financial services) 3) Interim measure (summary proceeding) ordered by court (without specific provision) 4) Judgment ordered by court in review of unfairness of contract terms and unfairness of commercial practices (under sec 301-306 CDPC)
Slovenia	No, single procedure	The scope of protection provided by an action for an injunction as regulated in the Consumer Protection Act is broader than the one foreseen by the Injunctions Directive. Art. 74 (1) of the Consumer Protection Act stipulates that an action for an injunction may be commenced in cases, where companies are using unfair terms, business practices or advertising activities contrary to this act and the act on the protection of consumers against unfair commercial practices, the act on consumer credit, the acts governing medicine and media, and by doing this are damaging the collective interests of consumers.

Spain	Yes, separate procedures in a single legal act	Act 3/1991 regulates (1) standing, (2) statute of limitations and (3) preliminary proceedings for actions against unfair commercial practices, including injunctions Act 7/1998 regulates collective actions against standard terms contrary to the law, including injunctions. It refers to (1) the possibility to submit the case to a previous conciliation; (2) standing and (3) statute of limitation Royal Legislative Decree 1/2007 regulates injunctions specifically. It contains rules on national and cross-border injunctions as well as standing and statute of limitations. All these rules contain cross-references to external legal texts (usually, Royal Legislative Decree 1/2007 and Act 1/2000). Act 1/2000 does not provide for tailor-made rules for injunctions (id est, a single procedure), but general rules on civil procedure.
Sweden	Yes, separate procedures in a single legal act	The relevant procedure is regulated in a single legal act, as a single procedure and these procedure does not go beyond measures foreseen by the ID.
United Kingdom	Yes, separate procedures in separate legal acts	As noted above in the report, there is some scope from streamlining the procedures in the Enterprise Act 2002 with other enforcement provisions (e.g. under the Consumer Rights Act 2015).

Source: Country reports' fact sheets on the Injunctions Directive.

Table 23: Overview table of entities entitled to bring an action seeking an injunction in the Member States

MS	Answer	Comments
AT	- Designated public bodies - Specified consumer associations - Competitors	*To the extent injunctions against unfair commercial practices (regardless whether misleading, aggressive commercial practices or comparative advertisement) are at issue, the following entities are entitled under Sec. 14 UWG:* *Business associations and government bodies, such as the Austrian Chamber of Commerce, the Federal Office of Competition, the Federal Labour Chamber, the Austrian Labour Union Association and the Chamber of Agriculture.* *To the extent unfair contract terms are at issue, the following entities are entitled under Sec. 29 KSchG: Austrian Chamber of Commerce, the Federal Labour Chamber, the Austrian Labour Union Association, the Austrian Farmworker Council and the Chamber of Agriculture, the "Verein für Konsumenteninformation (VKI)" and the "Seniorenrat".* *Pursuant to Sec. 14 para. 2 UWG and Sec. 29 para. 2 KSchG, designated consumer organisations are entitled to seek an injunction for, infringements of both the UCPD and the UCTD. However, please note that even if there are entitled public bodies, Austria does not have a public enforcement system. The entitled bodies have to bring their claims before a civil law court.*
BE	- Designated public bodies - Specified consumer associations - Individual consumers	*Persons who can apply for an injunction are listed in XVII.7 CEL.*
BG	- Designated public bodies - Specified consumer associations	
HR	- Designated public bodies - Specified consumer associations - Other	*1. Designated public bodies: Ministry of Economy, Ministry of Finance, Ministry of Maritime, Ministry of Health and Agency for Electronic Media* *2. Croatian Union of Consumer Protection Organisations-Potrošač* *Union of Organizations for Protection of Croatian's Consumers* *3. HAKOM as a regulatory authority is entitled to initiate proceedings*
CY	- Designated public bodies - Specified consumer associations	
CZ	- Authorized/registered consumer associations (6 organizations)	*1.Association of Czech Consumers, 2.dTest, 3. Consumer Defense Association – Syndicate, 4. Common defense, 5. Unicampus, 6. HELP - Cheated Consumers' Rights Association*
DK	- Designated public bodies - Specified consumer associations - Individual consumers - Other [the plaintiff must have a sufficient interest in the case]	*The ID is implemented in Act no. 1257 of 20 December 2000. It grants designated (foreign) authorities and organisation the right to to use the normal Danish procedure for injunctions.*
EE	- Designated public bodies - Specified consumer associations	

FI	- Designated public bodies	
FR	- Designated public bodies - Specified consumer associations	*The competence of the DGCCRF to bring an action seeking an injunction is based on Regulation 2006/2004, not on the ID.*
DE	- Designated public bodies - Specified consumer associations - business organisations	*Pursuant to Sec. 3 para. No 2 UKlaG also entitled are: Associations with legal personality for the promotion of commercial interests, insofar as their membership includes a considerable number of businesses marketing goods or commercial services of the same or a similar type on the same market, insofar as their staffing, material and financial resources enable them actually to perform the interest promotion functions laid down in their statutes.*
GR	- Specified consumer associations (N.2251/94, art.10 par.16)	*Consumer associations that have at least 500 active members and are enrolled in the consumer organisation register for at least a year.* *It is possible for two or more consumer associations of less than 500 active members to bring an action jointly, provided that the number of their combined members is 500 (N.2251/94, art.10 par.17)*
HU	- Designated public bodies - Specified consumer associations - Individual consumers	*Note that Section 6:105 of the Civil Code empowers a number of enforcement agents to commence injunctions procedures, i.e. the public prosecutor; the minister, or the head of any autonomous government authority, government office or central office; the head of the Budapest and county government offices and professional chambers and organizations (but the Civil Code does not implement the ID).*
IE		*Qualified entities are defined in the Directive for Member States other than Ireland. In Ireland The Competition and Consumer Protection Commission is the only body that can use the Directive as an enforcement mechanism.*
IT	- Designated public bodies - Specified consumer associations - Other	*Consumers' associations pursuant to Article 137, associations representing professionals, and Chambers of Commerce, Industry, Crafts and Agriculture*
LV	- Designated public bodies	*Consumer Rights Protection Centre can bring this action upon request of the responsible authorities and institution mentioned in list of Directive No.2009/22/EK, Article 4(3)* *Also Health Inspectorate (in accordance with Directive 2005/29 in area of medicine and Directive 2001/83/EC); Council of National Electronic Media (Directive 89/552/EEC)*
LT	- the SCRPA (a designated public body) - consumer associations, complying with statutory requirements. - in cases prescribed by laws: other state or municipal institutions and legal entities	*Individual consumers may also submit a claim to the court and seek an injunction, however such claims are regulated by general rules of civil procedure and are not subject to requirements of legal acts implementing the Injunctions Directive.*
LU	- Designated public bodies - Specified consumer associations (see code de la consommation, articles L.313-& L.313-2) - Individual consumers - Other : professional organisation	*Individual consumers and professional organisation are entitled to bring an action seeking an injunction in UCPD and UCTD matters*

MT	In accordance with article 2 of the Consumer Affairs Act , a 'qualified entity' – namely: A consumer association registered in accordance with Part IV of the Consumer Affairs Act (Cap. 378). The Minister may furthermore include any other voluntary organisation under this heading after consulting with the Consumer Affairs Council, an independent public body which has a legitimate interest in ensuring the protection of the collective interests of consumer in Malta or any other Member State ('MS') where such bodies exist, a voluntary organisation in any other MS whose purpose is to protect the collective interests of consumers Any qualified entity from any other MS including in the list of qualified entities published in the Official Journal of the EU.	*As explained earlier the Injunctions Directive has been implemented in different laws depending on the subject matter. The majority of the Directives listed in the Annex to the Injunctions Directives are catered for in Cap. 378.* *In the other instances the approach taken in identifying which entities are entitled to make an action seeing an injunction is similar to that under article 2 of Cap. 378 (cited in the first column). See for example the definition of 'qualified entity' reg.2 of Distance Selling (Retail Financial Services) Regulations (SL330.07).*
NL	Foreign qualified entities (Art. 3:305c DCC) Other	*For national cases, any association or foundation with legal personality can bring claims (Art. 3:305c DCC.). For cross-border claims by foreign entities the requirement of qualified foreign entity listed in their country of origin applies (Art. 3:305c DCC).*
PL	- Designated public bodies - Specified consumer associations - Individual consumers - Other	*Under Article 100 of the above-mentioned Act – anyone may notify the President of the UOKiK, who then may seek an injunction.* *Under Article 99a of the above-mentioned Act – individual consumers, consumer ombudsmen, ombudsmen of the insured, consumer associations and foreign organisations entitled to start injunction proceedings may notify the President of the UOKiK, who then may seek an injunction.*

PT	National injunctions: - Designated public bodies (Prosecutor's Office and Directorate-General for Consumers); - Consumer associations; - Trade associations; - Individual consumers. Cross-border injunctions: - Designated public bodies (Prosecutor's Office and Directorate-General for Consumers); - Consumer associations included in a list notified to the European Commission.	*Article 13, CPA and article 26, no. 1, Decree-Law no. 446/85.* *Articles 3 to 5, Law no. 25/2004.*
RO	Designated entities (consumer associations entitled by law to represent the collective interest of the consumers.	
SK	- Designated public bodies - Specified consumer associations	*Under sec 302 CDPC qualified entities are consumer associations or supervisory authorities stated in special statutes (e. g. STI, The National Bank of Slovakia). Abstract control in consumer affairs under CDPC is limited to review only unfair contract terms and unfair commercial practice in consumer contracts.* *Under sec 21 CPA a qualified entity is a consumer association – an interim measure ordered by STI in cases of collective interests in consumer law in general. STI can initiate proceedings ex officio, too.* *Under 35e para 3 Act No 747/2004 Coll. National Bank of Slovakia can order interim measures ex officio in cases of breaches of collective interests of financial consumers*
SI	- Designated public bodies - Specified consumer associations - Other	*Pursuant to Art. 75 of the Consumer Protection Act also a commercial association or chamber, in which the defendant is a member, are entitled to bring an action seeking an injunction.*

ES	- Designated public bodies - Specified consumer associations - Individual consumers - Other	*- Designated public bodies (National Institute of Consumer Affairs and its counterparts in the Regions and Local Governments, Chambers of Commerce): Articles 32 of Act 3/1991, 16 of Act 7/1998, 53 of Royal Legislative Decree 1/2007;* *- Specified consumer associations: Articles 32 of Act 3/1991, 16 of Act 7/1998, 11 of Act 1/2000, 53 of Royal Legislative Decree 1/2007;* *- Consumers: Articles 32 of Act 3/1991 (individual consumers, natural or legal persons), 6 and 11 of Act 1/2000 (individual consumers, natural or legal persons; groups of consumers whose members are determined or easily determined);* *- Associations, professional corporations or representatives of economic interests: Articles 32 of Act 3/1991, 16 of Act 7/1998;* *- Organisations from other EU Member States that protect collective and the diffuse interests of consumers and users: Articles 32 of Act 3/1991, 16 of Act 7/1998, 53 of Royal Legislative Decree 1/2007;* *-The Public Prosecutor: Articles 32 of Act 3/1991, 16 of Act 7/1998, 11 of Act 1/2000, 53 of Royal Legislative Decree 1/2007.*
SE		*A public body or a consumer organisation, according to a special list organized by the European Union and published in Official Journal*
UK	- Designated public bodies - Specified consumer associations	*See, in particular, ss.213 and 219C. See also Enterprise Act 2002 (Part 8) (Designation of the Consumers' Association) Order 2005/917.*

Source: Country reports' fact sheets on the Injunctions Directive.

Table 24: Overview table of sanctions for non-compliance with the injunction order in the Member States

MS	Answer	Comments
AT	Yes, a penalty of a fine for each day of non-compliance	*Regarding Art. 2 (1) b: Publication of decisions is possible in some cases.* *Regarding Art. 2 (1) c: The EO foresees, for instance, fines as sanctions.* *Under both the EO and Sec. 220 ZPO, the federal government is the beneficiary of the fines.*
BE	Yes, other sanction	*If the losing party does not comply with the injunction, the President of the commercial court may, at the request of the plaintiff, impose a penalty payment. The fine is paid to the public purse.*
BG	Yes, penalty of a fine for each day of non-compliance	*Article 226 the Consumer Protection Act – fine with an amount from 5000 BGN up to 25,000 BGN. The penalty is paid to the state.*
HR	Yes, penalty of a fine for each day of non-compliance	*According to Art 116 (4) CpA a fine (money penalty) will be paid to the state treasury (the public purse)*
CY	Yes, other sanction	*Fine, imprisonment or confiscation of property. Fine is paid to the public purse. This is according to Section 42, Law 14/60, which is adopted for the purposes of the injunction procedure by Section 6 of the law transposing the ID*
CZ	Theoretically yes, § 351 (1) Act 99/1963 Sb. [994]	*Max. 100.000 CZK (approx. EUR 3700)*
DK	Violation of an injunction may trigger penalty of a fine or imprisonment up to 4 months	*Fines are paid to the state.*
EE	No, no sanction	*No specific sanction but the court may order a fine for non-compliance*
FI	Yes, penalty of a fine for each day of non-compliance	
FR	Yes, penalty of a fine for each day of non-compliance	*To the public purse ('astreintes')*
DE	Yes, contractual penalty clause	*Under German law it is usually deemed necessary that the infringer sign a cease and desist declaration with a penalty clause due to the otherwise existing risk of repetition. This is paid to the claimant. Moreover, the claimant can ask for a fine (paid to the national budget) if the infringer violates this injunction, Sec. 890 para. 2 ZPO.*
GR	Yes, other sanction	*It is possible to request the temporary enforcement of the injunction order (N.2251/94, art.10 par.20). If granted, and the trader does not conform there is the threat of a penalty of up to 100.000€ and up imprisonment up to 1 year (ΚΠολΔ, art.947). The penalty would be paid to the plaintiff, the consumer organisation.*
HU	No, no sanction	

[994] While the possibility exists, no example of the application of this rule was found.

IE	Yes, penalty of a fine for each day of non-compliance	*The amount is to be specified in the Court Order and the payment is made to the Irish Exchequer (Central Fund). If payment is not made, the competent Minister may recover sum due as a simple contract debt.*
IT	Yes, pecuniary sanction	*Art. 140, Para 7 Consumer Code provides for non-compliance with the injunction order a sanction of an amount between EUR 516 and EUR 1032 for each non fulfilment or day of delay. The aforementioned amounts have to be paid to the Italian State Budget.*
LV	Yes, other sanction	*Sanctions are provided in the Latvian Administrative Violation Code. Article 175[9] provides In the case of the non-provision of information at the disposal of a person to an advertisement or consumer rights protection supervisory institution after a request therefrom within a specified time period and in the specified amount or of the provision of false information, as well as of the non-fulfilment of the lawful requests or decisions of the supervisory institution –a fine shall be imposed on natural persons in an amount up to EUR 700, but for legal persons – from EUR 70 up to EUR 14 000. Also Unfair Commercial Practices Prohibition Law provides for the sanctions. Article 15 states that supervising institution shall impose the fine for unfair commercial practice in amount of 10% of the annual turnover but not more than EUR 100 000*
LT	Yes, penalty of a fine for each day of non-compliance	*The legal acts transposing the Directive do not contain any specific provision. However, under general rules of Lithuanian civil procedure, in cases where the respondent does not complies with an injunction, the court may issue a fine of up to EUR 289 for each day of non-compliance.*
LU	Yes, penalty of a fine for each day of non-compliance	*Penalties should be paid to the plaintiff*
MT	Yes, penalty of a fine for each day of non-compliance and other sanction	*In the case of compliance orders und Cap. 378 the DG (Consumer Affairs) may impose both a one off administrative fine and /or a daily administrative fine (see art. 106A of Cap. 378).* *Administrative fines may also be imposed under the other sector specific laws implementing the injunctions directive – see for example reg. 13 of SL 409.17 and reg. 24 of SL 330.07.*
NL	Yes, penalty of a fine for each day of non-compliance	*To be paid to claimant*
PL	Yes, penalty of a fine for each day of non-compliance	*Pursuant to Article 107 of the Act, for every day of non-compliance the President of the UOKiK may fine a trader with a monetary fine of an equivalent of up to EUR 10 000*
PT	Yes, penalty of a fine for each day of non-compliance (periodic penalty payment)	*Article 10, no. 2, CPA.* *The fine is divided in equal parts between the State and the applicant.*
RO	The competent authorities apply the sanctions provided in the specific legislation that has been infringed.	

SK	Yes, penalty of a fine for each day of non-compliance and other sanction	*In a court procedure the dictum of the judgment in case of abstract control in consumer contracts is binding for everyone (sec 306 CDPC). It constitutes an enforcement order and the enforcement authority is entitled to impose fine up to EUR 30 000 to the trader for the violation of that judgment (sec 192 para 1 Enforcement Act). The fine is paid to state. The National Bank of Slovakia can cancel a license (permission) if a person in the sector of financial services violates the court decision* *In an administrative procedure –* *1. STI can impose a fine for breaches of consumer rights under CPA (including collective interests of consumer) up to EUR 66 400, in cases of repeated violations within twelve months up to EUR 166 000 (sec 24 para 1 CPA).* *2. The National Bank of Slovakia can cancel a license (permission) for a person who is entitled to provide financial services. It can also impose fines, up to EUR 700 000, in cases of repeated violations up to EUR 1 400 000 (sec 35g para 1 and sec 35f para 1 and 2 Act No 747/2004 Coll. Fines are paid to the state (Slovak Republic). STI can prohibit the trader from selling a product or providing services to consumers for up to three years in cases when the seller violates a previous decision within 12 months.*
SI	Yes, sanctions in form of fine	*Art. 226 and 227 of the Claim Enforcement and Security Act provide the procedure for execution of claims in cases of omissions. Pursuant to these articles the court orders the debtor to stop his activity, together with penalty for the case of acting against the order, for natural persons up to 10.000 EUR and for legal entities and sole traders up to 500.000 EUR, with regard to circumstances of every particular case; if the debtor acts against the order, the court executes the penalty (fine) and sets the next one higher. This can be repeated until the amount reaches 10 times the first penalty.*
ES	Yes, penalty of a fine for each day of non-compliance	*According to Article 711 of Act 1/2000, a judgement upholding an injunction will impose a fine ranging from EUR 600 to EUR 60 000 of delay in the enforcement of the judgement within the time limit set forth therein. The amount of this fine will depend on the nature and relevance of the damage caused and the economic capacity of the party who has been condemned. Such fine shall be paid to the Public Treasury.*
SE	No, no sanction	
UK	Yes, other sanction	*A fine and potentially imprisonment (see s.220 and Phillimore v. Surrey County Council [2010] EWCA Civ 61).*

Source: Country reports' fact sheets on the Injunctions Directive.

Table 25: Overview table of parties bearing the costs of an injunction procedure in the Member States

MS	Answer	Comments
AT	The costs are as a rule borne by the losing party	*Regarding proceedings instituted by privately organised qualified entities, Sec. 40 seqq. ZPO establishes that each party has to first bear its costs itself unless the costs have been induced by both or by the court in the interest of both. In the case of the latter, both have to commonly bear the costs. The party which loses the case has to reimburse the opposite party's legal costs. Where each party succeeds on some and fails on other aspect of the case, costs have to be shared proportionally.*
BE	Costs are borne by the losing party	*The Judge may however take circumstances into account and exempt the losing party from paying part of the costs.*
BG	The costs are as a rule borne by the losing party	
HR	The costs are as a rule borne by the losing party	
CY	The costs are as a rule borne by the losing party	*But by virtue of Section 43 of the Courts Law, Law 14/60, the court has full discretion to decide who (and to what extent) is to bear the costs of civil proceedings.*
CZ	The costs are as a rule borne by the losing party	
DK	The costs are as a rule borne by the losing party	
EE	The costs are as a rule borne by the losing party	*Certain deviations made by the court possible*
FI	The qualified entities are exempted from costs	
FR	The costs are as a rule borne by the losing party	*Art. 700 Code de procédure civile («condamnation aux dépens»).* *Not all the costs will however be covered.*
DE	The costs are in general borne by the losing party	*This is the general rule in German civil procedure (Sec. 91 ZPO), which is applicable under Sec. 5 UKlaG. There is no exception for qualified entities. However, qualified entities which are expected to cope without a lawyer in average cases can only receive a lump sum fee if they win. This is, for example, currently set at 230 EUR for the Wettbewerbszentrale. Please note that qualified entities are to certain extent funded by the federal government and are therefore able to bear the risk of losing in court.*
GR	The costs are as a rule borne by the losing party	
HU	- The costs are as a rule borne by the losing party -The qualified entities are exempted from costs - Some administrative procedures in front of public authorities are free of charge.	*Consumer protection organizations are exempted from the costs of court procedure under Section 5 paragraph 1 subparagraph b) of Act XCIII of 1990 on Fees.*

IE		*S.I. No. 555 of 2010 specifies that 'nothing in the regulations affects the Court's power to make an order for costs'. However, as these Regulations have never been invoked in an Irish court, there is no answer possible to this question.*
IT	The costs are normally borne by the unsuccessful party	
LV	The qualified entities are exempted from costs	*Article 25(11) of the Consumers Rights Protection Centre: The Consumer Rights Protection Centre, in recovering expenses in respect of the laboratory or other type of expert-examination of goods purchased or services utilised by consumers, shall be released from the payment of court costs.*
LT	The costs are as a rule borne by the losing party	*If the claim is submitted for the protection of a public interest, the claimants are exempt from stamp duty (Article 83(1)(5)). Thus, all entities filing a claim under the legal acts implementing the Injunctions Directive are exempt from stamp duty. However, if they lose the case, the costs (litigation expenses) of the opposing party will still be borne by the losing party.*
LU	Each party bears its own costs, the court estimate is inequitable to let a part of the costs to a party	
MT	- The costs are as a rule borne by the losing party - Each party bears its own costs -The qualified entities are exempted from costs	*Each party bears its own costs in relation to the procedures before the competent regulatory authority. If the decision of the regulatory authority in relation to the issue of the compliance order is contested before the competent appellate forum – provisionally each party will bear its own costs – however the competent adjudicative body may decide on the matter of costs in favour of one party or the other.* *There are no exemptions as to who bears the costs in such proceedings.*
NL	The costs are as a rule borne by the losing party	*Cost shifting rules are operated on the basis of modest tariffs, not full cost orders*
PL	- The costs are as a rule borne by the losing party -The qualified entities are exempted from costs	*Pursuant to Article 77 of the above-mentioned Act trader who was found infringing the provision of the Act is bound to pay the costs of an injunction procedure. Para 2 of this provision specified that in justified circumstances traders may be obliged to pay the costs only partially or not at all.* *Article 78 specifies that regardless of the outcome of the procedure, traders may be obliged to pay costs resulting from their obviously wrongful behaviour (e.g. hiding information).* *Pursuant to Article 58 para 2 of the above-mentioned Act, if one of the parties asks of an expert's opinion they may be obliged to pay a deposit to cover some of the expert's costs. If no practice harming collective consumer interests is found, these expert's costs are covered by the State Treasury, Article 58 para 3.*
PT	- Consumer associations and consumers: The costs are as a rule borne by the losing party. - Designated public bodies: Exemption from court costs.	*Article 25, no. 1, Decree-Law no. 34/2008 (February 26) repealed all previous exemptions.* *Article 4, no. 1, pars. a) and g), Decree-Law no. 34/2008. This exemption does not apply to other costs (e.g. with attorneys).*

RO	This is established in the laws that fall under injunction. Most of these laws provide for free of charge administrative procedure.	
SK	The costs are as a rule borne by the losing party	
SI	The costs are as a rule borne by the losing party.	
ES	- Costs are as a rule borne by the losing party: Articles 394.1 (first instance) and 398.1 (appeal) of Act 1/2000 - Each party bears its own costs and share common costs if cases are partially upheld or dismissed: Article 394.2 of Act 1/2000 -The qualified entities are exempted from costs: Second Additional Provision of Act 1/1996	*The costs are as a rule borne by the losing party, unless the case poses serious de facto or de iure doubts.* *If the upholding or dismissal is partial in the first instance, each party shall pay the costs involved in his proceedings and the common costs shall be shared equally, unless there are reasons to impose the costs on one of these as she litigated recklessly. In appeal, none of the litigants shall be ordered to pay the costs of appeals.* *Consumer associations are exempted from costs without having to prove lack of sources to bring a claim (Second Additional Provision of Act 1/1996). A new Project of Law on Legal Aid (Ministry of Justice, 2014) intended to limit the application of this exemption to superregional consumer associations, legally established and registered in the State Registry of Consumer Associations.*
SE	The costs are as a rule borne by the losing party	

UK	*Which?* noted: 'Court action in the UK is very expensive. Not only does the enforcer have to bear its own costs of bringing proceedings, if the enforcer loses the action then it also has to pay the trader's legal costs, which could be very significant. This problem is often exacerbated by an inequality of arms as between a consumer organisation or public enforcer on the one hand, and a large corporation with a substantial litigation budget on the other…The Directive itself is silent on costs. For *Which?*, the cost of litigating, and our exposure to the risk of paying the trader's costs, has inevitably been a key consideration when contemplating action. The same is true for Trading Standards, who tell us that pursuing civil cases is often too costly for them, and that adverse costs risk – particularly in the context of falling local authority budgets – is a significant factor in deterring actions. Importantly, Trading Standards do not have rights of audience in the civil courts (as opposed to the criminal courts, where they do) which means they have the additional cost of hiring counsel.'	

Source: Country reports' fact sheets on the Injunctions Directive.

Table 26: Overview table of whether effects of individual injunctions orders are extended to the future infringements and/or same or similar illegal practices (of other traders) in the Member States

MS	Answer	Comments
AT	No	*According to Austrian law court decisions have effect only inter partes with regard to the subject matter in dispute, Sec. 411 ZPO, Sec. 12 ABGB.*
BE	Yes	*Note: The President of the Commercial Court can issue an order even when the infringement has ceased 'as long as the risk of repetition of the infringement cannot objectively be excluded' (Case 1986-87, Court of cassation, 14 November 1986; Court of cassation, 29 May 2009.)*
BG	No	
HR	No	*Under Art 117(1) CpA the effects of the decision in which there is an individual injunctions order is also extended to the future infringements and/or same or similar illegal practices of the trader against which the procedure was initiated towards all consumers*
CY	No	
CZ	To the same illegal practice of the same traders to other consumers - Theoretically yes according § 159a (2) Act 99/1963	*No existence of practical experiences*
DK	Yes	*An identical illegal practice would be considered a failure to comply with the injunction.*
EE	No	
FI	Yes	*Injunction on pain of fine*
FR	Yes	*The erga-omnes effect of injunctions against unfair terms is laid down in art. L. 524-1(2) and (3), L. 621-2(2), L. 621-8(2) C.conso.*
DE	Yes	*Actually, a judgment in a civil law case binds only the parties themselves ("inter partes"). However Sec. 11 UKlaG deviates from this general rule stating that a trader cannot rely on a trading term that has been held unfair previously.*
GR	Yes and no	*Art.10 par. 20 of 2251/93 states that 'the legal consequences of the decision arising from this decision are valid for everyone, even if they have not been litigant parties.' It is accepted that this provision should be interpreted contractively so as not to conflict with the Greek law on res judicata. This means that individual consumers can invoke the injunction order for the violation e.g. an unfair term but it is ultimately not binding for the court.* *However, it is possible to extend the res judicata to all traders via the mechanism of N.2251/94, art.10 par.21. According to that provision, the Minister of Development, invoking reasons of public welfare may issue a decision (which is a law of the state), extending the res judicata of an irrevocable injunction order to all traders.*
HU	No	
IE	No	
IT	See comment	*Individual injunctions orders may have a role as precedents, even if in the Italian legal system the precedent is in itself not binding.*
LV	No	

LT	No	*Injunctions only cover the actions indicated in the injunction and are only directed at a specific trade (respondent).*
LU	No	
MT	Debateable	*The relevant provision of the law empowers the DG to require any person engaging or proposing to engage in any unfair commercial practice to discontinue or refrain or to take any measures as may be specified in the order. One may argue that such a provision can be applied to all persons who may be engaging in such a practice. To date however there has been no specific order in this regard and consequently there is no case law which may assist in interpreting this provision. (See art. 94(1) of Cap. 378).*
NL	No	*No ex parte effects. However, the injunction claim can have informal res judicata effect on the points of law to benefit of others in similar cases*
PL	- Yes - No	*The injunction order is extended to past and future practices of the same trader against other consumers, but not to practices of other traders.*
PT	Yes (trader concerned) No (other traders)	*Injunction orders are limited to the same or similar unfair terms used by the trader concerned (article 32, no. 2, Decree-Law no 446/85).*
RO	No	
SK	Yes	*It is applied only in court procedure and is limited to unfairness of contract terms and commercial practices. Under sec 306 CDPC dictum of the judgment in abstract control of consumer contracts is binding for everyone.* *In individual cases, under 53a CC, if the court determined some contractual condition in the consumer contract made in multiple cases, and it is usual that the consumer does not affect the content of the contract in a significant way, or in the general business conditions, to be invalid due to the unacceptability of such condition, or did not award the performance to the provider due to such condition, the provider shall refrain from using such condition or any condition with the same meaning in contracts with all consumers. The provider shall have the same obligation even if the court ordered the provider to render the consumer unjust enrichment, compensate for damages or pay adequate financial compensation on grounds of such condition. The legal successor of the provider shall have the same obligation.*
SI	No	
ES	No	
SE	No	
UK	Yes	*See s.217(6): 'A person complies with this subsection if he—(a) does not continue or repeat the conduct; (b) does not engage in such conduct in the course of his business or another business; (c) does not consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship (within the meaning of section 222(3)).'*

Source: Country reports' fact sheets on the Injunctions Directive.

Table 27: Overview of Member States that have taken specific measures regarding the publication of the decision and/or the publication of a corrective statement

MS	Answer	Comments
AT	Yes	*Sec. 25 UWG indicates that in certain cases it is possible (in other cases mandatory) to order the publication of the court's decision at the expense of the convicted party. Via Sec. 30 KSchG this provision in the UWG also applies to injunctions against unfair contract terms and injunctions pursuant to Sec. 28a KSchG.*
BE	Yes	*At the request of the plaintiff, the President of the commercial Court may order the publication of his decision or a summary of it (Art.XVII.4 CEL). Publication may be ordered only where it contributes to the cessation of the infringement (Art.XVII.4 CEL §2)*
BG	Yes	*According to Article. 187 item 1 CPA. When consider that a commercial practice or action constitutes a violation of acts listed in Article 186 (to which the injunction procedure is applied), the court may oblige the manufacturer, importer, trader and supplier to announce publicly the decision or part thereof and / or to make a public corrective statement to remove the effect of the infringement.*
HR	Yes	*According to Art 115 the court may order the defendant to publish the decision at its own expense*
CY	No	*No other than mentioning the power of the court to order such publication*
CZ	Theoretically yes, but the claimant should ask in his petition for publication § 155 (4) Act 99/1963 but just regarding unfair competition cases (incl. Unfair business practices)	*A publication provision of court decision in general is missing*
DK	No	
EE	Yes	*The conclusion of a court judgment whereby the person recommending application of a standard term is obliged to terminate recommending and to withdraw the recommendation of the term shall, in addition, set out the requirement to communicate the court judgment in the same manner as the recommendation was communicated. The court may require that the user of the standard terms communicate the court judgment in the manner determined by the court or may determine an additional manner for communication of the judgment (§ 443 (2) of the Code of Civil Procedure).*
FI	Yes	*All decisions are published on the websites of the Competition & Consumer Authority*
FR	Yes	*L. 621-11 C.conso.*
DE	Yes	*This is governed by Sec. 7 UKlaG or alternatively Sec. 12 para. 3 UWG. If the claimant succeeds, he can apply for the publication of the judgment in the "Bundesanzeiger" at the defendant's expense or at his own expense in any other medium. However, the decision is left to the discretion of the court, which also rules on the details of the publication.*
GR	No	*Law only states that suitable publication of the decision or corrective statement can be order with no further qualifications*

HU	Yes	*Under Section 38 paragraph 6 of Act CLV of 1997 the court may order the publication of a statement, upon the claimants' request. The court will decide on the content of the statement and the method of publication. Publication is in particular possible in a daily newspaper with country-wide distribution and on the Internet.* *Section 16/E of Act CVIII of 2001 contains detailed rules on the publication of an administrative decision.*
IE	Yes	*The Circuit Court makes provision for publicity when making the order.*
IT	Yes	*The decisions of the judges or of the admnistrative authority may be published on national newspapers. The decisions of the administrative authority may be published also on the institutional website of the authority.*
LV	Yes	*Article 25(8) of the Consumer Rights Protection Law states that If a violation of the consumer rights has been determined, which affects group consumer interests (collective interests of consumers) and it may cause losses or harm to consumers, as well as to a particular consumer, the Consumer Rights Protection Centre, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to carry out one or several following activities:* *1) to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period. In accordance with Article 15[1] of the Unfair Commercial Practice Prohibition Law (1) A written commitment is a document, which upon proposal of the Supervisory Authority is signed by the performer of commercial practices, committing to eliminate the detected violation within a specified time period. A written commitment may include the commitment of the performer of commercial activities:* *1) not to perform specific activities;* *2) to perform specific activities, also to provide additional information necessary in order to ensure the conformity of commercial practices with the requirements of this Law, to publish a notification in a communication medium conforming to the respective commercial practices, in which unfair commercial practices are withdrawn;* *3) to reimburse the losses caused to consumers.* *(2) Upon signing a written commitment in which the violation, as well as the way and time period for elimination thereof is indicated, the performer of commercial practices acknowledges that he or she has committed the violation detected. The written commitment shall be deemed received (enter into effect) from the moment when the Supervisory Authority has approved its acceptance, certifying in writing to the performer of commercial activities that the relevant measures are sufficient for elimination of the violation and its impact. The Supervisory Authority shall notify acceptance of the written commitment in accordance with the procedures laid down in the Law On Notification. The time period for elimination of the violation shall not exceed the time period necessary for the performer of commercial practices to take the intended measures and to ensure the conformity with the interests of consumers, and usually may not be longer than three months, except*
LT	Yes	*Consumer associations and other state or municipal institutions or other legal entities must:* *(i) no later than within 5 working days from the day the court accepts the claim as admissible, inform the SCRPA. The SCRPA will publish the information on their website.* *(ii) no later than within 5 working days from the day the court issues a decision, to provide a copy of the decision to the SCRPA. The Authority, after the decision enters into effect, will publish the decision on their website.*

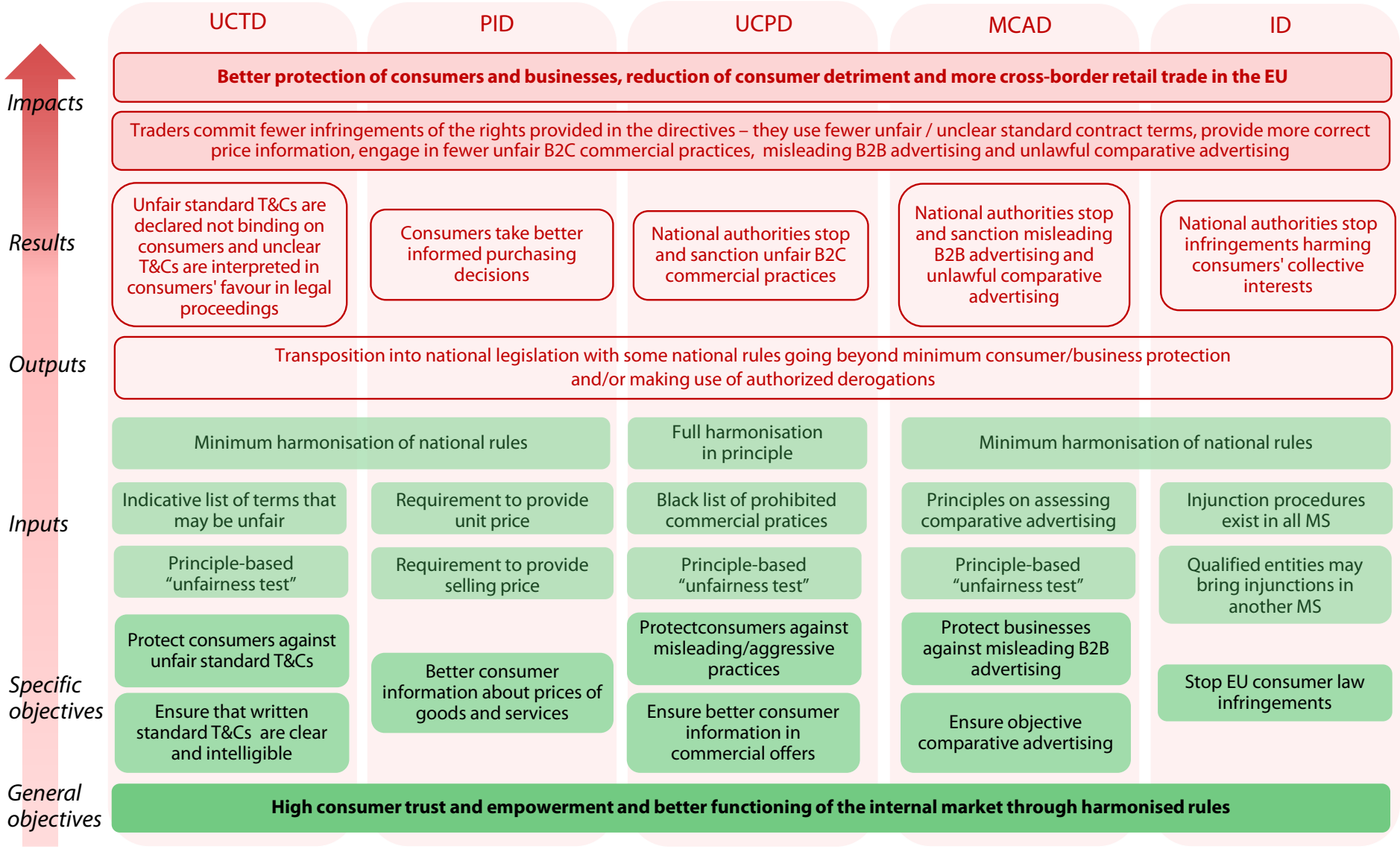
LU	Yes	*Publications can be order in and/or out of the point(s) of sales of the infringer and/or in newspapers and/or any other manner*
MT	Yes	*Yes in the case of compliance orders under Cap. 378 the DG may require 'any person' to publish the order in full or in part in such form as the DG 'consider to be appropriate and adequate'* *The DG may moreover require the publication of a corrective statement as may be required in the order.* *Cap. 378 further states that publication must be made in at least two daily newspapers and if appropriate in any other medium of communication and this at the expense of the person against whom the order is issued.* *If publication is not made then the DG may proceed to effect publication themselves in which case they are empowered to recover any covers relating thereto from the person against whom the order was made. (See art. 101 of Cap. 378).* *Similar though not identical measures exist under the other national (sector specific) laws which implement the ID (see for example: reg. 20 of SL 330.07).*
NL	No	*General rules apply*
PL	Yes	*Pursuant to Article 23b of the Act if the President of the UOKiK assesses a standard contract term as unfair, the President may oblige the trader to issue a corrective statement in a form and with content as stated in the decision. The President of the UOKiK may also decide to publish the decision, partially or in full, at the trader's expense. Article 26 of the Act states the same for other injunction procedures.*
PT	Yes	*The decision is published automatically (article 11, no. 3, CPA).*
RO	No	
SK	Yes	*Under sec 305 para 2 CDPC the plaintiff is entitled to ensure the publication of the judgment in abstract control in consumer contracts in appropriate form.*
SI	Yes	*Pursuant to Art. 74 (2) of the Consumer Protection Act the plaintiff can demand the legal decision to be published on the defendant's costs. The court may decide whether and to what extent the reasons for the decision are published.*
ES	Yes	*Total or partial publication of the decision and publication of a corrective statement are foreseen by Articles 32 of Act 3/1991 and 221.2 of Act 1/2000*
SE	No	
UK	Yes	*See, for example, s.217(8).*

Source: Country reports' fact sheets on the Injunctions Directive.

Annex VI Intervention logic of the EU consumer law and marketing Directives

The following figure presents the revised intervention logic and shows the interlinkages between the directives in terms of general and specific objectives, inputs, outputs and the intended results and impacts.

Figure 11: Refined intervention logic of the EU consumer and marketing law directives



Annex VII Analytical framework

Table 28: Overview of general and specific evaluation questions for the Study to support the Fitness Check of EU Consumer law

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
Effectiveness	Rules for consumer protection	1.1.1a Unfair Contract Terms Directive	– Extent to which the principle-based approach under this Directive has been effective overall; – What are the practical benefits for consumers of the indicative list of unfair terms annexed to the Directive? – Extent to which the "black" and/or "grey" lists of unfair contract terms adopted in certain Member States represent an advantage for consumer protection compared to the purely indicative list of the Directive; – What are the effects of limiting a court decision establishing the unfairness of an unfair term to the individual relationship between the specific trader and the consumer? – What would be the expected outcome of extending the effect of such court decision to all contracts concluded with a given trader, or to all contracts containing the same contract term? – Extent to which the contractual transparency requirements under the Directive have contributed to a high level of consumer protection; – Is there scope for strengthening the requirement for clear and intelligible contract terms, for example by attaching contractual consequences to unclear and unintelligible contract terms? – Have the extensions of the application of this Directive (to individually negotiated terms or to terms on the adequacy of the price and the main subject-matter) put in place in certain Member States provided an advantage for consumer protection?	– Assessment of stakeholders concerning the effectiveness of the principle-based approach – Identification of practical benefits of the indicative list of unfair terms for consumers – Assessment of stakeholders and legal experts concerning the extent to which the black/grey lists have contributed to a high level of consumer protection in the MS that have adopted them – Identification of possible benefits of: a) extending the effect of court decisions establishing the unfairness of an unfair term to all contracts concluded with a given trader, or to all contracts containing the same contract term; b) strengthening the requirement for clear and intelligible contract terms – Assessment of the extent to which the contractual transparency requirements under the Directive have contributed to a high level of consumer protection – Assessment of stakeholders and legal experts concerning the benefits of extending the application of this Directive (to individually negotiated terms or to terms on the adequacy of the price and the main subject-matter) for consumer protection	Stakeholder interviews with : – National consumer enforcement authorities – Responsible ministries – Relevant national regulatory authorities – National consumer organisations and EU umbrella associations – Business associations and EU umbrella associations Online consultation Legal analysis in the 28 EU MS Cross-cutting legal analysis Review of previous and ongoing/planned evaluations, reports and external studies including: – Report on the implementation of the Unfair Contract Terms Directive – Report on the integration of Directive 93/13 into the national legal systems

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
		1.1.1b Unfair Commercial Practices Directive	– Extent to which the principle-based approach under this Directive has been effective overall; – What are the practical benefits for consumers of the black list of unfair commercial practices annexed to this directive, in particular its application in practical cases? – What are the practical benefits for consumers arising from the Member States' use of the minimum harmonisation clauses for financial services and immovable property? – To what extent does the application of the Directive's rules in a) tackling misleading environmental claims; b) addressing misleading practices in the energy market lead to a higher level of consumer protection and practical benefits for consumers? – Extent to which there are practical benefits for consumers of a) using the "average consumer" as the reference point for assessing whether a commercial practice is likely to materially distort economic behaviour; b) the specific protection of "vulnerable consumers" introduced by the Directive; – Have self-and co-regulation actions in EU MS or at EU level have been effective in addressing unfair commercial practices?	– Assessment of stakeholders concerning the effectiveness of the principle-based approach – Practical cases in which the black list of unfair commercial practices annexed to this directive has led to benefits for consumers – Identification of the benefits for consumers arising from the Member States' use of the minimum harmonisation clauses for financial services and immovable property – Identification of the benefits for consumers arising from the application of the Directive's rules in a) tackling misleading environmental claims; b) addressing misleading practices in the energy market – Identification of self-and co-regulation actions in EU MS or at EU level that have (not) been effective in addressing unfair commercial practices	Stakeholder interviews Online consultation Legal analysis in the 28 EU MS Review of previous and ongoing/planned evaluations, reports and external studies including: – Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU (2011) – Study on consumer vulnerability across key markets in the European Union – Consumer Market Study on Environmental Claims for non-food products
		1.1.1c Price Indication Directive	– Are consumers are effectively informed about the unit selling price? – What are the effects of the regulatory choices/ derogations (e.g. for small retail shops) allowed by the Directive and applied by Member States?	– Assessment of stakeholders whether consumers are effectively informed about the unit selling price – Proportion of consumers that attach importance to the unit selling price – Assessment of effects of the regulatory choices/ derogations allowed by the Directive in different Member States	Stakeholder interviews Online consultation Legal analysis in 28 EU MS Consumer survey
		1.1.1d Injunctions	– Has the Injunctions Directive on EU consumers led to a reduction in the number of	– Stakeholder assessment of the contribution of the Injunctions Directive to a) reducing the	Stakeholder interviews with:

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria	Required evidence and analysis/indicators	Sources of evidence/ methodological tools
		Directive infringements to consumer protection rules? – Has the Injunctions Directive on EU consumers led to a reduction in consumers' detriment? – How has the number of injunctions initiated in each MS evolved since June 2011? – Extent to which specific national measures regarding the injunction procedure have been effective if taken by MS – To what extent has progress been made in removing obstacles compared to periods covered by the two previous Commission reports? – What obstacles to the effective use of the injunctions procedure remain across the EU?	number of infringements to consumer protection rules; b) reducing consumers' detriment – Identification of two effective injunctions cases per MS taking place after June 2011 – Estimation of the number of injunctions initiated in each Member State since June 2011, identifying: a) economic sectors most affected by the injunction actions; b) allegedly unlawful practice most challenged by the injunction actions; c) the number of injunction actions for infringements related to Internet and digital technologies; d) the number of purely national injunction actions; e) the number of injunction actions related to intra-EU cross-border infringements; f) the number of injunction actions having an extra-EU element; g) the number of cases in which a settlement with the alleged perpetrator of the infringement was reached – Analysis of the trends in the use of the injunction procedures – Assessment of the effectiveness of national measures regarding the cost of the procedure, the summary procedure, the publication of the decision and/or the publication of a corrective statement, the effects of the injunction order, the sanctions for non-compliance with the injunction order and the prior consultation, if taken in MS – Assessment of obstacles to the effective use of the injunctions procedure, regarding a) the cost and the associated financial risks of injunction procedure; b) the real and perceived complexity of the injunction procedure in another MS; c) the length of actions sought by qualified entities in their own jurisdictions and in another MS; d) the effects of the injunction orders, including the cross-border effects; e) the effectiveness of the	– National consumer enforcement authorities – Responsible ministries – Relevant national regulatory authorities – National consumer organisations and EU umbrella associations – Business associations and EU umbrella associations Online consultation Survey of qualified entities Legal analysis in 28 EU MS Review of previous and ongoing/planned evaluations, reports and external studies including: – 2008 and 2012 Commission reports on the application of the Injunctions Directive – Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers' interests (2011)

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
				sanctions for non-compliance with the injunction orders; f) the possible difficulties with the enforcement of the injunction orders both at national and at EU level.	
	Rules for business protection	1.1.2 Misleading and Comparative Advertising Directive	– Extent to which the current scope of protection under the Directive (limited to the notion of 'advertising') provides for the effective protection of businesses; – Which MS have gone beyond the minimum harmonisation requirements of the Directive, and how? – What are the effects of the minimum harmonisation provisions on misleading advertising? – Extent to which the principle-based approach to misleading advertising under this Directive has achieved business protection; – What are the practical benefits of a possible black list? – What are the effects of the full harmonisation provisions on comparative advertising? – Extent to which the comparative advertising rules provide an effective legal framework for modern types of marketing – Do the current rules on enforcement set in the Directive provide an effective enforcement framework, especially in the context of cross-border transactions?	– Stakeholder assessment of whether a) the current scope of protection under the Directive; b) the principle-based approach to misleading advertising under the Directive provides for the effective protection of businesses – Identification of MS that have gone beyond the minimum harmonisation provisions of the Directive and relevant national law provisions – Identification of (negative/positive) effects of using a) minimum harmonisation provisions on misleading advertising; b) full harmonisation provisions on comparative advertising – Identification of practical cases in which a possible black list would lead to benefits for business protection – Stakeholder assessment of whether the comparative advertising rules provide an effective legal framework for modern types of marketing – Identification of problems resulting from the current rules on enforcement of the Directive, e.g. in the context of cross-border transactions	Stakeholder interviews Online consultation Legal analysis in 28 EU MS Cross-cutting legal analysis Review of previous and ongoing/planned evaluations, reports and external studies including: – Impact assessment in the context of the review of Directive 2006/114/EC concerning misleading and comparative advertising (2012)
	Eliminating obstacles to the Internal Market	1.2a Unfair Contract Terms Directive	– Has the application of the general fairness clause in different Member States shown disparities in their understanding of this principle? – What impact, if any, have these disparities had on cross-border trade? – To what extent have the extended indicative lists, "black" and/or "grey" lists of unfair contract terms adopted in certain Member States	– Identification of disparities in the application of the general fairness clause in MS – Identification of cases in which these disparities have had an impact on cross-border trade – Assessment of extent to which a) indicative, “black” and/or “grey” lists adopted in certain MS; b) other extensions of the application of this directive in certain MS represent a barrier to	Stakeholder interviews Online consultation Legal analysis in 28 EU MS Review of previous and ongoing/planned evaluations, reports and external studies including:

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
			represented a barrier to cross-border trade? – Degree to which other extensions of the application of this directive (i.e. to individually negotiated terms and to terms dealing with the adequacy of price and main subject matter) in certain Member States represent a barrier to cross-border trade;	cross-border trade	– Report on the implementation of the Unfair Contract Terms Directive – Report on the integration of Directive 93/13 into the national legal systems
		1.2b Unfair Commercial Practices Directive	– Has the application of the principle-based approach under the Unfair Commercial Practices Directive in different Member States shown disparities in their understanding of this principle? – If yes, have these disparities had an impact on cross-border trade? – What has been the effect of the uniform black list of unfair commercial practices annexed to the Directive on the free movement of goods and services? – Extent to which the minimum harmonisation derogation under the Directive allowing national rules on financial services and immovable property represents a barrier to cross-border trade	– Identification of disparities in the application of the principle-based approach under the Unfair Commercial Practices Directive in MS – Identification of cases in which these disparities have had an impact on cross-border trade – Stakeholder assessment of the effect of the uniform black list of unfair commercial practices annexed to the Directive on the free movement of goods and services – Assessment of the extent to which the minimum harmonisation derogation under the Directive allowing national rules on financial services and immovable property has represented a barrier to cross-border trade	Stakeholder interviews Online consultation Legal analysis in 28 EU MS Review of previous and ongoing/planned evaluations, reports and external studies including: – Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU (2011)
		1.2c Misleading and Comparative Advertising Directive	– Has the application of the principle-based approach under the Misleading and Comparative Advertising Directive in different Member States shown disparities in their understanding of this principle? – Where the application of the principle-based approach in different Member States has shown such disparities, have they had an impact on cross-border trade? – Degree to which the minimum harmonisation character of the provisions on misleading advertising represents a barrier to cross-border trade	– Identification of disparities in the application of the principle-based approach under the Misleading and Comparative Advertising Directive in MS – Identification of cases in which these disparities have had an impact on cross-border trade – Assessment of the extent to which the minimum harmonisation character of the provisions on misleading advertising represents a barrier to cross-border trade – Assessment of the appropriateness of legal framework in cross-border trade provided by the fully harmonised provisions on comparative	Stakeholder interviews Online consultation Legal analysis Review of previous and ongoing/planned evaluations, reports and external studies including: – Impact assessment in the context of the review of Directive 2006/114/EC concerning misleading and comparative advertising (2012)

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
			– Extent to which the fully harmonised provisions on comparative advertising provide an appropriate legal framework in cross-border trade for advertising – Has the lack of a cross-border enforcement mechanism in B2B relations constituted a barrier to cross-border trade?	advertising – Stakeholder assessment of the effect of a lack of cross-border enforcement mechanism in B2B relations on cross-border trade	
		1.2d Injunctions Directive	– What are the effects of the provisions of the Injunctions Directive that facilitate the use of the injunction procedure for cross-border infringements (Article 4 of the Injunctions Directive)? – To what extent are consumer organisations that are qualified entities aware of: a) the legal possibility to bring injunction actions in another Member State; b) the procedural modalities of the injunction procedure in other Member States, as in particular demonstrated by their practical application – What are the trends in the approaches taken by qualified entities while developing strategies regarding injunction actions for cross-border infringements? – What are the modalities, advantages, and disadvantages of the cooperation between qualified entities a) from different EU MS, b) which are consumer organisations and which are independent public bodies? – Degree to which the Commission measures encouraging consumer organisations to better use injunctions procedures in a cross-border context (CoJEP I, CoJEP II and CLEF) have been effective	– Identification of the effects of the provisions of the Injunctions Directive that facilitate the use of the injunction procedure for cross-border infringements (Article 4 of the Injunctions Directive) – Assessment of consumer organisations which are qualified entities (as defined by the Injunctions Directive) concerning their degree of awareness of a) the legal possibility to bring injunction actions in another Member State; b) the procedural modalities of the injunction procedure in other Member States – Identification of cases in which injunctions procedures have been used in a cross-border context – Analysis of the trends in the approaches taken by qualified entities – Identification of modalities, advantages, and disadvantages of the cooperation between qualified entities a) from different EU MS, b) which are consumer organisations and which are independent public bodies – Evolution in the number of cases in which injunctions procedures have been used in a cross-border context – Assessment concerning the effectiveness of Commission measures as evidenced by the reported number of injunctions in the last five years compared to previous reporting periods	Stakeholder interviews Online consultation Cross-cutting legal analysis Survey of qualified entities Review of previous and ongoing/planned evaluations, reports and external studies including: – Commission Reports on the application of the Injunctions Directive (2008 and 2012) – 2011 Study on the application of the Injunctions Directive

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
Efficiency	Costs and benefits for consumers	2.1 Cross-cutting	– Costs (including time) spent by consumers for obtaining redress when invoking the unfairness in a contract they concluded; – What are the benefits for consumers stemming from the minimum and fully harmonised consumer rules?	– Expert estimate of costs (including time) borne by consumers obtaining redress when invoking the unfairness in a contract they concluded for a hypothetical example – Assessment of benefits for consumers resulting from the minimum and fully harmonised consumer rules	Stakeholder interviews Legal analysis in 28 EU MS Consumer survey Literature review
	Costs and benefits for traders	2.2 Cross-cutting	– What costs (including time) related to research are necessary to comply with the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the Misleading and Comparative Advertising Directive and the Price Indication Directive for traders a) engaged exclusively in domestic transactions; b) for traders involved in cross-border transactions; – What costs (including time) related to legal advice are necessary to comply with the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the Misleading and Comparative Advertising Directive and the Price Indication Directive for traders a) engaged exclusively in domestic transactions; b) for traders involved in cross-border transactions; – What are the other costs (including time) are involved in the compliance of traders with the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the Misleading and Comparative Advertising Directive and the Price Indication Directive for traders a) engaged exclusively in domestic transactions; b) for traders involved in cross-border transactions; – What are the costs for traders arising from the information obligations under the Unfair Commercial Practices Directive and the Price Indication Directive? – Degree to which these costs impact on the prices and availability of goods and services in selected	– Costs (including time) reported by SMEs related to research and legal advice involved for traders to comply with the Directives – Costs (including time) reported by SMEs related other costs (including time) involved in the compliance of traders with the Directives – Assessment of traders regarding the extent to which the legal basis eliminating/constraining dishonest market practices has created benefits – Assessment of traders regarding the benefits resulting from the protection in B2B transactions under the Misleading and Comparative Advertising Directive – Assessment of traders regarding the benefits for traders of using fair standard contract terms (in line with the Unfair Contract Terms Directive) exercising fair market practices in line with the Unfair Commercial Practices Directive, e.g. in attracting consumers and gaining market share	Stakeholder interviews Online consultation SME interviews and analysis of results Review of previous and ongoing/planned evaluations, reports and external studies including: – Report on the implementation of the Unfair Contract Terms Directive – Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU (2011) – 2008 and 2012 Commission reports on the application of the Injunctions Directive – Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers' interests (2011) – Review of Directive 2006/114/EC concerning misleading and comparative advertising (2012)

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
			markets – What benefits, if any, result from eliminating/ constraining dishonest market practices, such as the use of unfair contract term and unfair commercial practices, including through the application of the Injunctions Directive? – What are the benefits for traders resulting from the protection in business-to-business transactions under the Misleading and Comparative Advertising Directive? – What are the benefits of using fair standard contract terms (in line with the Unfair Contract Terms Directive) and exercising fair market practices in line with the Unfair Commercial Practices Directive?		
Coherence	Interplay amongst the information requirements in the horizontal consumer law instruments	3.1 Cross-cutting	– Extent to which the information requirements in the consumer law directives regarding the advertising stage (specifically Art 7(4) of the UCPD) a) duplicate one another; b) complement each other; – To what degree are traders aware of the information requirements at the advertising stage? – Which costs arise for businesses as a result of the multiplicity of information obligations?	– Analysis of the interplay between the existing information requirements of the EU consumer law directives regarding the advertising stage (specifically Art 7(4) of the UCPD) – Stakeholder assessment of the extent to which these information requirements a) duplicate one another; b) complement each other – Stakeholder assessment regarding the awareness of traders of these information requirements – Identification of costs arising for businesses as a result of the multiplicity of information obligations	Stakeholder interviews Legal analysis in the 28 EU MS Cross-cutting legal analysis SME interviews Analysis of costs (EU Standard Cost Model/Compliance Cost Assessment) Review of relevant previous and ongoing/planned evaluations, reports and external studies
	Interplay between the Injunctions Directive and other enforcement instruments of consumer law	3.2 Cross-cutting	– What is the legal and practical interplay between the Injunctions Directive and the CPC Regulation? – What has been the impact of the application of the CPC Regulation on a) the use of injunction procedure, as defined by the Directive; and b) on the number of injunction actions for infringements having a cross-border dimension brought by public bodies and organisations?	– Analysis of the legal and practical interplay between the Injunctions Directive and CPC Regulation – Evolution of the use of injunction procedures since the adoption of the CPC regulation (including injunctions actions for infringements having a cross border dimension) – Stakeholder assessment of the need for further steps in order to ensure the coherence between	Stakeholder interviews Online consultation Legal analysis in the 28 EU MS Cross-cutting legal analysis Survey of qualified entities Review of relevant previous and ongoing/planned evaluations, reports and external studies.

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria	Required evidence and analysis/indicators	Sources of evidence/ methodological tools
		– To what extent is there a need for further steps in order to ensure the coherence between the Injunctions Directive and the CPC Regulation? – What is the legal and practical interplay between the Injunctions Directive and the enforcement provisions provided by other EU consumer law directives subject to the Fitness Check and by the Consumer Rights Directive? – Extent to which there a need for any further steps in order to ensure the coherence between the abovementioned legislative acts.	the Injunctions Directive and the CPC Regulation[995] – Analysis of the legal and practical interplay between the Injunctions Directive and the enforcement provisions provided by other EU consumer law directives subject to the Fitness Check and by the Consumer Rights Directive – Stakeholder assessment of the need for further steps in order to ensure the coherence between the abovementioned legislative acts;	
	Interplay with EU sector-specific consumer protection legislation	3.4 – Degree to which businesses, consumers and the specific public enforcement bodies in the relevant sectors are aware of the requirements of the horizontal EU consumer legislation (UCPD and UCTD), as indicated by their practical application, in cases where a) one and the same authority is responsible for the enforcement of the horizontal EU consumer law and the sector specific rules and b) cases where different authorities are responsible these two sets of rules; – What are the benefits and costs arising from the complementary application of the general EU consumer legislation in the sectors concerned? – To what extent does the combination of horizontal consumer provisions and sector-specific rules provide for a clear and coherent legal framework? – Is there a need for clarification of the interplay between the EU sector-specific rules and	– Analysis of the use of UCPD and UCTD by court and specific public enforcement bodies in the relevant sectors by differentiating between cases where a) one and the same authority is responsible for the enforcement of the horizontal EU consumer law and the sector specific rules and b) cases where different authorities are responsible these two sets of rules – Stakeholder assessment regarding costs and benefits resulting from the complementary application of the general EU consumer legislation in sectors concerned – Analysis of the extent to which the combination of horizontal consumer provisions and sector-specific rules provides for a clear and coherent legal framework – Analysis of the need for clarification of the interplay between the EU sector-specific rules and horizontal EU consumer law	Stakeholder interviews with: – National consumer enforcement authorities – Responsible ministries – Relevant national regulatory authorities – National consumer organisations and EU umbrella associations – Business associations and EU umbrella associations Online consultation Legal analysis in the 28 EU MS Cross-cutting legal analysis Literature review

[995] Taking into account the Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws presented on 25 May 2016 (COM(2016) 283 final)

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
			horizontal EU consumer law?		
Relevance	Relevance for transactions other than business-to-consumer (B2C)	4.1 Unfair commercial practices/ marketing	– To which degree would a) an extension of the Unfair Commercial Practices Directive to B2B transactions; or b) a revision of the Misleading and Comparative Advertising Directive; bring benefits for cross-border trade? – Extent to which a) it is appropriate to keep separate legal regimes for B2B and B2C transactions in the area of commercial practices; or b) both regimes could be aligned; – What is the appropriate scope of the protection in B2B transactions? – To what extent is there a need a) for a black-list of practices in the business-to-business marketing area; b) to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive; c) to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive? – What should be the enforcement cooperation mechanism in the business-to-business marketing area?	– Identification of possible benefits for cross-border trade resulting from a) an extension of the Unfair Commercial Practices Directive to B2B transactions and b) a revision of the Misleading and Comparative Advertising Directive – Analysis of the regimes for B2B and B2C transactions in the area of commercial practices and assessment of the extent to which the two regimes should be separate/ could be aligned – Analysis of the appropriate scope of protection in B2B transactions – Stakeholder assessment of whether protection in B2B transactions should cover only the pre-contractual stage or also unfair commercial practices during and after the transaction; – Assessment of the extent to which is there a need a) for a black-list of practices in the business-to-business marketing area; b) to develop contractual consequences linked to the breaches of the Misleading and Comparative Advertising Directive; c) to adapt the rules on comparative advertising of the current Misleading and Comparative Advertising Directive – Identification and assessment of possible enforcement cooperation mechanisms in the B2B marketing area	Stakeholder interviews Online consultation Cross-cutting legal analysis Legal analysis in the 28 EU MS Review of previous and ongoing/planned evaluations, reports and external studies including: – Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU (2011) – Impact assessment in the context of the review of Directive 2006/114/EC concerning misleading and comparative advertising (2012)
		4.1 Contractual fairness and in relation to the Unfair Contract Terms	– To which degree would an extension of the Unfair Contract Terms Directive to B2B transactions bring benefits for cross-border trade? – What are the expected consequences of such an extension on innovation by or market opportunities for SME providers/suppliers? – What are the potential negative consequences	– Consultation results regarding the expected effect of an extension of the Unfair Contract Terms Directive to B2B transactions on a) cross-border trade; b) innovation by or market opportunities for SME providers/suppliers – Identification of possible negative/positive consequences of such an extension – Assessment regarding the need a) to strengthen	Stakeholder interviews Online consultation Cross-cutting legal analysis Legal analysis in the 28 EU MS Review of previous and ongoing/planned evaluations, reports and external studies including:

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
		Directive	and benefits of extending the scope to business-to-business transactions? Would the benefits exceed these negative consequences? – Extent to which there is a need a) to strengthen the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms; b) for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive; – What is the appropriate scope of B2B protection against unfair contract terms? – Would the system of protection established by the Directive be appropriate for B2B transactions? – Is there a need for the protection to extended to a) individually negotiated terms, b) the main subject-matter of the contract and the adequacy of the price? – Which specific contractual terms often used in B2B transactions could be regarded as unfair in all circumstances or presumed to be unfair?	the protection of businesses, especially SMEs and in particular micro enterprises, with regard to unfair contract terms; b) for contractual transparency requirements in B2B transactions, similar to the requirement of plain, intelligible language in the Directive – Analysis of the appropriateness of a) the scope of B2B protection against unfair contract terms; c) the system of protection established by the Directive for B2B transactions – Assessment regarding the need for the protection to be extended to a) individually negotiated terms, b) the main subject-matter of the contract and the adequacy of the price – Identification of specific contractual terms often used in B2B transactions which could be regarded as unfair in all circumstances or presumed to be unfair	– Report on the implementation of the Unfair Contract Terms Directive – Report on the integration of Directive 93/13 into the national legal systems
		4.1 Consumer to-business (C2B) relations	– To what extent is there a need for the application of the consumer law directives in consumer to-business (C2B) relations? – What is the potential for applying consumer law directives to consumer-to-business (C2B) relations?	– Stakeholder assessment of the need for applying consumer law directives to C2B relations – Analysis of the potential for applying consumer law directives to C2B relations	Stakeholder interviews Online consultation Cross-cutting legal analysis Legal analysis in the 28 EU MS Review of previous and ongoing/planned evaluations, reports and external studies
	Potential codification or recast	4.2 Cross-cutting	– Extent to which there is a potential need for simplification through codification or recast through a single horizontal EU instrument; – Extent to which the interpretations brought by the case-law of the Court of Justice could be integrated into the Unfair Contract Terms Directive	– Assessment of the extent to which the consumer law directives could be simplified by codification or recast through a single horizontal EU instrument – Analysis of the added clarity, removal of overlaps and filling of gaps that could be achieved – Analysis of the feasibility of integrating case-law	Stakeholder interviews with: – National consumer enforcement authorities – Responsible ministries – Relevant national regulatory authorities

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
			– What are the potential benefits and burden from integrating the requirements under the Price Indication Directive into the provisions of the Unfair Commercial Practices Directive and the Consumer Rights Directive? – Which inconsistencies regarding marketing and contractual fairness have been identified between a) EU consumer law and other EU horizontal law with a consumer protection dimension; b) EU consumer law and sector-specific EU consumer protection rules? – To which extent is there a need for clarification of the interplay between these laws or removal of the identified inconsistencies?	of the Court of Justice into the Unfair Contract Terms Directive – Identification of potential benefits and burdens resulting from integrating the requirements under the Price Indication Directive into the provisions of the Unfair Commercial Practices Directive and the Consumer Rights Directive – List of inconsistencies identified between a) EU consumer law and other EU horizontal law with a consumer protection dimension; b) EU consumer law and sector-specific EU consumer protection rules under evaluation criterion "Coherence" – Assessment concerning the need for clarification of the interplay between these laws or removal of the identified inconsistencies	– National consumer organisations and EU umbrella associations – Business associations and EU umbrella associations Online consultation Cross-cutting legal analysis Review of previous and ongoing/planned evaluations, reports and external studies including: – Study on procedural rules and the ex-officio assessment by the court in the area of consumer law (to be launched in 2016)
	Relevance of the Injunctions procedure	4.3 Injunctions Directive	– What are the possible benefits of the further harmonisation of the injunction procedure across the EU under the Injunctions Directive? – In particular, the following issues from the perspective of the possible further harmonisation at EU level should be analysed: (i) scope of the Injunctions Directive; (ii) provisions ensuring exemption of qualified entities from legal costs within injunction procedure; (iii) mandatory summary procedure; (iv) mandatory publication of the injunction decision; (v) common rules on the burden of proof; (vi) sanctions for the infringements defined by the Injunctions Directive, taking into account provisions of the Directives listed in the Annex I to the Injunctions Directive as transposed into internal legal orders of the Member States; (vii) more precise sanctions in case of the non-compliance with the injunction order; (viii) the cross-border effect of the injunction order within the EU. – What are the possible benefits of any further	– Identification and assessment of potential benefits resulting from the of further harmonisation of the injunction procedure across the EU under the Injunctions Directive – Identification of possible benefits of further non-legislative or legislative measures increasing the use of injunction procedures by consumer organisations and strengthening the cooperation between consumer organisations from different MS – Stakeholder assessment concerning the need and practical usefulness for a) awareness raising activities, e.g. on the "e-justice" portal; b) further measures such as CoJEF II aiming to coordinate injunction actions regarding infringements having a cross-border dimension – Analysis of the extent to which out-of-court settlements aiming at stopping infringements as defined by the Directive have the potential to improve the enforcement of EU legislation protecting the collective interests of consumers	Online consultation Cross-cutting legal analysis Survey of qualified entities Review of previous and ongoing/planned evaluations, reports and external studies including: – 2008 and 2012 Commission reports on the application of the Injunctions Directive – 2011 study on the application of the Injunctions Directive – Evaluation of the CPC Regulation

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
			non-legislative or legislative measures increasing the use of injunction procedures by consumer organisations and strengthening the cooperation between consumer organisations from different MS? – What is the need and practical usefulness for a) awareness raising activities, e.g. on the "e-justice" portal; b) further measures such as CoJEF II aiming to coordinate injunction actions regarding infringements having a cross-border dimension; – Extent to which out-of-court settlements aiming at stopping infringements as defined by the Directive have the potential to improve the enforcement of EU legislation protecting the collective interests of consumers – What possible measures could encourage such settlements?	– Identification of possible measures to encourage such settlements	
	Contractual consequences of unfair commercial practices	4.4 Unfair Commercial Practices Directives	– Is there a need and potential to develop contractual consequences linked to the use of unfair commercial practices? – What, if any, are the national law provisions providing contractual consequences in case of breaches to the Unfair Commercial Practices Directive or national provisions on the avoidance of the contract e.g. in cases of usury or other immoral behaviour? – What, if any, is the case law (enforcement decisions, court rulings) providing for such consequences? – What is the relationship of the Unfair Commercial Practices Directives with Article 6 (1) of the Unfair Contract Terms Directive?	– Assessment concerning the need and potential to develop contractual consequences linked to the use of unfair commercial practices – Identification of the national law provisions providing contractual consequences in case of breaches to the Unfair Commercial Practices Directive or national provisions on the avoidance of the contract e.g. in cases of usury or other immoral behaviour in the Member States – Identification of case law providing for such consequences – Analysis of the relationship of the UCPD with Article 6 (1) of the UCTD	Stakeholder interviews Online consultation Cross-cutting legal analysis Legal analysis in 28 EU MS Review of previous and ongoing/planned evaluations, reports and external studies including: – Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU (2011) – Report on the implementation of the Unfair Contract Terms Directive
	Specific protection for vulnerable	4.4 Cross-	– To what extent are the concepts of "consumer", "vulnerable consumer" and "average consumer" as currently defined and as applied by national	– Expert assessment concerning the validity and extent to which the concepts of "consumer", "vulnerable consumer" and "average consumer"	Stakeholder interviews Cross-cutting legal analysis Expert workshop

Evaluation criteria	Specific evaluation themes	Specific questions/ judgment criteria		Required evidence and analysis/indicators	Sources of evidence/ methodological tools
	consumers	cutting	authorities and courts, valid and fit for purpose? – What is the scope for redefining these concepts? – What are the possible options for redefining them? – What is the expected impact of redefining the concepts of the average consumers and various categories of vulnerable consumers (e.g. young consumers) in EU legislation? – Extent to which existing rules under the Unfair Commercial Practices Directive are adequate to protect vulnerable consumers – Should specific provisions to protect vulnerable consumers be introduced in other directives concerned, e.g. in the Unfair Contract Terms Directive?	as currently defined and applied are fit for purpose – Assessment of the scope for redefining the "consumer", "vulnerable consumer" and "average consumer" – Identification of possible new definitions, if relevant – Analysis of expected impacts of redefining the concepts of the average consumers and various categories of vulnerable consumers in EU legislation – Possible effects of introducing specific provisions to protect vulnerable consumers in other directives	– Review of previous and ongoing/planned evaluations, reports and external studies including: – Consumer vulnerability in key markets across the European Union – Study on the impact of marketing through social media, online games and mobile applications - Report on the implementation of the UCTD
EU added value - performance of the EU intervention and causality[b]		5 Cross-cutting	– What is the additional value resulting from the EU intervention, compared to what could be achieved by Member States at national and/or regional levels? – To what extent do the issues addressed by the intervention continue to require action at EU level? – What would be the most likely consequences of stopping or withdrawing the existing EU intervention?	– Identification of the effects of the covered EU consumer law directives on consumer protection on eliminating obstacles to the functioning of the internal market (Effectiveness) – Identification of areas covered by the EU consumer law directives or that could potentially be covered which cannot be addressed at MS level – Analysis of extent to which some areas covered by the EU consumer law directives are no longer relevant for addressing at EU level – Discussion of potential effects of stopping or withdrawing EU consumer law directives	Cross-cutting legal analysis Evaluation results Review of previous and ongoing/planned evaluations, reports and external studies

Source: Civic Consulting.

Annex VIII Analysis of levels of awareness and key trends since the adoption of key directives

In this Annex we present the results of the analysis of the level of trader and consumer awareness of the rules in the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the Misleading and Comparative Advertising Directive and the Price Indication Directive and of key trends and evolution of consumer problems, both from a general perspective and by Directive.[996]

1. Trends in consumer and trader awareness

1.1 Consumer rights in general

Consumer awareness

Before the Eurobarometer began including consumer knowledge questions, surveyed consumers were asked to self-assess their level of awareness of their consumer rights. The table below presents the questions and results from two consumer surveys conducted in 1999 and 2003.

Table 29: Consumers' self-assessment of their level of awareness regarding consumer rights, EU15.

Year	Question	Base	Results
1999	Generally speaking, do you think you are well informed about your rights as a consumer or not? If yes, by whom?	All respondents	63% 'No' [33% 'Yes']
2003	Do you think you know enough about your rights, as a consumer, under (NATIONALITY) laws?	All respondents	29% 'Yes'
	And, as a consumer, under European laws?		7% 'Yes'

Source: Eurobarometer 51.1 and Special Eurobarometer 193. Note: Possible responses to the question in EB51.1 included 'No, not well informed' / 'Yes, by (NATIONALITY) public bodies/government' / 'Yes, by European public bodies' / 'Yes, by the media' / 'Yes, by consumer organisations' / 'Yes, by industry and trade associations' / 'Yes, by sectoral associations/interest groups such as meat producers, wine producers, etc.' / 'Yes, by others' / 'Don't know'. [Displayed is the proportion of 'No' responses; 'Yes' responses were calculated by subtracting the proportion of 'No' and 'Don't know' responses from 100%].

The results of the older Eurobarometers show that while close to one third of consumers felt well-informed about consumer protection in their own country, less than one tenth felt similarly well-informed about their rights under European laws. In 2003, the highest level of self-assessed knowledge about national consumer rights was in Finland, with 47% of consumers feeling well-informed, followed by Sweden (44%) and Denmark (39%); the lowest levels were found in Belgium (20%), Spain and Portugal (each 21%). With respect to knowledge about consumer rights under European law, consumers felt most informed in Austria (18%), Luxembourg (12%), the Netherlands, Greece, and Portugal (each 11%) and least informed in Sweden (3%), Germany (3%) and Finland (5%). A relatively high level of respondents

[996] Note that due to the limitations in data availability, it is not possible in most cases to provide a before and after comparison for the adoption of the relevant Directives. Even in the case of the more recently adopted UCPD, the Directive was transposed by the Member States in various years between 2007 and 2010, with the result that a direct comparison based on the year of adoption is not possible. For a more nuanced analysis of levels of consumer trust and cross-border shopping before and after the transposition of the UCPD, see the panel data analysis in Part 4 of the report.

(ranging between 9 to 26%, depending on the Member State) answered 'Don't know' when asked about their knowledge of European consumer rights.

The Eurobarometer did not survey consumers on their level of knowledge again until 2010, when specific knowledge questions about consumer protection were introduced. The following table lists the knowledge questions, answer items and correct response rates for general consumer knowledge questions up to 2014.[997]

Table 30: Proportion of consumers answering correctly to knowledge questions about European consumer law, EU%.

Year	Question	Answer items	Percentage of respondents answering correctly
2010	Suppose you ordered a good by post, phone or the Internet, do you think you have the right to return the good you ordered 4 days after its delivery and get your money back, without giving any reason?	Yes [Correct]. (Other items: No; Don't know.)	62%
2011			70%
2012			69%
2014		Yes [Correct]. (Other items: No; It depends on the product; Don't know.)	56%
2010	Imagine that a new fridge you bought 18 months ago breaks down. You didn't buy any extended commercial guarantee. Do you have the right to have it repaired or replaced for free?	Yes [Correct]. (Other items: No; Don't know.)	39%
2011			51%
2012			56%
2014		Yes [Correct]. (Other items: No; It depends on the product; Don't know.)	41%

Source: Special Eurobarometer 342, Flash Eurobarometers 332, 358 and 397. Note: EU% comprises the EU27 until 2012, and the EU28 in 2014.

There is no clear trend towards greater or lesser awareness, although correct answers in both of the first two questions appear to have peaked in 2011-2012. The dip in correct responses in 2014 could however also be due to the inclusion of a new (incorrect) response item ('It depends on the product').

Results and trends from knowledge questions related to the Directives included in this study are discussed in the relevant subsections.

Trader awareness and compliance

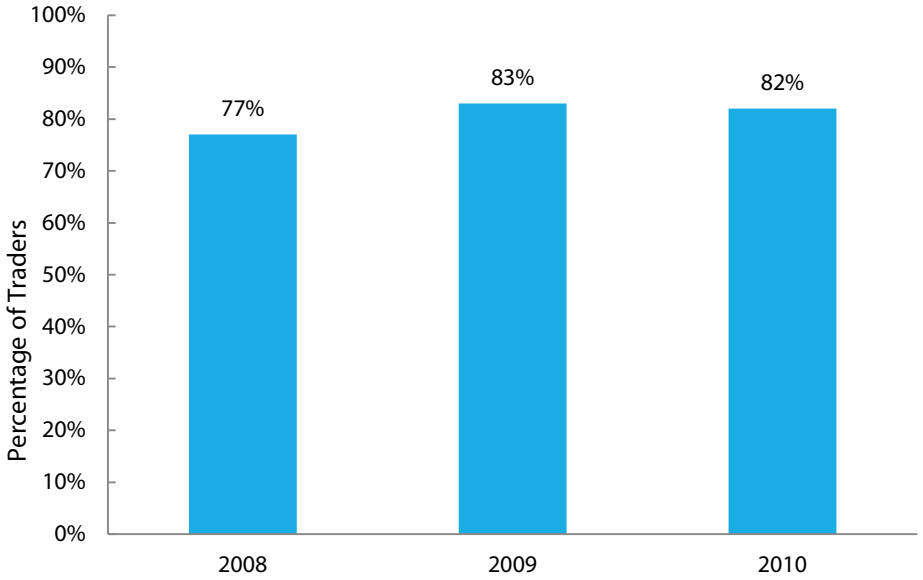
In 2012, the last time this question was posed directly in the Eurobarometer, 98% of traders EU-wide reported feeling confident that their own business was in compliance with consumer legislation.[998] In previous years, traders were asked to what degree

[997] Note that these knowledge questions do not directly fall under the Directives considered in this study. We have nonetheless provided this data in order to provide an impression of general consumer awareness in the EU. Knowledge questions related to specific Directives in the scope of this study are discussed in their respective subsections.

[998] Flash Eurobarometer 359: Retailers' attitudes towards cross-border trade and consumer protection. Question: Now, thinking about consumer legislation, please tell me to what extent you agree or disagree with the following statements. Let me confirm once more that all responses are strictly anonymous. 'You comply with consumer legislation'.

they felt informed about their legal obligations towards consumers under consumer legislation in their country; the figure below shows the results.

Figure 12: Percentage of traders feeling at least well informed about their legal obligations under consumer legislation, EU27.



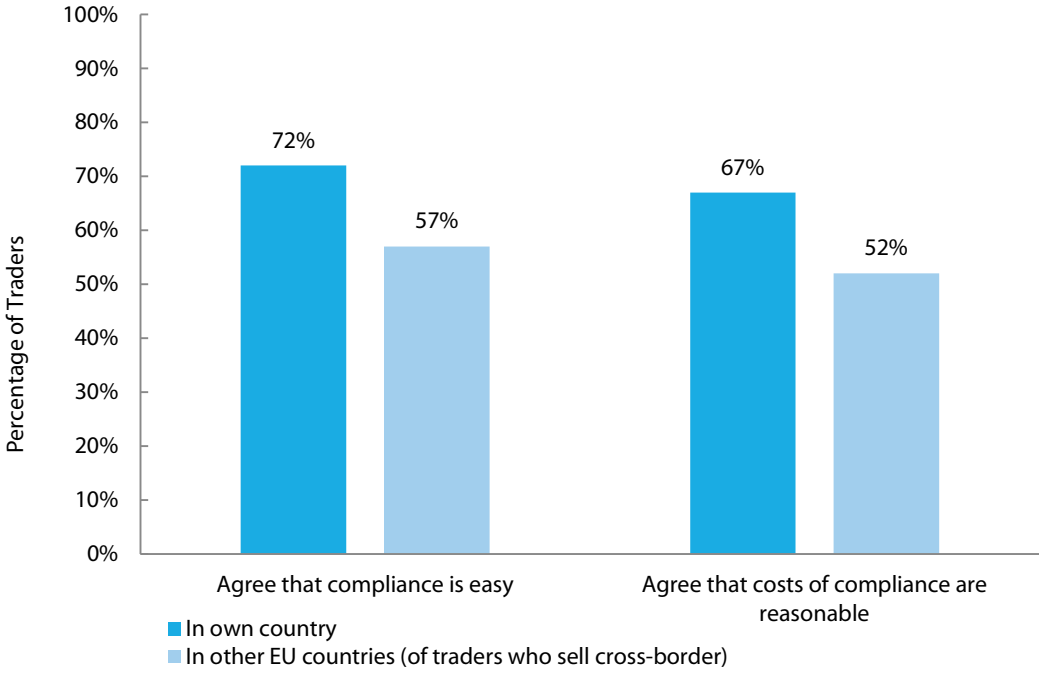
Source: Flash Eurobarometers 224, 278 and 300. Question: How well informed are you about your legal obligations towards consumers arising from consumer legislation in your country? [Displayed is the combined proportion responding 'well' or 'fully informed'].

More than three quarters of traders responded that they felt at least well informed about their legal obligations to consumers from 2008 to 2010; this proportion was slightly higher in the EU12 (89%) compared to the EU15[999] (82%) in 2010. At the country level, responses in 2010 ranged from highs in Slovakia (96%), Malta (95%), Portugal (94%) and Estonia (94%) to lows in France (65%), Sweden (74%) and Belgium (75%).

The figure below shows that a majority of traders in 2014 (the only year that such a question was asked directly in the Eurobarometer) agreed that compliance with consumer legislation is easy and that the costs of compliance are reasonable, although traders selling in other EU countries were less likely to agree that this applied when selling cross-border.

[999] EU15 refers to the countries that were members of the EU before its enlargement in 2004. EU 12/13 refers to the accession countries, with EU12 indicating the countries that acceded to the EU in 2004 and 2007, before Croatia became a member in 2013. While the EU averages presented in the figures are weighted averages drawn from the quoted Eurobarometer surveys, all references in text to comparisons between the EU15 and EU12/13 refer to the simple averages across each group of countries calculated by Civic Consulting.

Figure 13: Percentage of traders agreeing that compliance with consumer legislation is easy and the costs are reasonable, EU28 in 2014.



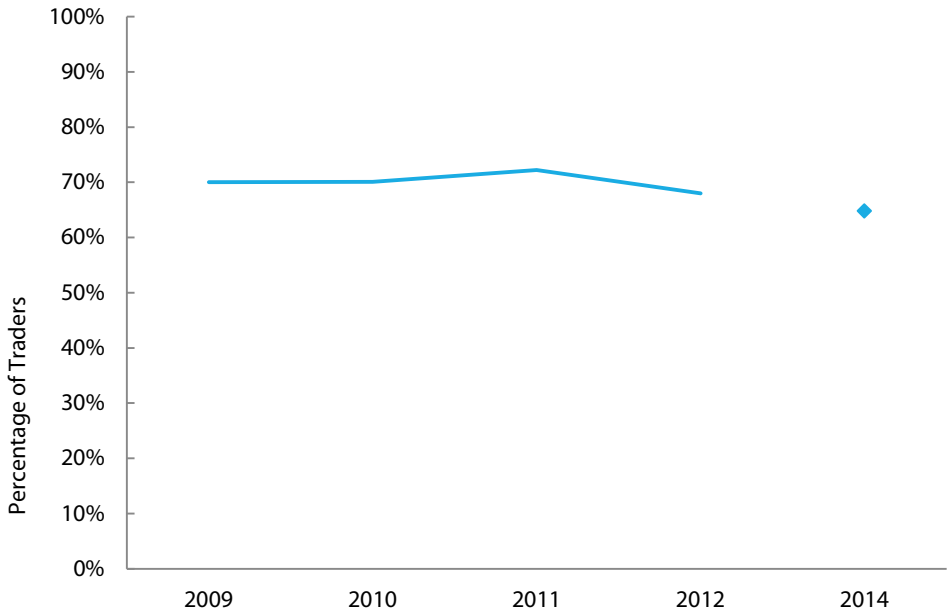
Source: Flash Eurobarometer 396. Question: I will read you three statements about compliance with consumer legislation in (OUR COUNTRY). Please tell me whether you strongly agree, agree, disagree, or strongly disagree with each of them: 'It is easy to comply with consumer legislation in your sector.' / '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.

A slight majority of traders operating cross-border (52%) agreed in 2014 that the costs of compliance with consumer legislation in other EU countries were reasonable. Although the questions were not identical, this result can be favourably (albeit cautiously) compared with a similar Eurobarometer question asked once in 2006, which found that only 34% of retailers and service providers currently trading (or preparing to trade) cross-border would rate compliance costs for consumer legislation in other EU countries as 'low or negligible'.[1000]

The figure below shows that most traders across the EU believe that their competitors also comply with consumer legislation. The proportion of traders who believe that their competitors comply with consumer legislation has however steadily fallen from an EU average of 70% in 2009 to 65% in 2014, a trend that is reflected in both the EU15 and the EU 12/13. Note, however, that from 2009 to 2012, the survey question asked about the compliance of competitors with no restriction on their location, while the question in 2014 was altered to ask traders about their competitors' compliance within their own country, which may have influenced responses in that year. Data prior to 2009 is not available, as previous Eurobarometers did not ask about compliance behaviours of competitors.

[1000] 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?

Figure 14: Percentage of traders agreeing that their competitors comply with consumer legislation, EU%.



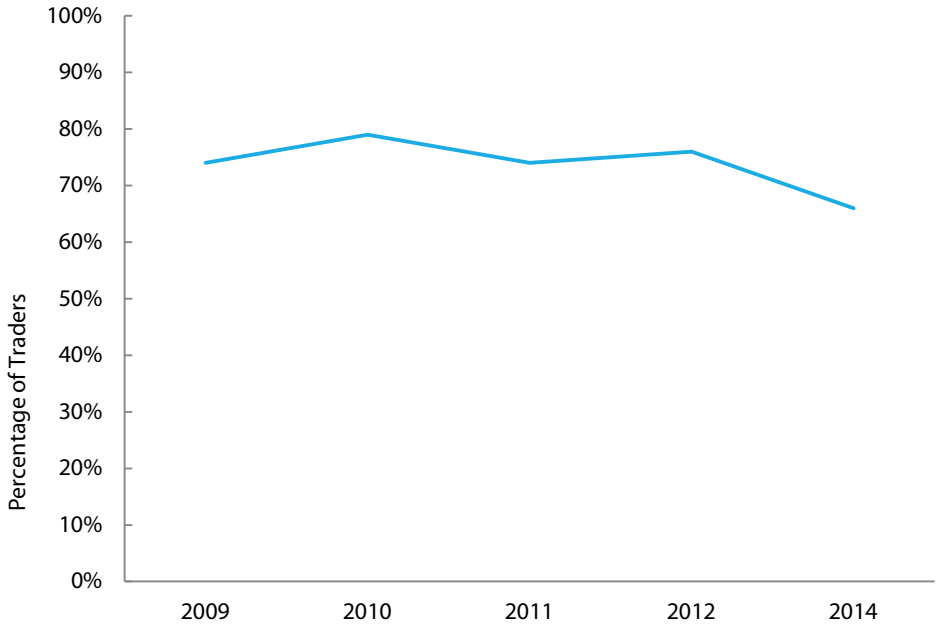
Source: Flash Eurobarometers 278, 300, 331, 359 and 396. Question: 2009-2013: Now, thinking about consumer legislation, please tell me to what extent you agree or disagree with the following statements. 'Your competitors comply with consumer legislation.' 2014: I will read you three statements about compliance with consumer legislation in (OUR COUNTRY). Please tell me whether you strongly agree, agree, disagree, or strongly disagree with each of them. 'Your competitors comply with consumer legislation.' Note: EU% comprises the EU27 from 2010 to 2012 and the EU28 thereafter.

Over the five years surveyed, there is an average difference of 12 percentage points between the proportion of traders agreeing that their competitors are in compliance with consumer legislation in the EU15 over the EU12/13. At the country level, even more variation can be observed, with trader confidence in the compliance of competitors in 2014 ranging from highs in the United Kingdom (79%), Germany (75%) and Ireland (75%) to lows in Bulgaria (41%), Poland (43%) and Croatia (47%).

The degree to which these perceptions correspond to the reality of trader awareness of consumer legislation as measured by specific knowledge questions are discussed with respect to each Directive separately in the sections below.

With respect to the visibility of enforcement measures, the figure below shows that a majority of traders agree that public authorities actively monitor and ensure compliance with consumer legislation in their sector, although this has declined by 8 percentage points from an EU average of 74% in 2009 to 66% in 2014.

Figure 15: Percentage of traders agreeing that public authorities actively monitor and ensure compliance with consumer legislation in their sector, EU%.



Source: Flash Eurobarometers Flash Eurobarometers 278, 300, 331, 359 and 396. 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. 'The public authorities actively monitor and ensure compliance with consumer legislation in your sector.' Note: EU% comprises the EU27 from 2009 to 2012 and the EU28 thereafter.

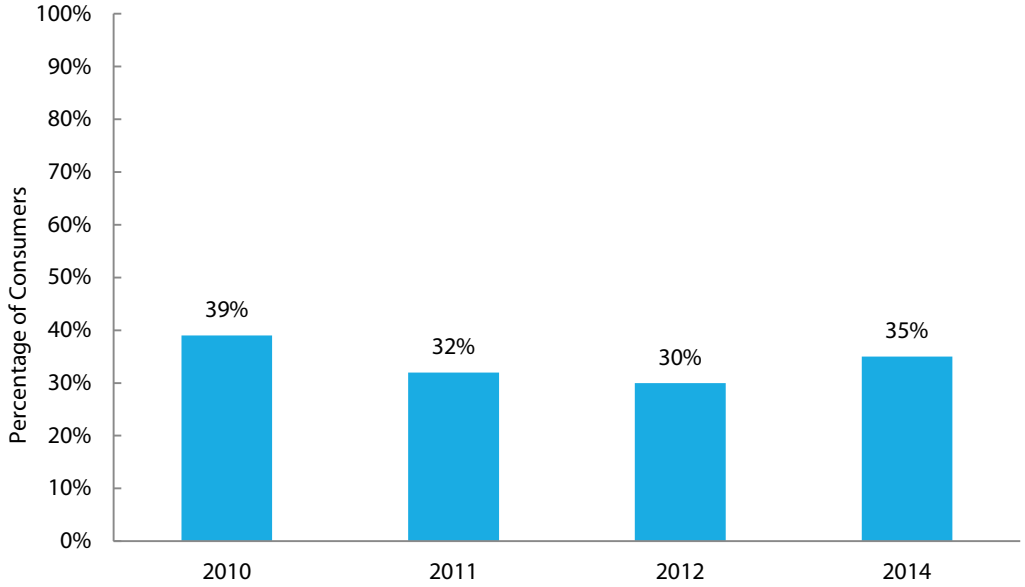
Over the five years surveyed, traders in the EU12/13 were on average 8 percentage points less likely than those in the EU15 to agree that public authorities actively enforce consumer legislation. At the country level, confidence in public enforcement in 2014 ranged from highs in the UK (85%), Finland (81%) and Hungary (81%) to lows in Poland (44%), Bulgaria (47%) and Croatia (47%).

1.2 Unfair Commercial Practices Directive

Consumer awareness

As the figure below shows, about one third of EU consumers on average are able to correctly answer a knowledge question from the Eurobarometer about a specific unfair commercial practice (receiving unsolicited goods; see the question wording in the note below the following figure). This proportion has slightly decreased since 2010, from an EU average of 39% to 35% in 2014.

Figure 16: Percentage of consumers who correctly answered a knowledge question about an unfair commercial practice (receiving unsolicited goods), EU%.



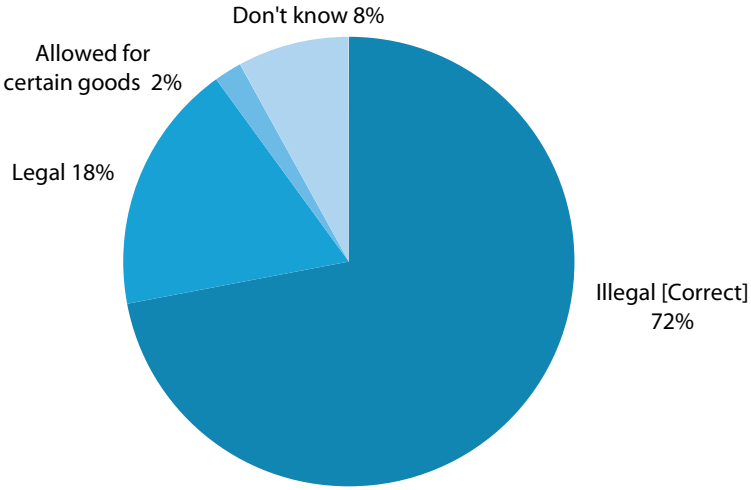
Source: Special Eurobarometer 342, Flash Eurobarometers 332, 358 and 397. Question: Imagine you receive two educational DVDs by post that you have not ordered, together with a EUR 20 [in 2010: EUR 50] invoice for the goods. Are you obliged to pay the invoice? [Correct answer: No, and you are not obliged to return the DVDs]. Note: EU% comprises the EU27 until 2012, and the EU28 in 2014.

There are no major differences in the response accuracy between the EU15 and EU12/13 in all four years. At the country level, the proportion of consumers answering correctly in 2014 ranged from highs in Slovenia (51%), Finland (46%) and Germany (45%) to lows in Lithuania (13%), Romania (15%) and Spain (15%).

Although just one third of respondents were able to answer the above knowledge question with complete accuracy (i.e., knowing that they were not obliged to pay the invoice, nor to return the unsolicited goods), the vast majority of consumers (95% in 2014) answered at least semi-correctly, and were aware that they were not obliged to pay the invoice; however, most assumed that they were obliged to return the products. Only 2% of consumers in 2014 thought they would be obliged to pay the invoice for an unsolicited good.

Another question regarding an unfair commercial practice (advertising a product as “free” when it actually entails substantial costs) was asked in 2010 but not repeated in future survey years. The figure below presents the results.

Figure 17: Percentage of consumers who correctly answered a knowledge question about an unfair commercial practice (falsely advertising a product as free), EU27 2010.



Source: Special Eurobarometer 342. Question: An advertisement in your newspaper says: 'Free sunglasses, just call this number to collect them.' You call the number and later you discover that it is a very costly premium rate telephone number. Was the advertisement legal or illegal?

Although most consumers were able to answer the question correctly, nearly one in five thought that the practice was legal. At the country level, the highest levels of awareness were found in Malta (89% correctly answered that the practice was illegal), Lithuania (86%), Estonia (84%) and Finland (84%), with the lowest levels found in Ireland (53%), the UK (57%) and Belgium (6%). One third (33%) of surveyed consumers in the EU were able to answer both this question and the unsolicited goods question (presented above) correctly in 2010.

A knowledge question on the UCPD was also asked in 2016 as part of the Consumer market study to support the Fitness Check of EU consumer law. The survey found that 73% of respondents across the EU were aware that it was illegal for a trader to bother consumers with persistent and unwanted sales calls.[1001] This proportion was slightly higher in the EU13 (79%) compared to the EU15 (72%). Additionally, in the same survey, 34% of consumers indicated that they felt they had benefited at least "moderately" from the right to complain against misleading and aggressive practices and have these practices stopped by competent authorities or the courts.[1002]

Trader awareness

The two figures that follow show trends in the responses of traders to three Eurobarometer questions intended to test their knowledge of unfair commercial practices. Each trader in the survey was presented with the same three unfair commercial practices (plus a fourth practice that was not unfair) and asked whether or not they thought the practice was prohibited.

[1001] Question: Despite your objections, you are being pressured by persistent and unwanted sales calls from a trader urging you to buy his products. Is the salesperson legally allowed to behave in this way? [Yes – No – Don't know]

[1002] Question: Based on your experience as a consumer, please indicate to what extent you have benefitted from the following consumer rights. 'The right to complain against misleading and aggressive practices and have these practices stopped by the competent authorities or courts.'

The first figure in this section shows the proportion of traders who were able to correctly identify all three practices (listed in the caption below the figures) as unfair commercial practices. The second figure shows the proportion of traders who were unable to identify any of the three practices as unfair commercial practices.

Note that in 2014, one of the three practices ('Advertising products at a very low price compared to other offers without having a reasonable quantity of products for sale') was reworded as an example of the same practice ('To run a promotional campaign stating 'We offer a discount of 60%' although the products offered with a 60% discount are almost out of stock.'). The data point for that year is therefore presented separately in the figures below.

Figure 18: Percentage of traders correctly identifying all three practices as unfair commercial practices, EU%.

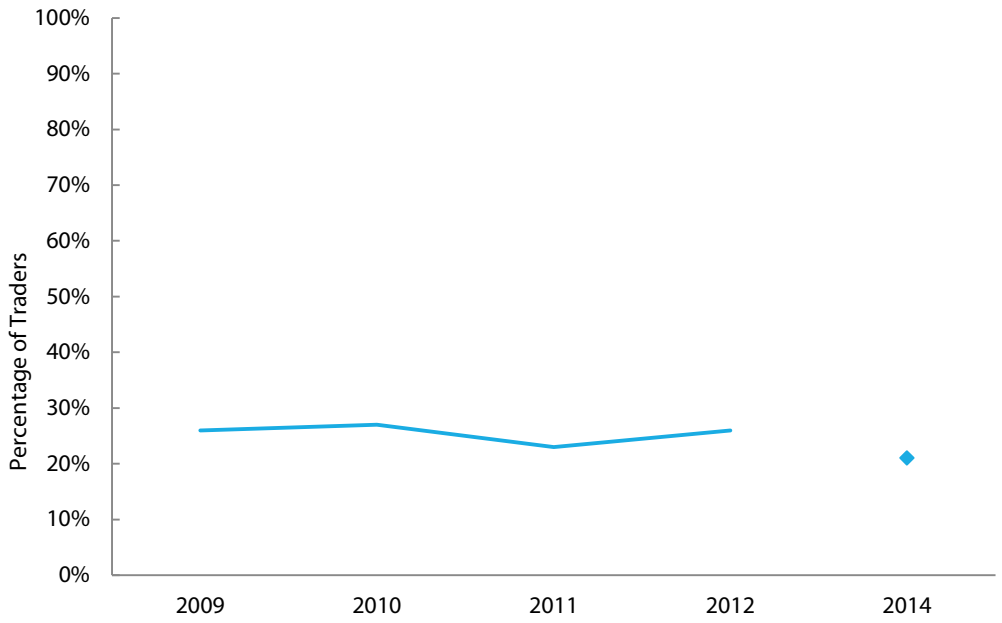
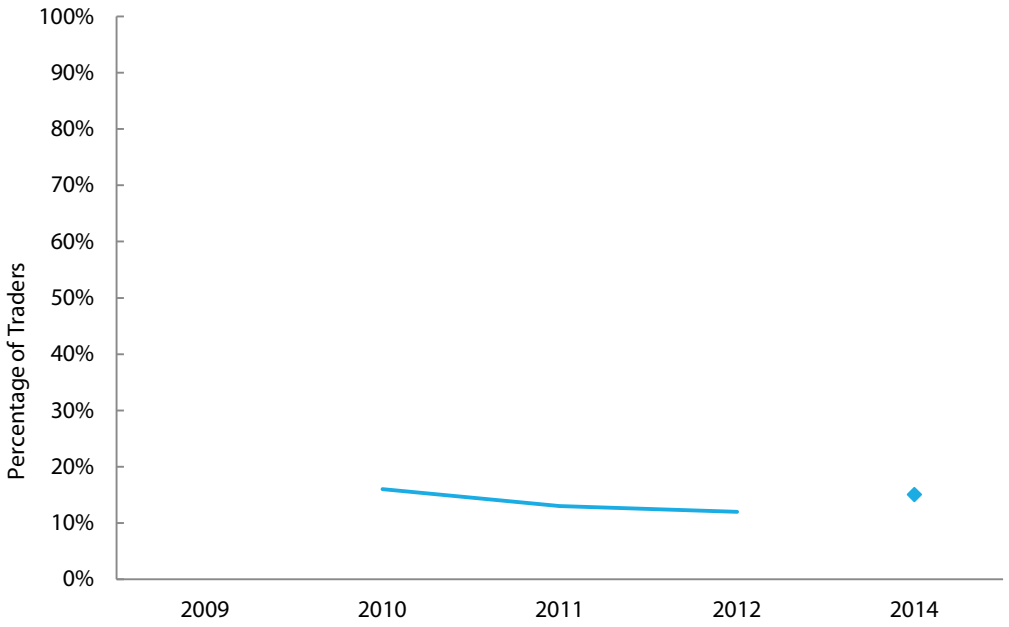


Figure 19: Percentage of traders unable to identify any of the three practices as unfair commercial practices, EU%.



Source: Flash Eurobarometers 278, 300, 332, 359 and 396. Question: 2009: Please state whether the following commercial practices are prohibited or not (IN YOUR COUNTRY). 2010-2013: I will read 4 statements concerning legislation in (OUR COUNTRY) related to commercial practices. Some of them are prohibited and some are not. For each statement, please tell me if you think it is prohibited or not: 'To describe a product as 'free' although it is only available free of charge to consumers calling a premium rate phone number.'/ 'To include an invoice or similar document seeking payment in marketing material.' / 'Advertising products at a very low price compared to other offers without having a reasonable quantity of products for sale [In 2014: 'To run a promotional campaign stating 'We offer a discount of 60%' although the products offered with a 60% discount are almost out of stock.']'. From 2009-2013 a fourth statement that was not an unfair practice was included as a decoy; this was changed to a fourth unfair practice in 2014. The figures above however only show the original three unfair practices. Note: No data was provided on the proportion of companies that were not able to identify any of the three unfair commercial practices in 2009. EU% comprises the EU27 from 2009 to 2012 and EU28 in 2014.

The two figures above show that trader awareness of UCPD provisions is mixed. While the proportion of traders unable to identify any unfair practices remained reasonably consistent (from 16% in 2010 to 15% in 2014), the proportion of traders able to correctly identify all three unfair practices decreased by 5 percentage points over the same period, from 26% to 21%. The majority of traders therefore have a middling level of knowledge about unfair commercial practices, with most answering one or two questions correctly.

Trader awareness of unfair commercial practices differs substantially between the EU15 and EU12/13. Traders in the EU15 consistently provide a greater proportion of correct answers (average difference of 7 percentage points over the time period surveyed) and a lower proportion of incorrect answers on average than traders in the EU12/13 (average difference of 11 percentage points). In 2014, for example, more than one quarter of traders (27%) in the EU12/13 were unable to correctly identify any unfair practices, compared to about one eighth (13%) in the EU15.

At the country level, the Member State with the highest proportion of traders correctly answering all three questions in 2014 was Germany (31%), followed by Finland (27%) and Slovenia (26%). The lowest proportions of correct answers were given in Bulgaria (6%), Cyprus (9%), Latvia (10%) and Croatia (10%). Cyprus was the only country in which more than half of traders (53%) were unable to identify any unfair practices.

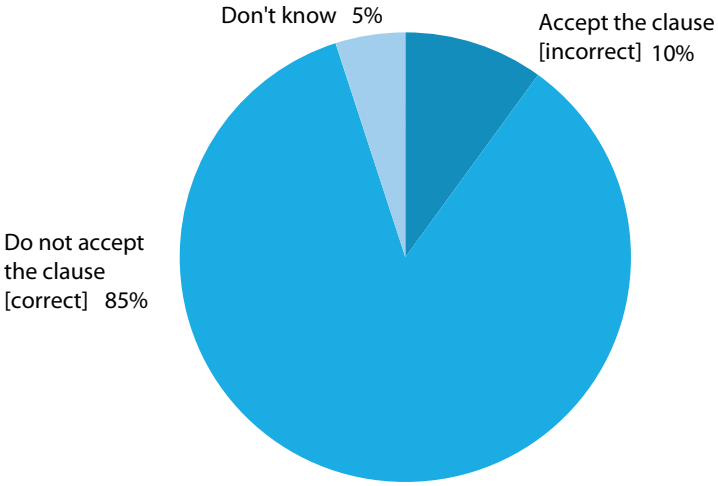
Further detail on the results for two of the knowledge questions tested – including documents seeking payment in marketing material and falsely advertising products as ‘free’ – can also be found in subsection 1.4 on the MCAD, as these practices are also relevant in the context of business-to-business transactions.

1.3 Unfair Contract Terms Directive

Consumer awareness

One knowledge question on unfair contract terms was included in the 2012 edition of the Flash Eurobarometer series ‘Consumer attitudes towards cross-border trade and consumer protection’, asking consumers whether they thought they were obliged to accept an unfair clause. A large majority of consumers (85%) responded correctly that they did not need to accept the clause, as shown in the figure below.

Figure 20: Consumer responses to a knowledge question about unfair contract terms, EU27% 2012.



Source: Flash Eurobarometer 358. Question: Imagine that, after having purchased a bike, you realize that it is faulty. You also realize that the sales contract contains a clause rejecting any responsibility of the seller or producer to deal with the faults. Do you think that…? 'You should accept the clause. The seller is not responsible for faults existing at the time of purchase/delivery of the good' [Incorrect] / 'You do not have to accept the clause. The seller is responsible for faults existing at the time of purchase/delivery, so you have the right to ask them to repair or replace it.' [Correct] / 'Don't know'.

The proportion of correct answers were slightly higher on average in the EU15 (85%) compared to the EU12 (81%). At the country level, this proportion ranged highs in Ireland (93%), the UK (91%) and the Czech Republic (90%) to lows in Cyprus (70%), Romania (73%) and Hungary (74%).

The consumer market study conducted for the Fitness Check in 2016 found a much lower awareness among consumers regarding particular unfair terms. When asked whether they would be bound by a clause in a gym contract that refused liability for any harm or injury caused by the use of the gym's facilities,[1003] only 40% of the survey respondents correctly answered that they would not be bound by this term, less than half the proportion of respondents that were able to answer the Eurobarometer question correctly. Slightly more respondents in the EU15 (41%) were able to answer the question correctly than in the EU13 (38%). In the same survey, 35% of consumers indicated that they benefited at least "moderately" from the right to not be bound by unfair terms and conditions.[1004]

The consumer market study also included behavioural experiments related to unfair contract terms. The behavioural experiments found that between 57% and 78% of the respondents were able to correctly identify certain contract terms as unfair, depending on the contract term. In contrast, between 30% and 72% of respondents were able to correctly identify contract terms that were actually fair. The ability of respondents to

[1003] Question: Imagine that you have signed a contract for one year's membership with a local gym. Some time later you have an accident that you believe was caused by a malfunction of the gym's equipment. When you complain to the gym, you are referred to its general terms and conditions which you had accepted at the time of signature of the contract. These terms and conditions include a clause providing that the gym does not accept any liability for any harm or injury caused by the use of the gym's facilities and equipment. Are you bound by the above-mentioned clause of the gym's terms and conditions? [Yes, because you accepted the gym's general terms and conditions – No, the respective contract clause is unfair and is therefore not binding on you as a consumer – Don't know.]

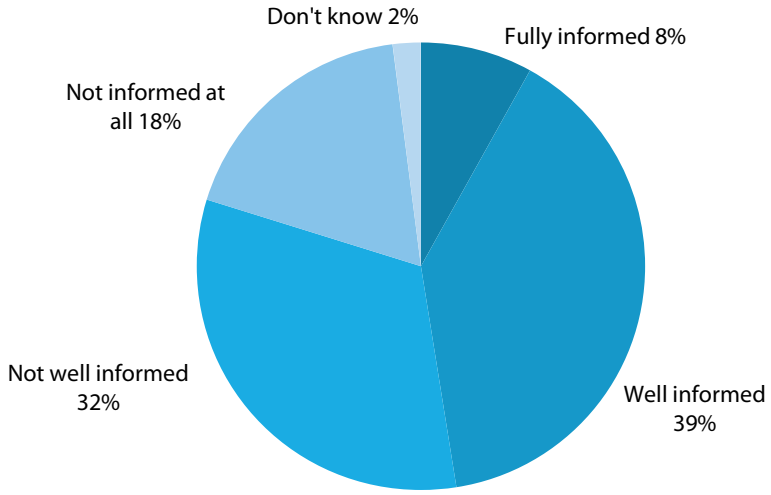
[1004] Question: Based on your experience as a consumer, please indicate to what extent you have benefitted from the following consumer rights. 'The right to not be bound by unfair terms and conditions.'

identify both fair and unfair contract terms was significantly higher when the contract terms were presented to the respondent in a summarised form compared to standard terms and conditions in a longer form.

Trader awareness

Trader knowledge of unfair contract terms falling under the UCTD has so far not been systematically surveyed in the Eurobarometer or other standard surveys. However, when traders that either sell or indicated interest in selling cross-border were asked in a 2011 survey about how well-informed they thought they were regarding consumer protection provisions in the contract law of other EU countries in which they sold or wanted to sell to consumers, less than half (47%) considered themselves to be 'well informed' or 'fully informed', as seen in the figure below.

Figure 21: Traders' self-assessed awareness regarding consumer protection provisions in the contract law of other EU countries in which they sell or wish to sell to final consumers, EU27% 2011.



Source: Flash Eurobarometer 321. Question: How well-informed are you about the consumer protection provisions in the contract laws of the EU countries where you sell or wish to sell to final consumers? [Possible responses in figure above.] Note: Base consists of traders who indicated that they sell or are interested in selling cross-border.

On average, traders in the EU12 indicated being three percentage points more confident about their own knowledge than those in the EU15, with 46% in the EU12 considering themselves to be well or fully informed compared to 43% in the EU15. At the country level, the proportion of traders reporting themselves to be well or fully informed ranged from highs in Slovakia (65%), the Czech Republic (65%) and Luxembourg (63%) to lows in Bulgaria (19%), Sweden (22%), the Netherlands (32%), Finland (32%) and Greece (32%).

Additionally, traders appear to be cognizant of variations in national consumer contract law to the extent that these represent a barrier to cross-border trade. The table below shows the proportion of traders that have identified contract problems as an obstacle to cross-border trade in response to various Eurobarometer questions over the last 10 years.

Table 31: Proportion of traders identifying differences in national contract law as an obstacle to cross-border trade in response to Eurobarometer questions, EU%.

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'
2014	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	39% 'Fairly important' or 'Very important'

Source: Flash Eurobarometers 186, 224, 331, 358 and 396. Note: EU% comprises the EU25 in 2006, EU27 from 2008 to 2012 and the EU28 thereafter.

At the national level, the proportion of traders indicating that differences in national contract law were an important obstacle to cross-border trade in 2014 ranged between highs in Romania (67%), Slovakia (57%) and Portugal (56%) to lows in Cyprus (18%), Estonia (18%) and Sweden (19%).

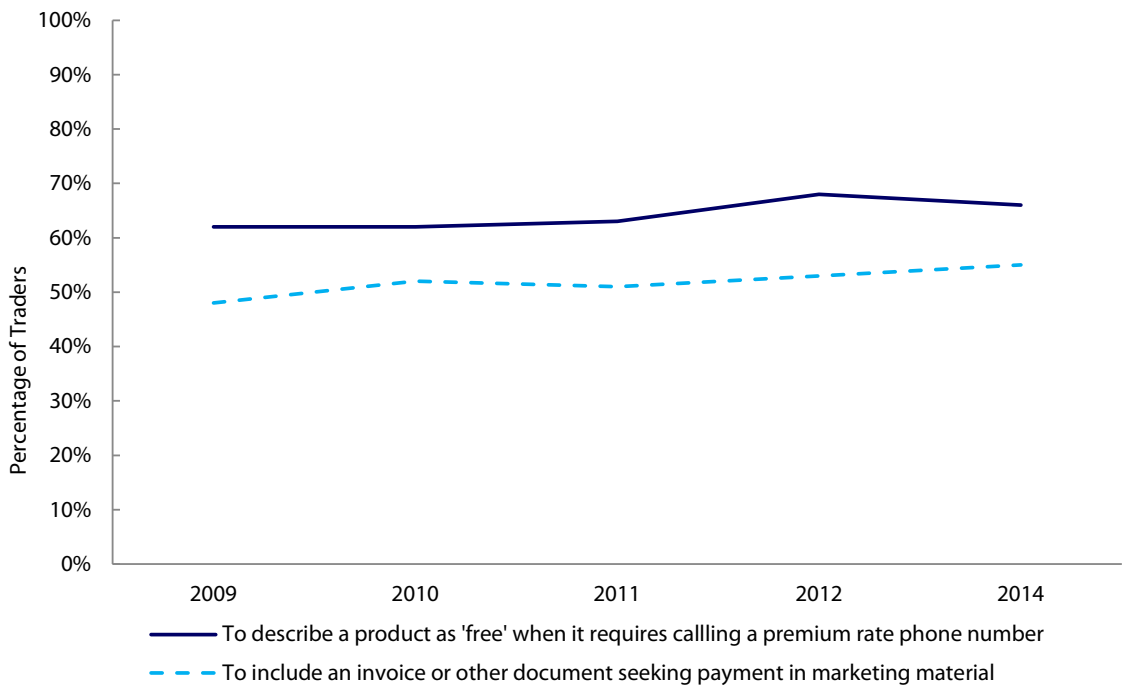
1.4 Misleading and Comparative Advertising Directive

Trader awareness

As indicated before, the MCAD concerns misleading advertising practices in a business-to-business context. Specific practices that fall under this Directive are not usually included in Eurobarometer surveys that explore awareness of rules concerning advertising, as these typically focus on consumers. However, certain unfair commercial practices falling under the UCPD in a business-to-consumer context also arise in a business-to-business context, for example, marketing practices that describe a product as 'free' when it actually entails substantial costs, or including a fake invoice or other document seeking payment in marketing material (relevant for example in the context of the so-called misleading directory companies, see below, Section 4.2.4). The following figure therefore provides more detail on the trader knowledge questions discussed in the UCPD section and shows the proportion of surveyed traders that correctly identified these two practices as prohibited.

As the figure below shows, two-thirds of traders in 2014 knew that falsely advertising a product as free was a prohibited practice, while slightly more than half (55%) knew that fake invoices were prohibited. The proportion of traders correctly identifying the advertisement of false 'free' products as a prohibited practice slightly increased between 2009 and 2014, from 62% to 66%. The proportion identifying fake invoices as a prohibited practice also increased over the same period, from 48% to 55%.

Figure 22: Percentage of traders aware that certain advertising practices are prohibited, EU%.



Source: Flash Eurobarometers 278, 300, 331, 359 and 396. Question: I will read 4 statements concerning legislation in (OUR COUNTRY) related to commercial practices. Some of them are prohibited and some are not. For each statement, please tell me if you think it is prohibited or not? 'To describe a product as 'free' although it is only available free of charge to customers calling a premium rate phone number.' / 'To include an invoice or a similar document seeking payment in marketing material.' Note: EU% comprises the EU27 from 2009 to 2012 and EU28 thereafter.

A larger proportion of traders in the EU15 were able to correctly identify each practice as prohibited than in the EU12/13. In 2014, the average gap between the two groups was equal to 13 percentage points for the practice of falsely advertising a product as free (67% in the EU15 to 54% in the EU13) and 17 percentage points for the practice of including fake invoices in marketing material (58% to 41%).

At the country level, the level of trader awareness regarding the prohibited nature of falsely advertising a product as free ranged from highs in France (78%), Germany (77%), Denmark (77%) and Sweden (77%) to lows in Cyprus (29%), Croatia (42%) and the UK (48%). in 2014. In the same year, the level of trader awareness regarding fake invoices ranged from highs in Finland (72%), Sweden (70%) and France (69%) to lows in Cyprus (20%), Bulgaria (24%) and Croatia (26%).

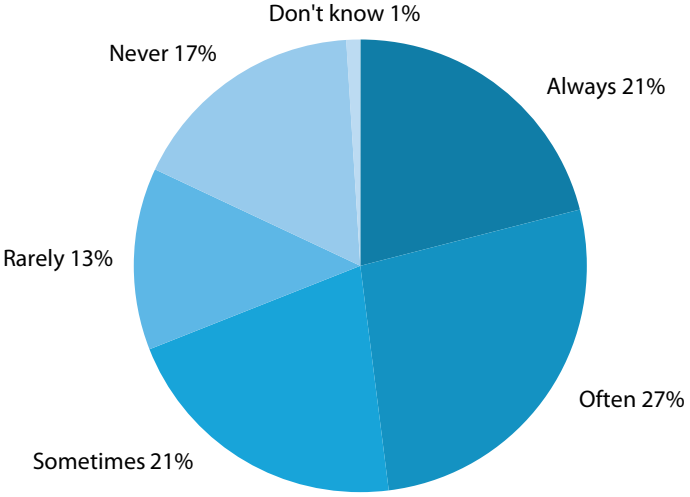
1.5 Price Indication Directive

Consumer awareness

Consumer awareness of the PID is only sporadically addressed in European consumer surveys. In 2001, 68% of consumers surveyed in the EU15 indicated that they were at least 'a little' interested in being able to use displayed unit prices to compare goods.[1005] According to a Special Eurobarometer conducted in 2010, 48% of surveyed consumers responded that they consulted the unit price 'always' or 'often' when comparing goods. The results are shown in the following figure.

[1005] Flash Eurobarometer 113. Question: In some shops, unit prices by the kilo or by the litre are displayed in addition to the price to pay for the pack, can, or bottle. This gives you a better opportunity to compare competing products. Does this double display interest you personally?

Figure 23: Consumer responses to how often they compare goods by looking at the price per unit, EU27% 2010.



Source: Special Eurobarometer 342. Question: In the last 12 months, how often have you compared the price of goods by looking at the price per unit measure, for example, price per kilo, per metre or per litre? [Possible responses in figure above.]

At the country level, more than one quarter of respondents indicated that they 'always' consult the unit price in Estonia (35%), Cyprus (31%), Latvia (29%), Germany, France and Spain (each 26%). In contrast, at least one quarter of respondents indicated that they 'never' consult the unit price in Luxembourg (32%), Ireland (32%), the UK (29%), Belgium (28%) and France (25%).

In the consumer market survey conducted for the Fitness Check in 2016, consumers were asked whether they thought it was legal for a supermarket to display prices for bottled water per bottle (where the bottle was not 1 litre) instead of per litre.[1006] Two-thirds of respondents (67%) correctly answered that the supermarket was obliged to show prices per litre. The proportion of correct responses was identical in the EU15 and EU13. 58% of consumers in the survey indicated that they benefited at least "moderately" from the right to see prices per unit, the highest level of benefit indicated for any the Directives under consideration in this study.[1007]

The consumer market study also included behavioural experiments related to consumers' use of unit price information. The results of the behavioural experiments showed that respondents were highly aware of the presence of unit prices, and that the majority of respondents who were not shown a unit price when asked to make a purchase decision reported calculating or estimating the unit price themselves. The results also showed that the presence of unit price information reduced the average price paid per unit by the respondent during the course of the experiments.

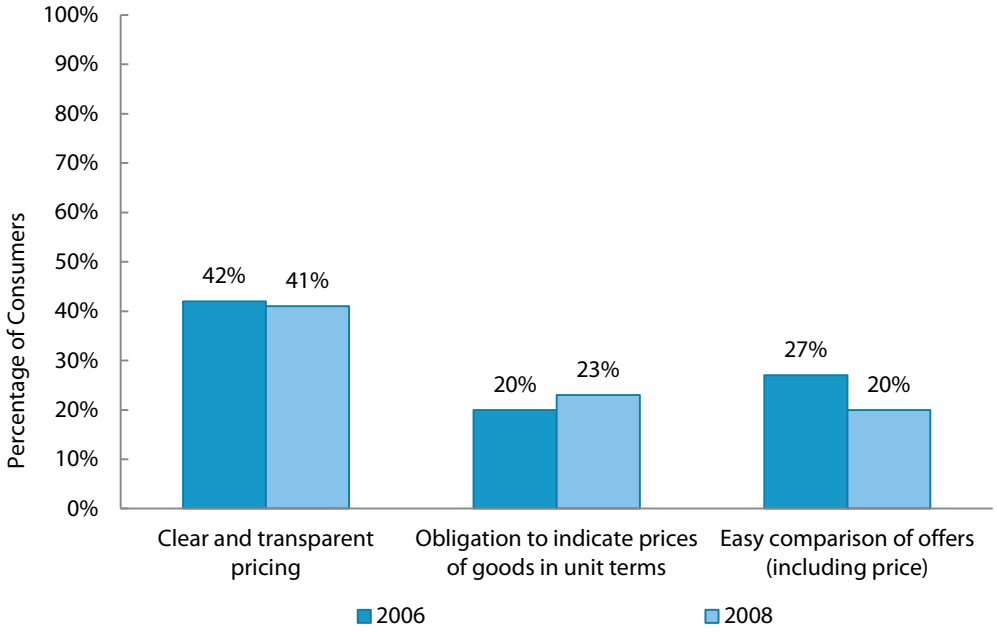
In the 2006 and 2008 Special Eurobarometers on 'Consumer protection in the internal market', consumers were asked to choose a maximum of five methods they thought were the best ways to protect consumers out of a list of 15. The proportion of

[1006] Question: You went to the supermarket to buy water. The shelf displayed the prices for some brands per bottle and per litre, whilst for others the price was only given per bottle. Should prices also be indicated per litre for all of the bottles of water (except where their volume is 1 litre)? [Yes, the supermarket must show litre prices for bottles that are not 1 litre bottles, that is the law – No, the supermarket is allowed to choose whether or not they show litre prices – Don't know]

[1007] Question: Based on your experience as a consumer, please indicate to what extent you have benefitted from the following consumer rights. 'The right to see the price of products also per unit.'

consumers who indicated price indication-related priorities is shown in the figure below. While more than 40% of consumers each year indicated 'clear and transparent pricing' as a priority to protect consumers – in fact, it was the most popular response in 2006 – the proportion that specifically selected unit prices was 20-23%.

Figure 24: Percentage of consumers who selected price indication-related methods as the best ways to protect consumers, EU%.



Source: Special Eurobarometers 252 and 298. Question: Among the following, which are the best ways to protect consumers? [Maximum five answers out of 15 options.] Note: EU% comprises the EU25 in 2006 and EU27 in 2008.

In 2008, the highest proportions of consumers selecting the unit price option were observed in Slovakia (33%), Romania (31%) and Belgium (31%), while the lowest proportions were observed in the UK (13%), Lithuania (14%) and Latvia (15%).

Trader awareness

The last comprehensive assessment of the trader compliance with the PID across the EU was conducted within the EU15 as part of an appraisal of the Directive in 2004, six years after it was adopted. The 2004 appraisal found that 77% of surveyed traders across the EU15 indicated unit price; for comparison, only 67% of traders in the EU15 were legally required to indicate unit price (i.e. who were not subject to derogations in certain Member States). 59% of the traders surveyed either agreed or strongly agreed that consumers use unit prices in their purchasing decisions.[1008]

2. Trends in problems experienced and complaints

In the following subsections, we present trends in consumer problems, first at a general level and then by Directive (UCPD, UCTD and PID). In the context of the MCAD we also consider trader problems with misleading advertising.

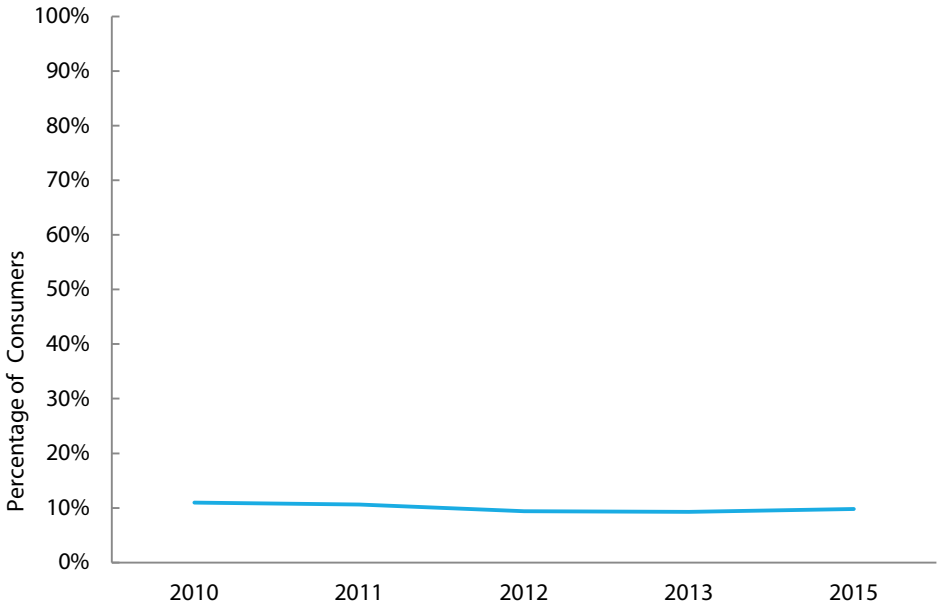
[1008] Appraisal of Directive 98/6/EC on consumer protection in the indication of unit prices of products offered to consumers, final report. Question wording not provided. Available at: http://ec.europa.eu/consumers/archive/cons_int/safe_shop/price_ind/disclaimer_en.pdf

2.1 Overall problems and complaints

The figure below presents results from the European Commission's Consumer Market Monitoring Survey (MMS),[1009] which show that the proportion of consumers who reported having at least one problem in the past 12 months has declined by an average of about 1 percentage point across the EU since 2010.

At the country level, the incidence of problems as measured by the MMS in 2015 – the most recent year for which data is available – ranges from highs in Bulgaria (17%), Croatia (15%) and Spain (15%) to lows in France (5%), Austria (5%), Germany (6%) and Luxembourg (6%).

Figure 25: Percentage of consumers who experienced at least one problem with a good or service in the last 12 months, Market Monitoring Survey, EU%.



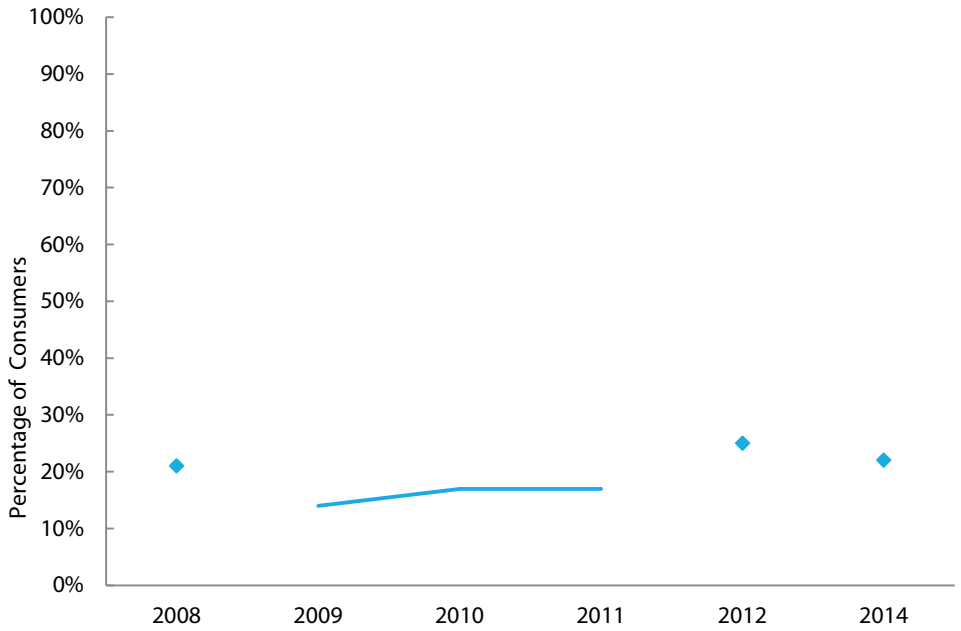
Source: Consumer Market Monitoring Survey 2010-2015. Question: Did you experience a problem with (SERVICE/PRODUCT) or (SUPPLIER/RETAILER), where you thought you had a legitimate cause for complaint? Note: EU% comprises the EU27 from 2010 to 2012 and the EU28 thereafter.

The Flash Eurobarometer series 'Consumer attitudes towards cross-border trade and consumer protection', shown below, also measured incidence rates of problems between 2008 and 2014. The Eurobarometer responses below show a more erratic pattern than the MMS results, a phenomenon which can be partly explained by two important changes in the question wording from 2008 to 2009 and again in 2012. In 2008, the relevant question asked only indirectly about problems in a question about complaints; consumers were asked directly about their problems starting in 2009. In 2012, however, rather than being asked about a 'problem', as in the previous and subsequent years of the survey, respondents were asked whether they had experienced '*any legitimate cause for complaint* when buying or using any goods or services', a wording that invites a broader range of responses than the questions used in 2009-2011 and in 2014 (see the figure caption for exact question wording). These differences in the question wording are reflected in the figure below, where the data

[1009] More detail available from: http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/market_monitoring/index_en.htm

points for 2008, 2012 and 2014 are presented separately. The series presented in this figure should therefore be interpreted cautiously.

Figure 26: Percentage of consumers who experienced at least one problem with a good or service in the last 12 months, Eurobarometer, EU%.



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 by 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, unlike 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 EU27 from 2008 to 2012 and the EU28 thereafter.

Despite the interim variation, the average incidence of problems as measured by the Eurobarometer is almost identical in 2008 and 2014, at 21% and 22% respectively. At the country level, the proportion of consumers reporting a problem in 2014 range from highs in Croatia (33%), Italy (30%), Finland, Hungary and Poland (each 29%) to lows in Cyprus (11%), Luxembourg (11%), France (14%) and Slovenia (14%).

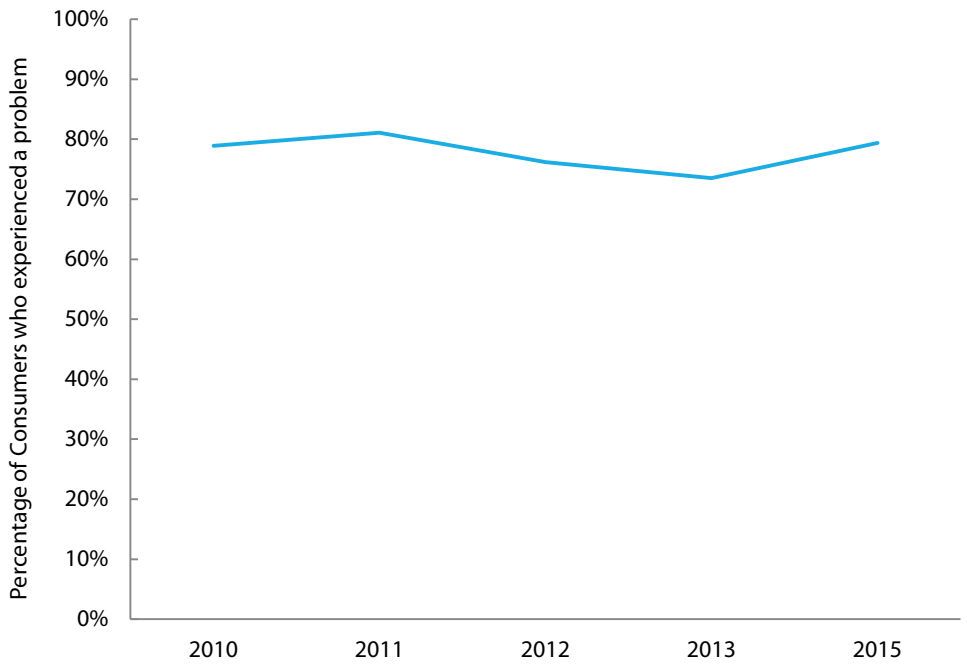
Consumers were also asked whether they had encountered a problem in the last 12 months as part of the consumer market study conducted for the Fitness Check in 2016. The survey found that 26% of consumers reported experiencing such a problem, a rate reasonably similar to the results of the last two Eurobarometers.[1010] The problem rate found in the consumer market survey is much higher among respondents in the EU13 (37%) than in the EU15 (24%).

After experiencing a problem, a large majority of consumers complain. The figure below shows the proportion of consumers who made a formal complaint after experiencing at least one problem with a good or service in any of the 52 markets

[1010] 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?

covered by the Commission's Market Monitoring Survey within the last 12 months. Between 2010 and 2014, the proportion of consumers surveyed indicating that they made a complaint remained stable, at an average of 79% across the EU.

Figure 27: Percentage of consumers who complained after experiencing at least one problem with a good or service in the last 12 months, EU%.



Source: Consumer Market Monitoring Survey Question: [When a problem was encountered] Have you complained about these problems? Note: EU% comprises the EU27 until 2012 and the EU28 thereafter.

The average rate of complaining is higher in the EU15 than in the EU12/13 by an average of 5 percentage points; this gap has remained stable through the survey years. At the country level, the reported complaints rate in 2015 ranges from highs in Spain (90%), the Czech Republic (86%), the Netherlands and Greece (both 83%) to a lows in Estonia (49%), Hungary (64%) and Luxembourg (66%).

In comparison, in the consumer market survey conducted for the Fitness Check in 2016, out of the consumers who indicated experiencing a problem related to one of the Directives under consideration[1011] within the last 12 months, 66% reported making a complaint, comprising 53% who had complained to the seller or service provider and a further 13% who had complained to the manufacturer.[1012]

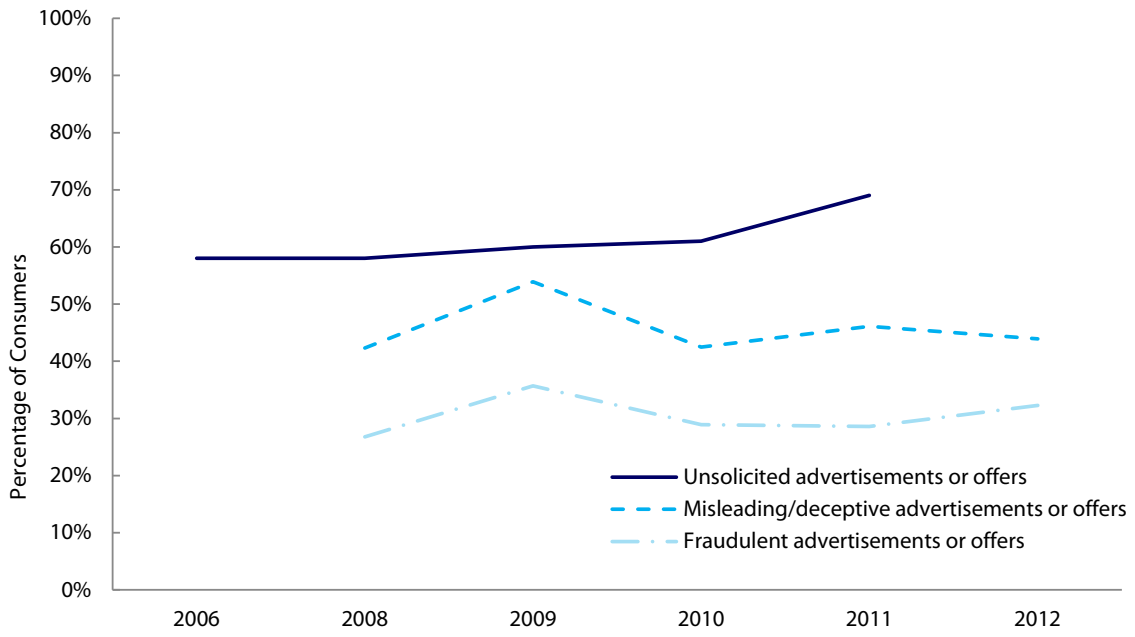
2.2. Unfair Commercial Practices Directive

The figure below shows the development over time of common types of unfair commercial practices that consumers have reported experiencing in the pre-contractual stage.

[1011] Also including defective goods. The full text of the screener question: Over the past 12 months, how often 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? Lack of indication of the unit price / Defective goods / Misleading or aggressive commercial practices / Unclear or ambiguous standard contract terms / Unfair standard contract terms.

[1012] Question: Still thinking about the most recent problem, what action did you take to resolve the problem: 'You complained to the seller or service provider / You complained to the manufacturer'.

Figure 28: Percentage of consumers reporting that they experienced common types of pre-contractual unfair practices within the last 12 months, EU%.

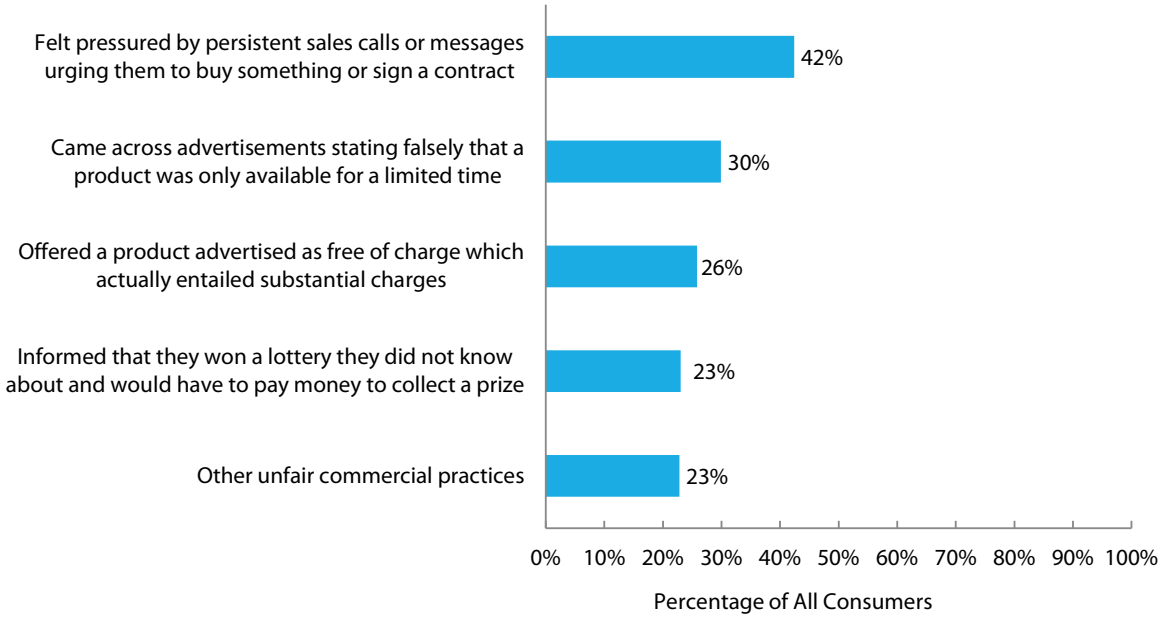


Source: Special Eurobarometers 252 and 298, Flash Eurobarometers 282, 299, 332, 358 and 397. Question 2008 – 2012: Have any of the following happened to you in the past 12 months? 'You came across misleading or deceptive advertisements, statements or offers' / 'You came across fraudulent advertisements, statements or offers.' Only in 2006 – 2011: 'You came across unsolicited commercial advertisements, statements or offers (cold calls, spam emails, commercial SMS, etc.)'. Note: EU% comprises the EU25 in 2006 and the EU27 thereafter.

Referring to the figure above, unsolicited advertisements were the most prevalent practice, with 69% of consumers reporting an experience with unsolicited advertising within the last 12 months before the option was dropped from the Eurobarometer survey in 2011. The levels of reported misleading and fraudulent advertising both show slight increases from 2008 to 2012, in the order of 2 percentage points for misleading advertising and 5 percentage points for fraudulent advertising.

The figure below provides a more detailed look at the prevalence of specific unfair commercial practices as reported by consumers in 2014. Consistent with the longer-term trends in the figure above, the most common practice is unsolicited or aggressive advertising (feeling pressured by persistent sales calls or messages), followed by misleading or deceptive advertising (false time-limited offers, products falsely advertised as 'free') and fraudulent advertising (lottery scams). Other unfair commercial practices were reported to be in the minority.

Figure 29: Most common unfair commercial practices experienced by consumers within the last 12 months, EU28% 2014.



Source: Flash Eurobarometer 397. Question: I will read you some statements about unfair commercial practices. After each one, please tell me whether you have experienced it during the last 12 months. [Possible responses in figure above.]

In the consumer market study conducted for the Fitness Check in 2016, when asked about their experience with types of problems in the last 12 months, 33% of consumers responded that they had experienced misleading or aggressive practices at least "sometimes" within the last 12 months, including 15% who had responded that they experienced misleading or aggressive commercial practices "often" or "very often".[1013] These problems were most likely to relate to telecom services (36%), financial/insurance services (23%) or utilities (18%).

Certain markets or commercial practices have been investigated by the Commission as emerging problem areas under the UCPD. 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, complete price details for the goods and services being compared, and other information required by the UCPD to help consumers make an informed decision may not be presented in a transparent manner. A Multi-stakeholder Group on Comparison Tools was launched in 2012 to address these concerns, and a dedicated Commission 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, most related to inaccurate information.[1014]

[1013] 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? 'Misleading or aggressive commercial practices.'

[1014] European Commission 2015 Study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes for such tools. Available from: http://ec.europa.eu/consumers/consumer_evidence/market_studies/comparison_tools/index_en.htm

In response to these findings, the Multi-stakeholder published a list of Key Principles for Comparison Tools in 2016 to improve compliance with the UCPD, available from: http://ec.europa.eu/consumers/consumer_rights/unfair-trade/comparison-tools/index_en.htm

Along with increasing consumer sensitivity to environmental concerns, the number of environmental claims – the claim that a good or service is more sustainable or environmentally friendly than competing goods or services – in packaging and marketing materials has also increased in the last few years, as have complaints that many of these claims are vague or misleading.[1015] The Commission established a Multi-stakeholder Dialogue on Environmental Claims in 2012 to investigate the problem. A dedicated Commission 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.[1016]

Recent EU enforcement sweeps by CPC authorities have also found unfair commercial practices to be prevalent within certain digital markets:

- 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;[1017]
- 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 advertising themselves as '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.[1018]

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. Only 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.[1019]

[1015] European Commission 2014 Consumer market study on environmental claims for non-food products. Available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/green-claims-report.pdf

[1016] See previous footnote. In response, the Multi-stakeholder Dialogue on Environmental Claims published a list of compliance criteria in 2016 with the intent to clarify UCPD guidance on the use of environmental claims. Available at: http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/files/mdec_compliance_criteria_en.pdf

[1017] EU-wide screening of websites ('SWEEPS'): Travel services. Available at: http://ec.europa.eu/consumers/enforcement/sweeps/travel_services/index_en.htm

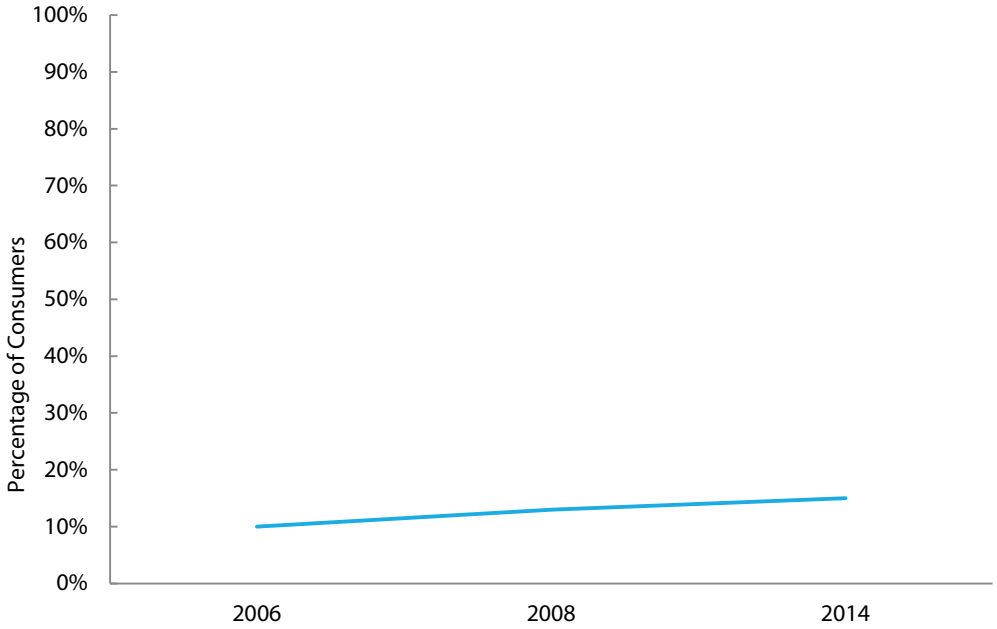
[1018] European Commission 2012 Study on Digital Content Products in the EU. Available from: http://ec.europa.eu/consumers/enforcement/sweeps/digital_contents/index_en.htm

[1019] Wettbewerbszentrale Jahresbericht 2015. Available from: https://www.wettbewerbszentrale.de/de/publikationen/jahresberichte/

2.3 Unfair Contract Terms Directive

As the following figure shows, the proportion of consumers reporting that they have encountered an unfair contract term within the last 12 months has increased by 5 percentage points since 2006, from an EU average of 10% to 15%.[1020]

Figure 30: Percentage of consumers reporting that they encountered unfair terms and conditions in a contract within the last 12 months, EU%.



Source: Special Eurobarometers 252 and 298, Flash Eurobarometer 376. Question: Now, I will read you some statements about problems consumers may have more generally when shopping. Please tell me whether you have experienced any of them when buying during the last 12 months. 'You have encountered unfair terms and conditions in a contract (for instance, enabling the provider to change the contract terms unilaterally or imposing excessive penalties for breach of the contract)'. Note: EU% comprises the EU25 in 2005, EU27 in 2008 and EU28 in 2014.

The proportion of consumers reporting encounters with unfair contract terms is slightly higher on average in the newer Member States than in the EU15; in 2014, the difference between these groups was equal to 5 percentage points (12% in the EU15 compared to 17% in the EU13), up from 3 percentage points in 2006 (9% in the EU15 compared to 12% in the EU10). This growing gap may be driven by higher reports of unfair contract terms in the newest Member States, with more than 20% of consumers surveyed reporting encounters with unfair contract terms in Bulgaria, Romania, and Croatia in 2014. The lowest proportions were found in Denmark (5%), the Netherlands (6%), and Sweden (7%).

In the consumer market conducted for the Fitness Check in 2016, 23% of consumers indicated that they had experienced unfair contract terms at least "sometimes" within the last year, including 9% who indicated that they had experienced unfair contract terms "often" or "very often". Most of these problems were reported in the telecom sector (31%), financial/insurance sector (18%), or utilities sector (14%). Additionally, 28% of consumers indicated that they had encountered unclear or ambiguous

[1020] As only one knowledge question has been asked in the Eurobarometer regarding unfair contract terms in 2012, it is not possible to determine whether this increase is due to greater consumer awareness of unfair contract terms. However, consumer performance on other general knowledge questions about consumer law as discussed in section 1.1. had actually decreased over this period.

standard contract terms at least "sometimes" in the last year, including 11% who indicated that they encountered unclear or ambiguous terms "often" or "very often".[1021] Unclear terms, like unfair terms, were most often reported in the telecom sector (32%), financial/insurance sector (21%), or utilities sector (16%).

An average of 13% of surveyed traders across the EU indicated that they were aware of their competitors using unfair contract terms in 2009, the only year that such a question was included in the Eurobarometer.[1022] On average, 21% of traders in the EU12 reported their competitors using unfair contract terms compared to 14% in the EU15. At a country level, the responses varied from highs in Poland (39%), Slovenia (31%) and Greece (26%) to lows in Ireland (6%), Latvia (6%) and Sweden (7%).

Additionally, in 2014, 15% of traders reported receiving complaints in the last year regarding their own contact terms, up threefold from the last time the question was surveyed in 2009.[1023] The average proportions were not different in the EU15 and EU12/13 in either year. Nationally, the proportion of traders reporting complaints about their contract terms in 2014 ranged from highs in Germany (21%), France (20%) and Belgium (19%) to lows in Portugal (4%), Cyprus (6%), Luxembourg and Ireland (both 7%) .

Data from other European-level studies and national authorities suggest that utilities markets are a particular problem area for unfair contract terms:

- The retail energy sector was selected for a Commission market study in 2010, which found that consumers have low trust in suppliers to use fair contract terms and often have difficulty understanding complex electricity contracts. A survey that was conducted in support of the market 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 two years;[1024]
- In 2014, the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) noted 200 unresolved cases with illegal contract terms (*"clauses illicites"*), 100 with unfair terms (*"clauses abusives"*) and 400 with presumed unfair terms (*"clauses présumées abusives"*) in the retail water distribution sector, often involving small distributors that claimed to not have the technical or legal resources to update their terms and conditions;[1025]
- In the internet services provision (ISP) market, a 2012 European Commission market found that 35% of surveyed stakeholders (national regulators,

[1021] 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? 'Unfair standard contract terms. / Unclear or ambiguous standard contract terms.'

[1022] Flash Eurobarometer 278. Question: In the past twelve months, are you aware that your competitors used what you regard as unfair consumer contract terms?

[1023] Flash Eurobarometers 278 and 397. Questions: 2009: What were the main issues consumers complained about in the past twelve months? 'Contract terms or guarantees'. 2014: What type of complaints has your company received from consumers located in (OUR COUNTRY) during the past 12 months? Were they complaints… 'About contractual terms'.

[1024] European Commission 2012 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

[1025] 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

consumer organisations, and ADR entities) thought that unfair terms in ISP contracts were 'fairly' or 'very common', with the most common complaints relating to termination fees, contract duration, cancellation notice periods, and automatic rollovers.[1026]

National studies suggest that the length and legalistic language of standard terms and conditions poses an obstacle for consumers to identify unfair terms, a problem also discussed in the 2016 European Commission study on consumers' attitudes towards Terms and Conditions (T&Cs). A report by Which? in the UK found that the terms and conditions for digital services such as PayPal and Apple iTunes contained more than 20,000 words, making them longer than Shakespeare's *Macbeth*.[1027] A separate study by consumer law experts in 2015 found that many of the terms used by these digital service providers would be unlikely to pass the unfairness test of the UCTD.[1028] A public consultation on simplifying and shortening terms and conditions was launched in March 2016 by the Department for Business Innovation & Skills in the UK; results of this consultation have not yet been released.[1029]

2.4 Misleading and Comparative Advertising Directive

Key issues related to misleading and comparative advertising in the B2B context are not currently measured by Eurobarometer surveys. Additionally, few Member States consistently collect data on such problems, making it difficult to draw conclusions about trends over time. However, a public consultation launched by the Commission in 2011 provides some data on the nature and extent of the B2B problems falling within the scope of the MCAD.[1030]

Misleading directory company schemes[1031] are the most commonly reported problem regarding misleading marketing in the B2B context. 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 to the Commission's 2011 public consultation came from companies that had encountered these schemes. A report prepared by Civic Consulting for the European Parliament in 2008 surveyed complaint-handling bodies in 16 Member States and recorded more than 13,000 complaints regarding misleading directory schemes in the period of 2003-2008.[1032]

[1026] European Commission 2012 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

[1027] Which? Conversation: Online T&Cs longer than Shakespeare plays – Who reads them? https://conversation.which.co.uk/technology/length-of-website-terms-and-conditions/

[1028] Loos, M. & J. Luzak (2015). Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers. Centre for the Study of European Contract Law Working Paper No. 2015-01

[1029] More information available at: https://www.gov.uk/government/consultations/improving-terms-and-conditions

[1030] Results summarised in the 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

[1031] 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.

[1032] 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

Other common misleading marketing practices identified in the Commission's public consultation in 2011 include:

- 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 extend 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.

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.[1033]

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.[1034]

2.5 Price Indication Directive

Consumer problems related to the PID are not tracked in Eurobarometers. However, the consumer market study conducted for the Fitness Check in 2016 found that 30% of consumers had encountered problems with the unit price at least "sometimes" in the last year, including 11% who had encountered problems "often" or "very often".[1035] 59% of consumers reported that their problems with the unit price related

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

[1033] 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'.

[1034] 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

[1035] 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? 'Lack of indication of the unit price.'

to food products, compared to drinks (41%), detergents/cleaning products (28%) or other products (8%).

Additionally, reports and investigations at the national level provide insight into some of the problems faced by consumers. 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. The main problems identified were:[1036]

- Unit price missing entirely (19% of price tags checked);
- Mathematical errors in the unit price calculation (9% of price tags checked);
- Unit price calculated using the wrong reference, e.g. dehydrated soup priced per weight of the soup mix rather than by volume of the end product (34% of price tags checked);
- Unit price calculation not matched with the product, e.g. where the product is sold in different sizes with unit prices given as a range, making the unit price of any one product unclear (5% of price tags checked).

In the UK, the consumer organisation Which? filed a 'super-complaint' regarding misleading and confusing unit price indication in supermarkets 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 2000 UK adults on their experiences using unit price indications in supermarkets. Three main problems were identified in their report:[1037]

- Unit price not displayed clearly on the grocery price tag, making it difficult for consumers to find or read the price (noted by 23% of poll respondents);
- Unit price of like products displayed in different units. For example, packaged food may be priced per weight or per item, or certain goods may be priced per 100g or 100ml (noted by 35% of poll respondents);
- Updated unit prices often not provided for products that are part of a special offer (noted by 33% of poll respondents).

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.[1038]

Older compliance investigations were 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 with enforcement, particularly for smaller retailers, as these countries had chosen not to

[1036] Grundpreisangaben im Lebensmitteleinzelhandel: Eine Gemeinschaftsaktion der Verbraucherzentralen. Available at: http://www.vzbv.de/sites/default/files/downloads/bericht_grundpreisangaben_29_10_2010.pdf

[1037] 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

[1038] 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

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.[1039]

Evidence from recent investigations by national organisations in Germany and the UK and older post-transposition compliance checks suggest therefore that consumers continue to encounter problems with unit price indication, particularly in supermarkets. Additional surveys would need to be done on unit price indication at the European level to determine whether these problems are more widespread and in which direction they are trending.

3. Trends in the internal market

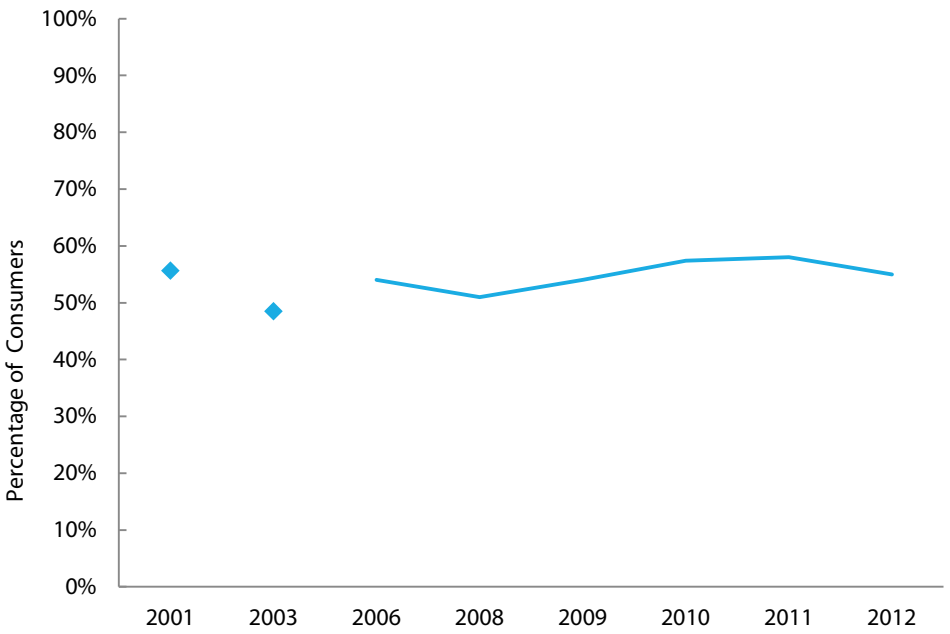
The following subsections present trends related to the internal market, focusing on trends in consumer trust, confidence, and cross-border shopping.

3.1 General trends in consumer trust

The figure below presents the percentage of EU consumers who feel their rights as consumers are adequately protected in their own country based on Eurobarometer data from 2001 to 2012. Note that the question was phrased differently in 2001 and 2003 (see figure caption).

[1039] 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.

Figure 31: Percentage of consumers who feel their rights as consumers are adequately protected, EU%.



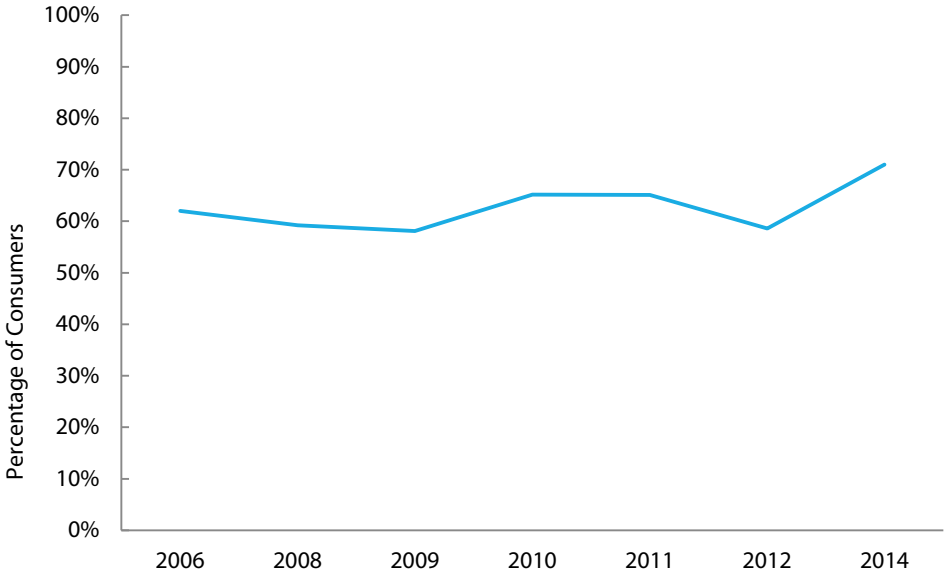
Source: Special Eurobarometer 193, 252, and 298, Flash Eurobarometers 117, 282, 299, 332 and 358. Question: 2001: If you had a dispute with a seller or a manufacturer here in (OUR COUNTRY), do you think that your consumer rights would be: [Very well protected - well protected - badly protected - very badly protected. Displayed is the proportion that responded 'well' or 'very well protected'.] 2003: Do you think that, as a consumer, you have a high level of protection in (OUR COUNTRY)? 2006-2012: For each of the following statements, please tell me if you agree or disagree with it. In (OUR COUNTRY)... 'You feel that you are protected by existing measures to protect consumers.' Note: EU% comprises the EU15 until 2004, the EU25 until 2007, and the EU27 from 2008 to 2012.

As the figure above shows, a majority of surveyed consumers feel that their consumer rights are adequately protected in their own country. Over the more than 10 year period between 2001 and 2012, the proportion of consumers feeling adequately protected has fluctuated around an EU average of 54%, reaching a peak of 58% in 2011. In 2012, the most recent year to survey consumers' general perceptions of being protected, 55% of consumers felt that their rights were adequately protected.

Furthermore, the proportion of consumers feeling protected is notably higher in the EU15 than in the newer Member States, although this difference has narrowed from 15 percentage points in 2006 (59% in the EU15 compared to 44% in the EU10) to 12 percentage points in 2012 (60% in the EU15 compared to 48% in the EU12). At the country level, the proportion of consumers feeling adequately protected in 2012 ranged from highs in the UK (76%), Austria (76%) and Luxembourg (73%) to lows of in Greece (18%), Bulgaria (30%) and Croatia (31%).

The figure below presents the proportion of consumers who agree that in general, retailers and service providers respect the rules and regulations of consumer law. As the figure shows, between 2006 and 2014, the average proportion of consumers agreeing to this statement increased by 9 percentage points from 62% to 71%.

Figure 32: Percentage of consumers agreeing that in general, traders respect the rules and regulations of consumer law, EU%.



Source: Special Eurobarometer 252 and 298, Flash Eurobarometers 282, 299, 332, 358 and 397. 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 EU25 in 2006, the EU27 from 2007 to 2012, and the EU28 thereafter.

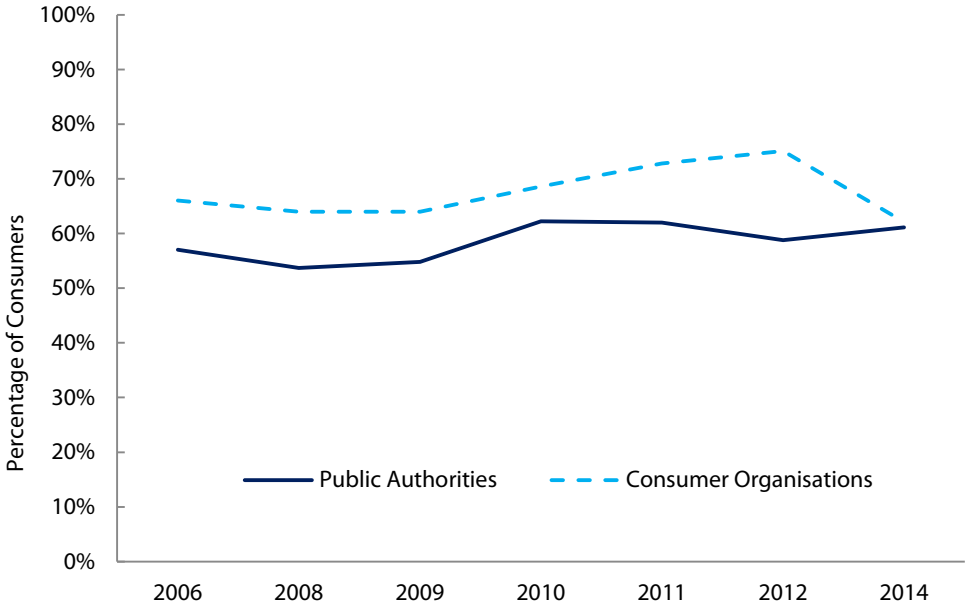
This overall rise in confidence was driven mostly by the EU12/13, which saw an average increase of 15 percentage points (from 52% to 67%) compared to 7 percentage points in the EU15 (67% to 74%). The gap in consumer trust between the EU15 and the EU12/13 decreased in size by almost half between 2006 and 2014, from 15 to 7 percentage points. At the country level, levels of trust in retailers and service providers in 2014 ranged from highs in Luxembourg (84%), the UK (84%), and Austria (83%) to lows in Greece (51%), Cyprus (52%) and Bulgaria (53%).

In the consumer market study conducted for the Fitness Check in 2016, 63% of consumers indicated that they thought traders selling in shops in their own country were "very" or "completely" compliant with their obligations toward consumers. This proportion dropped to 59% for domestic traders operating online. However, when asked about traders from other EU countries, less than half of consumers thought that they were "very" or "completely" compliant when selling in shops (47%) or online (45%).[1040]

As the figure below shows, in addition to retailers and service providers, a majority of consumers trust public authorities and consumer organisations to protect their rights. In general, consumers are more likely to trust consumer organisations than public authorities: between 2006 and 2012, trust in consumer organisations was an average of 10 percentage points higher than trust in public authorities. However, this gap has nearly closed in 2014, with 62% of respondents agreeing that they trusted consumer organisations compared to 61% for public authorities.

[1040] Question: How strongly do you agree or disagree that the following types of traders comply with their obligations towards consumers? 'Traders selling in shops in your country / Online traders based in your country / Traders selling in shops in other EU countries / Online traders based in other EU countries.'

Figure 33: Percentage of consumers agreeing that they trust public authorities and consumer organisations to protect consumer rights, EU%.



Source: Special Eurobarometers 252 and 298, Flash Eurobarometers 282, 299, 332, 358 and 397. Question: How strongly do you agree or disagree with each of the following statements. In (OUR COUNTRY)… 'you trust public authorities to protect your rights as a consumer.' / 'you trust non-governmental [in 2006: independent] consumer organisations to protect your rights as a consumer.' Note: EU% comprises the EU25 in 2006, the EU27 from 2008 to 2012 and the EU28 thereafter.

While the proportion of respondents expressing trust in public authorities rose slightly from 2006 to 2014, from 57% to 61%, the proportion expressing trust in consumer organisations slightly declined over the same period, from 66% to 62%. These trends are largely driven by changes in the EU15, which showed a larger increase in trust of public authorities compared to the EU12/13 (8 percentage point increase from 2008 to 2014 compared to 6 percentage point increase) and a decrease in trust of consumer organisations during the same time period (3 percentage point decline in trust in the EU15 compared to a 2 percentage point increase in trust in the EU12/13).

Among individual Member States, levels of trust in public authorities in 2014 ranged from highs in Finland (85%), Austria (81%), and Denmark (80%) to lows in Croatia (34%), Slovenia (34%), and Cyprus (41%), while levels of trust in consumer organisations ranged from highs in Luxembourg (78%), the Netherlands (77%), and Hungary (76%) to lows in Bulgaria (37%), Cyprus (43%) and Greece (44%).

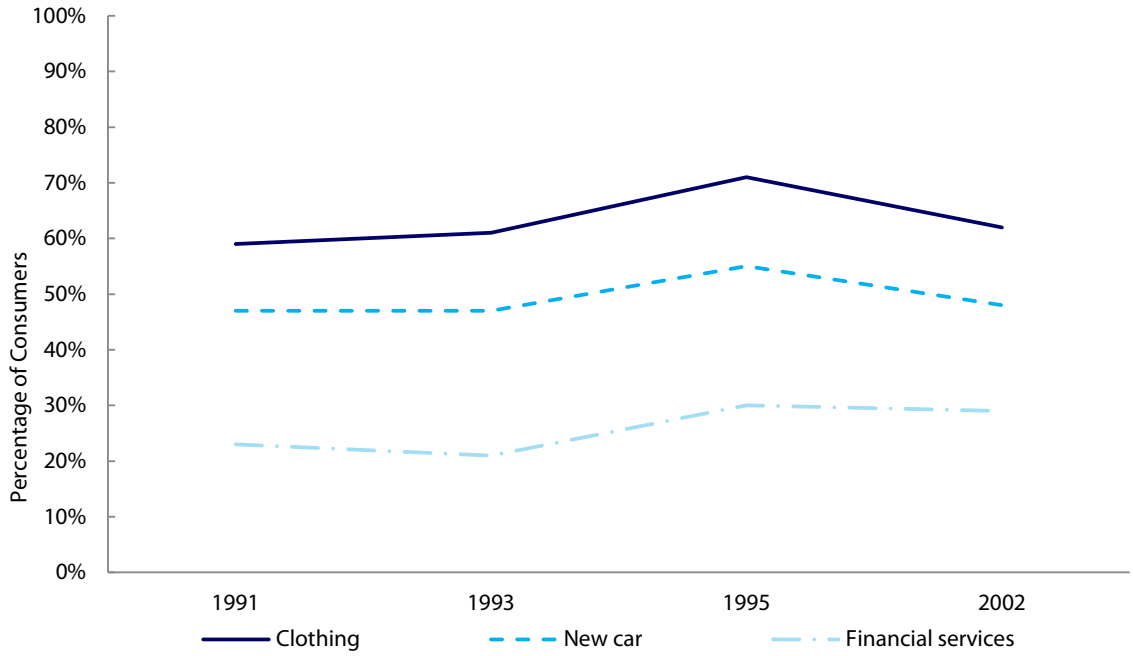
In the consumer market study conducted for the Fitness Check in 2016, in comparison, 46% of consumers agreed that they had confidence that national authorities took measures to stop traders from breaching consumer rights. 58% of consumers felt the same level of confidence in consumer organisations, a 12 percentage point gap over national authorities.[1041]

[1041] Question: How strongly do you agree or disagree with each of the following statements? 'You feel confident that competent national authorities take measures to stop traders from breaching these consumer rights / You feel confident that consumer associations take measures to stop traders from breaching these consumer rights'.

3.2 General trends in cross-border purchases

Consumer confidence in cross-border shopping within the internal market has increased since the early 1990s. The following figure shows the proportion of consumers who indicated that they would feel confident purchasing certain goods or services in another EU country, and is one of the few data series for which consistent data is available as far back as the 1990s. The series is available up until 2002, when the question set was discontinued in favour of more general questions regarding cross-border e-commerce (see the figure after next).

Figure 34: Percentage of consumers feeling confident purchasing certain goods or services in another EU country, EU%.



Source: Eurobarometers 35.1, 39.1, 43.1bis and 57.2. Question: 1991-1995: Please tell me for each of these whether you would purchase it, with complete confidence, in another member state of the EC/EU, if you needed it? 2002: If you were buying (SERVICE/GOOD), would you be more confident, as confident or less confident buying from a shop or seller located in another EU country as from one located in (OUR COUNTRY)? [Displayed is the combined proportion responding 'as' or 'more confident']. Note: More goods and services were tested in each year of the survey; the figure shows only the three that remained unchanged through the survey years. EU% comprises the EU12 from 1991-1993 and the EU15 thereafter.

As indicated in the figure above, consumer confidence in shopping cross-border for all three goods and services presented above increased slightly over survey period, particularly between 1993 and 1995, before returning to almost the same level in 2002 as at the start of the series in 1991, except in the case of financial services.

In addition, from 2003 onwards, consumer confidence in purchasing online from another EU country has grown dramatically, as the figure below shows. Note, however, that the survey questions in the Eurobarometer which address consumer confidence making cross-border purchases online has significantly changed twice, between 2003-2006 and between 2011-2012 (see figure caption). As question wording has an influence on consumer response, this trend should therefore be interpreted with care.

In 2003, only 10% of consumers felt that they had a high level of protection buying something on the internet from another Member State. By 2006, however, nearly one third reported that they felt at least "as confident" shopping online in another Member State compared to their own. Since 2008, however, the proportion of consumers

indicating that they feel confident shopping online in other Member States has fluctuated around an EU average of 38%.

Figure 35: Percentage of consumers feeling confident purchasing online from another EU country, EU%.

Source: Special Eurobarometers 193, 252 and 298, Flash Eurobarometers 299, 332, 358 and 397. 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']. 2012-2014: 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, EU25 in 2006, EU27 from 2008 to 2012 and EU28 thereafter.

There is no consistent difference between the EU15 and EU12/13 with respect to consumer confidence to shop in another EU country online. Between individual Member States, levels of confidence in 2014 ranged from highs in Ireland (62%), Luxembourg (56%) and Malta (55%) to lows in Croatia (27%), Hungary (28%) and Bulgaria (29%).

In tandem with increased consumer confidence, cross-border shopping in the internal market has experienced a steep increase since the 1990s. The following table shows the proportion of Eurobarometer respondents who indicated that they made at least one 'major purchase' (of EUR 100 or greater) in another country within the last six months in 1991 and 1995.

Table 32: Proportion of Eurobarometer respondents having made a major purchase in another EU country within the last 6 months, EU%.

Year	Question	Base	Results
1991	Over the last 6 months, did you make a major purchase yourself [in one of the EC countries], when travelling on holiday or on business. By a major expense, I mean at least (equivalent of 100 ECU [EUR] in national currency), excluding hotels, restaurants and travel costs?	All respondents, EU12	7.7%
1995		All respondents, EU15	8.3%

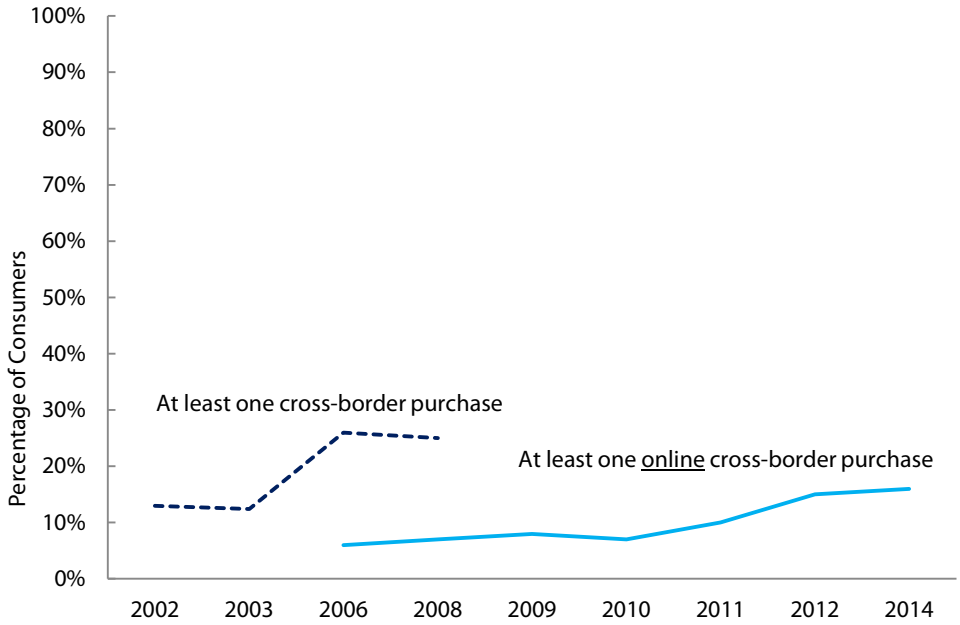
Source: Eurobarometers 35.1 and 43.1bis.

As the Eurobarometers from the 1990s only asked about 'major' purchases from the last 6 months, the results are not directly comparable to more recent Eurobarometer surveys, which ask more general questions about cross-border shopping within a longer timeframe (i.e., within last 12 months). The results of these more recent Eurobarometers from 2002 onwards are presented in the following figure, which shows 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%.[1042]

Also indicated in the following figure is the growth in cross-border shopping over the internet, which has also more than doubled since 2006, due in part to technological progress and the mainstreaming of internet shopping in general. In 2014, 16% of all Eurobarometer respondents reported that they made an online purchase from another EU country, compared to only 6% in 2006.

[1042] The Eurobarometer definition of a cross-border purchase for this question includes distance purchasing and purchasing as a result of physical travel (e.g. shopping while on holiday). However, in the case of physical travel, it does not include purchases linked to the trip itself (transportation, accommodation, meals, leisure activities, etc.).

Figure 36: Percentage of consumers who made at least one (online) cross-border purchase in the EU within the last 12 months, EU%.



Source: Standard Eurobarometer 57.2, Special Eurobarometers 128, 252 and 298, Flash Eurobarometers 299, 332, 358 and 397. Questions for general cross-border purchase: 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 purchase: 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] 2012-2014: 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]. Note: EU% comprises the EU15 up to 2004, the EU25 from 2004 to 2007, EU27 from 2007 to 2013, and EU28 thereafter.

The prevalence of online cross-border purchases is consistently higher in the EU15 states than in the EU12/13 by nearly 10 percentage points since 2006, with the gap showing no signs so far of convergence. At the country level, the rates of online cross-border shopping show large differences between Member States. In 2014, fewer than 10% of consumers made a purchase online from another EU country in three Member States (Romania, Poland, and Hungary), while in four Member States (Luxembourg, Austria, Ireland and Malta), more than 40% of consumers had made an online cross-border purchase within the last 12 months.

Annex IX Synopsis report

This annex presents a summary of the consultation activities conducted for the present evaluation.

1. Introduction

The Consultation Strategy for the Fitness Check emphasises the importance of stakeholder involvement for the success of the Fitness Check "in order to identify the problems, collect facts and data and, on this basis, assess the impacts of the consumer legislation as well as collect views on potential options for future action".[1043] It also explains that the Fitness Check is "a major opportunity for the Commission to reach out to citizens and businesses, to inform them of what the EU regulation does for them in this field, and to involve them in the evaluation process to make it even better". The objectives of the consultation provided in the strategy are as follows:

- Collect additional relevant facts and data on the implementation of the relevant consumer legislation (compliance);
- Identify provisions that work well and the added value of EU regulation in this area;
- Identify problems, including any implementation problems, excessive regulatory burdens, overlaps, inconsistencies, obsolete measures and regulatory gaps which may have appeared over time;
- Analyse the effects of the national divergences in the transposition of minimum harmonisation directives;
- Collect views on the potential options for future action.

In line with the Consultation Strategy, the following broad categories of stakeholders were identified as relevant for the Fitness Check:

- Consumers;
- National consumer associations and their EU umbrella organisations;
- Businesses;
- Organisations representing businesses;
- Member States' authorities;
- European networks/organisations of sector-specific national regulators;
- Network of European Consumer Centres.

Other stakeholders such as lawyers' associations, university/research institutes dealing with consumer law or third country authorities and organisations could also provide their views during the consultation if they were interested to do so.

In the context of this study, various stakeholder consultation activities were undertaken. These activities were designed taking into account the objectives listed above, the evaluation questions to be answered, and with the aim of covering all

[1043] Consultation Strategy REFIT Fitness check of Consumer law, http://ec.europa.eu/consumers/documents/2016.01.06_consultation_strategy_final.pdf

categories of stakeholders relevant for the Fitness Check.[1044] All relevant activities are documented below.

2. Overall consultation strategy

The following activities were carried out as part of the consultation task for this study:

- Open public consultation organised by the Commission for the Fitness Check of EU consumer and marketing law. The responses were analysed and summarised in the present study;
- Extensive interview process in all 28 Member States with national consumer enforcement authorities, responsible ministries and the relevant national regulatory authorities in the selected areas where sector-specific EU consumer protection rules exist, the European Consumer Centres (ECCs), national consumer associations, including associations in the selected areas subject to sector-specific EU consumer protection rules, and business associations, as well as with EU umbrella associations;
- Sectoral business interviews with individual companies in all 28 Member States;
- Evidence collection survey of qualified entities;
- Participation in and contribution to the Consumer Summit, which is a stakeholder event organised by the Commission and open to all categories of stakeholders in the field of consumer law, focusing on the Fitness Check of EU consumer and marketing law for its 2016 edition.

The consultation process started in the inception phase of the evaluation with the operationalisation of the consultation strategy, the development of methodological tools and the identification of relevant stakeholders. Exploratory interviews were first conducted with EC policy officers and key stakeholders. During this stage, we also informed key stakeholder organisations at both EU and national levels by email about the evaluation and the consultation tools planned in the framework of this study. DG Justice and Consumers supported this step by informing all stakeholders by email about the launch of the online public consultation for the Fitness Check of consumer and marketing law and about the studies undertaken by the Commission, including the present study. We further identified contact persons by complementing the contact information from our stakeholder database with contact information obtained directly from the Commission, EU stakeholder associations and web-based research.

All identified stakeholders were invited to participate in the relevant consultation activities once they were launched. The interview process was first launched in April 2016, followed by the open public consultation in May 2016, and the survey of qualified entities and the business interviews launched in June 2016, concurrently with other consultation activities undertaken as part of the other studies conducted in the framework of the Fitness Check.

The following section sets out the principal components of the consultation strategy and the main stakeholder groups consulted.

[1044] As regards consumers, while consumer respondents participated in the open public consultation, the consultation with consumers mainly took place in the framework of the consumer market study to support the Fitness Check, which activities are not covered in this synopsis report.

3. Overview of the consultation activities, stakeholder groups consulted and findings

3.1 Open public consultation

Approach and implementation

From 12 May to 12 September 2016, the European Commission carried out an open public consultation for the Fitness Check of EU consumer and marketing law and also covering the evaluation of the Consumer Rights Directive. The consultation was designed to obtain views on whether EU consumer and marketing rules are still up to date and fit for purpose. The consultation was structured in three questionnaires. The consumer questionnaire was available only to respondents that indicated that they were “a citizen/consumer”. The business questionnaire was available only to respondents that indicated that they were “a company (or group of companies)”. The “full” questionnaire was targeted at the other types of respondents and was optional for those consumers and companies who wanted to continue after completing their respective short questionnaires. The three survey questionnaires used closed questions and gave respondents the possibility to comment in each section. Some of the respondents also chose to upload a position paper with additional comments after completing the survey.

Overview of respondents

In total, 436 respondents filled in the online questionnaire, with 97 respondents completing the consumer questionnaire, 176 respondents completing the business questionnaire and 237 respondents completing the full questionnaire.[1045] For the analysis of responses to the full questionnaire, respondents other than "consumers" and "companies" are grouped into four broader categories (consumer associations, business associations, public authorities, and other). In addition, 55 position papers were received. The table below presents the number of responses received from each category of respondent.

[1045] The number of responses to the consumer, business and full questionnaires does not sum to the number of total responses, as some respondents who answered the consumer or business questionnaires also submitted answers to the full questionnaire.

Table 33: Responses to the open public consultation by category of respondent

Category	Total survey responses (% of total)	Position papers submitted (% of total)
Consumers	97 *(22%)*	0 *(0%)*
Businesses	176 *(40%)*	6 *(11%)*
Business associations	86 *(20%)*	33 *(60%)*
Consumer associations	20 *(5%)*	3 *(5%)*
Public authorities	28 *(28%)*	8 *(15%)*
Other	29 *(7%)*	5 *(9%)*
Total	*436 (100%)*	*55 (100%)*

Source: Public consultation for the Fitness Check of EU consumer and marketing law. *Question: Are you replying as/on behalf of:* Note: further details on the respondents are presented in Part 2 of this report.

Responses were received from all 28 Member States and "other" countries including Switzerland, Norway, Turkey and the United States.

Analysis of results

The 436 responses to the online survey that were received from stakeholders across the EU, as well as from non-EU countries, were analysed both overall and by type of stakeholder. Additionally, the 55 open submissions received in the context of the consultation, either by email or submitted together with an online survey response, were reviewed in depth, categorised according to recurring topics, and summarised by key theme and by type of respondent. The report on the consultation results is presented as Part 2 of this report.

Overview of main findings – Open public consultation

- 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 allowable 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, main subject matter, and individually negotiated terms, a black list 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 black list 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 however (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 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.

3.2 Interviews with stakeholders in the Member States and EU umbrella associations

Approach and implementation

Country level interviews were one of the main sources of information for the country level legal analysis. This interview process consisted of the following activities:

- Interviews targeting national consumer enforcement authorities, responsible ministries and the relevant national regulatory authorities in the selected areas where sector-specific EU consumer protection rules exist as well as the European Consumer Centres (ECCs) in all 28 Member States;
- Interviews targeting national consumer associations in all 28 Member States as well as their EU umbrella associations, including associations in the selected areas subject to sector-specific EU consumer protection rules;
- Interviews targeting business associations in all 28 Member States as well as their EU umbrella associations, including associations in the selected areas subject to sector-specific EU consumer protection rules.

The interviews were conducted based on tailored questionnaires developed for each target group in coordination with the Commission.

Legal country experts and researchers in the Member States interviewed relevant stakeholders, by phone or face-to-face, with a few exceptions where answers were provided in writing. In addition, the evaluation team conducted interviews with EU level stakeholders.

Overview of interviewees

In the Member States, a total of 243 interviews were conducted with responsible ministries and authorities, consumer organisations and ECCs, sectoral regulatory authorities and business associations. At the EU level, 12 stakeholder interviews were conducted. The detailed list of interviews conducted in the framework of this evaluation is presented in Annex II. The table below presents the number of interviews by type of stakeholder.

Table 34: Number of interviews by type of stakeholder

Stakeholder type	Number of interviews
National consumer enforcement authorities, responsible ministries, sectoral regulatory authorities, and European Consumer Centres*	147
National consumer associations as well as their EU umbrella associations	49
Business associations as well as their EU umbrella associations	59
Total	*255*

Source: Civic Consulting. Note: (*) including also one self-regulatory institution for the enforcement of rule against unfair competition.

In each Member State, between 4 and 14 interviews were conducted with relevant stakeholders. In a small number of countries, such as Latvia, Spain or the UK, the interview process proved more difficult than in the other Member States and less interviews could be conducted as a result (respectively 4, 5 and 5 interviews).

Analysis of results

The results of these interviews fed into the country-level legal analysis that is presented in Part 3 of this report, and which was further analysed and synthesised at the EU level in the cross-cutting analysis.

Overview of main findings – Stakeholder interviews

- Consumer organisations especially, but also enforcement agencies and some business stakeholders, were in favour of an *update of the black list of the UCPD*, to address new problematic practices in the context of digital markets, e-commerce and innovative marketing methods. However, other of the interviewed stakeholders did not report any necessity to extend or modify the black list, and rather expressed their opposition to it.
- Stakeholders 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, stakeholders emphasised that the amount of *information* that must be provided to consumers under Article 7(4) UCPD and/or Article 5 CRD is pushing the "information-model" to its limits, creating "information overload" and confusion amongst 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 through the assessment of 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 'open norm'), the exact scope of the obligations of the national courts, and the indicative list of unfair terms.
- In general a preference for a *black list of unfair terms* – and to a lesser extent grey list – over a mere indicative list is quite clear for some stakeholder groups (mostly consumer organisations and public authorities, as in the results of the open consultation), which are also strongly in favour of a (limited) black list at the EU level. 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.*

3.3 Sectoral business interviews

Approach and implementation

Business interviews targeting individual companies in five sectors (large household appliances, electronic and ICT products, gas and electricity services, telecommunication services, and pre-packaged food and detergents) were conducted in all 28 Member States with the aim to better understand their experience with legislation regarding advertising, marketing, standard contract terms and price indication, and to collect data concerning related costs and benefits. The interviews were conducted by phone between June and September 2016 using a questionnaire that was developed on the basis of the exploratory research and adapted after it was tested during test interviews with businesses.[1046]

Target companies were companies that sell products or services to consumers in the selected sectors, including both traders that engage in domestic transactions and traders that are involved in cross-border transactions. The original focus of the exercise on small and micro companies was broadened in light of the selected sectors (e.g. telecommunications). We identified potential target companies by consulting our business database, by identifying members of relevant business associations on the websites of the associations, by directly asking the associations, and by conducting

[1046] While the interview questionnaire was designed for interviews to last for around 25-30 minutes on average, interviewers often had to contact interviewees several times to complete the questionnaire and ask for clarifications. Information was also provided in writing.

structured internet research. Overall, we identified over 2 800 target companies in the five target sectors across the EU. In countries and/or sectors where the response rate was low, additional target companies were identified through further internet research and through the support of national business associations. It was generally difficult to reach the relevant staff at the target companies, and to obtain positive responses regarding their participation.

Overview of respondents

In total, 282 business interviews were completed throughout the EU, i.e. an average of 10 business interviews per Member State, which was the target set for this exercise. While slightly more than two thirds of case study interviews focused on micro, small and medium-sized enterprises, the remainder focused on large businesses with 250 or more employees.

Analysis of results

The completed interviews were checked for quality and analysed. Results were then extrapolated to the EU level. The results of the business interviews and of the extrapolation are presented in Part 4 of this report and fed into the cross-cutting analysis of costs and benefits.

Overview of main findings – Sectoral business interviews

- The estimated median *one-off costs per business* for compliance checks and adjusting business practices when entering another EU country's market range from EUR 1 727 per business in the sector for electronic and ICT products to EUR 12 029 per business in the sector for gas and electricity services.
- Total one-off costs may be substantial if a trader plans to operate at an EU-wide level, especially in the two network services sectors reviewed.
- The *annual costs incurred by businesses in the EU28* for checking that their advertising/marketing and standard contract terms still comply with national legislation and adjusting business practices if needed are estimated to amount to EUR 278 million in the five sectors reviewed, which amounts to approximately 0.024 percent of turnover in the five sectors.
- Of these annual costs, the largest share of 46% is caused by compliance checks and adjusting business practices related to advertising and marketing targeted at consumers and 16% is related to advertising and marketing targeted at businesses, with the remaining share of 39% of costs 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.
- The *costs of (unit) price indication* do not seem to imply disproportionate burdens on businesses.
- In terms of *benefits*, between 63% and 46% of the businesses that sell their products/services in other EU countries indicated that they benefited at least slightly from the EU legislative framework subject to the Fitness Check.
- In particular, these businesses benefited most from the harmonised legislation that facilitates selling cross-border to consumers in other EU countries, and from the level playing field that was created across the EU for businesses regarding contracts with consumers by safeguarding that standard contract terms are fair.
- A significantly lower proportion (between 51% and 29%) of the businesses that do not sell their products/services in other EU countries indicated that they benefited at least slightly from the legal framework.

3.4 Survey of qualified entities

Approach and implementation

We conducted a targeted evidence collection survey to collect data regarding the use of the injunctions procedure directly from qualified entities. The survey questionnaire was developed with the aim to complement the information provided in the country reports and included questions on the use of the injunctions procedure, obstacles to the effective use of the injunctions procedure, cooperation with qualified entities in other Member States, and possible future measures. 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 as well as complementary research were invited to participate. We first invited participants by email, and then undertook a number of follow-up actions in order to ensure an appropriate response rate.

Overview of respondents

In total, 29 qualified entities completed the questionnaire from the following 21 EU 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.

In some countries, the total number of qualified entities (for example, 78 in Germany and 75 in Greece) is much higher than in the other countries. These include a large number of regional organisations, as well as organisations focused on very specific matters such as renters' organisations ('Mietervereine'), which were therefore more difficult to reach or less relevant in the context of the study. Conversely, some Member States have only recognised one entity as being qualified to bring actions for an injunction under Article 4(2) of Directive 2009/22/EC. In most of these countries (i.e. in Ireland, Latvia, Lithuania, the Netherlands and Sweden), the qualified entity responded to the survey.

Of the responding entities, 61% were consumer organisations. The remainder consisted of public authorities/bodies (32%) and 'other' entities, such as business associations (7%).

Analysis of results

The results of the survey are presented in Part 4 of this report and fed into the cross-cutting analysis on the Injunctions Directive.

Overview of main findings – Survey of qualified entities

- In the five year period since June 2011, responding qualified entities initiated a total of 5 763 injunction actions. While in most countries the number of reported injunction actions is a few hundred or less, the notable exceptions are qualified entities in Germany which reported the highest number of injunction actions (4 579) of all Member States, and Latvia (794).
- The survey of qualified entities (and the country research) showed that the injunction procedure is not used at all, or rarely used, in Member States where qualified entities have public law mechanisms available that are faster, cheaper or more effective to use.
- Qualified entities considered the most important *obstacles* to the effective use of the injunction procedure with respect to national infringements to be costs and the associated financial risks of the injunction procedure, complexity of the injunction procedure, and length of court procedures. These obstacles were also listed as crucial obstacles in the other relevant consultation activities.

- The potential obstacles to the effective use of the injunctions procedure related to cross border infringements were assessed on average as being significantly more important than concerning national infringements.
- The possible future *harmonisation measure* viewed by qualified entities, on average, as the most beneficial was the possibility to bring an action for damages or redress to be paid to the consumers concerned within the injunction procedure. The second was exemption from legal costs.
- Qualified entities (as well as several interviewed stakeholders) have criticised the limited *scope of application of the Injunctions Directive* and suggested to adjust it to the scope of application of the CPC Regulation or to extend it to consumer law in general.
- Qualified entities ranked the publication of the decision and corrective statements highest as to the effectiveness of *measures taken in the national implementation* of the Injunctions Directive.

3.5 Consumer Summit

Approach and implementation

The European Commission's Directorate-General for Justice and Consumers hosted the 2016 edition of the European Consumer Summit: "EU consumer law: still fit for purpose? Achievements and challenges", on 17 October 2016 in Brussels. The 2016 Summit was entirely dedicated to the Fitness Check of EU consumer and marketing law.

Initial evaluation results were presented at the three thematic workshops: Workshop 1 on simplifying consumer information requirements; Workshop 2 on increasing fairness of commercial practices and of contract terms; and Workshop 3 on enhancing the effectiveness of the injunction procedure. Speakers representing various groups of stakeholders and various countries participated in panel discussions and/or made presentations, and participants were invited to contribute to the discussions.

Overview of participants

Around 450 representatives of national authorities, European institutions, consumer organisations, businesses and academics took part in the Summit.[1047]

Analysis of results

The initial evaluation results were refined to take into account the outcomes of the discussion, which were also taken into account in the subsequent analysis. The views expressed at the Consumer Summit are very much in line with the results of the other consultation activities, particularly the country research and the open consultation. This can be explained by the fact that these three consultation activities targeted and reached a wide range of stakeholder groups across the EU and that numerous stakeholders participated in several of these activities (although a complete list of participants to the Consumer Summit is not available). The summary below is based on the reporting from the workshops presented at the Consumer Summit.

[1047] According to the dedicated webpage: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34204

Overview of main findings – Consumer Summit

- Participants generally called for more effective and consistent *enforcement* of the directives, including cross-border.
- Participants generally considered the co-existence of the *principle-based approach of the UCPD and the black list* to be useful against unfair commercial practices.
- Participants suggested *extending the blacklist of practices* to facilitate proof in court and update the list to emerging practices, and were in favour of a right to claim *nullity of contract for the breach of the UCPD*.
- Participants also suggested *extending the UCPD to B2B*, by introducing a black list and prohibiting aggressive practices to protect SMEs.
- Participants argued that the *information requirements* under the CRD are relevant and necessary while information requirements laid down by Article 7(4) UCPD are considered redundant. Participants also suggested that information should be improved through simplified language and clear requirements for printed text.
- Participants agreed that all *price indication requirements* should be merged in one instrument, but had divergent views on the exemption for small businesses.
- Participants expressed general support for a *black/grey list of unfair terms* at the EU level. In line with the findings of the stakeholder interviews, some workshop participants specified that they would prefer a short black list at a minimum harmonisation level.
- Participants expressed needs for *clarifications*; in particular by defining clear and balanced responsibilities of platforms, consumers and traders, defining EU standard on what is a trader, and clarifying what is B2C, C2C, and B2B.
- Participants commented on well-functioning *national varieties of the injunctions procedure*, including: the option for swift out of court settlement, final decision according to the rules applicable to summary proceedings, the erga omnes effect of injunctions decisions, the individual's right to rely on the decision in later proceedings, periodic penalties or criminal fines for non-compliance, and a duty to remove the consequences of the breach.
- Participants expressed general support for a *single horizontal EU instrument*.

4. Results of the consultation activities

The various consultation activities served as complementary sources of evidence for the evaluation. As described above, the open public consultation and the stakeholder interviews covered a wide range of topics and targeted a wide range of stakeholder groups. They were complemented by activities targeted at specific stakeholder groups, namely the sectoral business interviews and the survey of qualified entities. The results of the stakeholder interviews covered all evaluation criteria and directly fed into the country level analysis, which was then further analysed and synthesised at the EU level in the cross-cutting analysis. The results of the open consultation also covered aspects of all the evaluation criteria and were a key source of information for the cross-cutting analysis. The results of the business interviews were used in the analysis of costs and benefits of the legislative framework subject to the Fitness Check for businesses, which further fed into the conclusions regarding the efficiency of the framework. The results of the survey of qualified entities covered all evaluation criteria and fed into the cross-cutting analysis on injunctions. Lastly, the Consumer Summit served to present and discuss interim results of the study.

Evidence obtained from the different consultation activities and other methodological tools employed in the study were processed and cross-checked, and served to answer the evaluation questions, arrive at conclusions, and develop recommendations for EU legislative and/or non-legislative actions regarding identified gaps, obsolete provisions or codification needs of the current rules.

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